Fox Rothschild LLP
ATTORNEYS AT LAW

2021 Employment Law Issues on the Enforcers' Radar

Complimentary Webinar
Co-Hosted with the
Benjamin N. Cardozo School of Law

Tuesday, September 14, 2021

Reference Materials

Fox Rothschild LLP
ATTORNEYS AT LAW

Contents

Guidance on Race Discrimination Based on Hairstyle
September 2019

This enforcement guidance clarifies and explains how the New Jersey Division on Civil Rights (DCR) applies the New Jersey Law Against Discrimination (LAD) to discrimination based on hairstyles,[1] with a particular focus on hairstyles closely associated with Black people.[2]

As we explain below, the LAD's prohibition on discrimination based on race encompasses discrimination that is ostensibly based on hairstyles that are inextricably intertwined with or closely associated with race. That means, for example, that the LAD generally prohibits employers, housing providers and places of public accommodation (including schools) in New Jersey from enforcing grooming or appearance policies that ban, limit, or restrict hairstyles closely associated with Black people, including, but not limited to, twists, braids, cornrows, Afros, locs, Bantu knots, and fades.[3] A similar analysis applies to discrimination based on hairstyles that are inextricably intertwined with or closely associated with other protected characteristics, such as hairstyles associated with a particular religion.

Background on Anti-Black Racism and Discrimination Based on Hairstyles That Are Inextricably Intertwined with or Closely Associated with Being Black

Anti-Black racism, along with implicit and explicit bias against Black people, is an entrenched and pervasive problem both in New Jersey and across the country. In 2017 and 2018, respectively, 52 and 54 percent of reported bias incidents in New Jersey were motivated by the victim's race, ethnicity, or national origin. Of those, approximately 72 percent were anti-Black.[4]

---

[1] The purpose of this enforcement guidance is to clarify and explain DCR's understanding of existing legal requirements in order to facilitate compliance with the LAD. This guidance does not impose any new or additional requirements that are not included in the LAD, does not establish any rights or obligations for any person, and will not be enforced by DCR as a substitute for enforcement of the LAD.

[2] The phrase "Black people" is used here to include all people who identify as African, African-American, Afro-Caribbean, Afro-Latin-x/a/o, or otherwise have African or Black ancestry.

[3] The New York City Commission on Human Rights (NYCCHR) set forth similar guidance interpreting the New York City Human Rights Law (NYCHRL) in February of this year. N.Y.C. Comm'n on Human Rights, Legal Enforcement Guidance on Race Discrimination on the Basis of Hair (Feb. 2019), *available at* https://www1.nyc.gov/assets/cchr/downloads/pdf/Hair-Guidance.pdf [hereinafter N.Y.C. Hair Guidance]. While DCR's guidance differs in certain respects, portions of the background section explaining the history of discrimination against Black people based on hair and many of the examples closely follow NYCCHR's analysis.

[4] *See* Office of the Attorney General, New Jersey State Police, and New Jersey Division on Civil Rights, *Bias Incident Report 2017-2018* at 6-8 (2019), *available at* https://www.nj.gov/oag/newsreleases19/2017-2018_Bias-Incident_Report_080719a.pdf.

While anti-Black racism can take many forms, one form of persistent anti-Black racism is discrimination against Black people based on hairstyles that are inextricably intertwined or closely associated with being Black. Historically, that discrimination has been rooted in white, European standards of beauty, and the accompanying stereotypical view that traditionally Black hairstyles are "unprofessional" or "unkempt."[5]

While Black people can have a wide range of hair textures, hair that naturally grows outward in thick, tight coils is most closely associated with being Black.[6] Such hair texture naturally forms or can be formed into a variety of hairstyles, including, but not limited to, locs,[7] cornrows, twists, braids, Afros, fades, and Bantu knots, all of which are closely associated with Black people.[8]

Discrimination based on hairstyles closely associated with Black people has been all too common in our history. Many employers, schools, and other places of public accommodation have allowed traditionally white or European hairstyles, while banning, restricting, or limiting hairstyles that are closely associated with Black people.[9] Black people around the country have

---

[5] *See, e.g.,* First Am. Compl. ¶¶ 27, 30, *EEOC v. Catastrophe Mgmt. Solutions*, No. 1:13-cv-00476, ECF No. 21-1 (S.D. Ala. Apr. 17, 2014) [hereinafter EEOC Compl.]; Alexis M. Johnson, et al., *The "Good Hair" Study: Explicit And Implicit Attitudes Toward Black Women's Hair* 6, 9-10, 12-14, Perception Institute (Feb. 2017), *available at* https://perception.org/wp-content/uploads/217/01/TheGood-HairStudyFindingsReport.pdf (discussing implicit bias against natural Black hairstyles); N.Y.C. Hair Guidance, *supra* note 3, at 1, 4, 10.

[6] *See, e.g.*, Johnson, *supra* note 5, at 2 ("Tightly coiled hair texture is distinctly tied to blackness and has been a marker of black racial identity for centuries."); Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 Geo. L.J. 1079, 1094 (2010) ("[T]he hair of black women is not naturally straight. It is tightly coiled into tiny curls."); NAACP Legal Defense and Educational Fund, Inc. & American Civil Liberties Union, Letter to Florida Department of Education 5 (Nov. 29, 2018), *available at* https://www.aclu.org/legal-document/florida-department-education-complaint-charge-race-discrimination [hereinafter NAACP-ACLU Compl.].

[7] This document uses the term "locs" rather than "dreadlocks" because the term "dreadlocks" comes from the word "dreadful," which is how slave traders described the hair of African slaves, which had likely naturally formed into locs during the Middle Passage. *See* Shauntae Brown White, *Releasing the Pursuit of Bouncin' and Behavin' Hair: Natural Hair as an Afrocentric Feminist Aesthetic for Beauty*, 1 Int'l J. Media & Cultural Pol. 295, 296 n.3 (2005); EEOC Compl., *supra* note 5, ¶ 20.

[8] The natural texture of Black hair is often conducive to locs, "which can be formed with manipulation (cultivated locs) or without (freeform locs)." Petition for Writ of Certiorari, *EEOC v. Catastrophe Mgmt. Solutions*, No. 14-13482, at 5-6 (U.S. Apr. 4, 2018), *available at* https://www.naacpldf.org/files/about-us/CMS%20-%20Cert%20Petition%20FINAL.PDF; *see* NAACP-ACLU Compl., *supra* note 6, at 5. For more on traditionally Black hairstyles, see N.Y.C. Hair Guidance, *supra* note 3, at 3-4; D. Wendy Greene, *A Multidimensional Analysis of What Not To Wear in the Workplace: Hijabs and Natural Hair*,8 F.I.U. L. Rev. 333, 347, 349, 355-56, (2013); EEOC Compl., *supra* note 5, ¶¶ 8, 19; *see also* Audrey Davis-Sivasothy, *The Science of Black Hair: A Comprehensive Guide to Textured Hair* 23, 144-52 (2011); Venessa Simpson, Note, *What's Going on Hair?: Untangling Societal Misconceptions That Stop Braids, Twists, and Dreads from Receiving Deserved Title VII Protection*, 47 Sw. L. Rev. 265, 265-66 (2017).

[9] N.Y.C. Hair Guidance, *supra* note 3, at 1, 4-6 & n.23; *see* D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit's Take on Workplace Bans Against Black Women's Natural Hair in* EEOC v. Catastrophe Management Solutions, 71 U. Miami L. Rev. 987, 991, 1005 (2017) [hereinafter Greene, *Splitting Hairs*]; D. Wendy Greene, *Black Women Can't Have Blonde Hair … in the Workplace*, 14 J. Gender, Race & Justice, 405, 421-28 (2011).

thus been subjected to dignitary, psychological, physiological, and financial harm because of discrimination based on their hair.[10]

For example, for years, the United States Army explicitly banned locs, referring to them as "matted" and "unkempt."[11] In 2014, it added for female soldiers an "outright ban"[12] on twists, as well as more specific prohibitions on those"[b]raids or cornrows" that were considered to be "unkempt or matted."[13] Shortly after issuing the 2014 updates, the Army reversed some portions of the policy after complaints that it was "racially biased against black women who choose to wear their hair naturally curly rather than use heat or chemicals to straighten it."[14] And it was not until 2017 that the Army retracted its prohibition on female soldiers wearing locs altogether.[15]

In 2017, a Black woman who worked at Banana Republic reportedly was told by her store manager that her braids were inappropriate and "too 'urban' and 'unkempt' for [the store's] image."[16]

In 2018, a six-year-old child allegedly was forced to forgo a scholarship at a private school because the school would not permit him to wear locs. Locs were explicitly prohibited in the student handbook along with "Mohawks, designs, unnatural color, or unnatural designs."[17]

Many policies that ban traditionally Black hairstyles while leaving traditionally white hairstyles untouched are rooted in the pervasive stereotype that Black hairstyles are somehow

---

[10] Greene, *Splitting Hairs*, *supra* note 9, at 1011-13 13 (citing Onwuachi-Willig, *supra* note 6, at 1112-20); *see also* EEOC Compl., *supra* note 5, ¶ 27.

[11] Army Regulation 670-1, Wear and Appearance of Army Uniforms and Insignia 3-4 (Feb. 3, 2005), *available at* https://fas.org/irp/doddir/army/ar670-1.pdf.

[12] NPR, *Army's Updated Rules on Hair Styles Tangle with Race* (Apr. 21, 2014), https://www.npr.org/2014/04/21/305477539/armys-new-rules-on-hair-styles-tangles-with-race.

[13] Army Regulation 670-1, Wear and Appearance of Army Uniforms and Insignia 5-6 (Mar. 31, 2014), *available at* https://www.army.mil/e2/c/downloads/337951.pdf; Helen Cooper, *Army's Ban on Some Popular Hairstyles Raises Ire of Black Female Soldiers*, N.Y. Times (Apr. 20, 2014), https://www.nytimes.com/2014/04/21/us/politics/armys-ban-on-some-popular-hairstyles-raises-ire-of-black-female-soldiers.html.

[14] Andrew Tilghman, *Hagel Changes Hair Policy After Controversy*, Army Times (Aug. 12, 2014), https://www.militarytimes.com/2014/08/12/hagel-changes-hair-policy-after-controversy/.

[15] Christopher Mele, *Army Lifts Ban on Dreadlocks, and Black Servicewomen Rejoice*, N.Y. Times (Feb. 10, 2017), https://www.nytimes.com/2017/02/10/us/army-ban-on-dreadlocks-black-servicewomen.html; *see* Army Regulation 670-1, Wear and Appearance of Army Uniforms and Insignia (May 25, 2017), *available at* https://history.army.mil/html/forcestruc/docs/AR670-1.pdf.

[16] Perrie Samotin, *A Banana Republic Employee Says She Was Told Her Box Braids Looked Too 'Urban'*, Glamour (Oct. 7, 2017), https://www.glamour.com/story/banana-republic-employee-destiny-tompkins-says-she-was-told-box-braids-looked-too-urban.

[17] NAACP-ACLU Compl., *supra* note 6, at 1-4; Mandy Velez*, 'Discriminatory': ACLU, NAACP Go After Florida School That Banned Child for Dreadlocks*, Daily Beast Nov. 30, 2018, https://www.thedailybeast.com/aclu-naacp-take-on-florida-schools-discriminatory-hair-policy-after-boy-banned-for-having-locs. For other similar incidents in schools, *see* NAACP-ACLU Compl., *supra* note 6, at 6 n.22 (collecting and describing list of incidents).

"unprofessional" or "unkempt."[18] And attempting to conform to racial stereotypes about what constitutes "professional" or "neat" hair can be expensive, time-consuming, dangerous, and psychologically harmful to Black people.[19] Indeed, certain hair products and professional treatments that are intended to help Black people "conform" to these stereotypes can be damaging to the hair and scalp and can be acutely painful.[20]

In recent years, federal, state, and local government entities have increasingly recognized that policies that discriminate against traditionally Black hairstyles, including, but not limited to, locs, cornrows, twists, braids, Afros, fades, and Bantu knots, qualify as discrimination on the basis of race.

The Equal Employment Opportunity Commission (EEOC) recognized as much nearly fifty years ago. Indeed, "one of the earliest formal Commission decisions"—from 1971—"concluded that race discrimination encompassed an employer's prohibition of Afro hairstyles."[21] In that 1971 decision, the EEOC explained that "the wearing of an Afro-American hair style by a Negro has been so appropriated as a cultural symbol by members of the Negro race as to make its suppression either an automatic badge of racial prejudice or a necessary abridgement of first amendment rights."[22] The EEOC reaffirmed that position a year later.[23] The Commission thus "has long recognized" that Title VII's definition of race "includes not only hair texture, but also a hairstyle that is physically or culturally linked to Black hair texture."[24] That remains the EEOC's conclusion to this day; the EEOC explains on its website that "[r]ace discrimination involves treating someone … unfavorably because he/she is of a certain race or because of personal characteristics associated with race (such as hair texture …)."[25]

Some federal courts have reached similar conclusions. In 1976, the U.S. Court of Appeals for the Seventh Circuit, sitting en banc, concluded that a plaintiff successfully alleged race discrimination in an EEOC charge by explaining that her employer stated she "could never represent Blue Cross with [an] Afro."[26] As the court explained, "A lay person's description of

---

[18] *See, e.g.*, N.Y.C. Hair Guidance, *supra* note 3, at 4; Onwuachi-Willig, *supra* note 6, at 1107; Greene, *Splitting Hairs*, *supra* note 9, at 990.

[19] N.Y.C. Hair Guidance, *supra* note 3, at 5; Onwuachi-Willig, *supra* note 6, at 1120.

[20] *See* Onwuachi-Willig, *supra* note 6, at 1114-20.

[21] Br. of the Equal Employment Opportunity Commission, *EEOC v. Catastrophe Mgmt. Solutions*, No. 14-13482 at *26 (11th Cir. Sept. 22, 2014), *available at* 2014 WL 4795874 [hereinafter EEOC Br.].

[22] EEOC Dec. No. 71-2444, 1971 WL 3898, 4 Fair Empl. Prac. Cas. (BNA) 18 (1971).

[23] EEOC Dec. No. 72-979, 1972 WL 3999, 4 Fair Empl. Prac. Cas. (BNA) 840 (1972).

[24] EEOC Br., *supra* note 21, at *26.

[25] U.S. Equal Employment Opportunity Commission, *Race/Color Discrimination*, https://www.eeoc.gov/laws/types/race_color.cfm (last visited Sept. 10, 2019); see also EEOC Compliance Manual, § 15.VII.B.5 (2006), *available at* https://www.eeoc.gov/policy/docs/race-color.html#VIIB5 ("Employers can impose neutral hairstyle rules – e.g., that hair be neat, clean, and well-groomed – as long as the rules respect racial differences in hair textures and are applied evenhandedly.").

[26] *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, 538 F.2d 164, 168 (1976); *see* Onwuachi-Willig, *supra* note 6, at 1097 (discussing *Jenkins*). Although *EEOC v. Catastrophe Management Solutions*, 852 F.3d 1018, 1021 (11th Cir. 2016),

racial discrimination could hardly be more explicit. The reference to the Afro hairstyle was merely the method by which the plaintiff's supervisor allegedly expressed the employer's racial discrimination."[27]

More recently, the New York City Commission on Human Rights (NYCCHR) released a guidance document clarifying that, "with very few exceptions," hair policies that restrict natural hair or hairstyles associated with Black people discriminate on the basis of race and therefore are prohibited under the New York City Human Rights Law (NYCHRL).[28] The guidance explained that "Black hairstyles are protected racial characteristics under the NYCHRL because they are an inherent part of Black identity."[29]

Two state legislatures followed suit. In July 2019, California amended its Fair Employment and Housing Act and its Education Code to clarify that race includes "hair texture and protective hairstyles," including "braids, locks, and twists."[30] The purpose of the legislation was to clarify that existing prohibitions on racial discrimination also prohibit discrimination against Black people because of hairstyles closely associated with being Black.[31] New York State followed California's lead later in the same month, amending its civil rights and education laws to clarify that the existing definition of race includes "traits historically associated with race," including "hair texture and protective hairstyles" such as "braids, locks, and twists."[32] And there is a similar bill currently pending before the New Jersey Legislature.[33]

---

found that Title VII was not violated when a job applicant was asked to cut off her locs because locs were not an "immutable characteristic" of all black persons, the New Jersey Supreme Court has never held that only "immutable characteristics" of race are protected by the LAD and has repeatedly emphasized that in interpreting the LAD, it will not hesitate to depart "from federal precedent if a rigid application of its standards is inappropriate under the circumstances." *L.W. v. Toms River Regional Schools Bd. of Educ*., 189 N.J. 381, 405 (2007) (quoting *Lehmann v. Toyrs R Us, Inc.*, 132 N.J. 587, 600 (1993), and citing *Grigoletti v. Ortho Pharm. Corp*., 118 N.J. 89, 107 (1990)).

[27] *Jenkins*, 538 F.2d at 168.

[28] N.Y.C. Hair Guidance, *supra* note 3, at 1 & n.2, 6-10.

[29] *Id.* at 6.

[30] Creating a Respectful and Open Workplace for Natural Hair (CROWN) Act, 2019 Cal. Stat. ch. 58, *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB18.

[31] California Senate Judiciary Committee, Analysis of SB 188 (2019-2020 Reg. Sess.), as amended March 13, 2019, at 1 (Mar. 25, 2019), *available at* https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB188 ("This bill would clarify that, for the purposes of FEHA's workplace protections against discrimination, the term "race" includes traits historically associated with race, including hair texture and protective hairstyles."); California Assembly, Floor Analysis (Senate Third Reading) of SB 188 (2019-2020 Reg. Sess.), as amended April 2, 2019, at 2 (June 21, 2019), *available at* https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB188 ("This bill will usefully clarify that an employment practice that discriminates against persons based on traits historically associated with race is a form of racial discrimination.").

[32] 2019 Laws of New York ch. 95 (passed July 12, 2019), codified at N.Y. Exec. Law § 292(37)-(38) and N.Y. Educ. L. § 11(9)-(10).

[33] *S. 3945*/*A. 5564* (2019).

The LAD's Prohibition on Race Discrimination Includes Discrimination Based on Hairstyles Closely Associated with Race

The New Jersey Legislature created the New Jersey Division on Civil Rights (DCR) nearly seventy-five years ago to enforce the New Jersey Law Against Discrimination (LAD) and to "prevent and eliminate discrimination" in the State of New Jersey.[34] The LAD prohibits discrimination and harassment in housing, employment, and places of public accommodations on the basis of race, religion, gender, sexual orientation, gender identity or expression, national origin, disability, and other protected characteristics.[35]

The LAD prohibits discrimination in employment, housing, and places of public accommodation either as a result of disparate treatment or disparate impact. Disparate treatment occurs when a covered entity (i.e., an employer, place of public accommodation, or housing provider) takes an adverse action against a person at least in part because of their actual or perceived membership in an LAD-protected class.

Bias on the basis of race, religion, or other protected characteristics can take many forms. It can be both explicit or implicit, conscious or unconscious. The LAD not only prohibits discrimination that is explicitly based on a protected characteristic, but also discrimination that is ostensibly based on something that is inextricably intertwined or closely associated with a protected characteristic. So, for example, discrimination based on gender includes not only explicit discrimination because a person is a man or woman, but also discrimination that is based on gender stereotypes regarding how men and women should behave.[36] And discrimination based on religion includes not only explicit discrimination because a person is Jewish or Muslim or Sikh, but also discrimination because of a person's religious hairstyle or religious garb.[37]

Discrimination that is ostensibly based on hair can inflict the very kinds of harms and "personal hardships" that the LAD highlights as consequences of discrimination, including "economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma … or other irreparable harm resulting from the strain of employment controversies."[38]

Therefore, just as it would likely violate the LAD to refuse to hire an Orthodox Jewish man because he wears payot, or to refuse to hire a Muslim woman because she wears a hijab, or to refuse to hire a Sikh person because they wear uncut hair, it is unlawful to refuse to hire or to

---

[34] N.J.S.A. 10:5-6.

[35] N.J.S.A. 10:5-12.

[36] *See, e.g.*, *Zalewski v. Overlook Hospital*, 300 N.J. Super, 202, 210-212 (discrimination against a man who others believed "did not behave as they perceived a male should behave" was actionable under the LAD).

[37] *See, e.g.*, *Tisby v. Camden Cty. Correctional Facility*, 448 N.J. Super. 241, 245-46, 249 (N.J. App. Div. 2017) (Muslim woman stated a prima facie claim under the LAD for discrimination based on religion where she alleged that she was terminated because she wore a hijab); *E.E.O.C. v. United Galaxy, Inc.*, Civ. No. 10–4987 (ES), 2013 WL 3223626, at *6-*7 (D.N.J. June 25, 2013) (Sikh man stated a claim under the LAD for failure to hire based on religion where he alleged that he was not hired as a sales associate because he wore a turban and maintained an unshaven beard).

[38] N.J.S.A. 10:5-3; *see* N.Y.C. Hair Guidance, *supra* note 3, at 5-6; Onwuachi-Willig, *supra* note 6, at 1114-20.

otherwise treat a Black person differently because they wear their hair in a style that is closely associated with being Black.

That means that as a general matter, employers, housing providers, and places of public accommodation covered by the LAD—including schools—may not enforce grooming or appearance policies that ban, limit, or restrict hair styled into twists, braids, cornrows, Afros, locs, Bantu knots, fades, or other hairstyles closely associated with Black racial, cultural, and ethnic identity. Any policy specifically singling out such a hairstyle will generally constitute direct evidence of disparate treatment under the LAD and unlawful discrimination on the basis of race.

In addition, hair-related policies that are facially neutral—such as requirements to maintain a "professional" or "tidy" appearance—will likely violate the LAD if they are discriminatorily applied or selectively enforced against Black people, such as if Black people with shoulder-length locs or braids are told that they cannot maintain their hairstyle because it is not "tidy," whereas white people with shoulder-length hair are not told to change their hair.[39] Similarly, if a retail store has a policy that only employees with a "neat and tidy appearance" may work on the sales floor, but the store uses that policy to station all employees with locs or Afros in the stockroom rather than the sales floor, the store will likely be liable for race-based discrimination under the LAD. And if a school handbook requires students to maintain "appropriate" hair and lists Black hairstyles as examples of "inappropriate" hairstyles, the school has likely violated the LAD. Such policies either explicitly or in application rest on invidious racial stereotypes that hairstyles closely associated with Black people are inherently messy, unkempt, or disorderly.

Covered entities also may not justify policies that, explicitly or in practice, ban, limit, or restrict natural hair or hairstyles associated with Black people based on a desire to project a certain "corporate image," because of concerns about "customer preference" or customer complaints, or because of speculative health or safety concerns. And any legitimate health and safety justification would need to be rooted in objective, factual evidence—not generalized assumptions—that the hairstyle in question would actually present a materially enhanced risk of harm to the wearer or to others.[40] Even then, there would generally be no health and safety concerns that would justify a policy that exclusively banned, limited, or restricted natural hair or hairstyles associated with Black people. And covered entities must consider whether the legitimate health or safety risk can be eliminated or reduced by reasonable alternatives other than banning or restricting a hairstyle. In addition, less restrictive alternatives like hair ties, hairnets, and head coverings must be required without regard to race or religion. For example, if a fast-food restaurant requires cooks with hair longer than shoulder-length to wear hairnets, it cannot require only employees with long locs to wear hairnets, while allowing employees with long straight hair to wear it loose.

---

[39] The Appellate Division recently applied analogous reasoning in a gender-discrimination case, explaining that "[g]rooming policies applicable to all, but not evenhandedly enforced between men and women, may disadvantage one gender over the other and violate the LAD." *Schiavo v. Marina Dist. Dev't Co.*, 442 N.J. Super. 346, 384 (2015).

[40] *Cf. Grande v. St. Clare's Health System,* 230 N.J. 1, 29 (2017); N.J.S.A. 10:5-12(q)(3)(a); N.J.A.C. 13:13-2.8(a).

Additionally, covered entities may not retaliate against employees, tenants, customers, patrons, or students for objecting to discrimination under the LAD, including objecting to discriminatory hair policies or objecting to facially neutral hair policies that are enforced in a discriminatory fashion.[41]

In sum, when a covered entity has taken an adverse action (including enforcing a discriminatory policy) against someone because of a hairstyle closely associated with being Black, that entity may have violated the LAD by engaging in unlawful discrimination on the basis of race. The following examples, in addition to those discussed above, may be violations of the LAD for the reasons explained in this guidance:

- A school administrator selectively applying a facially neutral hair-length policy only to Black students or only to students with braids, while not applying the policy to white students with long hair.
- An employer denying a promotion or bonus to, failing to address harassment or a hostile work environment against, imposing unfair work conditions on, or otherwise adversely disadvantaging an employee for wearing locs.
- A dance school requiring a child to change or cut her Afro in order to attend class because it is a "distraction" to other students.
- A restaurant or bar refusing entry to a patron with braids because it does not conform to the establishment's dress code.

***

The Division on Civil Rights is committed to preventing and eliminating discrimination on the basis of race, religion, gender, sexual orientation, gender identity or expression, national origin, disability, and other protected characteristics. If you believe you have been subject to discrimination, harassment, or retaliation in violation of the LAD, you may either (1) file a lawsuit in court (within two years of the violation); or (2) file a complaint with DCR (within 180 days of the violation) by visiting NJCivilRights.gov or by calling (973) 648-2700.

Rachel Wainer Apter
Director, New Jersey Division on Civil Rights
September 2019

[41] *See* N.J.S.A. 10:5-12(d).

U.S. Equal Employment Opportunity Commission

Facts about Race/Color Discrimination

This technical assistance document was issued upon approval of the Chair of the U.S. Equal Employment Opportunity Commission.

OLC Control Number:

EEOC-NVTA-0000-17

Concise Display Name:

Facts about Race/Color Discrimination

Issue Date:

01-15-1997

General Topics:

Race/Color

Summary:

This document provides information regarding Title VII's prohibition on employment discrimination based on race or color.

Citation:

Title VII, 29 CFR Part 1601,

Document Applicant:

Employees, Employers, Applicants, HR Practitioners

Previous Revision:

No

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

Title VII of the Civil Rights Act of 1964 (https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964) protects individuals against employment discrimination on the basis of race and color as well as national origin, sex, or religion.

It is unlawful to discriminate against any employee or applicant for employment because of race or color in regard to hiring, termination, promotion, compensation, job training, or any other term, condition, or privilege of employment. Title VII also prohibits employment decisions based on stereotypes and assumptions about abilities, traits, or the performance of individuals of certain racial groups.

Title VII prohibits both intentional discrimination and neutral job policies that disproportionately exclude minorities and that are not job related.

Equal employment opportunity cannot be denied because of marriage to or association with an individual of a different race; membership in or association with ethnic based organizations or groups; attendance or participation in schools or places of worship generally associated with certain minority groups; or other cultural practices or characteristics often linked to race or ethnicity, such as cultural dress or manner of speech, as long as the cultural practice or characteristic does not materially interfere with the ability to perform job duties.

Race-Related Characteristics and Conditions

Discrimination on the basis of an immutable characteristic associated with race, such as skin color, hair texture, or certain facial features violates Title VII, even though not all members of the race share the same characteristic.

Title VII also prohibits discrimination on the basis of a condition which predominantly affects one race unless the practice is job related and consistent with business necessity. For example, since sickle cell anemia predominantly occurs in African-Americans, a policy which excludes individuals with sickle cell anemia is discriminatory unless the policy is job related and consistent with business necessity. Similarly, a "no-beard" employment policy may discriminate against African-American men who have a predisposition to pseudofolliculitis barbae (severe shaving bumps) unless the policy is job-related and consistent with business necessity.

Color Discrimination

Even though race and color clearly overlap, they are not synonymous. Thus, color discrimination can occur between persons of different races or ethnicities, or between persons of the same race or ethnicity. Although Title VII does not define "color," the courts and the Commission read "color" to have its commonly understood meaning - pigmentation, complexion, or skin shade or tone. Thus, color discrimination occurs when a person is discriminated against based on the lightness, darkness, or other color characteristic of the person. Title VII prohibits race/color discrimination against all persons, including Caucasians.

Although a plaintiff may prove a claim of discrimination through direct or circumstantial evidence, some courts take the position that if a white person relies on circumstantial evidence to establish a reverse discrimination claim, he or she must meet a heightened standard of proof. The Commission, in contrast, applies the same standard of proof to all race discrimination claims, regardless of the victim's race or the type of evidence used. In either case, the ultimate burden of persuasion remains always on the plaintiff.

Employers should adopt "best practices" to reduce the likelihood of discrimination and to address impediments to equal employment opportunity.

Title VII's protections include:

- **Recruiting, Hiring, and Advancement**

  Job requirements must be uniformly and consistently applied to persons of all races and colors. Even if a job requirement is applied consistently, if it is not important for job performance or business needs, the requirement may be found unlawful if it excludes persons of a certain racial group or color significantly more than others. Examples of potentially unlawful practices include: (1) soliciting applications only from sources in which all or most potential workers are of the same race or color; (2) requiring applicants to have a certain educational background that is not important for job performance or business needs; (3) testing applicants for knowledge, skills or abilities that are not important for job performance or business needs.

  Employers may legitimately need information about their employees or applicants race for affirmative action purposes and/or to track applicant flow. One way to obtain racial information and simultaneously guard against discriminatory selection is for employers to use separate forms or otherwise keep the information about an applicant's race separate from the application. In that way, the employer can capture the information it needs but ensure that it is not used in the selection decision.

  Unless the information is for such a legitimate purpose, pre-employment questions about race can suggest that race will be used as a basis for making selection decisions. If the information is used in the selection decision and members of particular racial groups are excluded from employment, the inquiries can constitute evidence of discrimination.

- **Compensation and Other Employment Terms, Conditions, and Privileges**

  Title VII prohibits discrimination in compensation and other terms, conditions, and privileges of employment. Thus, race or color discrimination may not be the basis for differences in pay or benefits, work assignments, performance evaluations, training, discipline or discharge, or any other area of employment.

- **Harassment**

  Harassment on the basis of race and/or color violates Title VII. Ethnic slurs, racial "jokes," offensive or derogatory comments, or other verbal or physical conduct based on an individual's race/color constitutes unlawful harassment if the conduct creates an intimidating, hostile, or offensive working environment, or interferes with the individual's work performance.

- **Retaliation**

  Employees have a right to be free from retaliation for their opposition to discrimination or their participation in an EEOC proceeding by filing a charge, testifying, assisting, or otherwise participating in an agency proceeding.

- **Segregation and Classification of Employees**

  Title VII is violated where minority employees are segregated by physically isolating them from other employees or from customer contact. Title VII also prohibits assigning primarily minorities to predominantly minority establishments or geographic areas. It is also illegal to exclude minorities from certain positions or to group or categorize employees or jobs so that certain jobs are generally held by minorities. Title VII also does not permit racially motivated decisions driven by business concerns - for example, concerns about the effect on employee relations, or the negative reaction of clients or customers. Nor may race or color ever be a bona fide occupational qualification under Title VII.

  Coding applications/resumes to designate an applicant's race, by either an employer or employment agency, constitutes evidence of discrimination where minorities are excluded from employment or from certain positions. Such discriminatory coding includes the use of facially benign code terms that implicate race, for example, by area codes where many racial minorities may or are presumed to live.

- **Pre-Employment Inquiries and Requirements**

  Requesting pre-employment information which discloses or tends to disclose an applicant's race suggests that race will be unlawfully used as a basis for hiring. Solicitation of such pre-employment information is presumed to be used as a basis for making selection decisions. Therefore, if members of minority groups

are excluded from employment, the request for such pre-employment information would likely constitute evidence of discrimination.

However, employers may legitimately need information about their employees' or applicants' race for affirmative action purposes and/or to track applicant flow. One way to obtain racial information and simultaneously guard against discriminatory selection is for employers to use "tear-off sheets" for the identification of an applicant's race. After the applicant completes the application and the tear-off portion, the employer separates the tear-off sheet from the application and does not use it in the selection process.

Other pre-employment information requests which disclose or tend to disclose an applicant's race are personal background checks, such as criminal history checks. Title VII does not categorically prohibit employers' use of criminal records as a basis for making employment decisions. Using criminal records as an employment screen may be lawful, legitimate, and even mandated in certain circumstances. However, employers that use criminal records to screen for employment must comply with Title VII's nondiscrimination requirements.

U.S. Equal Employment Opportunity Commission

Race/Color Discrimination - FAQs

Select any of the questions below to get quick answers to some common questions about race and color discrimination.

1. **What are some examples of racial harassment?**
2. **Is it illegal to discriminate against or harass someone of your own race?**
3. **Is it illegal to be discriminated against or harassed because of your race and another prohibited reason, such as color or sex?**
4. **Can my employer ask about my race?**
5. **Am I protected from race and color discrimination if I am bi-racial or multi-racial?**
6. **Are White employees protected from race discrimination even though they are not a minority?**
7. **Is it illegal for my employer to discriminate against or harass me if I have a friend or parent of a different race?**
8. **Is it illegal for someone to discriminate against or harass certain members of a race, but not others?**
9. **Can my employer assign me to work with customers of my own race?**
10. **Can my employer base any job decisions on my race or color?**

What are some examples of racial harassment?

Racial harassment involves unwelcome and racially offensive conduct in the workplace. The harasser can be your supervisor, a supervisor in another area, a co-worker, or someone who does not work for your employer, such as a client or customer. Racial harassment can include racial slurs, jokes, or comments; racially offensive cartoons, drawings, symbols, or gestures; and other verbal or physical conduct based on an individual's race.

Is it illegal to discriminate against or harass someone of your own race?

Yes. It is illegal for people to discriminate against people of their own racial group on the basis of race or color. For example, a light-skinned Black male may not harass another Black male who has darker skin.

Is it illegal to be discriminated against or harassed because of your race and another prohibited reason, such as color or sex?

Yes. It is illegal to be discriminated against because of your race and another protected trait. For example, it is illegal for a restaurant to refuse to hire a dark-skinned Black woman because of her race (Black) and color (dark skin tone). It also is illegal to be discriminated against or harassed because of your race and some other protected trait, like your sex or national origin. For example, it is illegal for a grocery store to refuse to hire Native American women, even if the store hires women of other races and Native American men.

Can my employer ask about my race?

Federal law does not prohibit employers from asking you about your race. However, because such questions may indicate a possible intent to discriminate based on race, we recommend that employers ensure that they ask about race only for a lawful purpose. For example, your employer may need information about your race for affirmative action purposes or to comply with government laws that require the reporting of race information.

Am I protected from race and color discrimination if I am bi-racial or multi-racial?

Yes. Bi-racial and multi-racial job applicants and employees are protected from unfair treatment or harassment at work on the basis of their race and color.

Are White employees protected from race discrimination even though they are not a minority?

Yes. You are protected from different treatment at work on the basis of your race, whether you are White, Black, or some other race.

Is it illegal for my employer to discriminate against or harass me if I have a friend or parent of a different race?

Yes. The laws enforced by EEOC prohibit an employer from treating you differently or harassing you because your friends, parents, or other people you associate with are of a particular race or color. You also may not be discriminated against or harassed because you belong to a race-based organization or attend schools or places of worship associated with a particular racial group.

Is it illegal for someone to discriminate against or harass certain members of a race, but not others?

Yes. It is illegal for someone to discriminate against or harass a sub-set of a particular race. For example, a manager may not refuse to promote Asian males, even if he promotes other males and Asian females.

Can my employer assign me to work with customers of my own race?

No. Your employer may not ask you to work only with customers of your own race or assign you to a particular territory based on your race, even if your employer believes the assignment may benefit you. For example, an employer cannot assign a Black employee to work in a predominantly Black neighborhood because of his or her race, even if the employer believes the employee will sell more products, and thus, earn more money.

Can my employer base any job decisions on my race or color?

No. Your employer should not base any job decision on your race or color. This includes decisions about hiring, firing, promotions, training, wages, and benefits.

Can my employer punish me for reporting what I think is race discrimination?

No. It is illegal for your employer to punish you, treat you differently, or harass you because you report discrimination to someone at your company, to EEOC, or to your parents, your teacher, or another trusted adult. This is true even if it turns out that the conduct you complained about is not found to be discrimination. We refer to this as your right to be protected from **retaliation (https://www.eeoc.gov/youth/retaliation)** .

U.S. Equal Employment Opportunity Commission

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.

Discrimination can occur when the victim and the person who inflicted the discrimination are the same race or color.

Race/Color Discrimination & Work Situations

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.

Race/Color Discrimination & Harassment

It is unlawful to harass a person because of that person's race or color.

Harassment can include, for example, racial slurs, offensive or derogatory remarks about a person's race or color, or the display of racially-offensive symbols. 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.

Race/Color Discrimination & Employment Policies/Practices

An employment policy or practice that applies to everyone, regardless of race or color, can be illegal if it has a negative impact on the employment of people of a particular race or color and is not job-related and necessary to the operation of the business. For example, a "no-beard" employment policy that applies to all workers without regard to race may still be unlawful if it is not job-related and has a negative impact on the employment of African-American men (who have a predisposition to a skin condition that causes severe shaving bumps).

Employer Coverage

15 or more employees

Time Limits

180 days to **file a charge (https://www.eeoc.gov/employees/charge.cfm)**
(may be extended by state laws)

Federal employees have 45 days to **contact an EEO Counselor (https://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm)**

For more information, see:

- **Facts About Race/Color Discrimination (https://www.eeoc.gov/eeoc/publications/fs-race.cfm)**
- **Title VII of the Civil Rights Act of 1964 (https://www.eeoc.gov/laws/statutes/titlevii.cfm)**
- **Policy & Guidance (https://www.eeoc.gov/laws/types/race_color_guidance.cfm)**
- **Statistics (https://www.eeoc.gov/eeoc/statistics/enforcement/race.cfm)**

U.S. Equal Employment Opportunity Commission

Title VII of the Civil Rights Act of 1964

EDITOR'S NOTE: The following is the text of Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (Title VII), as amended, as it appears in volume 42 of the United States Code, beginning at section 2000e. Title VII prohibits employment discrimination based on race, color, religion, sex and national origin. The Civil Rights Act of 1991 (Pub. L. 102-166) (CRA) and the Lily Ledbetter Fair Pay Act of 2009 (Pub. L. 111-2) amend several sections of Title VII. In addition, section 102 of the CRA (which is printed elsewhere in this publication) amends the Revised Statutes by adding a new section following section 1977 (42 U.S.C. 1981), to provide for the recovery of compensatory and punitive damages in cases of intentional violations of Title VII, the Americans with Disabilities Act of 1990, and section 501 of the Rehabilitation Act of 1973. Cross references to Title VII as enacted appear in italics following each section heading. Editor's notes also appear in italics.

An Act

To enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights Act of 1964".

* * *

DEFINITIONS

SEC. 2000e. *[Section 701]*

For the purposes of this subchapter-

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11 *[originally, bankruptcy],* or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5 *[United States Code]*), or

(2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26 *[the Internal Revenue Code of 1986]*, except that during the first year after March 24, 1972 *[the date of enactment of the Equal Employment Opportunity Act of 1972]*, persons having fewer than twenty--five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or

joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972 *[the date of enactment of the Equal Employment Opportunity Act of 1972]*, or (B) fifteen or more thereafter, and such labor organization-

> (1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended *[29 U.S.C. 151 et seq.]*, or the Railway Labor Act, as amended *[45 U.S.C. 151 et seq.]*;
>
> (2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or
>
> (3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or
>
> (4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or
>
> (5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any

person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 *[29 U.S.C. 401 et seq.]*, and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act *[43 U.S.C. 1331 et seq.]*.

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title *[section 703(h)]* shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to

term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.

APPLICABILITY TO FOREIGN AND RELIGIOUS EMPLOYMENT

SEC. 2000e-1. *[Section 702]*

(a) Inapplicability of subchapter to certain aliens and employees of religious entities

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(b) Compliance with statute as violative of foreign law

It shall not be unlawful under section 2000e-2 or 2000e-3 of this title *[section 703 or 704]* for an employer (or a corporation controlled by an employer), labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining (including on-the-job training programs) to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located.

(c) Control of corporation incorporated in foreign country

(1) If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by section 2000e-2 or 2000e-3 of this title *[section 703 or 704]* engaged in by such corporation shall be presumed to be engaged in by such employer.

(2) Sections 2000e-2 and 2000e-3 of this title *[sections 703 and 704]* shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(3) For purposes of this subsection, the determination of whether an employer controls a corporation shall be based on-

(A) the interrelation of operations;

(B) the common management;

(C) the centralized control of labor relations; and

(D) the common ownership or financial control, of the employer and the corporation.

UNLAWFUL EMPLOYMENT PRACTICES

SEC. 2000e-2. *[Section 703]*

(a) Employer practices

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect

his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization-

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 *[50 U.S.C. 781 et seq.]*.

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if-

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29 *[section 6(d) of the Labor Standards Act of 1938, as amended]*.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1) (A) An unlawful employment practice based on disparate impact is established under this subchapter only if-

> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
>
> (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.
>
> (B) (i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act *[21 U.S.C. 801 et seq.]* or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1) (A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws-

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had-

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to-

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class

represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of Title 28 [*United States Code]*.

OTHER UNLAWFUL EMPLOYMENT PRACTICES

SEC. 2000e-3. *[Section 704]*

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on—the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

(b) Printing or publication of notices or advertisements indicating prohibited preference, limitation, specification, or discrimination; occupational qualification

exception

It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SEC. 2000e-4. *[Section 705]*

(a) Creation; composition; political representation; appointment; term; vacancies; Chairman and Vice Chairman; duties of Chairman; appointment of personnel; compensation of personnel

There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. Members of the Commission shall be appointed by the President by and with the advice and consent of the Senate for a term of five years. Any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed, and all members of the Commission shall continue to serve until their successors are appointed and qualified, except that no such member of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in

which such nomination was submitted. The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and, except as provided in subsection (b) of this section, shall appoint, in accordance with the provisions of Title 5 *[United States Code]* governing appointments in the competitive service, such officers, agents, attorneys, administrative law judges *[originally, hearing examiners]*, and employees as he deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of Title 5 *[United States Code]*, relating to classification and General Schedule pay rates: Provided, That assignment, removal, and compensation of administrative law judges *[originally, hearing examiners]* shall be in accordance with sections 3105, 3344, 5372, and 7521 of Title 5 *[United States Code]*.

(b) General Counsel; appointment; term; duties; representation by attorneys and Attorney General

> (1) There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel shall have responsibility for the conduct of litigation as provided in sections 2000e-5 and 2000e-6 of this title *[sections 706 and 707]*. The General Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and shall concur with the Chairman of the Commission on the appointment and supervision of regional attorneys. The General Counsel of the Commission on the effective date of this Act shall continue in such position and perform the functions specified in this subsection until a successor is appointed and qualified.
>
> (2) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this subchapter.

(c) Exercise of powers during vacancy; quorum

A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission and three members thereof shall

constitute a quorum.

(d) Seal; judicial notice

The Commission shall have an official seal which shall be judicially noticed.

(e) Reports to Congress and the President

The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken *[originally, the names, salaries, and duties of all individuals in its employ]* and the moneys it has disbursed. It shall make such further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable.

(f) Principal and other offices

The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all its powers at any other place. The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this subchapter.

(g) Powers of Commission

The Commission shall have power-

> (1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;
>
> (2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;
>
> (3) to furnish to persons subject to this subchapter such technical assistance as they may request to further their compliance with this subchapter or an order issued thereunder;
>
> (4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this subchapter, to assist in such effectuation by conciliation or such other remedial action as is provided by this subchapter;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public;

(6) to intervene in a civil action brought under section 2000e-5 of this title *[section 706]* by an aggrieved party against a respondent other than a government, governmental agency or political subdivision.

(h) Cooperation with other departments and agencies in performance of educational or promotional activities; outreach activities

(1) The Commission shall, in any of its educational or promotional activities, cooperate with other departments and agencies in the performance of such educational and promotional activities.

(2) In exercising its powers under this subchapter, the Commission shall carry out educational and outreach activities (including dissemination of information in languages other than English) targeted to-

(A) individuals who historically have been victims of employment discrimination and have not been equitably served by the Commission; and

(B) individuals on whose behalf the Commission has authority to enforce any other law prohibiting employment discrimination, concerning rights and obligations under this subchapter or such law, as the case may be.

(i) Personnel subject to political activity restrictions

All officers, agents, attorneys, and employees of the Commission shall be subject to the provisions of section 7324 of Title 5 *[originally, section 9 of the Act of August 2, 1939, as amended (the Hatch Act)]*, notwithstanding any exemption contained in such section.

(j) Technical Assistance Training Institute

(1) The Commission shall establish a Technical Assistance Training Institute, through which the Commission shall provide technical assistance and training regarding the laws and regulations enforced by the Commission.

(2) An employer or other entity covered under this subchapter shall not be excused from compliance with the requirements of this subchapter because of any failure to receive technical assistance under this subsection.

(3) There are authorized to be appropriated to carry out this subsection such sums as may be necessary for fiscal year 1992.

(k) EEOC Education, Technical Assistance, and Training Revolving Fund

(1) There is hereby established in the Treasury of the United States a revolving fund to be known as the "EEOC Education, Technical Assistance, and Training Revolving Fund" (hereinafter in this subsection referred to as the "Fund") and to pay the cost (including administrative and personnel expenses) of providing education, technical assistance, and training relating to laws administered by the Commission. Monies in the Fund shall be available without fiscal year limitation to the Commission for such purposes.

(2)(A) The Commission shall charge fees in accordance with the provisions of this paragraph to offset the costs of education, technical assistance, and training provided with monies in the Fund. Such fees for any education, technical assistance, or training--

(i) shall be imposed on a uniform basis on persons and entities receiving such education, assistance, or training,

(ii) shall not exceed the cost of providing such education, assistance, and training, and

(iii) with respect to each person or entity receiving such education, assistance, or training, shall bear a reasonable relationship to the cost of providing such education, assistance, or training to such person or entity.

(B) Fees received under subparagraph (A) shall be deposited in the Fund by the Commission.

(C) The Commission shall include in each report made under subsection (e) of this section information with respect to the operation of the Fund, including information, presented in the aggregate, relating to--

(i) the number of persons and entities to which the Commission provided education, technical assistance, or training with monies in the Fund, in the fiscal year for which such report is prepared,

(ii) the cost to the Commission to provide such education, technical assistance, or training to such persons and entities, and

(iii) the amount of any fees received by the Commission from such persons and entities for such education, technical assistance, or training.

(3) The Secretary of the Treasury shall invest the portion of the Fund not required to satisfy current expenditures from the Fund, as determined by the Commission, in obligations of the United States or obligations guaranteed as to principal by the United States. Investment proceeds shall be deposited in the Fund.

(4) There is hereby transferred to the Fund $1,000,000 from the Salaries and Expenses appropriation of the Commission.

ENFORCEMENT PROVISIONS

SEC. 2000e-5. *[Section 706]*

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title *[section 703 or 704]*.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency,

labor organization, or joint labormanagement committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) of this section by the person aggrieved before the

expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty- day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

> (1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful

employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1977A of the Revised Statutes (42 U.S.C. 1981a), liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and

venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely

application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28 *[United States Code]*, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to

designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2) (A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this Title *[section 704(a)]*.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title *[section 703(m)]* and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court-

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title *[section 703(m)]*; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of chapter 6 of Title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of chapter 6 of title 29 *[the Act entitled"An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U.S.C. 105-115)]* shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28 *[United States Code]*.

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the

Commission and the United States shall be liable for costs the same as a private person.

CIVIL ACTIONS BY THE ATTORNEY GENERAL

SEC. 2000e-6. *[Section 707]*

(a) Complaint

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) Jurisdiction; three-judge district court for cases of general public importance: hearing, determination, expedition of action, review by Supreme Court; single judge district court: hearing, determination, expedition of action

The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was

instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

(c) Transfer offunctions, etc., to Commission; effective date; prerequisite to transfer; execution of functions by Commission

Effective two years after March 24, 1972 *[the date of enactment of the Equal Employment Opportunity Act of 1972]*, the functions of theAttorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of Title 5 *[United States Code]*, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Transfer of functions, etc., not to affect suits commenced pursuant to this section prior to date of transfer

Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United

States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Investigation and action by Commission pursuant to filing of charge of discrimination; procedure

Subsequent to March 24, 1972 *[the date of enactment of the Equal Employment Opportunity Act of 1972]*, the Commission shall haveauthority to investigate and act on a charge of a pattern or practice ofdiscrimination, whether filed by or on behalf of a person claiming to beaggrieved or by a member of the Commission. All such actions shall beconducted in accordance with the procedures set forth in section 2000e-5of this title *[section 706]*.

EFFECT ON STATE LAWS

SEC. 2000e-7. *[Section 708]*

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

INVESTIGATIONS

SEC. 2000e-8. *[Section 709]*

(a) Examination and copying of evidence related to unlawful employment practices

In connection with any investigation of a charge filed under section 2000e-5 of this title *[section 706]*, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

(b) Cooperation with State and local agencies administering State fair employment practices laws; participation in and contribution to research and other projects;

utilization of services; payment in advance or reimbursement; agreements and rescission of agreements

The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this subchapter and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this subchapter. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this subchapter.

(c) Execution, retention, and preservation of records; reports to Commission; training program records; appropriate relief from regulation or order for undue hardship; procedure for exemption; judicial action to compel compliance

Every employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this subchapter which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this subchapter, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or

other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

(d) Consultation and coordination between Commission and interested State and Federal agencies in prescribing recordkeeping and reporting requirements; availability of information furnished pursuant to recordkeeping and reporting requirements; conditions on availability

In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection.

(e) Prohibited disclosures; penalties

It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this

subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

CONDUCT OF HEARINGS AND INVESTIGATIONS PURSUANT TO SECTION 161 OF Title 29

SEC. 2000e-9. *[Section 710]*

For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of Title 29 *[section 11 of the National Labor Relations Act]* shall apply.

POSTING OF NOTICES; PENALTIES

SEC. 2000e-10. *[Section 711]*

(a) Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from or, summaries of, the pertinent provisions of this subchapter and information pertinent to the filing of a complaint.

(b) A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense.

VETERANS' SPECIAL RIGHTS OR PREFERENCE

SEC. 2000e-11. *[Section 712]*

Nothing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

REGULATIONS; CONFORMITY OF REGULATIONS WITH ADMINISTRATIVE PROCEDURE PROVISIONS; RELIANCE ON INTERPRETATIONS AND INSTRUCTIONS OF COMMISSION

SEC. 2000e-12. *[Section 713]*

(a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter. Regulations issued under this section shall be in conformity with the standards and limitations of subchapter II of chapter 5 of Title 5 *[originally, the Administrative Procedure Act]*.

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this subchapter if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this subchapter regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this subchapter.

APPLICATION TO PERSONNEL OF COMMISSION OF SECTIONS 111 AND 1114 OF TITLE 18; PUNISHMENT FOR VIOLATION OF SECTION 1114 OF TITLE 18

SEC. 2000e-13. *[Section 714]*

The provisions of sections 111 and 1114, Title 18 *[United States Code]*, shall apply to officers, agents, and employees of the Commission in the performance of their official duties. Notwithstanding the provisions of sections 111 and 1114 of Title 18 *[United States Code]*, whoever in violation of the provisions of section 1114 of such title kills a person while engaged in or on account of the performance of his official functions under this Act shall be punished by imprisonment for any term of years or for life.

TRANSFER OF AUTHORITY

[Administration of the duties of the Equal Employment Opportunity Coordinating Council was transferred to the Equal Employment Opportunity Commission effective July 1, 1978, under the President's Reorganization Plan of 1978.]

EQUAL EMPLOYMENT OPPORTUNITY COORDINATING COUNCIL; ESTABLISHMENT; COMPOSITION; DUTIES; REPORT TO PRESIDENT AND CONGRESS

SEC. 2000e-14. *[Section 715]*

[Original introductory text: There shall be established an Equal Employment Opportunity Coordinating Council (hereinafter referred to in this section as the

Council) composed of the Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, the Chairman of the United States Civil Service Commission, and the Chairman of the United States Civil Rights Commission, or their respective delegates.]

The Equal Employment Opportunity Commission *[originally, Council]* shall have the responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. On or before October 1 *[originally, July 1]* of each year, the Equal Employment Opportunity Commission *[originally, Council]* shall transmit to the President and to the Congress a report of its activities, together with such recommendations for legislative or administrative changes as it concludes are desirable to further promote the purposes of this section.

PRESIDENTIAL CONFERENCES; ACQUAINTANCE OF LEADERSHIP WITH PROVISIONS FOR EMPLOYMENT RIGHTS AND OBLIGATIONS; PLANS FOR FAIR ADMINISTRATION; MEMBERSHIP

SEC. 2000e-15. *[Section 716]*

[Original text: (a) This title shall become effective one year after the date of its enactment.

(b) Notwithstanding subsection (a), sections of this title other than sections 703, 704, 706, and 707 shall become effective immediately.

(c)] The President shall, as soon as feasible after July 2, 1964 *[the date of enactment of this title]*, convene one or more conferences for the purpose of enabling the leaders of groups whose members will be affected by this subchapter to become

familiar with the rights afforded and obligations imposed by its provisions, and for the purpose of making plans which will result in the fair and effective administration of this subchapter when all of its provisions become effective. The President shall invite the participation in such conference or conferences of (1) the members of the President's Committee on Equal Employment Opportunity, (2) the members of the Commission on Civil Rights, (3) representatives of State and local agencies engaged in furthering equal employment opportunity, (4) representatives of private agencies engaged in furthering equal employment opportunity, and (5) representatives of employers, labor organizations, and employment agencies who will be subject to this subchapter.

TRANSFER OF AUTHORITY

[Enforcement of Section 717 was transferred to the Equal Employment Opportunity Commission from the Civil Service Commission (Office of Personnel Management) effective January 1, 1979 under the President's Reorganization Plan No. 1 of 1978.]

EMPLOYMENT BY FEDERAL GOVERNMENT

SEC. 2000e-16. *[Section 717]*

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5 *[United States Code]*, in executive agencies *[originally, other than the General Accounting Office]* as defined in section 105 of Title 5 *[United States Code]* (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be

made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Equal Employment Opportunity Commission; enforcement powers; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission *[originally, Civil Service Commission]* shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission *[originally, Civil Service Commission]* shall-

> (1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;
>
> (2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and
>
> (3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to-

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission *[originally, Civil Service Commission]* shall be exercised by the Librarian of Congress.

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission *[originally, Civil Service Commission]* upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission *[originally, Civil Service Commission]* on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title *[section 706]*, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Section 2000e-5(f) through (k) of this title applicable to civil actions

The provisions of section 2000e-5(f) through (k) of this title *[section 706(f) through (k)]*, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

(f) Section 2000e-5(e)(3) *[Section 706(e)(3)]* shall apply to complaints of discrimination in compensation under this section.

PROCEDURE FOR DENIAL, WITHHOLDING, TERMINATION, OR SUSPENSION OF GOVERNMENT CONTRACT SUBSEQUENT TO ACCEPTANCE BY GOVERNMENT OF AFFIRMATIVE ACTION PLAN OF EMPLOYER; TIME OF ACCEPTANCE OF PLAN

SEC. 2000e-17. *[Section 718]*

No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication under the provisions of section 554 of Title 5 *[United States Code]*, and the following pertinent sections: Provided, That if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply: Provided further, That for the purposes of this section an affirmative action plan shall be deemed to have been accepted by the Government at the time the appropriate compliance agency has accepted such

plan unless within forty-five days thereafter the Office of Federal Contract Compliance has disapproved such plan.

STATE OF NEW JERSEY | DEPARTMENT OF LAW & PUBLIC SAFETY

ANDREW J. BRUCK
Acting Attorney General

COVID-19 FAQs

Rachel Wainer Apter, Director

Civil Rights and COVID-19: Frequently Asked Questions

Learn more about your rights and protections against discrimination and bias-based harassment related to the COVID-19 pandemic. To find out more about how to file a complaint, click here.

Translate »

What are the LAD's protections related to COVID-19 in employment?

An employer cannot discriminate against you because of your actual or perceived race, national origin, religion, disability, or other LAD-protected characteristic. The LAD also prohibits bias-based harassment that creates a hostile work environment. Your employer must take reasonable steps to stop harassment if they knew or should have known about it, regardless of whether the harasser is a coworker or supervisor and regardless of whether the harassing conduct takes place in the office or electronically. These protections apply even if the conduct at issue stems from concerns related to COVID-19.

My coworker repeatedly harasses me by claiming that Asian people "caused" COVID-19 and calling it "the Chinese virus." Does my employer need to do something?

Yes. The LAD prohibits harassment based on actual or perceived race or national origin that creates a hostile work environment. Your employer must take reasonable steps to stop harassment if they knew or should have known about it, regardless of whether the harasser is a coworker or supervisor and regardless of whether the harassing conduct takes place in the office or electronically.

My employer is allowing mothers to telework if their children are in virtual school, but not fathers. Could this violate the LAD?

ANDREW J. BRUCK
Acting Attorney General

home because they have or are perceived to have a disability related to COVID-19, an employer must provide reasonable accommodations to the employee (such as allowing them to telework or providing them with time off from work) unless doing so would impose an undue hardship on the employer's operations.

Is COVID-19 a disability under the LAD?

The LAD defines disability as, among other things, any "physical … infirmity … which is caused by … illness …" COVID-19 is an infectious disease caused by a newly discovered coronavirus, and would constitute an illness. Thus, if you have any physical infirmity caused by COVID-19, that would qualify as a disability under the LAD.

I have COVID-19. What reasonable accommodations can I ask for from my employer under the LAD?

If you have any physical infirmity caused by COVID-19, your employer must provide you with reasonable accommodations to enable you to do your job, unless doing so would impose an undue burden on their operations. Safety—your safety as well as the safety of your coworkers, clients, and customers—is a factor in evaluating whether a potential accommodation would be reasonable. However, an employer must base its decisions regarding any potential safety hazard on objective, scientific evidence, including evidence reflected in policies and guidance from federal, state, and local authorities, and not on unfounded assumptions or stereotypes.

people who have asthma, serious heart conditions, or diabetes). An employer must provide reasonable accommodations to such an employee unless doing so would be an undue burden on their operations. Depending on the circumstances, reasonable accommodations may include, among other things, allowing employees to telework, changing employees' schedules, or providing them with personal protective equipment.

I am teleworking and have a disability that is not related to COVID-19. Am I still entitled to a reasonable accommodation?

Yes. Based on changes to the work environment, employers may be required to provide reasonable accommodations for employees with disabilities that are not related to COVID-19, even if no accommodation or a different accommodation was necessary before the pandemic. With the expansion of telework, for example, an employee with a disability may require the same accommodations as before or could require different accommodations.

I have been placed in isolation or quarantine. Can I be fired?

If you have been placed in isolation or quarantine pursuant to an order of the DOH Commissioner and you were employed (other than in a temporary position) at the time you were placed in isolation or quarantine, New Jersey law requires that your employer reinstate you to your position or a position of like seniority, status and pay, unless your employer's circumstances have so changed as to make it impossible or unreasonable to do so. To be reinstated pursuant to that law, you must: (1) still be qualified to perform the duties of your position; (2) receive a certificate of completion of isolation or quarantine from

accommodations may include, among other things, allowing employees to telework, changing employees' schedules, or allowing them to work in an office separated from other co-workers.

My employer is not providing me with personal protective equipment, such as masks and gloves, but I think I need them to protect myself from contracting COVID-19 at work. What should I do?

Governor Murphy has issued Executive Orders that require essential retail businesses, manufacturing businesses, warehousing businesses, and businesses engaged in essential construction projects to provide masks for their employees at the business's own expense. Click HERE to report a violation of those Executive Orders.

I believe that my job duties can be performed via telework, but my employer is requiring me to report to work instead of allowing me to work remotely. What should I do?

Per Executive Order, employers are generally expected to accommodate telework wherever practicable. You should talk to your employer to see if a telework arrangement can be implemented If you believe that your employer is violating the requirements of the Governor's Executive Order regarding teleworking, please click HERE to report a violation.

Employers generally may request medical documentation to confirm a disability when an employee requests a reasonable accommodation. Employers must ensure that all information about an employee's disability is kept confidential and must maintain all information about employee illness as a confidential medical record.

If you cannot receive a COVID-19 vaccine because of a disability, and the risk of COVID-19 transmission can be mitigated by your employer granting you a reasonable accommodation, your employer must do so unless it would be an undue burden on its operations. A reasonable accommodation may include allowing you to continue to work remotely, or otherwise to work in a manner that would reduce or eliminate the risk of harm to other employees or to the public. A reasonable accommodation may also include providing you with personal protective equipment that sufficiently mitigates your risk of COVID-19 transmission and exposure. Your employer should engage in a flexible, interactive process with you to determine if an appropriate accommodation exists and must conduct an individualized assessment based on your specific job duties and limitations in assessing whether to provide a particular accommodation.

Under the LAD, if there is no reasonable accommodation that your employer can provide that would mitigate the risk of COVID-19 transmission to its employees and customers, then your employer can enforce its policy of excluding unvaccinated employees from the physical workplace, even if you are unvaccinated because of a disability. However, that does not mean that your employer can automatically terminate you if you cannot get vaccinated, as the employer may be precluded from doing so by other laws, regulations, or policies.

My employer is requiring me to get a vaccine before returning to work, but my doctor says I shouldn't get the vaccine while I am pregnant or breastfeeding. Does the LAD offer me any protection?

advised by their doctor to seek such accommodation. Employers must ensure that all information about an employee's disability is kept confidential and must maintain all information about employee illness as a confidential medical record.

If you cannot receive a COVID-19 vaccine because you are pregnant or breastfeeding, and the risk of COVID-19 transmission can be mitigated by your employer granting you a reasonable accommodation, your employer must do so unless it would be an undue burden on its operations. A reasonable accommodation may include allowing you to continue to work remotely, or otherwise to work in a manner that would reduce or eliminate the risk of harm to other employees or to the public. A reasonable accommodation may also include providing you with personal protective equipment that sufficiently mitigates your risk of COVID-19 transmission and exposure. Your employer should engage in a flexible, interactive process with you to determine if an appropriate accommodation exists and must conduct an individualized assessment based on your specific job duties and limitations in assessing whether to provide a particular accommodation.

Under the LAD, if there is no reasonable accommodation that your employer can provide that would mitigate the risk of COVID-19 transmission to its employees and customers, then your employer can enforce its policy of excluding unvaccinated employees from the physical workplace, even if you are unvaccinated because you have been advised by a physician not to receive the vaccine while pregnant or breastfeeding. However, that does not mean that your employer can automatically terminate you if you cannot get vaccinated, as the employer may be precluded from doing so by other laws, regulations, or policies.

My employer is requiring me to get a vaccine before returning to work, but my religious beliefs do not allow me to get vaccinated. Does the LAD offer me any protection?

the employer may make a limited inquiry into the facts and circumstances supporting the employee's request.

Thus, if you cannot receive a COVID-19 vaccine because of sincerely held religious belief, practice, or observance, and the risk of COVID-19 transmission can be mitigated by your employer granting you a reasonable accommodation, your employer must do so unless it would be an undue burden on its operations. A reasonable accommodation may include allowing you to continue to work remotely, or otherwise to work in a manner that would reduce or eliminate the risk of harm to other employees or to the public. A reasonable accommodation may also include providing you with personal protective equipment that sufficiently mitigates your risk of COVID-19 transmission and exposure. In determining whether providing an accommodation may impose an undue burden, an employer may consider the number of employees who need the particular accommodation and any related loss of productivity.

Under the LAD, if there is no reasonable accommodation that your employer can provide that would mitigate the risk of COVID-19 transmission to its employees and customers, then your employer can enforce its policy of excluding unvaccinated employees from the physical workplace, even if you are unvaccinated because of a sincerely held religious belief. However, that does not mean that your employer can automatically terminate you if you cannot get vaccinated, as the employer may be precluded from doing so by other laws, regulations, or policies.

Housing

ANDREW J. BRUCK
Acting Attorney General

How does the LAD apply to COVID-19-related rental or mortgage relief?

Public Accommodations

What are the LAD's protections related to COVID-19 in places of public accommodation, including schools?

What are the LAD's protections related to medical facilities and COVID-19?

Does the LAD prohibit stores from designating certain hours as limited to shoppers over a specific age?

Can I be required to wear masks or face coverings in a store or other establishment open to the public?

I applied for a PPP loan but believe I was treated differently because of my race or gender. Could that violate the LAD?

ANDREW J. BRUCK
Acting Attorney General

I witnessed a bias/hate crime on a sidewalk in my town. What should I do?

New Jersey Family Leave Act

Who is protected by the New Jersey Family Leave Act (NJFLA)?

To be eligible for the protections available under the NJFLA, you must work either for a state or local government agency, or for a company or organization with 30 or more employees worldwide. In addition, you must have been employed by the agency or company for at least 1 year and have worked at least 1,000 hours in the past 12 months. Please click HERE to learn more about the NJFLA.

What protections does the New Jersey Family Leave Act offer?

Eligible employees generally can take up to 12 weeks of job-protected leave during any 24-month period to care for a family member, or someone who is the equivalent of family, who has a serious health condition (including a diagnosis of COVID-19) or who has been isolated or quarantined because of suspected exposure to a communicable disease (including COVID-19) during a state of emergency. They can also take job-protected leave to take care of a child whose school or place of care is closed by order of a public official due to COVID-19.

ANDREW J. BRUCK
Acting Attorney General

use accrued Earned Sick Leave. Earned Sick Leave is enforced by the New Jersey Department of Labor and Workforce Development (NJDOL). NJDOL has set up a website about COVID-19. Please click **HERE** for more information. Your employer may also be required to provide a leave of absence for your own disability if it does not impose an undue hardship on the employer.

You may also be eligible for job-protected leave under the Families First Coronavirus Response Act, which is enforced by the federal Department of Labor. Please click **HERE** for more information.

Am I eligible for job-protected leave under the NJFLA if my child's school or daycare is closed or operating only virtually?

Yes. If your child's school or daycare is closed due to COVID-19, you are eligible to take job-protected leave under the NJFLA. Similarly, if your child's school is operating only virtually, you can take leave under the NJFLA. This applies even if the school is starting the school year with only virtual instruction but will reevaluate the situation in the future to determine if it will open in person.

However, if you already exhausted your 12 weeks of NJFLA leave, including by taking time off in the spring of this year to care for your child while your child's school or daycare was closed, your employer is not required to provide additional FLA leave.

Am I eligible for job-protected leave if my child's school or daycare is open but I choose to keep my child home from school because someone in my family is high risk or I

ANDREW J. BRUCK
Acting Attorney General

hours in the past 12 months. When my employer calls me back to work, am I still entitled to NJFLA leave?

To be eligible for job-protected leave under the NJFLA, you must have been employed by the agency or company for at least one year and have worked at least 1,000 hours in the past 12 months. If you were furloughed or laid off due to the COVID-19 state of emergency, any time up to 90 calendar days during the COVID-19 furlough or time of unemployment can be counted as time in which you were employed. To calculate the "hours worked" per week during the COVID-19 furlough or unemployment, use the average number of hours you worked per week during the rest of the 12-month period.

How do I get answers to questions I have about Earned Sick Leave, Temporary Disability, Worker's Compensation, or Family Leave Insurance?

Those laws are enforced by the New Jersey Department of Labor and Workforce Development (NJDOL). NJDOL has set up a website about NJDOL Benefits and the Coronavirus (COVID-19). Please click HERE for more information.

ANDREW J. BRUCK
Acting Attorney General

F NEW JERSEY | DEPARTMENT OF LAW & PUBLIC SAFETY
)F THE ATTORNEY GENERAL

Search

ABOUT

Translate »

ANDREW J. BRUCK
Acting Attorney General

CONTACT

File a Complaint

AG Event Request Form

Public Records Request

Constituent Services

ATTORNEY GENERAL'S PRIORITIES

Protecting New Jersey in Court

Fighting the Opioid Crisis

Combatting Gun Violence

Strengthening Community Trust

ONGOING PROJECTS

Child Protection

Civil Rights

Consumer Protection

Environmental Justice

Human Trafficking

STATE OF NEW JERSEY | DEPARTMENT OF LAW & PUBLIC SAFETY

ANDREW J. BRUCK
Acting Attorney General

- AG Directives
- AG Guidelines
- AG Opinions
- Grant Opportunities
- Licenses & Permits
- Outside Counsel
- Victim Services

U.S. Equal Employment Opportunity Commission

What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

Technical Assistance Questions and Answers - Updated on May 28, 2021.

INTRODUCTION

- *All EEOC materials related to COVID-19 are collected at **www.eeoc.gov/coronavirus (https://www.eeoc.gov/coronavirus)** .*
- The EEOC enforces workplace anti-discrimination laws, including the Americans with Disabilities Act (ADA) and the Rehabilitation Act (which include the requirement for reasonable accommodation and non-discrimination based on disability, and rules about employer medical examinations and inquiries), Title VII of the Civil Rights Act (which prohibits discrimination based on race, color, national origin, religion, and sex, including pregnancy), the Age Discrimination in Employment Act (which prohibits discrimination based on age, 40 or older), and the Genetic Information Nondiscrimination Act. Note: Other federal laws, as well as state or local laws, may provide employees with additional protections.
- Title I of the ADA applies to private employers with 15 or more employees. It also applies to state and local government employers, employment agencies, and labor unions. All nondiscrimination standards under Title I of the ADA also apply to federal agencies under Section 501 of the Rehabilitation Act. Basic background information about the ADA and the Rehabilitation Act is available on EEOC's **disability page (https://www.eeoc.gov/disability-discrimination)** .
- The EEO laws, including the ADA and Rehabilitation Act, continue to apply during the time of the COVID-19 pandemic, but they do not interfere with or prevent employers from following the **guidelines and suggestions made by the CDC or state/local public health authorities (https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html)** about steps employers should take regarding COVID-19. **Employers**

should remember that guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety. This includes evolving guidance found in the CDC publication, "**Interim Public Health Recommendations for Fully Vaccinated People (https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html)** ." Many common workplace inquiries about the COVID-19 pandemic are addressed in the CDC publication "**General Business Frequently Asked Questions (https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html)** ."

- The EEOC has provided guidance (a publication entitled **Pandemic Preparedness in the Workplace and the Americans With Disabilities Act (https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act)** [**PDF version (https://www.eeoc.gov/sites/default/files/2020-04/pandemic_flu.pdf)**]) ("Pandemic Preparedness"), consistent with these workplace protections and rules, that can help employers implement strategies to navigate the impact of COVID-19 in the workplace. This pandemic publication, which was written during the prior H1N1 outbreak, is still relevant today and identifies established ADA and Rehabilitation Act principles to answer questions frequently asked about the workplace during a pandemic. It has been updated as of March 19, 2020 to address examples and information regarding COVID-19; **the new 2020 information appears in bold and is marked with an asterisk**.
- On March 27, 2020 the EEOC provided a webinar ("3/27/20 Webinar") which was recorded and transcribed and is available at **www.eeoc.gov/coronavirus (https://www.eeoc.gov/coronavirus)** . The World Health Organization (WHO) has declared COVID-19 to be an international pandemic. The EEOC pandemic publication includes a **separate section (https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act#secB)** that answers common employer questions about what to do after a pandemic has been declared. Applying these principles to the COVID-19 pandemic, the following may be useful:

A. Disability-Related Inquiries and Medical Exams

*The ADA has restrictions on when and how much medical information an employer may obtain from any applicant or employee. Prior to making a conditional job offer to an applicant, disability-related inquiries and medical exams are generally prohibited. They are permitted between the time of the offer and when the applicant begins work, provided they are required for everyone in the same job category. Once an employee begins work, any disability-related inquiries or medical exams must be job related and consistent with business necessity. See CDC guidance, including the CDC's "**Interim Public Health Recommendations for Fully Vaccinated People.***

(https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.htm) *" The EEOC monitors CDC publications.*

A.1. How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic? *(3/17/20)*

During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

A.2. When screening employees entering the workplace during this time, may an employer only ask employees about the COVID-19 symptoms EEOC has identified as examples (https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q1) , or may it ask about any symptoms identified by public health authorities as associated with COVID-19? *(4/9/20)*

As public health authorities and doctors learn more about COVID-19, they may expand the list of associated symptoms. Employers should rely on the CDC, other public health authorities, and reputable medical sources for guidance on emerging symptoms associated with the disease. These sources may guide employers when choosing questions to ask employees to determine whether they would pose a direct threat to health in the workplace. For example, additional symptoms beyond fever or cough may include new loss of smell or taste as well as gastrointestinal problems, such as nausea, diarrhea, and vomiting.

A.3. When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic? *(3/17/20)*

Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.

A.4. Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19? *(3/17/20)*

Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.

A.5. >When employees return to work, does the ADA allow employers to require a doctor's note certifying fitness for duty? *(3/17/20)*

Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to

provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.

A.6. May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) when evaluating an employee's initial or continued presence in the workplace? *(4/23/20; updated 9/8/20 to address stakeholder questions about updates to CDC guidance)*

The ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity." Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take screening steps to determine if **employees entering the workplace have COVID-19 (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#A.2)** because **an individual with the virus will pose a direct threat (https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q1)** to the health of others. Therefore an employer may choose to administer COVID-19 testing to employees before initially permitting them to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others. The ADA does not interfere with employers following **recommendations by the CDC (https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/testing-non-healthcare-workplaces.html)** or other public health authorities regarding whether, when, and for whom testing or other screening is appropriate. Testing administered by employers consistent with current CDC guidance will meet the ADA's "business necessity" standard.

Consistent with the ADA standard, employers should ensure that the tests are considered accurate and reliable. For example, employers may review **information (https://www.fda.gov/medical-devices/emergency-situations-medical-devices/faqs-diagnostic-testing-sars-cov-2)** from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities. Because the CDC and FDA may revise their recommendations based on new information, it may be helpful to check these agency websites for updates. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test. Note that a positive test result reveals that an individual most likely has a current infection and may be able to transmit the virus to others. A negative test result means that the individual did not have detectable COVID-19 at the time of testing.

A negative test does not mean the employee will not acquire the virus later. Based on guidance from medical and public health authorities, employers should still require–to the greatest extent possible–that employees observe infection control practices (such as social distancing, regular handwashing, and other measures) in the workplace to prevent transmission of COVID-19.

Note: Question A.6 and A.8 address screening of employees generally. See Question A.9 regarding decisions to screen individual employees.

A.7. CDC said in its Interim Guidelines (https://www.cdc.gov/coronavirus/2019-ncov/lab/resources/antibody-tests-guidelines.html) that antibody test results "should not be used to make decisions about returning persons to the workplace." In light of this CDC guidance, under the ADA may an employer require antibody testing before permitting employees to re-enter the workplace? *(6/17/20)*

No. An antibody test constitutes a medical examination under the ADA. In light of CDC's **Interim Guidelines (https://www.cdc.gov/coronavirus/2019-ncov/lab/resources/antibody-tests-guidelines.html)** that antibody test results "should not be used to make decisions about returning persons to the workplace," an antibody test at this time does not meet the ADA's "job related and consistent with business necessity" standard for medical examinations or inquiries for current employees. Therefore, requiring antibody testing before allowing employees to re-enter the workplace is not allowed under the ADA. Please note that an antibody test is different from a test to determine if someone has an active case of COVID-19 (i.e., a viral test). The EEOC has already stated that COVID-19 viral tests are **permissible under the ADA (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#A.6)** .

The EEOC will continue to closely monitor CDC's recommendations, and could update this discussion in response to changes in CDC's recommendations.

A.8. May employers ask all employees physically entering the workplace if they have been diagnosed with or tested for COVID-19? *(9/8/20; adapted from 3/27/20 Webinar Question 1)*

Yes. Employers may ask all employees who will be physically entering the workplace if they have COVID-19 or symptoms associated with COVID-19, and ask if they have been tested for COVID-19. Symptoms associated with COVID-19 include, for example, fever, chills, cough, and shortness of breath. The CDC has identified a **current list of symptoms (https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html)** .

An employer may exclude those with COVID-19, or symptoms associated with COVID-19, from the workplace because, as EEOC has stated, their presence would pose a direct threat to the health or safety of others. However, for those employees who are teleworking and are not physically interacting with coworkers or others (for example, customers), the employer would generally not be permitted to ask these questions.

A.9. May a manager ask only one employee—as opposed to asking all employees—questions designed to determine if she has COVID-19, or require that this employee alone have her temperature taken or undergo other screening or testing? *(9/8/20; adapted from 3/27/20 Webinar Question 3)*

If an employer wishes to ask only a particular employee to answer such questions, or to have her temperature taken or undergo other screening or testing, the ADA requires the employer to have a reasonable belief based on objective evidence that this person might have the disease. So, it is important for the employer to consider why it wishes to take these actions regarding this

particular employee, such as a display of COVID-19 symptoms. In addition, the ADA does not interfere with employers following **recommendations by the CDC (https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/testing-non-healthcare-workplaces.html)** or other public health authorities regarding whether, when, and for whom testing or other screening is appropriate.

A.10. May an employer ask an employee who is physically coming into the workplace whether they have family members who have COVID-19 or symptoms associated with COVID-19? *(9/8/20; adapted from 3/27/20 Webinar Question 4)*

No. The Genetic Information Nondiscrimination Act (GINA) prohibits employers from asking employees medical questions about family members. GINA, however, does not prohibit an employer from asking employees whether they have had contact with anyone diagnosed with COVID-19 or who may have symptoms associated with the disease. Moreover, from a public health perspective, only asking an employee about his contact with family members would unnecessarily limit the information obtained about an employee's potential exposure to COVID-19.

A.11. What may an employer do under the ADA if an employee refuses to permit the employer to take his temperature or refuses to answer questions about whether he has COVID-19, has symptoms associated with COVID-19, or has been tested for COVID-19? *(9/8/20; adapted from 3/27/20 Webinar Question 2)*

Under the circumstances existing currently, the ADA allows an employer to bar an employee from physical presence in the workplace if he refuses to have his temperature taken or refuses to answer questions about whether he has COVID-19, has symptoms associated with COVID-19, or has been tested for COVID-19. To gain the cooperation of employees, however, employers may wish to ask the reasons for the employee's refusal. The employer may be able to provide information or reassurance that they are taking these steps to ensure the safety of everyone in the workplace, and that these steps are consistent with health screening recommendations from CDC. Sometimes, employees are reluctant to provide medical information because they fear an employer may widely spread such personal medical information throughout the workplace. The ADA prohibits such broad disclosures. Alternatively, if an employee requests reasonable accommodation with respect to screening, the usual accommodation process should be followed; this is discussed in Question G.7.

A.12. During the COVID-19 pandemic, may an employer request information from employees who work on-site, whether regularly or occasionally, who report feeling ill or who call in sick? *(9/8/20; adapted from Pandemic Preparedness Question 6)*

Due to the COVID-19 pandemic, at this time employers may ask employees who work on-site, whether regularly or occasionally, and report feeling ill or who call in sick, questions about their symptoms as part of workplace screening for COVID-19.

A.13. May an employer ask an employee why he or she has been absent from work? *(9/8/20; adapted from Pandemic Preparedness Question 15)*

Yes. Asking why an individual did not report to work is not a disability-related inquiry. An employer is always entitled to know why an employee has not reported for work.

A.14. When an employee returns from travel during a pandemic, must an employer wait until the employee develops COVID-19 symptoms to ask questions about where the person has traveled? *(9/8/20; adapted from Pandemic Preparedness Question 8)*

No. Questions about where a person traveled would not be disability-related inquiries. If the CDC or state or local public health officials recommend that people who visit specified locations remain at home for a certain period of time, an employer may ask whether employees are returning from these locations, even if the travel was personal.

B. Confidentiality of Medical Information

With limited exceptions, the ADA requires employers to keep confidential any medical information they learn about any applicant or employee. Medical information includes not only a diagnosis or treatments, but also the fact that an individual has requested or is receiving a reasonable accommodation.

B.1. May an employer store in existing medical files information it obtains related to COVID-19, including the results of taking an employee's temperature or the employee's self-identification as having this disease, or must the employer create a new medical file system solely for this information? *(4/9/20)*

The ADA requires that all medical information about a particular employee be stored separately from the employee's personnel file, thus limiting access to this **confidential information (https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q9)** . An employer may store all medical information related to COVID-19 in existing medical files. This includes an employee's statement that he has the disease or suspects he has the disease, or the employer's notes or other documentation from questioning an employee about symptoms.

B.2. If an employer requires all employees to have a daily temperature check before entering the workplace, may the employer maintain a log of the results? *(4/9/20)*

Yes. The employer needs to maintain the confidentiality of this information.

B.3. May an employer disclose the name of an employee to a public health agency when it learns that the employee has COVID-19? *(4/9/20)*

Yes (https://www.cdc.gov/coronavirus/2019-ncov/community/contact-tracing-nonhealthcare-workplaces.html) .

B.4. May a temporary staffing agency or a contractor that places an employee in an employer's workplace notify the employer if it learns the employee has COVID-19? *(4/9/20)*

Yes. The staffing agency or contractor may notify the employer and disclose the name of the employee, because the employer may need to determine if this employee had contact with anyone in the workplace.

B.5. Suppose a manager learns that an employee has COVID-19, or has symptoms associated with the disease. The manager knows she must report it but is worried about violating ADA confidentiality. What should she do? *(9/8/20; adapted from 3/27/20 Webinar Question 5)*

The ADA requires that an employer keep all medical information about employees confidential, even if that information is not about a disability. Clearly, the information that an employee has symptoms of, or a diagnosis of, COVID-19, is medical information. But the fact that this is medical information does not prevent the manager from reporting to appropriate employer officials so that they can take actions consistent with guidance from the CDC and other public health authorities.

The question is really what information to report: is it the fact that an employee—unnamed—has symptoms of COVID-19 or a diagnosis, or is it the identity of that employee? Who in the organization needs to know the identity of the employee will depend on each workplace and why a specific official needs this information. Employers should make every effort to limit the number of people who get to know the name of the employee.

The ADA does not interfere with a designated representative of the employer interviewing the employee to get a list of people with whom the employee possibly had contact through the workplace, so that the employer can then take action to notify those who may have come into contact with the employee, without revealing the employee's identity. For example, using a generic descriptor, such as telling employees that "someone at this location" or "someone on the fourth floor" has COVID-19, provides notice and does not violate the ADA's prohibition of disclosure of confidential medical information. For small employers, coworkers might be able to figure out who the employee is, but employers in that situation are still prohibited from confirming or revealing the employee's identity. Also, all employer officials who are designated as needing to know the identity of an employee should be specifically instructed that they must maintain the confidentiality of this information. Employers may want to plan in advance what supervisors and managers should do if this situation arises and determine who will be responsible for receiving information and taking next steps.

B.6. An employee who must report to the workplace knows that a coworker who reports to the same workplace has symptoms associated with COVID-19. Does ADA confidentiality prevent the first employee from disclosing the coworker's symptoms to a supervisor? *(9/8/20; adapted from 3/27/20 Webinar Question 6)*

No. ADA confidentiality does not prevent this employee from communicating to his supervisor about a coworker's symptoms. In other words, it is not an ADA confidentiality violation for this employee to inform his supervisor about a coworker's symptoms. After learning about this situation, the supervisor should contact appropriate management officials to report this information and discuss next steps.

B.7. An employer knows that an employee is teleworking because the person has COVID-19 or symptoms associated with the disease, and that he is in self-quarantine. May the employer tell staff that this particular employee is teleworking without saying why? *(9/8/20; adapted from 3/27/20 Webinar Question 7)*

Yes. If staff need to know how to contact the employee, and that the employee is working even if not present in the workplace, then disclosure that the employee is teleworking without saying why is permissible. Also, if the employee was on leave rather than teleworking because he has COVID-19 or symptoms associated with the disease, or any other medical condition, then an employer cannot disclose the reason for the leave, just the fact that the individual is on leave.

B.8. Many employees, including managers and supervisors, are now teleworking as a result of COVID-19. How are they supposed to keep medical information of employees confidential while working remotely? *(9/8/20; adapted from 3/27/20 Webinar Question 9)*

The ADA requirement that medical information be kept confidential includes a requirement that it be stored separately from regular personnel files. If a manager or supervisor receives medical information involving COVID-19, or any other medical information, while teleworking, and is able to follow an employer's existing confidentiality protocols while working remotely, the supervisor has to do so. But to the extent that is not feasible, the supervisor still must safeguard this information to the greatest extent possible until the supervisor can properly store it. This means that paper notepads, laptops, or other devices should not be left where others can access the protected information.

Similarly, documentation must not be stored electronically where others would have access. A manager may even wish to use initials or another code to further ensure confidentiality of the name of an employee.

C. Hiring and Onboarding

Under the ADA, prior to making a conditional job offer to an applicant, disability-related inquiries and medical exams are generally prohibited. They are permitted between the time of the offer and when the applicant begins work, provided they are required for everyone in the same job category.

C.1. If an employer is hiring, may it screen applicants for symptoms of COVID-19? *(3/18/20)*

Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job.

This ADA rule applies whether or not the applicant has a disability.

C.2. May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam? *(3/18/20)*

Yes. Any medical exams are permitted after an employer has made a conditional offer of employment. However, employers should be aware that some people with COVID-19 do not have a fever.

C.3. May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it? *(3/18/20)*

Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.

C.4. May an employer withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it? *(3/18/20)*

Based on current CDC guidance, this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer.

C.5. May an employer postpone the start date or withdraw a job offer because the individual is 65 years old or pregnant, both of which place them at higher risk from COVID-19? *(4/9/20)*

No. The fact that the CDC has identified those who are 65 or older, or pregnant women, as being at greater risk does not justify unilaterally postponing the start date or withdrawing a job offer. However, an employer may choose to allow telework or to discuss with these individuals if they would like to postpone the start date.

D. Reasonable Accommodation

Under the ADA, reasonable accommodations are adjustments or modifications provided by an employer to enable people with disabilities to enjoy equal employment opportunities. If a reasonable accommodation is needed and requested by an individual with a disability to apply for a job, perform a job, or enjoy benefits and privileges of employment, the employer must provide it unless it would pose an undue hardship, meaning significant difficulty or expense. An employer has the discretion to choose among effective accommodations. Where a requested accommodation would result in undue hardship, the employer must offer an alternative accommodation if one is available absent undue hardship. In discussing accommodation requests, employers and employees may find it helpful to consult the Job Accommodation Network (JAN) website for types of accommodations, ***www.askjan.org (http://www.askjan.org/)*** *. JAN's materials specific to COVID-19 are at* ***https://askjan.org/topics/COVID-19.cfm (https://askjan.org/topics/COVID-19.cfm)*** *.*

D.1. If a job may only be performed at the workplace, are there reasonable accommodations (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#general) for individuals with disabilities, absent undue hardship (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#undue) , that could offer protection to an employee who, due to a preexisting disability, is at higher risk from COVID-19? *(4/9/20)*

There may be reasonable accommodations that **could offer protection to an individual whose disability puts him at greater risk from COVID-19 (https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q17)** and who therefore requests such actions to eliminate possible exposure. Even with the constraints imposed by a pandemic, some accommodations may meet an employee's needs on a temporary basis without causing undue hardship on the employer.

Low-cost solutions achieved with materials already on hand or easily obtained may be effective. If not already implemented for all employees, accommodations for those who request reduced contact with others due to a disability may include changes to the work environment such as designating one-way aisles; using plexiglass, tables, or other barriers to ensure minimum distances between customers and coworkers whenever feasible per **CDC guidance (https://www.cdc.gov/coronavirus/2019-ncov/community/index.html)** or other accommodations that reduce chances of exposure.

Flexibility by employers and employees is important in determining if some accommodation is possible in the circumstances. Temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment may also permit an individual with a disability to perform safely the essential functions of the job while reducing exposure to others in the workplace or while commuting.

D.2. If an employee has a preexisting mental illness or disorder that has been exacerbated by the COVID-19 pandemic, may he now be entitled to a reasonable accommodation (absent undue hardship)? *(4/9/20)*

Although many people feel significant stress due to the COVID-19 pandemic, employees with certain preexisting mental health conditions, for example, anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder, may have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic.

As with any accommodation request, employers may: ask questions to determine whether the condition is a disability; discuss with the employee how the requested accommodation would assist him and enable him to keep working; explore alternative accommodations that may effectively meet his needs; and request medical documentation if needed.

D.3. In a workplace where all employees are required to telework during this time, should an employer postpone discussing a request from an employee with a disability for an

accommodation that will not be needed until he returns to the workplace when mandatory telework ends? *(4/9/20)*

Not necessarily. An employer may give higher priority to discussing requests for reasonable accommodations that are needed while teleworking, but the employer may begin discussing this request now. The employer may be able to acquire all the information it needs to make a decision. If a reasonable accommodation is granted, the employer also may be able to make some arrangements for the accommodation in advance.

D.4. What if an employee was already receiving a reasonable accommodation prior to the COVID-19 pandemic and now requests an additional or altered accommodation? *(4/9/20)*

An employee who was already receiving a reasonable accommodation prior to the COVID-19 pandemic may be entitled to an additional or altered accommodation, absent undue hardship. For example, an employee who is teleworking because of the pandemic may need a different type of accommodation than what he **uses in the workplace (https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q20)** . The employer **may discuss (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#requesting)** with the employee whether the same or a different disability is the basis for this new request and why an additional or altered accommodation is needed.

D.5. During the pandemic, if an employee requests an accommodation for a medical condition either at home or in the workplace, may an employer still request information to determine if the condition is a disability? *(4/17/20)*

Yes, if it is not obvious or already known, an employer may ask questions or request medical documentation to determine whether the employee has a "disability" as defined by the ADA (a physical or mental impairment that substantially limits a major life activity, or a history of a substantially limiting impairment).

D.6. During the pandemic, may an employer still engage in the interactive process and request information from an employee about why an accommodation is needed? *(4/17/20)*

Yes, if it is not obvious or already known, an employer may ask questions or request **medical documentation (https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q17)** to determine whether the employee's disability necessitates an accommodation, either the one he requested or any other. **Possible questions (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#requesting)** for the employee may include: (1) how the disability creates a limitation, (2) how the requested accommodation will effectively address the limitation, (3) whether another form of accommodation could effectively address the issue, and (4) how a proposed accommodation will enable the employee to continue performing the "essential functions" of his position (that is, the fundamental job duties).

D.7. If there is some urgency to providing an accommodation, or the employer has limited time available to discuss the request during the pandemic, may an employer provide a temporary accommodation? *(4/17/20)*

Yes. Given the pandemic, some employers may choose to forgo or shorten the exchange of information between an employer and employee known as the "interactive process" (discussed in D.5 and D.6., above) and grant the request. In addition, when government restrictions change, or are partially or fully lifted, the need for accommodations may also change. This may result in more requests for short-term accommodations. Employers may wish to adapt the interactive process—and devise end dates for the accommodation—to suit changing circumstances based on public health directives.

Whatever the reason for shortening or adapting the interactive process, an employer may also choose to place an end date on the accommodation (for example, either a specific date such as May 30, or when the employee returns to the workplace part- or full-time due to changes in government restrictions limiting the number of people who may congregate). Employers may also opt to provide a requested accommodation on an interim or trial basis, with an end date, while awaiting receipt of medical documentation. Choosing one of these alternatives may be particularly helpful where the requested accommodation would provide protection that an employee may need because of a pre-existing disability that puts her at greater risk during this pandemic. This **could also apply (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D.2)** to employees who have disabilities exacerbated by the pandemic.

Employees may request an extension that an employer must consider, particularly if current government restrictions are extended or new ones adopted.

D.8. May an employer invite employees now to ask for reasonable accommodations they may need in the future when they are permitted to return to the workplace? *(4/17/20; updated 9/8/20 to address stakeholder questions)*

Yes. Employers may inform the workforce that employees with disabilities may request accommodations in advance that they believe they may need when the workplace re-opens. This is discussed in greater detail in Question G.6. If advance requests are received, employers may begin the "interactive process" – the discussion between the employer and employee focused on whether the impairment is a disability and the reasons that an accommodation is needed. If an employee chooses not to request accommodation in advance, and instead requests it at a later time, the employer must still consider the request at that time.

D.9. Are the circumstances of the pandemic relevant to whether a requested accommodation can be denied because it poses an undue hardship? *(4/17/20)*

Yes. An employer does not have to provide a particular reasonable accommodation if it poses an "**undue hardship (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#undue)**," which means

"significant difficulty or expense." As described in the two questions that follow, in some instances, an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now.

D.10. What types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant difficulty" during the COVID-19 pandemic? *(4/17/20)*

An employer may consider whether current circumstances create "significant difficulty" in acquiring or providing certain accommodations, considering the facts of the particular job and workplace. For example, it may be significantly more difficult in this pandemic to conduct a needs assessment or to acquire certain items, and delivery may be impacted, particularly for employees who may be teleworking. Or, it may be significantly more difficult to provide employees with temporary assignments, to remove marginal functions, or to readily hire temporary workers for specialized positions. If a particular accommodation poses an undue hardship, employers and employees should work together to determine if there may be an alternative that could be provided that does not pose such problems.

D.11. What types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant expense" during the COVID-19 pandemic? *(4/17/20)*

Prior to the COVID-19 pandemic, most accommodations did not pose a significant expense when considered against an employer's overall budget and resources (always considering the budget/resources of the entire entity and not just its components). But, the sudden loss of some or all of an employer's income stream because of this pandemic is a relevant consideration. Also relevant is the amount of discretionary funds available at this time—when considering other expenses—and whether there is an expected date that current restrictions on an employer's operations will be lifted (or new restrictions will be added or substituted). These considerations do not mean that an employer can reject any accommodation that costs money; an employer must weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic. For example, even under current circumstances, there may be many no-cost or very low-cost accommodations.

D.12. Do the ADA and the Rehabilitation Act apply to applicants or employees who are classified as "critical infrastructure workers (https://www.cdc.gov/coronavirus/2019-ncov/downloads/Essential-Critical-Workers_Dos-and-Donts.pdf) " or "essential critical workers (https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html) " by the CDC? *(4/23/20)*

Yes. These CDC designations, or any other designations of certain employees, do not eliminate coverage under the ADA or the Rehabilitation Act, or any other equal employment opportunity law. Therefore, employers receiving requests for reasonable accommodation under the ADA or the Rehabilitation Act from employees falling in these categories of jobs must accept and

process the requests as they would for any other employee. Whether the request is granted will depend on whether the worker is an individual with a disability, and whether there is a reasonable accommodation that can be provided absent undue hardship.

D.13. Is an employee entitled to an accommodation under the ADA in order to avoid exposing a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition? *(6/11/20)*

No. Although the ADA prohibits discrimination based on association with an individual with a disability, that protection is limited to disparate treatment or harassment. The ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom she is associated.

For example, an employee without a disability is not entitled under the ADA to telework as an accommodation in order to protect a family member with a disability from potential COVID-19 exposure.

Of course, an employer is free to provide such flexibilities if it chooses to do so. An employer choosing to offer additional flexibilities beyond what the law requires should be careful not to engage in disparate treatment on a protected EEO basis.

D.14. When an employer requires some or all of its employees to telework because of COVID-19 or government officials require employers to shut down their facilities and have workers telework, is the employer required to provide a teleworking employee with the same reasonable accommodations for disability under the ADA or the Rehabilitation Act that it provides to this individual in the workplace? *(9/8/20; adapted from 3/27/20 Webinar Question 20)*

If such a request is made, the employer and employee should discuss what the employee needs and why, and whether the same or a different accommodation could suffice in the home setting. For example, an employee may already have certain things in their home to enable them to do their job so that they do not need to have all of the accommodations that are provided in the workplace.

Also, the undue hardship considerations might be different when evaluating a request for accommodation when teleworking rather than working in the workplace. A reasonable accommodation that is feasible and does not pose an undue hardship in the workplace might pose one when considering circumstances, such as the place where it is needed and the reason for telework. For example, the fact that the period of telework may be of a temporary or unknown duration may render certain accommodations either not feasible or an undue hardship. There may also be constraints on the normal availability of items or on the ability of an employer to conduct a necessary assessment.

As a practical matter, and in light of the circumstances that led to the need for telework, employers and employees should both be creative and flexible about what can be done when

an employee needs a reasonable accommodation for telework at home. If possible, providing interim accommodations might be appropriate while an employer discusses a request with the employee or is waiting for additional information.

D.15. Assume that an employer grants telework to employees for the purpose of slowing or stopping the spread of COVID-19. When an employer reopens the workplace and recalls employees to the worksite, does the employer automatically have to grant telework as a reasonable accommodation to every employee with a disability who requests to continue this arrangement as an ADA/Rehabilitation Act accommodation? *(9/8/20; adapted from 3/27/20 Webinar Question 21)*

No. Any time an employee requests a reasonable accommodation, the employer is entitled to understand the disability-related limitation that necessitates an accommodation. If there is no disability-related limitation that requires teleworking, then the employer does not have to provide telework as an accommodation. Or, if there is a disability-related limitation but the employer can effectively address the need with another form of reasonable accommodation at the workplace, then the employer can choose that alternative to telework.

To the extent that an employer is permitting telework to employees because of COVID-19 and is choosing to excuse an employee from performing one or more essential functions, then a request—after the workplace reopens—to continue telework as a reasonable accommodation does not have to be granted if it requires continuing to excuse the employee from performing an essential function. The ADA never requires an employer to eliminate an essential function as an accommodation for an individual with a disability.

The fact that an employer temporarily excused performance of one or more essential functions when it closed the workplace and enabled employees to telework for the purpose of protecting their safety from COVID-19, or otherwise chose to permit telework, does not mean that the employer permanently changed a job's essential functions, that telework is always a feasible accommodation, or that it does not pose an undue hardship. These are fact-specific determinations. The employer has no obligation under the ADA to refrain from restoring all of an employee's essential duties at such time as it chooses to restore the prior work arrangement, and then evaluating any requests for continued or new accommodations under the usual ADA rules.

D.16. Assume that prior to the emergence of the COVID-19 pandemic, an employee with a disability had requested telework as a reasonable accommodation. The employee had shown a disability-related need for this accommodation, but the employer denied it because of concerns that the employee would not be able to perform the essential functions remotely. In the past, the employee therefore continued to come to the workplace. However, after the COVID-19 crisis has subsided and temporary telework ends, the employee renews her request for telework as a reasonable accommodation. Can the employer again refuse the request? *(9/8/20; adapted from 3/27/20 Webinar Question 22)*

Assuming all the requirements for such a reasonable accommodation are satisfied, the temporary telework experience could be relevant to considering the renewed request. In this situation, for example, the period of providing telework because of the COVID-19 pandemic could serve as a trial period that showed whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely, and the employer should consider any new requests in light of this information. As with all accommodation requests, the employee and the employer should engage in a flexible, cooperative interactive process going forward if this issue does arise.

D.17. Might the pandemic result in excusable delays during the interactive process? *(9/8/20; adapted from 3/27/20 Webinar Question 19)*

Yes. The rapid spread of COVID-19 has disrupted normal work routines and may have resulted in unexpected or increased requests for reasonable accommodation. Although employers and employees should address these requests as soon as possible, the extraordinary circumstances of the COVID-19 pandemic may result in delay in discussing requests and in providing accommodation where warranted. Employers and employees are encouraged to use interim solutions to enable employees to keep working as much as possible.

D.18. Federal agencies are required to have timelines in their written reasonable accommodation procedures governing how quickly they will process requests and provide reasonable accommodations. What happens if circumstances created by the pandemic prevent an agency from meeting this timeline? *(9/8/20; adapted from 3/27/20 Webinar Question 19)*

Situations created by the current COVID-19 crisis may constitute an "extenuating circumstance"—something beyond a Federal agency's control—that may justify exceeding the normal timeline that an agency has adopted in its internal reasonable accommodation procedures.

E. Pandemic-Related Harassment Due to National Origin, Race, or Other Protected Characteristics

E.1. What practical tools are available to employers to reduce and address workplace harassment that may arise as a result of the COVID-19 pandemic? *(4/9/20)*

Employers can help reduce the chance of harassment by explicitly communicating to the workforce that fear of the COVID-19 pandemic should not be misdirected against individuals because of a protected characteristic, including their **national origin, race (https://www.eeoc.gov/wysk/message-eeoc-chair-janet-dhillon-national-origin-and-race-discrimination-during-covid-19)** , or other prohibited bases.

Practical anti-harassment tools provided by the EEOC for small businesses can be found here:

- Anti-harassment **policy tips (https://www.eeoc.gov/employers/small-business/harassment-policy-tips)** for small businesses
- Select Task Force on the Study of Harassment in the Workplace (includes detailed recommendations and tools to aid in designing effective anti-harassment policies; developing training curricula; implementing complaint, reporting, and investigation procedures; creating an organizational culture in which harassment is not tolerated):
  - **report (https://www.eeoc.gov/select-task-force-study-harassment-workplace#_Toc453686319)** ;
  - **checklists (https://www.eeoc.gov/select-task-force-study-harassment-workplace#_Toc453686319)** for employers who want to reduce and address harassment in the workplace; and
  - **chart (https://www.eeoc.gov/chart-risk-factors-harassment-and-responsive-strategies)** of risk factors that lead to harassment and appropriate responses.

E.2. Are there steps an employer should take to address possible harassment and discrimination against coworkers when it re-opens the workplace? *(4/17/20)*

Yes. An employer may remind all employees that it is against the federal EEO laws to harass or otherwise discriminate against coworkers based on race, national origin, color, sex, religion, age (40 or over), disability, or genetic information. It may be particularly helpful for employers to advise supervisors and managers of their roles in watching for, stopping, and reporting any harassment or other discrimination. An employer may also make clear that it will immediately review any allegations of harassment or discrimination and take appropriate action.

E.3. How may employers respond to pandemic-related harassment, in particular against employees who are or are perceived to be Asian? *(6/11/20)*

Managers should be alert to demeaning, derogatory, or hostile remarks directed to employees who are or are perceived to be of Chinese or other Asian national origin, including about the coronavirus or its origins.

All employers covered by Title VII should ensure that management understands in advance how to recognize such harassment. Harassment may occur using electronic communication tools—regardless of whether employees are in the workplace, teleworking, or on leave—and also in person between employees at the worksite. Harassment of employees at the worksite may also originate with contractors, customers or clients, or, for example, with patients or their family members at health care facilities, assisted living facilities, and nursing homes. Managers should know their legal obligations and be **instructed (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#E.2)** to quickly identify and resolve potential problems, before they rise to the level of unlawful discrimination.

Employers may choose to send a reminder to the entire workforce noting Title VII's prohibitions on harassment, reminding employees that harassment will not be tolerated, and inviting anyone who experiences or witnesses workplace harassment to report it to management. Employers may remind employees that harassment can result in disciplinary action up to and including termination.

E.4. An employer learns that an employee who is teleworking due to the pandemic is sending harassing emails to another worker. What actions should the employer take? *(6/11/20)*

The employer should take the same actions it would take if the employee was in the workplace. Employees may not harass other employees through, for example, emails, calls, or platforms for video or chat communication and collaboration.

F. Furloughs and Layoffs

F.1. Under the EEOC's laws, what waiver responsibilities apply when an employer is conducting layoffs? *(4/9/20)*

Special rules apply when an employer is offering employees severance packages in exchange for a general release of all discrimination claims against the employer. More information is available in EEOC's **technical assistance document on severance agreements (https://www.eeoc.gov/laws/guidance/qa-understanding-waivers-discrimination-claims-employee-severance-agreements)** .

F.2. What are additional EEO considerations in planning furloughs or layoffs? *(9/8/20; adapted from 3/27/20 Webinar Question 13)*

The laws enforced by the EEOC prohibit covered employers from selecting people for furlough or layoff because of that individual's race, color, religion, national origin, sex, age, disability, protected genetic information, or in retaliation for protected EEO activity.

G. Return to Work

G.1. As government stay-at-home orders and other restrictions are modified or lifted in your area, how will employers know what steps they can take consistent with the ADA to screen employees for COVID-19 when entering the workplace? *(4/17/20)*

The ADA permits employers to make disability-related inquiries and conduct medical exams if job-related and consistent with business necessity. Inquiries and reliable medical exams meet this standard if it is necessary to exclude employees with a medical condition that would pose a direct threat to health or safety.

Direct threat is to be determined based on the best available objective medical evidence. The guidance from CDC or other public health authorities is such evidence. Therefore, employers will be acting consistent with the ADA as long as any screening implemented is consistent with advice from the CDC and public health authorities for that type of workplace at that time.

For example, this may include continuing to take temperatures and asking questions about symptoms (or require self-reporting) **of all those entering the workplace**. Similarly, the CDC recently posted **information (https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html)** on return by certain types of critical workers.

Employers should make sure not to engage in unlawful disparate treatment based on protected characteristics in decisions related to screening and exclusion.

G.2. An employer requires returning workers to wear personal protective gear and engage in infection control practices. Some employees ask for accommodations due to a need for modified protective gear. Must an employer grant these requests? *(4/17/20)*

An employer may require employees to wear protective gear (for example, masks and gloves) and observe infection control practices (for example, regular hand washing and social distancing protocols).

However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, modified face masks for interpreters or others who communicate with an employee who uses lip reading, or gowns designed for individuals who use wheelchairs), or a religious accommodation under Title VII (such as modified equipment due to religious garb), the employer should discuss the request and provide the modification or an alternative if feasible and not an undue hardship on the operation of the employer's business under the ADA or Title VII.

G.3. What does an employee need to do in order to request reasonable accommodation from her employer because she has one of the medical conditions (https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html) that CDC says may put her at higher risk for severe illness from COVID-19? *(5/5/20)*

An employee—or a third party, such as an employee's doctor—must **let the employer know (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#requesting)** that she needs a change for a reason related to a medical condition (here, the underlying condition). Individuals may request accommodation in conversation or in writing. While the employee (or third party) does not need to use the term "reasonable accommodation" or reference the ADA, she may do so.

The employee or her representative should communicate that she has a medical condition that necessitates a change to meet a medical need. After receiving a request, the employer may **ask**

questions or seek medical documentation (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D.6) to help decide if the individual has a disability and if there is a reasonable accommodation, barring **undue hardship (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D)** , that can be provided.

G.4. The CDC identifies a number of medical conditions that might place individuals at "higher risk for severe illness" (https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html) if they get COVID-19. An employer knows that an employee has one of these conditions and is concerned that his health will be jeopardized upon returning to the workplace, but the employee has not requested accommodation. How does the ADA apply to this situation? *(5/7/20)*

First, if the employee does not request a reasonable accommodation, the ADA does not mandate that the employer take action.

If the employer is concerned about the employee's health being jeopardized upon returning to the workplace, the ADA does not allow the employer to exclude the employee—or take any other adverse action—*solely* because the employee has a disability that the CDC identifies as potentially placing him at "higher risk for severe illness" if he gets COVID-19. Under the ADA, such action is not allowed unless the employee's disability poses a "direct threat" to his health that cannot be eliminated or reduced by reasonable accommodation.

The ADA direct threat requirement is a high standard. As an affirmative defense, direct threat requires an employer to show that the individual has a disability that poses a "significant risk of substantial harm" to his own health under **29 C.F.R. section 1630.2(r) (https://www.ecfr.gov/cgi-bin/text-idx?SID=28cadc4b7b37847fd37f41f8574b5921&mc=true&node=pt29.4.1630&rgn=div5#se29.4.1630_12)** (regulation addressing direct threat to health or safety of self or others). A direct threat assessment cannot be based solely on the condition being on the CDC's list; the determination must be an individualized assessment based on a reasonable medical judgment about this employee's disability—not the disability in general—using the most current medical knowledge and/or on the best available objective evidence. The ADA regulation requires an employer to consider the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm. Analysis of these factors will likely include considerations based on the severity of the pandemic in a particular area and the employee's own health (for example, is the employee's disability well-controlled), and his particular job duties. A determination of direct threat also would include the likelihood that an individual will be exposed to the virus at the worksite. Measures that an employer may be taking in general to protect all workers, such as mandatory social distancing, also would be relevant.

Even if an employer determines that an employee's disability poses a direct threat to his own health, the employer still cannot exclude the employee from the workplace—or take any other

adverse action—unless there is no way to provide a reasonable accommodation (absent undue hardship). The ADA regulations require an employer to consider whether there are reasonable accommodations that would eliminate or reduce the risk so that it would be safe for the employee to return to the workplace while still permitting performance of essential functions. This can involve an interactive process with the employee. If there are not accommodations that permit this, then an employer must consider accommodations such as telework, leave, or reassignment (perhaps to a different job in a place where it may be safer for the employee to work or that permits telework). An employer may only bar an employee from the workplace if, after going through all these steps, the facts support the conclusion that the employee poses a significant risk of substantial harm to himself that cannot be reduced or eliminated by reasonable accommodation.

G.5. What are examples of accommodation that, absent undue hardship, may eliminate (or reduce to an acceptable level) a direct threat to self? *(5/5/20)*

Accommodations (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D.1) may include additional or enhanced protective gowns, masks, gloves, or other gear beyond what the employer may generally provide to employees returning to its workplace. Accommodations also may include additional or enhanced protective measures, for example, erecting a barrier that provides separation between an employee with a disability and coworkers/the public or increasing the space between an employee with a disability and others. Another possible reasonable accommodation may be elimination or substitution of particular "marginal" functions (less critical or incidental job duties as distinguished from the "essential" functions of a particular position). In addition, accommodations may include temporary modification of work schedules (if that decreases contact with coworkers and/or the public when on duty or commuting) or moving the location of where one performs work (for example, moving a person to the end of a production line rather than in the middle of it if that provides more social distancing).

These are only a few ideas. Identifying an effective accommodation depends, among other things, on an employee's job duties and the design of the workspace. An employer and employee should discuss possible ideas; the Job Accommodation Network (**www.askjan.org (http://www.askjan.org/)**) also may be able to assist in helping identify possible accommodations. As with all discussions of reasonable accommodation during this pandemic, employers and employees are encouraged to be creative and flexible.

G.6. As a best practice, and in advance of having some or all employees return to the workplace, are there ways for an employer to invite employees to request flexibility in work arrangements? *(6/11/20)*

Yes. The ADA and the Rehabilitation Act permit employers to make information available in advance to **all** employees about who to contact—if they wish—to request accommodation for a disability that they may need upon return to the workplace, even if no date has been announced for their return. If requests are received in advance, the employer may begin the **interactive**

process (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D.8) . An employer may choose to include in such a notice all the CDC-listed medical conditions that may place people at higher risk of serious illness if they contract COVID-19, provide instructions about who to contact, and explain that the employer is willing to consider on a case-by-case basis any requests from employees who have these or other medical conditions.

An employer also may send a general notice to all employees who are designated for returning to the workplace, noting that the employer is willing to consider requests for accommodation or flexibilities on an individualized basis. The employer should specify if the contacts differ depending on the reason for the request – for example, if the office or person to contact is different for employees with disabilities or pregnant workers than for employees whose request is based on age or child-care responsibilities.

Either approach is consistent with the ADEA, the ADA, and the May 29, 2020 **CDC guidance (https://www.cdc.gov/coronavirus/2019-ncov/community/high-risk-workers.html?deliveryName=USCDC_2067-DM29601)** that emphasizes the importance of employers providing accommodations or flexibilities to employees who, due to age or certain medical conditions, are at higher risk for severe illness.

Regardless of the approach, however, employers should ensure that whoever receives inquiries knows how to handle them consistent with the different federal employment nondiscrimination laws that may apply, for instance, with respect to accommodations due to a medical condition, a religious belief, or pregnancy.

G.7. What should an employer do if an employee entering the worksite requests an alternative method of screening due to a medical condition? *(6/11/20)*

This is a request for reasonable accommodation, and an employer should proceed as it would for any other request for accommodation under the ADA or the Rehabilitation Act. If the requested change is easy to provide and inexpensive, the employer might voluntarily choose to make it available to anyone who asks, without going through an interactive process. Alternatively, if the disability is not obvious or already known, an employer may ask the employee for information to establish that the condition is a **disability (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D.5)** and what specific limitations require an accommodation. If necessary, an employer also may request medical documentation to support the employee's request, and then determine if that accommodation or an alternative effective accommodation can be provided, absent undue hardship.

Similarly, if an employee requested an alternative method of screening as a religious accommodation, the employer should determine if accommodation is **available under Title VII (https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace)** .

H. Age

H.1. The CDC has explained (https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html) that individuals age 65 and over are at higher risk for a severe case of COVID-19 if they contract the virus and therefore has encouraged employers to offer maximum flexibilities to this group. Do employees age 65 and over have protections under the federal employment discrimination laws? *(6/11/20)*

The Age Discrimination in Employment Act (ADEA) prohibits employment discrimination against individuals age 40 and older. The ADEA would prohibit a covered employer from involuntarily excluding an individual from the workplace based on his or her being 65 or older, even if the employer acted for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19.

Unlike the ADA, the ADEA does not include a right to reasonable accommodation for older workers due to age. However, employers are free to provide flexibility to workers age 65 and older; the ADEA does not prohibit this, even if it results in younger workers ages 40-64 being treated less favorably based on age in comparison.

Workers age 65 and older also may have medical conditions that bring them under the protection of the ADA as individuals with disabilities. As such, they may request reasonable **accommodation for their disability (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D.1)** as opposed to their age.

H.2. If an employer is choosing to offer flexibilities to other workers, may older comparable workers be treated less favorably based on age? *(9/8/20; adapted from 3/27/20 Webinar Question 12)*

No. If an employer is allowing other comparable workers to telework, it should make sure it is not treating older workers less favorably based on their age.

I. Caregivers/Family Responsibilities

I.1. If an employer provides telework, modified schedules, or other benefits to employees with school-age children due to school closures or distance learning during the pandemic, are there sex discrimination considerations? *(6/11/20)*

Employers may provide any flexibilities as long as they are not treating employees differently based on sex or other EEO-protected characteristics. For example, under Title VII, female employees cannot be given more favorable treatment than male employees because of a gender-based assumption about who may have **caretaking responsibilities**

(https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities) for children.

J. Pregnancy

J.1. Due to the pandemic, may an employer exclude an employee from the workplace involuntarily due to pregnancy (https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/pregnancy-breastfeeding.html) ? *(6/11/20)*

No. Sex discrimination under Title VII of the Civil Rights Act includes discrimination based on pregnancy. Even if motivated by benevolent concern, an employer is not permitted to single out workers on the basis of pregnancy for adverse employment actions, including involuntary leave, layoff, or furlough.

J.2. Is there a right to accommodation based on pregnancy during the pandemic? *(6/11/20)*

There are two federal employment discrimination laws that may trigger **accommodation for employees based on pregnancy (https://www.eeoc.gov/laws/guidance/legal-rights-pregnant-workers-under-federal-law)** .

First, pregnancy-related medical conditions may themselves be disabilities under the ADA, even though pregnancy itself is not an ADA disability. If an employee makes a request for reasonable accommodation due to a pregnancy-related medical condition, the employer must consider it under the usual ADA rules.

Second, Title VII as amended by the Pregnancy Discrimination Act specifically requires that women affected by pregnancy, childbirth, and related medical conditions be treated the same as others who are similar in their ability or inability to work. This means that a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent provided for other employees who are similar in their ability or inability to work. Employers should ensure that supervisors, managers, and human resources personnel know how to handle such requests to avoid disparate treatment in violation of Title VII.

K. Vaccinations

*The availability of COVID-19 vaccinations raises questions under the federal equal employment opportunity (EEO) laws, including the Americans with Disabilities Act (ADA), the Rehabilitation Act, the Genetic Information Nondiscrimination Act (GINA), and Title VII of the Civil Rights Act, as amended, inter alia, by the Pregnancy Discrimination Act (Title VII) (see also **Section J, EEO rights relating to pregnancy**).*

This section was originally issued on Dec. 16, 2020, and was clarified and supplemented on May 28, 2021. The May 2021 updates are consistent in substance with the original technical assistance and also address new subjects. (See, e.g., discussion of vaccine incentives under the ADA (starting at K.16) and under GINA (starting at K.18)). Also note that the Centers for Disease Control and Prevention (CDC) issued ***guidance (https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html)*** *for fully vaccinated individuals that addresses, among other things, when they need to wear a mask indoors.*

The EEOC has received many inquiries from employers and employees about the type of authorization granted by the U.S. Department of Health and Human Services (HHS) Food and Drug Administration (FDA) for the administration of three COVID-19 vaccines. These three vaccines were granted Emergency Use Authorizations (EUA) by the FDA. It is beyond the EEOC's jurisdiction to discuss the legal implications of EUA or the FDA approach. Individuals seeking more information about the legal implications of EUA or the FDA approach to vaccines can visit the ***FDA's EUA page*** **(https://www.fda.gov/vaccines-blood-biologics/vaccines/emergency-use-authorization-vaccines-explained)** *. The EEOC's jurisdiction is limited to the federal EEO laws as noted above.*

Indeed, other federal, state, and local laws and regulations govern COVID-19 vaccination of employees, including requirements for the federal government as an employer. The federal government as an employer is subject to the EEO laws. Federal departments and agencies should consult the Safer Federal Workforce Task Force for additional guidance on agency operations during the COVID-19 pandemic.

The EEOC questions and answers provided here only set forth applicable EEO legal standards, unless another source is expressly cited. In addition, whether an employer meets the EEO standards will depend on the application of these standards to particular factual situations.

The technical assistance on vaccinations below was written to help employees and employers better understand how federal workplace discrimination laws apply during the COVID-19 pandemic caused by the SARS-CoV-2 virus and its variants. The technical assistance here is based on and consistent with the federal civil rights laws enforced by the EEOC and with EEOC regulations, guidance, and technical assistance. Analysis of how it applies in any specific instance should be conducted on an individualized basis.

COVID-19 Vaccinations: EEO Overview

K.1. Under the ADA, Title VII, and other federal employment nondiscrimination laws, may an employer require all employees physically entering the workplace to be vaccinated for COVID-19? *(5/28/21)*

The federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, subject to the **reasonable accommodation provisions of Title VII and the ADA and other EEO considerations discussed**

below. These principles apply if an employee gets the vaccine in the community or from the employer.

In some circumstances, Title VII and the ADA require an employer to provide reasonable accommodations for employees who, because of a disability or a sincerely held religious belief, practice, or observance, do not get vaccinated for COVID-19, unless providing an accommodation would pose an undue hardship on the operation of the employer's business. The analysis for undue hardship depends on whether the accommodation is for a disability (including pregnancy-related conditions that constitute a disability) (see K.6) or for religion (see K.12).

As with any employment policy, employers that have a vaccine requirement may need to respond to allegations that the requirement has a disparate impact on—or disproportionately excludes—employees based on their race, color, religion, sex, or national origin under Title VII (or age under the Age Discrimination in Employment Act (40+)). Employers should keep in mind that because some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccination than others, some employees may be more likely to be negatively impacted by a vaccination requirement.

It would also be unlawful to apply a vaccination requirement to employees in a way that treats employees differently based on disability, race, color, religion, sex (including pregnancy, sexual orientation and gender identity), national origin, age, or genetic information, unless there is a legitimate non-discriminatory reason.

K.2. What are some examples of reasonable accommodations or modifications that employers may have to provide to employees who do not get vaccinated due to disability; religious beliefs, practices, or observance; or pregnancy? *(5/28/21)*

An employee who does not get vaccinated due to a disability (covered by the ADA) or a sincerely held religious belief, practice, or observance (covered by Title VII) may be entitled to a reasonable accommodation that does not pose an undue hardship on the operation of the employer's business. For example, as a reasonable accommodation, an unvaccinated employee entering the workplace might wear a face mask, work at a social distance from coworkers or non-employees, work a modified shift, get periodic tests for COVID-19, be given the opportunity to telework, or finally, accept a reassignment.

Employees who are not vaccinated because of pregnancy may be entitled (under Title VII) to adjustments to keep working, if the employer makes modifications or exceptions for other employees. These modifications may be the same as the accommodations made for an employee based on disability or religion.

K.3. How can employers encourage employees and their family members to be vaccinated without violating the EEO laws, especially the ADA and GINA? *(5/28/21, updated 6/28/21)*

Employers may provide employees and their family members with information to educate them about COVID-19 vaccines, raise awareness about the benefits of vaccination, and address common questions and concerns. Also, under certain circumstances employers may offer incentives to employees who receive COVID-19 vaccines, as discussed in **K.16 – K. 21**. As of May 2021, the federal government is providing vaccines at no cost to everyone ages 12 and older.

There are many resources available to employees seeking more information about how to get vaccinated:

- The federal government's online **vaccines.gov (https://www.vaccines.gov/)** site can identify vaccination sites anywhere in the country (or **https://www.vacunas.gov (https://www.vacunas.gov)** for Spanish). Individuals also can text their zip code to "GETVAX" (438829) – or "VACUNA" (822862) for Spanish – to find three vaccination locations near them.
- Employees with disabilities (or employees**'** family members with disabilities) may need extra support to obtain a vaccination, such as transportation or in-home vaccinations. The U.S. Dept. of Health and Human Services/Administration for Community Living has launched a hotline to assist individuals with disabilities in obtaining such help. The Disability Information and Assistance Center (DIAL) can be reached at: 888-677-1199 from 9 am to 8 pm (Eastern Standard Time) Mondays through Fridays or by emailing **DIAL@n4a.org**.
- CDC's website offers a link to a listing of **local health departments (https://www.cdc.gov/publichealthgateway/healthdirectories/index.html)**, which can provide more information about local vaccination efforts.
- In addition, the CDC offers **background information for employers about workplace vaccination programs (https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/essentialworker/workplace-vaccination-program.html)**. The CDC provides a complete communication "tool kit" for employers to use with their workforce to educate people about getting the COVID-19 vaccine. (Although originally written for essential workers, it is useful for all workers.) *See* **CDC's Essential Workers COVID-19 Toolkit (https://www.cdc.gov/coronavirus/2019-ncov/vaccines/toolkits/essential-workers.html#anchor_1612717640568)**. Employers should provide the contact information of a management representative for employees who need to request a reasonable accommodation for a disability or religious belief, practice, or observance or to ensure nondiscrimination for an employee who is pregnant.
- Some employees may not have reliable access to the internet to identify nearby vaccination locations or may speak no or limited English and find it difficult to make an appointment for a vaccine over the phone. The CDC operates a toll-free telephone line that can provide assistance in many languages for individuals seeking more information about vaccinations: 800-232-4636; TTY 888-232-6348.
- Some employees also may require assistance with transportation to vaccination sites. Employers may gather and disseminate information to their employees on low-cost and no-cost transportation resources available in their community serving vaccination sites and

offer time-off for vaccination, particularly if transportation is not readily available outside regular work hours.

General

K.4. Is information about an employee's COVID-19 vaccination confidential medical information under the ADA? *(5/28/21)*

Yes. The ADA requires an employer to maintain the confidentiality of employee medical information, such as documentation or other confirmation of COVID-19 vaccination. This ADA confidentiality requirement applies regardless of where the employee gets the vaccination. Although the EEO laws themselves do not prevent employers from requiring employees to bring in documentation or other confirmation of vaccination, this information, like all medical information, must be kept confidential and stored separately from the employee's personnel files under the ADA.

Mandatory Employer Vaccination Programs

K.5. Under the ADA, may an employer require a COVID-19 vaccination for all employees entering the workplace, even though it knows that some employees may not get a vaccine because of a disability? *(12/16/20, updated 5/28/21)*

Yes, provided certain requirements are met. Under the ADA, an employer may require an individual with a disability to meet a qualification standard applied to all employees, such as a safety-related standard requiring COVID-19 vaccination, if the standard is job-related and consistent with business necessity. If a particular employee cannot meet such a safety-related qualification standard because of a disability, the employer may not require compliance for that employee unless it can demonstrate that the individual would pose a "direct threat" to the health or safety of the employee or others in the workplace. A "direct threat" is a "significant risk of substantial harm" that cannot be eliminated or reduced by reasonable accommodation. **29 C.F.R. 1630.2(r) (https://www.govinfo.gov/content/pkg/CFR-2012-title29-vol4/xml/CFR-2012-title29-vol4-sec1630-2.xml)** . This determination can be broken down into two steps: determining if there is a direct threat and, if there is, assessing whether a reasonable accommodation would reduce or eliminate the threat.

To determine if an employee who is not vaccinated due to a disability poses a "direct threat" in the workplace, an employer first must make an individualized assessment of the employee's present ability to safely perform the essential functions of the job. The factors that make up this assessment are: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. The determination that a particular employee poses a direct threat should be based on a reasonable medical judgment that relies on the most current medical knowledge about COVID-19. Such medical knowledge may include, for example, the level of community spread at the time of the assessment. Statements from the CDC provide an important source of current

medical knowledge about COVID-19, and the employee's health care provider, with the employee's consent, also may provide useful information about the employee. Additionally, the assessment of direct threat should take account of the type of work environment, such as: whether the employee works alone or with others or works inside or outside; the available ventilation; the frequency and duration of direct interaction the employee typically will have with other employees and/or non-employees; the number of partially or fully vaccinated individuals already in the workplace; whether other employees are wearing masks or undergoing routine screening testing; and the space available for social distancing.

If the assessment demonstrates that an employee with a disability who is not vaccinated would pose a direct threat to self or others, the employer must consider whether providing a reasonable accommodation, absent undue hardship, would reduce or eliminate that threat. Potential reasonable accommodations could include requiring the employee to wear a mask, work a staggered shift, making changes in the work environment (such as improving ventilation systems or limiting contact with other employees and non-employees), permitting telework if feasible, or reassigning the employee to a vacant position in a different workspace.

As a best practice, an employer introducing a COVID-19 vaccination policy and requiring documentation or other confirmation of vaccination should notify all employees that the employer will consider requests for reasonable accommodation based on disability on an individualized basis. (See also **K.12** recommending the same best practice for religious accommodations.)

K.6. Under the ADA, if an employer requires COVID-19 vaccinations for employees physically entering the workplace, how should an employee who does not get a COVID-19 vaccination because of a disability inform the employer, and what should the employer do? *(12/16/20, updated 5/28/21)*

An employee with a disability who does not get vaccinated for COVID-19 because of a disability must let the employer know that he or she needs an exemption from the requirement or a change at work, known as a reasonable accommodation. To request an accommodation, an individual does not need to mention the ADA or use the phrase "reasonable accommodation."

Managers and supervisors responsible for communicating with employees about compliance with the employer's vaccination requirement should know **how to recognize an accommodation request from an employee with a disability (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#requesting)** and know to whom to refer the request for full consideration. As a best practice, before instituting a mandatory vaccination policy, employers should provide managers, supervisors, and those responsible for implementing the policy with clear information about how to handle accommodation requests related to the policy.

Employers and employees typically engage in a flexible, interactive process to identify workplace accommodation options that do not impose an undue hardship (significant difficulty or expense) on the employer. This process may include determining whether it is necessary to obtain supporting medical documentation about the employee's disability.

In discussing accommodation requests, employers and employees may find it helpful to consult the **Job Accommodation Network (JAN) website (https://www.askjan.org)** as a resource for different types of accommodations. JAN's materials about COVID-19 are available at **https://askjan.org/topics/COVID-19.cfm (https://askjan.org/topics/COVID-19.cfm)** . Employers also may consult applicable **Occupational Safety and Health Administration (OSHA) COVID-specific resources (https://www.osha.gov/SLTC/covid-19/)** . Even if there is no reasonable accommodation that will allow the unvaccinated employee to be physically present to perform his or her current job without posing a direct threat, the employer must consider if telework is an option for that particular job as an accommodation and, as a last resort, whether reassignment to another position is possible.

The ADA requires that employers offer an available accommodation if one exists that does not pose an undue hardship, meaning a significant difficulty or expense. See 29 C.F.R. 1630.2(p). Employers are advised to consider all the options before denying an accommodation request. The proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19 and the extent of employee contact with non-employees, who may be ineligible for a vaccination or whose vaccination status may be unknown, can impact the ADA undue hardship consideration. Employers may rely on **CDC recommendations (https://www.cdc.gov/coronavirus/2019-ncov/)** when deciding whether an effective accommodation is available that would not pose an undue hardship.

Under the ADA, it is unlawful for an employer **to disclose that an employee is receiving a reasonable accommodation (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#li42)** or **to retaliate against an employee for requesting an accommodation (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#li19)** .

K.7. If an employer requires employees to get a COVID-19 vaccination from the employer or its agent, do the ADA's restrictions on an employer making disability-related inquiries or medical examinations of its employees apply to any part of the vaccination process?
(12/16/20, updated 5/28/21)

Yes. The ADA's restrictions apply to the screening questions that must be asked immediately prior to administering the vaccine if the vaccine is administered by the employer or its agent. An **employer's agent (https://www.eeoc.gov/laws/guidance/section-2-threshold-issues#2-III-B-2)** is an individual or entity having the authority to act on behalf of, or at the direction of, the employer.

The ADA generally restricts when employers may require medical examinations (procedures or tests that seek information about an individual's physical or mental impairments or health) or make disability-related inquiries (questions that are likely to elicit information about an individual's disability). The act of administering the vaccine is not a "medical examination" under the ADA because it does not seek information about the employee's physical or mental health.

However, because the pre-vaccination screening questions are likely to elicit information about a disability, the ADA requires that they must be "job related and consistent with business necessity" when an employer or its agent administers the COVID-19 vaccine. To meet this standard, an employer would need to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, cannot be vaccinated, will pose a direct threat to the employee's own health or safety or to the health and safety of others in the workplace. (See general discussion in **Question K.5**.) Therefore, when an employer requires that employees be vaccinated by the employer or its agent, the employer should be aware that an employee may challenge the mandatory pre-vaccination inquiries, and an employer would have to justify them under the ADA.

The ADA also requires employers to keep any employee medical information obtained in the course of an employer vaccination program confidential.

Voluntary Employer Vaccination Programs

K.8. Under the ADA, are there circumstances in which an employer or its agent may ask disability-related screening questions before administering a COVID-19 vaccine *without* needing to satisfy the "job-related and consistent with business necessity" standard? *(12/16/20, updated 5/28/21)*

Yes. If the employer offers to vaccinate its employees on a voluntary basis, meaning that employees can choose whether or not to get the COVID-19 vaccine from the employer or its agent, the employer does not have to show that the pre-vaccination screening questions are job-related and consistent with business necessity. However, the employee's decision to answer the questions must be voluntary. (See also Questions **K.16 – 17**.) The ADA prohibits taking an adverse action against an employee, including harassing the employee, for refusing to participate in a voluntary employer-administered vaccination program. An employer also must keep any medical information it obtains from any voluntary vaccination program confidential.

K.9. Under the ADA, is it a "disability-related inquiry" for an employer to inquire about or request documentation or other confirmation that an employee obtained the COVID-19 vaccine from a third party in the community, such as a pharmacy, personal health care provider, or public clinic? *(12/16/20, updated 5/28/21)*

No. When an employer asks employees whether they obtained a COVID-19 vaccine from a third party in the community, such as a pharmacy, personal health care provider, or public clinic, the employer is not asking a question that is likely to disclose the existence of a disability; there are

many reasons an employee may not show documentation or other confirmation of vaccination in the community besides having a disability. Therefore, requesting documentation or other confirmation of vaccination by a third party in the community is not a disability-related inquiry under the ADA, and the ADA's rules about such inquiries do not apply.

However, documentation or other confirmation of vaccination provided by the employee to the employer is medical information about the employee and must be kept confidential.

K.10. May an employer offer voluntary vaccinations only to certain groups of employees? *(5/28/21)*

If an employer or its agent offers voluntary vaccinations to employees, the employer must comply with federal employment nondiscrimination laws. For example, not offering voluntary vaccinations to certain employees based on national origin or another protected basis under the EEO laws would not be permissible.

K.11. What should an employer do if an employee who is fully vaccinated for COVID-19 requests accommodation for an underlying disability because of a continuing concern that he or she faces a heightened risk of severe illness from a COVID-19 infection, despite being vaccinated? *(5/28/21)*

Employers who receive a reasonable accommodation request from an employee should process the request in accordance with applicable ADA standards.

When an employee asks for a reasonable accommodation, whether the employee is fully vaccinated or not, the employer should engage in an interactive process to determine if there is a disability-related need for reasonable accommodation. This process typically includes seeking information from the employee's health care provider with the employee's consent explaining why an accommodation is needed.

For example, some individuals who are immunocompromised might still need reasonable accommodations because their conditions may mean that the vaccines may not offer them the same measure of protection as other vaccinated individuals. If there is a disability-related need for accommodation, an employer must explore potential reasonable accommodations that may be provided absent undue hardship.

Title VII and COVID-19 Vaccinations

K.12. Under Title VII, how should an employer respond to an employee who communicates that he or she is unable to be vaccinated for COVID-19 (or provide documentation or other confirmation of vaccination) because of a sincerely held religious belief, practice, or observance? (*12/16/20*, *updated 5/28/21*)

Once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from getting a COVID-19 vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship. Employers also may

receive religious accommodation requests from individuals who wish to wait until an alternative version or specific brand of COVID-19 vaccine is available to the employee. Such requests should be processed according to the same standards that apply to other accommodation requests.

EEOC guidance explains that the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar. Therefore, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief, practice, or observance. However, if an employee requests a religious accommodation, and an employer is aware of facts that provide an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information. See also 29 CFR 1605.

Under Title VII, an employer should thoroughly consider all possible reasonable accommodations, including telework and reassignment. For suggestions about types of reasonable accommodation for unvaccinated employees, see **question and answer K.6.**, above. In many circumstances, it may be possible to accommodate those seeking reasonable accommodations for their religious beliefs, practices, or observances.

Under Title VII, courts define "undue hardship" as having more than minimal cost or burden on the employer. This is an easier standard for employers to meet than the ADA's undue hardship standard, which applies to requests for accommodations due to a disability. Considerations relevant to undue hardship can include, among other things, the proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19 and the extent of employee contact with non-employees, whose vaccination status could be unknown or who may be ineligible for the vaccine. Ultimately, if an employee cannot be accommodated, employers should determine if any other rights apply under the EEO laws or other federal, state, and local authorities before taking adverse employment action against an unvaccinated employee

K.13. Under Title VII, what should an employer do if an employee chooses not to receive a COVID-19 vaccination due to pregnancy? *(12/16/20, updated 5/28/21)*

Under Title VII, some employees may seek job adjustments or may request exemptions from a COVID-19 vaccination requirement due to pregnancy.

If an employee seeks an exemption from a vaccine requirement due to pregnancy, the employer must ensure that the employee is not being discriminated against compared to other employees similar in their ability or inability to work. This means that a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent such modifications are provided for other employees who are similar in their ability or inability to work. Employers should ensure that supervisors, managers, and human

resources personnel know how to handle such requests to avoid **disparate treatment in violation of Title VII**.

GINA And COVID-19 Vaccinations

Title II of GINA prohibits covered employers from using the genetic information of employees to make employment decisions. It also restricts employers from requesting, requiring, purchasing, or disclosing genetic information of employees. Under Title II of GINA, genetic information includes information about the manifestation of disease or disorder in a family member (which is referred to as "family medical history") and information from genetic tests of the individual employee or a family member, among other things.

K.14. Is Title II of GINA implicated if an employer requires an employee to receive a COVID-19 vaccine administered by the employer or its agent? *(12/16/20, updated 5/28/21)*

No. Requiring an employee to receive a COVID-19 vaccination administered by the employer or its agent would not implicate Title II of GINA unless the pre-vaccination medical screening questions include questions about the employee's genetic information, such as asking about the employee's family medical history. As of May 27, 2021, the pre-vaccination medical screening questions for the first three COVID-19 vaccines to receive Emergency Use Authorization (EUA) from the FDA do not seek family medical history or any other type of genetic information. See **CDC's Pre-vaccination Checklist (https://www.cdc.gov/vaccines/covid-19/downloads/pre-vaccination-screening-form.pdf)** (last visited May 27, 2021). Therefore, an employer or its agent may ask these questions without violating Title II of GINA.

The act of administering a COVID-19 vaccine does not involve the use of the employee's genetic information to make employment decisions or the acquisition or disclosure of genetic information and, therefore, does not implicate Title II of GINA.

K.15. Is Title II of GINA implicated when an employer requires employees to provide documentation or other confirmation that they received a vaccination from a doctor, pharmacy, health agency, or another health care provider in the community? *(12/16/20, updated 5/28/21)*

No. An employer requiring an employee to show documentation or other confirmation of vaccination from a doctor, pharmacy, or other third party is not using, acquiring, or disclosing genetic information and, therefore, is not implicating Title II of GINA. This is the case even if the medical screening questions that must be asked before vaccination include questions about genetic information, because documentation or other confirmation of vaccination would not reveal genetic information. Title II of GINA does not prohibit an employee's *own* health care provider from asking questions about genetic information. This GINA Title II prohibition only applies to the employer or its agent.

Employer Incentives For COVID-19 Voluntary Vaccinations Under ADA and GINA

ADA: Employer Incentives for Voluntary COVID-19 Vaccinations

K.16. Under the ADA, may an employer offer an incentive to employees to voluntarily provide documentation or other confirmation that they received a vaccination on their own from a pharmacy, public health department, or other health care provider in the community? *(5/28/21)*

Yes. Requesting documentation or other confirmation showing that an employee received a COVID-19 vaccination in the community is not a disability-related inquiry covered by the ADA. Therefore, an employer may offer an incentive to employees to voluntarily provide documentation or other confirmation of a vaccination received in the community. As noted elsewhere, the employer is required to keep vaccination information confidential pursuant to the ADA.

K.17. Under the ADA, may an employer offer an incentive to employees for voluntarily receiving a vaccination administered by the employer or its agent? *(5/28/21)*

Yes, if any incentive (which includes both rewards and penalties) is not so substantial as to be coercive. Because vaccinations require employees to answer pre-vaccination disability-related screening questions, a very large incentive could make employees feel pressured to disclose protected medical information. As explained in K.16., however, this incentive limitation does not apply if an employer offers an incentive to employees to voluntarily provide documentation or other confirmation that they received a COVID-19 vaccination on their own from a third-party provider that is not their employer or an agent of their employer.

GINA: Employer Incentives for Voluntary COVID-19 Vaccinations

K.18. Under GINA, may an employer offer an incentive to employees to provide documentation or other confirmation that they or their family members received a vaccination from their own health care provider, such as a doctor, pharmacy, health agency, or another health care provider in the community? *(5/28/21)*

Yes. Under GINA, an employer may offer an incentive to employees to provide documentation or other confirmation from a third party not acting on the employer's behalf, such as a pharmacy or health department, that employees or their family members have been vaccinated. If employers ask an employee to show documentation or other confirmation that the employee or a family member has been vaccinated, it is not an unlawful request for genetic information under GINA because the fact that someone received a vaccination is not information about the manifestation of a disease or disorder in a family member (known as family medical history under GINA), nor is it any other form of genetic information. GINA's restrictions on employers acquiring genetic information (including those prohibiting incentives in exchange for genetic information), therefore, do not apply.

K.19. Under GINA, may an employer offer an incentive to employees in exchange for the employee getting vaccinated by the employer or its agent? *(5/28/21)*

Yes. Under GINA, as long as an employer does not acquire genetic information while administering the vaccines, employers may offer incentives to employees for getting vaccinated. Because the pre-vaccination medical screening questions for the three COVID-19 vaccines now available do not inquire about genetic information, employers may offer incentives to their employees for getting vaccinated. See **K.14** for more about GINA and pre-vaccination medical screening questions.

K.20. Under GINA, may an employer offer an incentive to an employee in return for an employee's *family member* getting vaccinated by the employer or its agent? *(5/28/21)*

No. Under GINA's Title II health and genetic services provision, an employer may not offer any incentives to an employee in exchange for a family member's receipt of a vaccination from an employer or its agent. Providing such an incentive to an employee because a family member was vaccinated by the employer or its agent would require the vaccinator to ask the family member the pre-vaccination medical screening questions, which include medical questions about the family member. Asking these medical questions would lead to the employer's receipt of genetic information in the form of family medical history *of the employee*. The regulations implementing Title II of GINA prohibit employers from providing incentives in exchange for genetic information. Therefore, the employer may not offer incentives in exchange for the family member getting vaccinated. However, employers may still offer an employee's family member the opportunity to be vaccinated by the employer or its agent, if they take certain steps to ensure GINA compliance.

K.21. Under GINA, may an employer offer an employee's family member an opportunity to be vaccinated *without* offering the employee an incentive? *(5/28/21)*

Yes. GINA permits an employer to offer vaccinations to an employee's family members if it takes certain steps to comply with GINA. Employers must not require employees to have their family members get vaccinated and must not penalize employees if their family members decide not to get vaccinated. Employers must also ensure that all medical information obtained from family members during the screening process is only used for the purpose of providing the vaccination, is kept confidential, and is not provided to any managers, supervisors, or others who make employment decisions for the employees. In addition, employers need to ensure that they obtain prior, knowing, voluntary, and written authorization from the family member before the family member is asked any questions about his or her medical conditions. If these requirements are met, GINA permits the collection of genetic information.

Table of Contents

No. 17-1618
U.S. Supreme Court

Bostock v. Clayton County

140 S. Ct. 1731 (2020) · 207 L. Ed. 2d 218
Decided Jun 15, 2020

No. 17–1618 No. 17–1623 No. 18–107

06-15-2020

Gerald Lynn BOSTOCK, Petitioner v. CLAYTON COUNTY, GEORGIA ; Altitude Express, Inc., et al., Petitioners v. Melissa Zarda and William Allen Moore, Jr., Co-Independent Executors of the Estate of Donald Zarda; R.G. & G.R. Harris Funeral Homes, Inc., Petitioner v. Equal Employment Opportunity Commission, et al.

Brian J. Sutherland, Thomas J. Mew IV, Buckley Beal, LLP, Atlanta, GA, for Petitioner. Jack R. Hancock, William H. Buechner, Jr., Michael M. Hill, Freeman Mathis & Gary, LLP, Forest Park, GA, for Respondent. Jeffrey L. Fisher, Brian H. Fletcher, Pamela S. Karlan, Stanford CA, Ria Tabacco, Mar James D. Esseks New York, NY, Gregory Antollino, New York, NY, Stephen Bergstein, New Paltz, NY, David D. Cole, Washington, DC, Erin Beth Harrist, Robert Hodgson, Christopher Dunn New York, NY, for Plaintiff-Respondent Zarda.

Justice GORSUCH delivered the opinion of the Court.

Brian J. Sutherland, Thomas J. Mew IV, Buckley Beal, LLP, Atlanta, GA, for Petitioner.

Jack R. Hancock, William H. Buechner, Jr., Michael M. Hill, Freeman Mathis & Gary, LLP, Forest Park, GA, for Respondent.

Jeffrey L. Fisher, Brian H. Fletcher, Pamela S. Karlan, Stanford CA, Ria Tabacco, Mar James D. Esseks New York, NY, Gregory Antollino, New York, NY, Stephen Bergstein, New Paltz, NY, David D. Cole, Washington, DC, Erin Beth Harrist, Robert Hodgson, Christopher Dunn New York, NY, for Plaintiff-Respondent Zarda.

Justice GORSUCH delivered the opinion of the
1737 Court.*1737 Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them. In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964. There, in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.

Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations

suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.

I

Few facts are needed to appreciate the legal question we face. Each of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status.

Gerald Bostock worked for Clayton County, Georgia, as a child welfare advocate. Under his leadership, the county won national awards for its work. After a decade with the county, Mr. Bostock began participating in a gay recreational softball league. Not long after that, influential *1738 members of the community allegedly made disparaging comments about Mr. Bostock's sexual orientation and participation in the league. Soon, he was fired for conduct "unbecoming" a county employee.

Donald Zarda worked as a skydiving instructor at Altitude Express in New York. After several seasons with the company, Mr. Zarda mentioned that he was gay and, days later, was fired.

Aimee Stephens worked at R.G. & G.R. Harris Funeral Homes in Garden City, Michigan. When she got the job, Ms. Stephens presented as a male. But two years into her service with the company, she began treatment for despair and loneliness. Ultimately, clinicians diagnosed her with gender dysphoria and recommended that she begin living as a woman. In her sixth year with the company, Ms. Stephens wrote a letter to her employer explaining that she planned to " live and work full-time as a woman" after she returned from an upcoming vacation. The funeral home fired her before she left, telling her "this is not going to work out."

While these cases began the same way, they ended differently. Each employee brought suit under Title VII alleging unlawful discrimination on the basis of sex. 78 Stat. 255, 42 U.S.C. § 2000e–2(a)(1). In Mr. Bostock's case, the Eleventh Circuit held that the law does not prohibit employers from firing employees for being gay and so his suit could be dismissed as a matter of law. 723 Fed.Appx. 964 (2018). Meanwhile, in Mr. Zarda's case, the Second Circuit concluded that sexual orientation discrimination does violate Title VII and allowed his case to proceed. 883 F.3d 100 (2018). Ms. Stephens's case has a more complex procedural history, but in the end the Sixth Circuit reached a decision along the same lines as the Second Circuit's, holding that Title VII bars employers from firing employees because of their transgender status. 884 F.3d 560 (2018). During the course of the proceedings in these long-running disputes, both Mr. Zarda and Ms. Stephens have passed away. But their estates continue to press their causes for the benefit of their heirs. And we granted certiorari in these matters to resolve at last the disagreement among the courts of appeals over the scope of Title VII's protections for homosexual and transgender persons. 587 U.S. ——, 139 S.Ct. 1599, 203 L.Ed.2d 754 (2019).

II

This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and

obligations. See *New Prime Inc.* v. *Oliveira* , 586 U.S. ——, —— – ——, 139 S.Ct. 532, 538–539, 202 L.Ed.2d 536 (2019).

With this in mind, our task is clear. We must determine the ordinary public meaning of Title VII's command that it is "unlawful ... for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." § 2000e–2(a)(1). To do so, we orient ourselves to the time of the statute's adoption, here 1964, and begin by 1739examining *1739 the key statutory terms in turn before assessing their impact on the cases at hand and then confirming our work against this Court's precedents.

A

The only statutorily protected characteristic at issue in today's cases is "sex"—and that is also the primary term in Title VII whose meaning the parties dispute. Appealing to roughly contemporaneous dictionaries, the employers say that, as used here, the term "sex" in 1964 referred to "status as either male or female [as] determined by reproductive biology." The employees counter by submitting that, even in 1964, the term bore a broader scope, capturing more than anatomy and reaching at least some norms concerning gender identity and sexual orientation. But because nothing in our approach to these cases turns on the outcome of the parties' debate, and because the employees concede the point for argument's sake, we proceed on the assumption that "sex" signified what the employers suggest, referring only to biological distinctions between male and female.

Still, that's just a starting point. The question isn't just what "sex" meant, but what Title VII says about it. Most notably, the statute prohibits employers from taking certain actions "because of " sex. And, as this Court has previously explained, "the ordinary meaning of 'because of' is 'by reason of' or 'on account of.' " *University of Tex. Southwestern Medical Center v. Nassar* , 570 U.S. 338, 350, 133 S.Ct. 2517, 186 L.Ed.2d 503 (2013) (citing *Gross v. FBL Financial Services, Inc.* , 557 U.S. 167, 176, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009) ; quotation altered). In the language of law, this means that Title VII's "because of " test incorporates the " 'simple' " and "traditional" standard of but-for causation. *Nassar* , 570 U.S. at 346, 360, 133 S.Ct. 2517. That form of causation is established whenever a particular outcome would not have happened "but for" the purported cause. See *Gross* , 557 U.S. at 176, 129 S.Ct. 2343. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.

This can be a sweeping standard. Often, events have multiple but-for causes. So, for example, if a car accident occurred *both* because the defendant ran a red light *and* because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision. Cf. *Burrage v. United States* , 571 U.S. 204, 211–212, 134 S.Ct. 881, 187 L.Ed.2d 715 (2014). When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff 's sex was one but-for cause of that decision, that is enough to trigger the law. See *ibid* . ; *Nassar* , 570 U.S. at 350, 133 S.Ct. 2517.

No doubt, Congress could have taken a more parsimonious approach. As it has in other statutes, it could have added "solely" to indicate that actions taken "because of " the confluence of multiple factors do not violate the law. Cf. 11 U.S.C. § 525 ; 16 U.S.C. § 511. Or it could have written "primarily because of " to indicate that the prohibited factor had to be the main cause of the defendant's challenged employment decision. Cf. 22 U.S.C. § 2688. But none of this is the law we have. If anything, Congress has moved in the opposite direction, supplementing Title VII in

1991 to allow a plaintiff to prevail merely by showing that a protected trait like sex was a "motivating factor" in a defendant's challenged employment practice. Civil Rights Act of 1991, § 1740 107, 105 Stat. 1075, codified at *1740 42 U.S.C. § 2000e–2(m). Under this more forgiving standard, liability can sometimes follow even if sex *wasn't* a but-for cause of the employer's challenged decision. Still, because nothing in our analysis depends on the motivating factor test, we focus on the more traditional but-for causation standard that continues to afford a viable, if no longer exclusive, path to relief under Title VII. § 2000e–2(a)(1).

As sweeping as even the but-for causation standard can be, Title VII does not concern itself with everything that happens "because of " sex. The statute imposes liability on employers only when they "fail or refuse to hire," "discharge," "or otherwise ... discriminate against" someone because of a statutorily protected characteristic like sex. *Ibid.* The employers acknowledge that they discharged the plaintiffs in today's cases, but assert that the statute's list of verbs is qualified by the last item on it: "otherwise ... discriminate against." By virtue of the word *otherwise* , the employers suggest, Title VII concerns itself not with every discharge, only with those discharges that involve discrimination.

Accepting this point, too, for argument's sake, the question becomes: What did "discriminate" mean in 1964? As it turns out, it meant then roughly what it means today: "To make a difference in treatment or favor (of one as compared with others)." Webster's New International Dictionary 745 (2d ed. 1954). To "discriminate against" a person, then, would seem to mean treating that individual worse than others who are similarly situated. See *Burlington N. & S. F. R. Co. v. White* , 548 U.S. 53, 59, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). In so-called "disparate treatment" cases like today's, this Court has also held that the difference in treatment based on sex must be intentional. See, *e.g., Watson v. Fort Worth Bank & Trust* , 487 U.S. 977, 986, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988). So, taken together, an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII.

At first glance, another interpretation might seem possible. Discrimination sometimes involves "the act, practice, or an instance of discriminating categorically rather than individually." Webster's New Collegiate Dictionary 326 (1975); see also *post,* at 1768- 1769, n. 22 (ALITO, J., dissenting). On that understanding, the statute would require us to consider the employer's treatment of groups rather than individuals, to see how a policy affects one sex as a whole versus the other as a whole. That idea holds some intuitive appeal too. Maybe the law concerns itself simply with ensuring that employers don't treat women generally less favorably than they do men. So how can we tell which sense, individual or group, "discriminate" carries in Title VII?

The statute answers that question directly. It tells us three times—including immediately after the words "discriminate against"—that our focus should be on individuals, not groups: Employers may not "fail or refuse to hire or ... discharge any *individual* , or otherwise ... discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* ... sex." § 2000e–2(a)(1) (emphasis added). And the meaning of "individual" was as uncontroversial in 1964 as it is today: "A particular being as distinguished from a class, species, or collection." Webster's New International Dictionary, at 1267. Here, again, Congress could have written the law differently. It might have said that "it shall be an unlawful 1741 employment *1741 practice to prefer one sex to the other in hiring, firing, or the terms or conditions of employment." It might have said that there should be no "sex discrimination," perhaps implying a focus on differential treatment between the two sexes as groups. More narrowly still, it could have

forbidden only "sexist policies" against women as a class. But, once again, that is not the law we have.

The consequences of the law's focus on individuals rather than groups are anything but academic. Suppose an employer fires a woman for refusing his sexual advances. It's no defense for the employer to note that, while he treated that individual woman worse than he would have treated a man, he gives preferential treatment to female employees overall. The employer is liable for treating *this* woman worse in part because of her sex. Nor is it a defense for an employer to say it discriminates against both men and women because of sex. This statute works to protect individuals of both sexes from discrimination, and does so equally. So an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. But in *both* cases the employer fires an individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it.

B

From the ordinary public meaning of the statute's language at the time of the law's adoption, a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff 's sex contributed to the decision. And it doesn't matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred. Title VII's message is "simple but momentous": An individual employee's sex is "not relevant to the selection, evaluation, or compensation of employees." *Price Waterhouse v. Hopkins* , 490 U.S. 228, 239, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion).

The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays 1742 an unmistakable *1742 and impermissible role in the discharge decision.

That distinguishes these cases from countless others where Title VII has nothing to say. Take an employer who fires a female employee for tardiness or incompetence or simply supporting the wrong sports team. Assuming the employer would not have tolerated the same trait in a man, Title VII stands silent. But unlike any of these other traits or actions, homosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or

because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.

Nor does it matter that, when an employer treats one employee worse because of that individual's sex, other factors may contribute to the decision. Consider an employer with a policy of firing any woman he discovers to be a Yankees fan. Carrying out that rule because an employee is a woman *and* a fan of the Yankees is a firing "because of sex" if the employer would have tolerated the same allegiance in a male employee. Likewise here. When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play—*both* the individual's sex *and* something else (the sex to which the individual is attracted or with which the individual identifies). But Title VII doesn't care. If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met, and liability may attach.

Reframing the additional causes in today's cases as additional intentions can do no more to insulate the employers from liability. Intentionally burning down a neighbor's house is arson, even if the perpetrator's ultimate intention (or motivation) is only to improve the view. No less, intentional discrimination based on sex violates Title VII, even if it is intended only as a means to achieving the employer's ultimate goal of discriminating against homosexual or transgender employees. There is simply no escaping the role intent plays here: Just as sex is necessarily a but-for *cause* when an employer discriminates against homosexual or transgender employees, an employer who discriminates on these grounds inescapably *intends* to rely on sex in its decisionmaking. Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman. To be sure, that employer's ultimate goal might be to discriminate on the basis of sexual orientation. But to achieve that purpose the employer must, along the way, intentionally treat an employee worse based in part on that individual's sex.

An employer musters no better a defense by responding that it is equally happy to fire male *and* female employees who are homosexual or transgender. Title VII liability is not limited to employers who, through the sum of all of their employment actions, treat the class of men differently than the class of women. Instead, the law makes each instance of discriminating against an individual employee because of that individual's sex an independent violation of Title VII. So just as an employer who fires both Hannah and Bob for failing to fulfill traditional sex stereotypes doubles rather than eliminates Title
1743*1743 VII liability, an employer who fires both Hannah and Bob for being gay or transgender does the same.

At bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings. For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms —and that "should be the end of the analysis." 883 F.3d at 135 (Cabranes, J., concurring in judgment).

C

If more support for our conclusion were required, there's no need to look far. All that the statute's plain terms suggest, this Court's cases have already confirmed. Consider three of our leading precedents.

In *Phillips v. Martin Marietta Corp.* , 400 U.S. 542, 91 S.Ct. 496, 27 L.Ed.2d 613 (1971) (*per curiam*), a company allegedly refused to hire women with young children, but did hire men with children the same age. Because its discrimination depended not only on the employee's sex as a female but also on the presence of another criterion—namely, being a parent of young children—the company contended it hadn't engaged in discrimination "because of " sex. The company maintained, too, that it hadn't violated the law because, as a whole, it tended to favor hiring women over men. Unsurprisingly by now, these submissions did not sway the Court. That an employer discriminates intentionally against an individual only in part because of sex supplies no defense to Title VII. Nor does the fact an employer may happen to favor women as a class.

In *Los Angeles Dept. of Water and Power v. Manhart* , 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978), an employer required women to make larger pension fund contributions than men. The employer sought to justify its disparate treatment on the ground that women tend to live longer than men, and thus are likely to receive more from the pension fund over time. By everyone's admission, the employer was not guilty of animosity against women or a "purely habitual assumptio[n] about a woman's inability to perform certain kinds of work"; instead, it relied on what appeared to be a statistically accurate statement about life expectancy. *Id.* , at 707–708, 98 S.Ct. 1370. Even so, the Court recognized, a rule that appears evenhanded at the group level can prove discriminatory at the level of individuals. True, women as a class may live longer than men as a class. But "[t]he statute's focus on the individual is unambiguous," and any individual woman might make the larger pension contributions and still die as early as a man. *Id.* , at 708, 98 S.Ct. 1370. Likewise, the Court dismissed as irrelevant the employer's insistence that its actions were motivated by a wish to achieve classwide equality between the sexes: An employer's intentional discrimination on the basis of sex is no more permissible when it is prompted by some further intention (or motivation), even one as prosaic as seeking to account for actuarial tables. *Ibid.* The employer violated Title VII because, when its policy worked exactly as planned, it could not "pass the simple test" asking whether an individual female employee would have been treated the same regardless of her sex. *Id.* , at 711, 98 S.Ct. 1370.

In *Oncale v. Sundowner Offshore Services, Inc.* , 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998), a male plaintiff alleged that he was singled out by his male co-workers for sexual harassment. The Court held it was immaterial that members of the same sex as the victim committed the alleged
1744 discrimination. Nor did the Court *1744 concern itself with whether men as a group were subject to discrimination or whether something in addition to sex contributed to the discrimination, like the plaintiff 's conduct or personal attributes. " [A]ssuredly," the case didn't involve "the principal evil Congress was concerned with when it enacted Title VII." *Id.* , at 79, 118 S.Ct. 998. But, the Court unanimously explained, it is "the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Ibid.* Because the plaintiff alleged that the harassment would not have taken place but for his sex—that is, the plaintiff would not have suffered similar treatment if he were female—a triable Title VII claim existed.

The lessons these cases hold for ours are by now familiar.

First, it's irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it. In *Manhart* , the employer called its rule requiring women to pay more into the pension fund a "life expectancy" adjustment necessary to achieve sex equality. In *Phillips* , the employer could have accurately spoken of its policy as one based on "motherhood." In much the same way, today's

employers might describe their actions as motivated by their employees' homosexuality or transgender status. But just as labels and additional intentions or motivations didn't make a difference in *Manhart* or *Phillips* , they cannot make a difference here. When an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex. And that is all Title VII has ever demanded to establish liability.

Second, the plaintiff 's sex need not be the sole or primary cause of the employer's adverse action. In *Phillips* , *Manhart* , and *Oncale* , the defendant easily could have pointed to some other, nonprotected trait and insisted it was the more important factor in the adverse employment outcome. So, too, it has no significance here if another factor—such as the sex the plaintiff is attracted to or presents as—might also be at work, or even play a more important role in the employer's decision.

Finally, an employer cannot escape liability by demonstrating that it treats males and females comparably as groups. As *Manhart* teaches, an employer is liable for intentionally requiring an individual female employee to pay more into a pension plan than a male counterpart even if the scheme promotes equality at the group level. Likewise, an employer who intentionally fires an individual homosexual or transgender employee in part because of that individual's sex violates the law even if the employer is willing to subject all male and female homosexual or transgender employees to the same rule.

III

What do the employers have to say in reply? For present purposes, they do not dispute that they fired the plaintiffs for being homosexual or transgender. Sorting out the true reasons for an adverse employment decision is often a hard business, but none of that is at issue here. Rather, the employers submit that even intentional discrimination against employees based on their homosexuality or transgender status supplies no basis for liability under Title VII.

The employers' argument proceeds in two stages. Seeking footing in the statutory text, they begin by advancing a number of reasons why discrimination on the basis of homosexuality or transgender status doesn't involve discrimination because of sex. But each of these arguments turns out only to repackage errors we've already *1745 seen and this Court's precedents have already rejected. In the end, the employers are left to retreat beyond the statute's text, where they fault us for ignoring the legislature's purposes in enacting Title VII or certain expectations about its operation. They warn, too, about consequences that might follow a ruling for the employees. But none of these contentions about what the employers think the law was meant to do, or should do, allow us to ignore the law as it is.

1745

A

Maybe most intuitively, the employers assert that discrimination on the basis of homosexuality and transgender status aren't referred to as sex discrimination in ordinary conversation. If asked by a friend (rather than a judge) why they were fired, even today's plaintiffs would likely respond that it was because they were gay or transgender, not because of sex. According to the employers, that conversational answer, not the statute's strict terms, should guide our thinking and suffice to defeat any suggestion that the employees now before us were fired because of sex. Cf. *post,* at 1755 - 1756 (ALITO, J., dissenting); *post,* at 1826 - 1829 (KAVANAUGH, J., dissenting).

But this submission rests on a mistaken understanding of what kind of cause the law is looking for in a Title VII case. In conversation, a speaker is likely to focus on what seems most relevant or informative to the listener. So an employee who has just been fired is likely to identify the primary or most direct cause rather than list literally every but-for cause. To do

otherwise would be tiring at best. But these conversational conventions do not control Title VII's legal analysis, which asks simply whether sex was a but-for cause. In *Phillips* , for example, a woman who was not hired under the employer's policy might have told her friends that her application was rejected because she was a mother, or because she had young children. Given that many women could be hired under the policy, it's unlikely she would say she was not hired because she was a woman. But the Court did not hesitate to recognize that the employer in *Phillips* discriminated against the plaintiff because of her sex. Sex wasn't the only factor, or maybe even the main factor, but it was one but-for cause—and that was enough. You can call the statute's but-for causation test what you will—expansive, legalistic, the dissents even dismiss it as wooden or literal. But it is the law.

Trying another angle, the defendants before us suggest that an employer who discriminates based on homosexuality or transgender status doesn't *intentionally* discriminate based on sex, as a disparate treatment claim requires. See *post* , at 1758 - 1760 (ALITO, J., dissenting); *post* , at 1828 - 1829 (KAVANAUGH, J., dissenting). But, as we've seen, an employer who discriminates against homosexual or transgender employees necessarily and intentionally applies sex-based rules. An employer that announces it will not employ anyone who is homosexual, for example, intends to penalize male employees for being attracted to men and female employees for being attracted to women.

What, then, do the employers mean when they insist intentional discrimination based on homosexuality or transgender status isn't intentional discrimination based on sex? Maybe the employers mean they don't intend to harm one sex or the other as a class. But as should be clear by now, the statute focuses on discrimination against individuals, not groups. Alternatively, the employers may mean that they don't perceive themselves as motivated by a desire to discriminate based on sex. But nothing in Title VII
1746 turns on the employer's *1746 labels or any further intentions (or motivations) for its conduct beyond sex discrimination. In *Manhart* , the employer intentionally required women to make higher pension contributions only to fulfill the further purpose of making things more equitable between men and women as groups. In *Phillips* , the employer may have perceived itself as discriminating based on motherhood, not sex, given that its hiring policies as a whole *favored* women. But in both cases, the Court set all this aside as irrelevant. The employers' policies involved intentional discrimination because of sex, and Title VII liability necessarily followed.

Aren't these cases different, the employers ask, given that an employer could refuse to hire a gay or transgender individual without ever learning the applicant's sex? Suppose an employer asked homosexual or transgender applicants to tick a box on its application form. The employer then had someone else redact any information that could be used to discern sex. The resulting applications would disclose which individuals are homosexual or transgender without revealing whether they also happen to be men or women. Doesn't that possibility indicate that the employer's discrimination against homosexual or transgender persons cannot be sex discrimination?

No, it doesn't. Even in this example, the individual applicant's sex still weighs as a factor in the employer's decision. Change the hypothetical ever so slightly and its flaws become apparent. Suppose an employer's application form offered a single box to check if the applicant is either black or Catholic. If the employer refuses to hire anyone who checks that box, would we conclude the employer has complied with Title VII, so long as it studiously avoids learning any particular applicant's race or religion? Of course not: By intentionally setting out a rule that makes hiring turn on race or religion, the employer violates the law, whatever he might know or not know about individual applicants.

The same holds here. There is no way for an applicant to decide whether to check the homosexual or transgender box without considering sex. To see why, imagine an applicant doesn't know what the words homosexual or transgender mean. Then try writing out instructions for who should check the box without using the words man, woman, or sex (or some synonym). It can't be done. Likewise, there is no way an employer can discriminate against those who check the homosexual or transgender box without discriminating in part because of an applicant's sex. By discriminating against homosexuals, the employer intentionally penalizes men for being attracted to men and women for being attracted to women. By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today. Any way you slice it, the employer intentionally refuses to hire applicants in part because of the affected individuals' sex, even if it never learns any applicant's sex.

Next, the employers turn to Title VII's list of protected characteristics—race, color, religion, sex, and national origin. Because homosexuality and transgender status can't be found on that list and because they are conceptually distinct from sex, the employers reason, they are implicitly excluded from Title VII's reach. Put another way, if Congress had wanted to address these matters in Title VII, it would have referenced them specifically. Cf. *post,* at 1757 - 1758 (ALITO, J., dissenting); *post,* at 1828 - 1830 (KAVANAUGH, J., dissenting).

But that much does not follow. We agree that homosexuality and transgender status are distinct
1747 concepts from *1747 sex. But, as we've seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second. Nor is there any such thing as a "canon of donut holes," in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception. Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule. And that is exactly how this Court has always approached Title VII. "Sexual harassment" is conceptually distinct from sex discrimination, but it can fall within Title VII's sweep. *Oncale* , 523 U.S. at 79–80, 118 S.Ct. 998. Same with "motherhood discrimination." See *Phillips* , 400 U.S. at 544, 91 S.Ct. 496. Would the employers have us reverse those cases on the theory that Congress could have spoken to those problems more specifically? Of course not. As enacted, Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them.

The employers try the same point another way. Since 1964, they observe, Congress has considered several proposals to add sexual orientation to Title VII's list of protected characteristics, but no such amendment has become law. Meanwhile, Congress has enacted other statutes addressing other topics that do discuss sexual orientation. This postenactment legislative history, they urge, should tell us something. Cf. *post* , at 1754 - 1755, 1776 - 1778 (ALITO, J., dissenting); *post* , at 1823 - 1824, 1830 - 1831 (KAVANAUGH, J., dissenting).

But what? There's no authoritative evidence explaining why later Congresses adopted other laws referencing sexual orientation but didn't amend this one. Maybe some in the later legislatures understood the impact Title VII's broad language already promised for cases like ours and didn't think a revision needed. Maybe others knew about its impact but hoped no one else would notice. Maybe still others, occupied by other concerns, didn't consider the issue at all. All we can know for certain is that speculation about why a later Congress declined to adopt new legislation offers a "particularly dangerous" basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt.

Pension Benefit Guaranty Corporation v. LTV Corp. , 496 U.S. 633, 650, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990) ; see also *United States v. Wells* , 519 U.S. 482, 496, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997) ; *Sullivan v. Finkelstein* , 496 U.S. 617, 632, 110 S.Ct. 2658, 110 L.Ed.2d 563 (1990) (Scalia, J., concurring) ("Arguments based on subsequent legislative history ... should not be taken seriously, not even in a footnote").

That leaves the employers to seek a different sort of exception. Maybe the traditional and simple but-for causation test should apply in all other Title VII cases, but it just doesn't work when it comes to cases involving homosexual and transgender employees. The test is too blunt to capture the nuances here. The employers illustrate their concern with an example. When we apply the simple test to Mr. Bostock—asking whether Mr. Bostock, a man attracted to other men, would have been fired had he been a woman—we don't just change his sex. Along the way, we change his sexual orientation too (from homosexual to heterosexual). If the aim is to isolate whether a plaintiff 's sex caused the dismissal, the employers stress, we must hold sexual orientation constant—meaning we need to change both his sex and the sex to which he is attracted. So for Mr. Bostock, the question should be whether he would've been 1748 fired if he were *1748 a woman attracted to women. And because his employer would have been as quick to fire a lesbian as it was a gay man, the employers conclude, no Title VII violation has occurred.

While the explanation is new, the mistakes are the same. The employers might be onto something if Title VII only ensured equal treatment between groups of men and women or if the statute applied only when sex is the sole or primary reason for an employer's challenged adverse employment action. But both of these premises are mistaken. Title VII's plain terms and our precedents don't care if an employer treats men and women comparably as groups; an employer who fires both lesbians and gay men equally doesn't diminish but doubles its liability. Just cast a glance back to *Manhart* , where it was no defense that the employer sought to equalize pension contributions based on life expectancy. Nor does the statute care if other factors besides sex contribute to an employer's discharge decision. Mr. Bostock's employer might have decided to fire him only because of the confluence of two factors, his sex and the sex to which he is attracted. But exactly the same might have been said in *Phillips* , where motherhood was the added variable.

Still, the employers insist, something seems different here. Unlike certain other employment policies this Court has addressed that harmed only women or only men, the employers' policies in the cases before us have the same adverse consequences for men and women. How could sex be necessary to the result if a member of the opposite sex might face the same outcome from the same policy?

What the employers see as unique isn't even unusual. Often in life and law two but-for factors combine to yield a result that could have also occurred in some other way. Imagine that it's a nice day outside and your house is too warm, so you decide to open the window. Both the cool temperature outside and the heat inside are but-for causes of your choice to open the window. That doesn't change just because you also would have opened the window had it been warm outside and cold inside. In either case, no one would deny that the window is open "because of" the outside temperature. Our cases are much the same. So, for example, when it comes to homosexual employees, male sex and attraction to men are but-for factors that can combine to get them fired. The fact that female sex and attraction to women can *also* get an employee fired does no more than show the same outcome can be achieved through the combination of different factors. In either case, though, sex plays an essential but-for role.

At bottom, the employers' argument unavoidably comes down to a suggestion that sex must be the sole or primary cause of an adverse employment action for Title VII liability to follow. And, as we've seen, that suggestion is at odds with everything we know about the statute. Consider an employer eager to revive the workplace gender roles of the 1950s. He enforces a policy that he will hire only men as mechanics and only women as secretaries. When a qualified woman applies for a mechanic position and is denied, the "simple test" immediately spots the discrimination: A qualified man would have been given the job, so sex was a but-for cause of the employer's refusal to hire. But like the employers before us today, this employer would say not so fast. By comparing the woman who applied to be a mechanic to a man who applied to be a mechanic, we've quietly changed two things: the applicant's sex and her trait of failing to conform to 1950s gender roles. The "simple test" thus overlooks that it is really the applicant's bucking of 1950s gender roles, not her sex, *1749 doing the work. So we need to hold that second trait constant: Instead of comparing the disappointed female applicant to a man who applied for the same position, the employer would say, we should compare her to a man who applied to be a secretary. And because that jobseeker would be refused too, this must not be sex discrimination.

No one thinks *that* , so the employers must scramble to justify deploying a stricter causation test for use only in cases involving discrimination based on sexual orientation or transgender status. Such a rule would create a curious discontinuity in our case law, to put it mildly. Employer hires based on sexual stereotypes? Simple test. Employer sets pension contributions based on sex? Simple test. Employer fires men who do not behave in a sufficiently masculine way around the office? Simple test. But when that same employer discriminates against women who are attracted to women, or persons identified at birth as women who later identify as men, we suddenly roll out a new and more rigorous standard? Why are *these* reasons for taking sex into account different from all the rest? Title VII's text can offer no answer.

B

Ultimately, the employers are forced to abandon the statutory text and precedent altogether and appeal to assumptions and policy. Most pointedly, they contend that few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons. And whatever the text and our precedent indicate, they say, shouldn't this fact cause us to pause before recognizing liability?

It might be tempting to reject this argument out of hand. This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration. See, *e.g.* , *Carcieri v. Salazar* , 555 U.S. 379, 387, 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009) ; *Connecticut Nat. Bank v. Germain* , 503 U.S. 249, 253–254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) ; *Rubin v. United States* , 449 U.S. 424, 430, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981). Of course, some Members of this Court have consulted legislative history when interpreting *ambiguous* statutory language. Cf. *post* , at 1775 (ALITO, J., dissenting). But that has no bearing here. "Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it." *Milner v. Department of Navy* , 562 U.S. 562, 574, 131 S.Ct. 1259, 179 L.Ed.2d 268 (2011). And as we have seen, no ambiguity exists about how Title VII's terms apply to the facts before us. To be sure, the statute's application in these cases reaches "beyond the principal evil" legislators may have intended or expected to address. *Oncale* , 523 U.S. at 79, 118 S.Ct. 998. But " ‘the fact that [a statute] has been applied in situations not expressly anticipated by Congress’ " does not demonstrate ambiguity; instead, it simply " ‘demonstrates [the] breadth’ "

of a legislative command. *Sedima* , *S.P.R.L.* v. *Imrex Co* ., 473 U.S. 479, 499, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985). And "it is ultimately the provisions of " those legislative commands "rather than the principal concerns of our legislators by which we are governed." *Oncale* , 523 U.S. at 79, 118 S.Ct. 998 ; see also A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 101 (2012) (noting that unexpected applications of broad language reflect only Congress's "presumed point [to] produce general coverage—not to leave room for courts to recognize ad hoc exceptions").

1750*1750 Still, while legislative history can never defeat unambiguous statutory text, historical sources can be useful for a different purpose: Because the law's ordinary meaning at the time of enactment usually governs, we must be sensitive to the possibility a statutory term that means one thing today or in one context might have meant something else at the time of its adoption or might mean something different in another context. And we must be attuned to the possibility that a statutory phrase ordinarily bears a different meaning than the terms do when viewed individually or literally. To ferret out such shifts in linguistic usage or subtle distinctions between literal and ordinary meaning, this Court has sometimes consulted the understandings of the law's drafters as some (not always conclusive) evidence. For example, in the context of the National Motor Vehicle Theft Act, this Court admitted that the term "vehicle" in 1931 could literally mean "a conveyance working on land, water or air." *McBoyle v. United States* , 283 U.S. 25, 26, 51 S.Ct. 340, 75 L.Ed. 816 (1931). But given contextual clues and "everyday speech" at the time of the Act's adoption in 1919, this Court concluded that "vehicles" in that statute included only things "moving on land," not airplanes too. *Ibid* . Similarly, in *New Prime* , we held that, while the term "contracts of employment" today might seem to encompass only contracts with employees, at the time of the statute's adoption the phrase was ordinarily understood to cover contracts with independent contractors as well. 586 U.S., at 1825 - 1826, 139 S.Ct., at 538–540. Cf. *post,* at —— – —— (KAVANAUGH, J., dissenting) (providing additional examples).

The employers, however, advocate nothing like that here. They do not seek to use historical sources to illustrate that the meaning of any of Title VII's language has changed since 1964 or that the statute's terms, whether viewed individually or as a whole, ordinarily carried some message we have missed. To the contrary, as we have seen, the employers *agree* with our understanding of all the statutory language —"discriminate against any individual ... because of such individual's ... sex." Nor do the competing dissents offer an alternative account about what these terms mean either when viewed individually or in the aggregate. Rather than suggesting that the statutory language bears some other *meaning* , the employers and dissents merely suggest that, because few in 1964 expected today's *result* , we should not dare to admit that it follows ineluctably from the statutory text. When a new application emerges that is both unexpected and important, they would seemingly have us merely point out the question, refer the subject back to Congress, and decline to enforce the plain terms of the law in the meantime.

That is exactly the sort of reasoning this Court has long rejected. Admittedly, the employers take pains to couch their argument in terms of seeking to honor the statute's "expected applications" rather than vindicate its "legislative intent." But the concepts are closely related. One could easily contend that legislators only intended expected applications or that a statute's purpose is limited to achieving applications foreseen at the time of enactment. However framed, the employer's logic impermissibly seeks to displace the plain meaning of the law in favor of something lying beyond it.

If anything, the employers' new framing may only add new problems. The employers assert that "no one" in 1964 or for some time after would have anticipated today's result. But is that really true?

Not long after the law's passage, gay and transgender employees began filing Title VII
1751 complaints, so at least *some* people *1751 foresaw this potential application. See, *e.g.* , *Smith v. Liberty Mut. Ins. Co.* , 395 F.Supp. 1098, 1099 (ND Ga. 1975) (addressing claim from 1969); *Holloway v. Arthur Andersen & Co.* , 566 F.2d 659, 661 (CA9 1977) (addressing claim from 1974). And less than a decade after Title VII's passage, during debates over the Equal Rights Amendment, others counseled that its language—which was strikingly similar to Title VII's—might also protect homosexuals from discrimination. See, *e.g.* , Note, The Legality of Homosexual Marriage, 82 Yale L. J. 573, 583–584 (1973).

Why isn't that enough to demonstrate that today's result isn't totally unexpected? How many people have to foresee the application for it to qualify as "expected"? Do we look only at the moment the statute was enacted, or do we allow some time for the implications of a new statute to be worked out? Should we consider the expectations of those who had no reason to give a particular application any thought or only those with reason to think about the question? How do we account for those who change their minds over time, after learning new facts or hearing a new argument? How specifically or generally should we frame the "application" at issue? None of these questions have obvious answers, and the employers don't propose any.

One could also reasonably fear that objections about unexpected applications will not be deployed neutrally. Often lurking just behind such objections resides a cynicism that Congress could not *possibly* have meant to protect a disfavored group. Take this Court's encounter with the Americans with Disabilities Act's directive that no " 'public entity' " can discriminate against any " 'qualified individual with a disability.' " *Pennsylvania Dept. of Corrections v. Yeskey* , 524 U.S. 206, 208, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998). Congress, of course, didn't list every public entity the statute would apply to. And no one batted an eye at its application to, say, post offices. But when the statute was applied to *prisons* , curiously, some demanded a closer look: Pennsylvania argued that "Congress did not 'envisio[n] that the ADA would be applied to state prisoners.' " *Id* ., at 211–212, 118 S.Ct. 1952. This Court emphatically rejected that view, explaining that, "in the context of an unambiguous statutory text," whether a specific application was anticipated by Congress "is irrelevant." *Id.* , at 212, 118 S.Ct. 1952. As *Yeskey* and today's cases exemplify, applying protective laws to groups that were politically unpopular at the time of the law's passage—whether prisoners in the 1990s or homosexual and transgender employees in the 1960s—often may be seen as unexpected. But to refuse enforcement just because of that, because the parties before us happened to be unpopular at the time of the law's passage, would not only require us to abandon our role as interpreters of statutes; it would tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law's terms. Cf. *post* , at 1769 - 1773 (ALITO, J., dissenting); *post,* at 1833 - 1834 (KAVANAUGH, J., dissenting).

The employer's position also proves too much. If we applied Title VII's plain text only to applications some (yet-to-be-determined) group expected in 1964, we'd have more than a little law to overturn. Start with *Oncale* . How many people in 1964 could have expected that the law would turn out to protect male employees? Let alone to protect them from harassment by other male employees? As we acknowledged at the time, "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII." 523 U.S. at 79, 118 S.Ct. 998. Yet the
1752 Court did not hesitate to recognize that *1752 Title VII's plain terms forbade it. Under the employer's logic, it would seem this was a mistake.

That's just the beginning of the law we would have to unravel. As one Equal Employment Opportunity Commission (EEOC) Commissioner observed shortly after the law's passage, the words of " 'the sex provision of Title VII [are] difficult to ... control.' " Franklin, Inventing the "Traditional Concept" of Sex Discrimination, 125 Harv. L. Rev. 1307, 1338 (2012) (quoting Federal Mediation Service To Play Role in Implementing Title VII, [1965–1968 Transfer Binder] CCH Employment Practices ¶8046, p. 6074). The "difficult[y]" may owe something to the initial proponent of the sex discrimination rule in Title VII, Representative Howard Smith. On some accounts, the congressman may have wanted (or at least was indifferent to the possibility of) broad language with wide-ranging effect. Not necessarily because he was interested in rooting out sex discrimination in all its forms, but because he may have hoped to scuttle the whole Civil Rights Act and thought that adding language covering sex discrimination would serve as a poison pill. See C. Whalen & B. Whalen, The Longest Debate: A Legislative History of the 1964 Civil Rights Act 115–118 (1985). Certainly nothing in the meager legislative history of this provision suggests it was meant to be read narrowly.

Whatever his reasons, thanks to the broad language Representative Smith introduced, many, maybe most, applications of Title VII's sex provision were "unanticipated" at the time of the law's adoption. In fact, many now-obvious applications met with heated opposition early on, even among those tasked with enforcing the law. In the years immediately following Title VII's passage, the EEOC officially opined that listing men's positions and women's positions separately in job postings was simply helpful rather than discriminatory. Franklin, 125 Harv. L. Rev., at 1340 (citing Press Release, EEOC (Sept. 22, 1965)). Some courts held that Title VII did not prevent an employer from firing an employee for refusing his sexual advances. See, *e.g.* , *Barnes v. Train* , 1974 WL 10628, *1 (D DC, Aug. 9, 1974). And courts held that a policy against hiring mothers but not fathers of young children wasn't discrimination because of sex. See *Phillips v. Martin Marietta Corp.* , 411 F.2d 1 (CA5 1969), rev'd, 400 U.S. 542, 91 S.Ct. 496, 27 L.Ed.2d 613 (1971) (*per curiam*).

Over time, though, the breadth of the statutory language proved too difficult to deny. By the end of the 1960s, the EEOC reversed its stance on sex-segregated job advertising. See Franklin, 125 Harv. L. Rev., at 1345. In 1971, this Court held that treating women with children differently from men with children violated Title VII. *Phillips* , 400 U.S. at 544, 91 S.Ct. 496. And by the late 1970s, courts began to recognize that sexual harassment can sometimes amount to sex discrimination. See, *e.g.* , *Barnes v. Costle* , 561 F.2d 983, 990 (CADC 1977). While to the modern eye each of these examples may seem "plainly [to] constitut[e] discrimination because of biological sex," *post* , at 1774 - 1775 (ALITO, J., dissenting), all were hotly contested for years following Title VII's enactment. And as with the discrimination we consider today, many federal judges long accepted interpretations of Title VII that excluded these situations. Cf. *post* , at 1833 - 1834 (KAVANAUGH, J., dissenting) (highlighting that certain lower courts have rejected Title VII claims based on homosexuality and transgender status). Would the employers have us undo every one of 1753 these unexpected applications too? *1753 The weighty implications of the employers' argument from expectations also reveal why they cannot hide behind the no-elephants-in-mouseholes canon. That canon recognizes that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman v. American Trucking Assns.* , Inc., 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001). But it has no relevance here. We can't deny that today's holding—that employers are prohibited from firing employees on the basis of homosexuality or transgender status—is an

elephant. But where's the mousehole? Title VII's prohibition of sex discrimination in employment is a major piece of federal civil rights legislation. It is written in starkly broad terms. It has repeatedly produced unexpected applications, at least in the view of those on the receiving end of them. Congress's key drafting choices—to focus on discrimination against individuals and not merely between groups and to hold employers liable whenever sex is a but-for cause of the plaintiff 's injuries—virtually guaranteed that unexpected applications would emerge over time. This elephant has never hidden in a mousehole; it has been standing before us all along.

With that, the employers are left to abandon their concern for expected applications and fall back to the last line of defense for all failing statutory interpretation arguments: naked policy appeals. If we were to apply the statute's plain language, they complain, any number of undesirable policy consequences would follow. Cf. *post* , at 1778 - 1784 (ALITO, J., dissenting). Gone here is any pretense of statutory interpretation; all that's left is a suggestion we should proceed without the law's guidance to do as we think best. But that's an invitation no court should ever take up. The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress. When it comes to statutory interpretation, our role is limited to applying the law's demands as faithfully as we can in the cases that come before us. As judges we possess no special expertise or authority to declare for ourselves what a self-governing people should consider just or wise. And the same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them.

What are these consequences anyway? The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual "because of such individual's sex." As used in Title VII, the term " 'discriminate against' " refers to "distinctions or differences in treatment that injure protected individuals." *Burlington N. & S.F.R.* , 548 U.S. at 59, 126 S.Ct. 2405. Firing employees because of a statutorily protected trait surely counts. Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these.

Separately, the employers fear that complying with Title VII's requirement in cases like ours may require some employers to violate their religious convictions. *1754 We are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society. But worries about how Title VII may intersect with religious liberties are nothing new; they even predate the statute's passage. As a result of its deliberations in adopting the law, Congress included an express statutory exception for religious organizations. § 2000e–1(a). This Court has also recognized that the First Amendment can bar the application of employment discrimination laws "to claims concerning the employment relationship between a religious institution and its ministers." *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* , 565 U.S. 171, 188, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012). And Congress has gone a step further yet in the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, codified at 42 U.S.C. § 2000bb *et seq.* That statute prohibits the federal

government from substantially burdening a person's exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest. § 2000bb–1. Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases. See § 2000bb–3.

But how these doctrines protecting religious liberty interact with Title VII are questions for future cases too. Harris Funeral Homes did unsuccessfully pursue a RFRA-based defense in the proceedings below. In its certiorari petition, however, the company declined to seek review of that adverse decision, and no other religious liberty claim is now before us. So while other employers in other cases may raise free exercise arguments that merit careful consideration, none of the employers before us today represent in this Court that compliance with Title VII will infringe their own religious liberties in any way.

*

Some of those who supported adding language to Title VII to ban sex discrimination may have hoped it would derail the entire Civil Rights Act. Yet, contrary to those intentions, the bill became law. Since then, Title VII's effects have unfolded with far-reaching consequences, some likely beyond what many in Congress or elsewhere expected.

But none of this helps decide today's cases. Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations. In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.

The judgments of the Second and Sixth Circuits in Nos. 17–1623 and 18–107 are affirmed. The judgment of the Eleventh Circuit in No. 17–1618 is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice ALITO, with whom Justice THOMAS joins, dissenting.

There is only one word for what the Court has done today: legislation. The document that the Court releases is in the form of a judicial opinion interpreting a statute, but that is deceptive.

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on *1755 any of five specified grounds: "race, color, religion, sex, [and] national origin." 42 U.S.C. § 2000e–2(a)(1). Neither "sexual orientation" nor "gender identity" appears on that list. For the past 45 years, bills have been introduced in Congress to add "sexual orientation" to the list,[1] and in recent years, bills have included "gender identity" as well.[2] But to date, none has passed both Houses.

1755

1 *E.g.* , H.R. 166, 94th Cong., 1st Sess., § 6 (1975); H.R. 451, 95th Cong., 1st Sess., § 6 (1977); S. 2081, 96th Cong., 1st Sess. (1979); S. 1708, 97th Cong., 1st Sess. (1981); S. 430, 98th Cong., 1st Sess. (1983); S. 1432, 99th Cong., 1st Sess., § 5 (1985); S. 464, 100th Cong., 1st Sess., § 5 (1987); H.R. 655, 101st Cong., 1st Sess., § 2 (1989); S. 574, 102d Cong., 1st Sess., § 5 (1991); H.R. 423, 103d Cong., 1st Sess., § 2 (1993); S. 932, 104th Cong., 1st Sess. (1995); H.R. 365, 105th Cong., 1st Sess., § 2 (1997); H.R. 311, 106th Cong., 1st Sess., § 2 (1999); H.R. 217, 107th Cong., 1st Sess., § 2 (2001); S. 16, 108th Cong., 1st Sess., §§ 701–704 (2003); H.R. 288, 109th Cong., 1st Sess., § 2 (2005).

2 See, *e.g.* , H.R. 2015, 110th Cong., 1st Sess. (2007); H.R. 3017, 111th Cong., 1st Sess. (2009); H.R. 1397, 112th Cong., 1st Sess. (2011); H.R. 1755, 113th Cong., 1st

Sess. (2013); H.R. 3185, 114th Cong., 1st Sess., § 7 (2015); H.R. 2282, 115th Cong., 1st Sess., § 7 (2017); H.R. 5, 116th Cong., 1st Sess. (2019).

Last year, the House of Representatives passed a bill that would amend Title VII by defining sex discrimination to include both "sexual orientation" and "gender identity," H.R. 5, 116th Cong., 1st Sess. (2019), but the bill has stalled in the Senate. An alternative bill, H.R. 5331, 116th Cong., 1st Sess. (2019), would add similar prohibitions but contains provisions to protect religious liberty.[3] This bill remains before a House Subcommittee.

[3] H.R. 5331, 116th Cong., 1st Sess., §§ 4(b), (c) (2019).

Because no such amendment of Title VII has been enacted in accordance with the requirements in the Constitution (passage in both Houses and presentment to the President, Art. I, § 7, cl. 2), Title VII's prohibition of discrimination because of "sex" still means what it has always meant. But the Court is not deterred by these constitutional niceties. Usurping the constitutional authority of the other branches, the Court has essentially taken H.R. 5's provision on employment discrimination and issued it under the guise of statutory interpretation.[4] A more brazen abuse of our authority to interpret statutes is hard to recall.

[4] Section 7(b) of H.R. 5 strikes the term "sex" in 42 U.S.C. § 2000e–2 and inserts: "SEX (INCLUDING SEXUAL ORIENTATION AND GENDER IDENTITY)."

The Court tries to convince readers that it is merely enforcing the terms of the statute, but that is preposterous. Even as understood today, the concept of discrimination because of "sex" is different from discrimination because of "sexual orientation" or "gender identity." And in any event, our duty is to interpret statutory terms to "mean what they conveyed to reasonable people *at the time they were written* ." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 16 (2012) (emphasis added). If every single living American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation—not to mention gender identity, a concept that was essentially unknown at the time.

The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually 1756*1756 represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should "update" old statutes so that they better reflect the current values of society. See A. Scalia, A Matter of Interpretation 22

(1997). If the Court finds it appropriate to adopt this theory, it should own up to what it is doing.[5]

[5] That is what Judge Posner did in the Seventh Circuit case holding that Title VII prohibits discrimination because of sexual orientation. See *Hively v. Ivy Tech Community College of Ind.* , 853 F.3d 339 (2017) (en banc). Judge Posner agreed with that result but wrote:

"*I would prefer to see us acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a halfcenturyold statute a meaning of 'sex discrimination' that the Congress that enacted it would not have accepted* ." *Id.* , at 357 (concurring opinion) (emphasis added).

Many will applaud today's decision because they agree on policy grounds with the Court's updating of Title VII. But the question in these cases is not whether discrimination because of sexual orientation or gender identity *should be* outlawed. The question is *whether Congress did that in 1964* .

It indisputably did not.

I

A

Title VII, as noted, prohibits discrimination "because of ... sex," § 2000e–2(a)(1), and in 1964, it was as clear as clear could be that this meant discrimination because of the genetic and anatomical characteristics that men and women have at the time of birth. Determined searching has not found a single dictionary from that time that defined "sex" to mean sexual orientation, gender identity, or "transgender status."[6] *Ante* , at 1737. (Appendix A, *infra* , to this opinion includes the full definitions of "sex" in the unabridged dictionaries in use in the 1960s.)

> 6 The Court does not define what it means by "transgender status," but the American Psychological Association describes "transgender" as "[a]n umbrella term encompassing those whose gender identities or gender roles differ from those typically associated with the sex they were assigned at birth." A Glossary: Defining Transgender Terms, 49 Monitor on Psychology 32 (Sept. 2018), https://www.apa.org/monitor/2018/09/ce-corner-glossary. It defines "gender identity" as "[a]n internal sense of being male, female or something else, which may or may not correspond to an individual's sex assigned at birth or sex characteristics." *Ibid.* Under these definitions, there is no apparent difference between discrimination because of transgender status and discrimination because of gender identity.

In all those dictionaries, the primary definition of "sex" was essentially the same as that in the then-most recent edition of Webster's New International Dictionary 2296 (def. 1) (2d ed. 1953): "[o]ne of the two divisions of organisms formed on the distinction of male and female." See also American Heritage Dictionary 1187 (def. 1(a)) (1969) ("The property or quality by which organisms are classified according to their reproductive functions"); Random House Dictionary of the English Language 1307 (def. 1) (1966) (Random House Dictionary) ("the fact or character of being either male or female"); 9 Oxford English Dictionary 577 (def. 1) (1933) ("Either of the two divisions of organic beings distinguished as male and female respectively").

The Court does not dispute that this is what "sex" means in Title VII, although it coyly suggests that there is at least some support for a different and potentially relevant definition. *Ante* , at 1739. (I address alternative definitions below. See Part I–B–3, *infra* .) But the Court declines to stand on that ground and instead "proceed[s] on the
1757 assumption that 'sex' ... *1757 refer[s] only to biological distinctions between male and female." *Ante* , at 1739.

If that is so, it should be perfectly clear that Title VII does not reach discrimination because of sexual orientation or gender identity. If "sex" in Title VII means biologically male or female, then discrimination because of sex means discrimination because the person in question is biologically male or biologically female, not because that person is sexually attracted to members of the same sex or identifies as a member of a particular gender.

How then does the Court claim to avoid that conclusion? The Court tries to cloud the issue by spending many pages discussing matters that are beside the point. The Court observes that a Title VII plaintiff need not show that "sex" was the sole or primary motive for a challenged employment decision or its sole or primary cause; that Title VII is limited to discrimination with respect to a list of specified actions (such as hiring, firing, etc.); and that Title VII protects individual rights, not group rights. See *ante* , at 1739 - 1741, 1742.

All that is true, but so what? In cases like those before us, a plaintiff must show that sex was a "motivating factor" in the challenged employment action, 42 U.S.C. § 2000e–2(m), so the question we must decide comes down to this: if an

individual employee or applicant for employment shows that his or her sexual orientation or gender identity was a "motivating factor" in a hiring or discharge decision, for example, is that enough to establish that the employer discriminated "because of ... sex"? Or, to put the same question in different terms, if an employer takes an employment action solely because of the sexual orientation or gender identity of an employee or applicant, has that employer necessarily discriminated because of biological sex?

The answers to those questions must be no, unless discrimination because of sexual orientation or gender identity inherently constitutes discrimination because of sex. The Court attempts to prove that point, and it argues, not merely that the terms of Title VII *can* be interpreted that way but that they *cannot reasonably be interpreted any other way* . According to the Court, the text is unambiguous. See *ante* , at 1749 - 1750, 1751, 1752 - 1753.

The arrogance of this argument is breathtaking. As I will show, there is not a shred of evidence that any Member of Congress interpreted the statutory text that way when Title VII was enacted. See Part III–B, *infra* . But the Court apparently thinks that this was because the Members were not "smart enough to realize" what its language means. *Hively v. Ivy Tech Community College of Ind.* , 853 F.3d 339, 357 (CA7 2017) (Posner, J., concurring). The Court seemingly has the same opinion about our colleagues on the Courts of Appeals, because until 2017, every single Court of Appeals to consider the question interpreted Title VII's prohibition against sex discrimination to mean discrimination on the basis of biological sex. See Part III–C, *infra* . And for good measure, the Court's conclusion that Title VII unambiguously reaches discrimination on the basis of sexual orientation and gender identity necessarily means that the EEOC failed to see the obvious for the first 48 years after Title VII became law.[7] Day in 1758*1758 and day out, the Commission enforced Title VII but did not grasp what discrimination "because of ... sex" unambiguously means. See Part III–C, *infra* .

[7] The EEOC first held that "discrimination against a transgender individual because that person is transgender" violates Title VII in 2012 in *Macy* v. *Holder* , 2012 WL 1435995, *11 (Apr. 20, 2012), though it earlier advanced that position in an *amicus* brief in Federal District Court in 2011, *ibid* ., n. 16. It did not hold that discrimination on the basis of sexual orientation violated Title VII until 2015. See *Baldwin* v. *Foxx* , 2015 WL 4397641 (July 15, 2015).

The Court's argument is not only arrogant, it is wrong. It fails on its own terms. "Sex," "sexual orientation," and "gender identity" are different concepts, as the Court concedes. *Ante* , at 1746 - 1747 ("homosexuality and transgender status are distinct concepts from sex"). And neither "sexual orientation" nor "gender identity" is tied to either of the two biological sexes. See *ante* , at 1742 (recognizing that "discrimination on these bases" does not have "some disparate impact on one sex or another"). Both men and women may be attracted to members of the opposite sex, members of the same sex, or members of both sexes.[8] And individuals who are born with the genes and organs of either biological sex may identify with a different gender.[9]

[8] "Sexual orientation refers to a person's erotic response tendency or sexual attractions, be they directed toward individuals of the same sex (homosexual), the other sex (heterosexual), or both sexes (bisexual)." 1 B. Sadock, V. Sadock, & P. Ruiz, Comprehensive Textbook of Psychiatry 2061 (9th ed. 2009); see also American Heritage Dictionary 1607 (5th ed. 2011) (defining "sexual orientation" as "[t]he direction of a person's sexual interest, as toward people of the opposite sex, the same sex, or both sexes"); Webster's New College Dictionary 1036 (3d ed. 2008) (defining "sexual orientation"

as "[t]he direction of one's sexual interest toward members of the same, opposite, or both sexes").

9 See n. 6, *supra* ; see also Sadock, *supra,* at 2063 ("transgender" refers to "any individual who identifies with and adopts the gender role of a member of the other biological sex").

Using slightly different terms, the Court asserts again and again that discrimination because of sexual orientation or gender identity inherently or necessarily entails discrimination because of sex. See *ante* , at 1737 (When an employer "fires an individual for being homosexual or transgender," " [s]ex plays a necessary and undisguisable role in the decision"); *ante* , at 1741 ("[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex"); *ante* , at 1742 ("[W]hen an employer discriminates against homosexual or transgender employees, [the] employer ... inescapably *intends* to rely on sex in its decisionmaking"); *ante* , at 1743 ("For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex"); *ante* , at 1744 ("When an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex"); *ante* , at 1747 ("[D]iscrimination based on homosexuality or transgender status necessarily entails discrimination based on sex"). But repetition of an assertion does not make it so, and the Court's repeated assertion is demonstrably untrue.

Contrary to the Court's contention, discrimination because of sexual orientation or gender identity does not in and of itself entail discrimination because of sex. We can see this because it is quite possible for an employer to discriminate on those grounds without taking the sex of an individual applicant or employee into account. An employer can have a policy that says: "We do not hire gays, lesbians, or transgender individuals." And an employer can implement this policy without paying any attention to or even knowing the biological sex of gay, lesbian, and transgender applicants. In fact, at the time of the enactment of Title VII, the United States military had a blanket 1759 policy of refusing to enlist gays *1759 or lesbians, and under this policy for years thereafter, applicants for enlistment were required to complete a form that asked whether they were "homosexual." Appendix D, *infra* , at 1803, 1816.

At oral argument, the attorney representing the employees, a prominent professor of constitutional law, was asked if there would be discrimination because of sex if an employer with a blanket policy against hiring gays, lesbians, and transgender individuals implemented that policy without knowing the biological sex of any job applicants. Her candid answer was that this would "not" be sex discrimination.[10] And she was right.

10 See Tr. of Oral Arg. in Nos. 17–1618, 17–1623, pp. 69–70 ("If there was that case, it might be the rare case in which sexual orientation discrimination is not a subset of sex"); see also *id.* , at 69 ("Somebody who comes in and says I'm not going to tell you what my sex is, but, believe me, I was fired for my sexual orientation, that person will lose").

The attorney's concession was necessary, but it is fatal to the Court's interpretation, for if an employer discriminates against individual applicants or employees without even knowing whether they are male or female, it is impossible to argue that the employer intentionally discriminated because of sex. Contra, *ante* , at 1746 - 1747. An employer cannot intentionally discriminate on the basis of a characteristic of which the employer has no knowledge. And if an employer does not violate Title VII by discriminating on the basis of sexual orientation or gender identity without knowing the sex of the affected individuals, there is no reason why the same employer could not lawfully implement the

same policy even if it knows the sex of these individuals. If an employer takes an adverse employment action for a perfectly legitimate reason—for example, because an employee stole company property—that action is not converted into sex discrimination simply because the employer knows the employee's sex. As explained, a disparate treatment case requires proof of intent—*i.e.,* that the employee's sex motivated the firing. In short, what this example shows is that discrimination because of sexual orientation or gender identity does not inherently or necessarily entail discrimination because of sex, and for that reason, the Court's chief argument collapses.

Trying to escape the consequences of the attorney's concession, the Court offers its own hypothetical:

> "Suppose an employer's application form offered a single box to check if the applicant is either black or Catholic. If the employer refuses to hire anyone who checks that box, would we conclude the employer has complied with Title VII, so long as it studiously avoids learning any particular applicant's race or religion? Of course not." *Ante* , at 1746.

How this hypothetical proves the Court's point is a mystery. A person who checked that box would presumably be black, Catholic, or both, and refusing to hire an applicant because of race or religion is prohibited by Title VII. Rejecting applicants who checked a box indicating that they are homosexual is entirely different because it is impossible to tell from that answer whether an applicant is male or female.

The Court follows this strange hypothetical with an even stranger argument. The Court argues that an applicant could not answer the question whether he or she is homosexual without knowing something about sex. If the applicant was unfamiliar with the term "homosexual," the applicant would have to look it up or ask what the term means. And because this applicant would have to take into account his or her sex and that of
1760 the persons to whom he or *1760 she is sexually attracted to answer the question, it follows, the Court reasons, that an employer could not reject this applicant without taking the applicant's sex into account. See *ante* , at 1746 - 1747.

This is illogical. Just because an applicant cannot say whether he or she is homosexual without knowing his or her own sex and that of the persons to whom the applicant is attracted, it does not follow that an employer cannot reject an applicant based on homosexuality without knowing the applicant's sex.

While the Court's imagined application form proves nothing, another hypothetical case offered by the Court is telling. But what it proves is not what the Court thinks. The Court posits:

> "Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman." *Ante* , at 1742.

This example disproves the Court's argument because it is perfectly clear that the employer's motivation in firing the female employee had nothing to do with that employee's sex. The employer presumably knew that this employee was a woman before she was invited to the fateful party. Yet the employer, far from holding her biological sex against her, rated her a "model employee." At the party, the employer learned something new, her sexual orientation, and it was this new information that motivated her discharge. So this is another example showing that

discrimination because of sexual orientation does not inherently involve discrimination because of sex.

In addition to the failed argument just discussed, the Court makes two other arguments, more or less in passing. The first of these is essentially that sexual orientation and gender identity are closely related to sex. The Court argues that sexual orientation and gender identity are "inextricably bound up with sex," *ante* , at 1742, and that discrimination on the basis of sexual orientation or gender identity involves the application of "sex-based rules," *ante* , at 1745 - 1746. This is a variant of an argument found in many of the briefs filed in support of the employees and in the lower court decisions that agreed with the Court's interpretation. All these variants stress that sex, sexual orientation, and gender identity are related concepts. The Seventh Circuit observed that "[i]t would require considerable calisthenics to remove 'sex' from 'sexual orientation.' " *Hively* , 853 F.3d at 350.[11] The Second Circuit wrote that sex is necessarily "a factor in sexual orientation" and further concluded that "sexual orientation is a function of sex." 883 F.3d 100, 112–113 (CA2 2018) (en banc). Bostock's brief and those of *amici* supporting his position contend that sexual orientation is "a sex-based consideration."[12] Other briefs state that sexual orientation is "a function of sex"[13] or is *1761 "intrinsically related to sex."[14] Similarly, Stephens argues that sex and gender identity are necessarily intertwined: "By definition, a transgender person is someone who lives and identifies with a sex different than the sex assigned to the person at birth."[15]

11 See also Brief for William N. Eskridge Jr. et al. as *Amici Curiae* 2 ("[T]here is no reasonable way to disentangle sex from same-sex attraction or transgender status").

12 Brief for Petitioner in No. 17–1618, at 14; see also Brief for Southern Poverty Law Center et al. as *Amici Curiae* 7–8.

13 Brief for Scholars Who Study the LGB Population as *Amici Curiae* in Nos. 17–1618, 17–1623, p. 10.

14 Brief for American Psychological Association et al. as *Amici Curiae* 11.

15 Reply Brief for Respondent Aimee Stephens in No. 18–107, p. 5.

It is curious to see this argument in an opinion that purports to apply the purest and highest form of textualism because the argument effectively amends the statutory text. Title VII prohibits discrimination because of *sex itself,* not everything that is related to, based on, or defined with reference to, "sex." Many things are related to sex. Think of all the nouns other than "orientation" that are commonly modified by the adjective "sexual." Some examples yielded by a quick computer search are "sexual harassment," "sexual assault," "sexual violence," "sexual intercourse," and "sexual content."

Does the Court really think that Title VII prohibits discrimination on all these grounds? Is it unlawful for an employer to refuse to hire an employee with a record of sexual harassment in prior jobs? Or a record of sexual assault or violence?

To be fair, the Court does not claim that Title VII prohibits discrimination because of *everything* that is related to sex. The Court draws a distinction between things that are "inextricably" related and those that are related in "some vague sense." *Ante* , at 1741 - 1742. Apparently the Court would graft onto Title VII some arbitrary line separating the things that are related closely enough and those that are not.[16] And it would do this in the name of high textualism. An additional argument made in passing also fights the text of Title VII and the policy it reflects. The Court proclaims that "[a]n individual's homosexuality or transgender status is not relevant to employment decisions." *Ante* , at 1741. That is the policy view of many people in 2020, and perhaps Congress would have amended Title VII to implement it if this Court had not intervened. But that is not the policy embodied in

Title VII in its current form. Title VII prohibits discrimination based on five specified grounds, and neither sexual orientation nor gender identity is on the list. As long as an employer does not discriminate based on one of the listed grounds, the employer is free to decide for itself which characteristics are "relevant to [its] employment decisions." *Ibid.* By proclaiming that sexual orientation and gender identity are "not relevant to employment decisions," the Court updates Title VII to reflect what it regards as 2020 values.

16 Notably, Title VII itself already suggests a line, which the Court ignores. The statute specifies that the terms "because of sex" and "on the basis of sex" cover certain conditions that are biologically tied to sex, namely, "pregnancy, childbirth, [and] related medical conditions." 42 U.S.C. § 2000e(k). This definition should inform the meaning of "because of sex" in Title VII more generally. Unlike pregnancy, neither sexual orientation nor gender identity is biologically linked to women or men.

The Court's remaining argument is based on a hypothetical that the Court finds instructive. In this hypothetical, an employer has two employees who are "attracted to men," and "*to the employer's mind* " the two employees are "materially identical" except that one is a man and the other is a woman. *Ante* , at 1741 (emphasis added). The Court reasons that if the employer fires the man but not the woman, the employer is necessarily motivated by the man's biological sex. *Ante* , at 1741 - 1742. After all, if two employees are identical in every respect but sex, and the 1762 employer *1762 fires only one, what other reason could there be?

The problem with this argument is that the Court loads the dice. That is so because in the mind of an employer who does not want to employ individuals who are attracted to members of the same sex, these two employees are not materially identical in every respect but sex. On the contrary, they differ in another way that the employer thinks is quite material. And until Title VII is amended to add sexual orientation as a prohibited ground, this is a view that an employer is permitted to implement. As noted, other than prohibiting discrimination on any of five specified grounds, "race, color, religion, sex, [and] national origin." 42 U.S.C. § 2000e–2(a)(1), Title VII allows employers to decide whether two employees are "materially identical." Even idiosyncratic criteria are permitted; if an employer thinks that Scorpios make bad employees, the employer can refuse to hire Scorpios. Such a policy would be unfair and foolish, but under Title VII, it is permitted. And until Title VII is amended, so is a policy against employing gays, lesbians, or transgender individuals.

Once this is recognized, what we have in the Court's hypothetical case are two employees who differ in *two* ways—sex and sexual orientation—and if the employer fires one and keeps the other, all that can be inferred is that the employer was motivated either entirely by sexual orientation, entirely by sex, or in part by both. We cannot infer with any certainty, as the hypothetical is apparently meant to suggest, that the employer was motivated even in part by sex. The Court harps on the fact that under Title VII a prohibited ground need not be the sole motivation for an adverse employment action, see *ante* , at 1741 - 1742, 1743 - 1745, 1747 - 1748, but its example does not show that sex necessarily played *any* part in the employer's thinking.

The Court tries to avoid this inescapable conclusion by arguing that sex is really the only difference between the two employees. This is so, the Court maintains, because both employees "are attracted to men." *Ante* , at 1741 - 1742. Of course, the employer would couch its objection to the man differently. It would say that its objection was his sexual orientation. So this may appear to leave us with a battle of labels. If the employer's objection to the male employee is characterized as attraction to men, it seems that he is just like the woman in all respects except sex and that the

employer's disparate treatment must be based on that one difference. On the other hand, if the employer's objection is sexual orientation or homosexuality, the two employees differ in two respects, and it cannot be inferred that the disparate treatment was due even in part to sex.

The Court insists that its label is the right one, and that presumably is why it makes such a point of arguing that an employer cannot escape liability under Title VII by giving sex discrimination some other name. See *ante* , at 1743 - 1744, 1745 - 1746. That is certainly true, but so is the opposite. Something that is *not* sex discrimination cannot be converted into sex discrimination by slapping on that label. So the Court cannot prove its point simply by labeling the employer's objection as "attract[ion] to men." *Ante* , at 1741 - 1742. Rather, the Court needs to show that its label is the correct one.

And a labeling standoff would not help the Court because that would mean that the bare text of Title VII does not unambiguously show that its interpretation is right. The Court would have no justification for its stubborn refusal to look any
1763 further.*1763 As it turns out, however, there is no standoff. It can easily be shown that the employer's real objection is not "attract[ion] to men" but homosexual orientation.

In an effort to prove its point, the Court carefully includes in its example just two employees, a homosexual man and a heterosexual woman, but suppose we add two more individuals, a woman who is attracted to women and a man who is attracted to women. (A large employer will likely have applicants and employees who fall into all four categories, and a small employer can potentially have all four as well.) We now have the four exemplars listed below, with the discharged employees crossed out:

~~Man attracted to men~~

Woman attracted to men

~~Woman attracted to women~~

Man attracted to women

The discharged employees have one thing in common. It is not biological sex, attraction to men, or attraction to women. It is attraction to members of their own sex—in a word, sexual orientation. And that, we can infer, is the employer's real motive.

In sum, the Court's textual arguments fail on their own terms. The Court tries to prove that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex," *ante,* at 1741, but as has been shown, it is entirely possible for an employer to do just that. "[H]omosexuality and transgender status are distinct concepts from sex," *ante* , at 1746 - 1747, and discrimination because of sexual orientation or transgender status does not inherently or necessarily constitute discrimination because of sex. The Court's arguments are squarely contrary to the statutory text.

But even if the words of Title VII did not definitively refute the Court's interpretation, that would not justify the Court's refusal to consider alternative interpretations. The Court's excuse for ignoring everything other than the bare statutory text is that the text is unambiguous and therefore no one can reasonably interpret the text in any way other than the Court does. Unless the Court has met that high standard, it has no justification for its blinkered approach. And to say that the Court's interpretation is the only possible reading is indefensible.

B

Although the Court relies solely on the arguments discussed above, several other arguments figure prominently in the decisions of the lower courts and in briefs submitted by or in support of the employees. The Court apparently finds these arguments unpersuasive, and so do I, but for the sake of completeness, I will address them briefly.

1

One argument, which relies on our decision in *Price Waterhouse v. Hopkins* , 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion), is that discrimination because of sexual orientation or gender identity violates Title VII because it constitutes prohibited discrimination on the basis of sex stereotypes. See 883 F.3d at 119–123 ; *Hively* , 853 F.3d at 346 ; 884 F.3d 560, 576–577 (CA6 2018). The argument goes like this. Title VII prohibits discrimination based on stereotypes about the way men and women should behave; the belief that a person should be attracted only to persons of the opposite sex and the belief that a person should identify with his or her biological sex are examples of such stereotypes; therefore, discrimination on either of these 1764grounds is unlawful.*1764 This argument fails because it is based on a faulty premise, namely, that Title VII forbids discrimination based on sex stereotypes. It does not. It prohibits discrimination because of "sex," and the two concepts are not the same. See *Price Waterhouse* , 490 U.S. at 251, 109 S.Ct. 1775. That does not mean, however, that an employee or applicant for employment cannot prevail by showing that a challenged decision was based on a sex stereotype. Such evidence is relevant to prove discrimination because of sex, and it may be convincing where the trait that is inconsistent with the stereotype is one that would be tolerated and perhaps even valued in a person of the opposite sex. See *ibid.*

Much of the plaintiff 's evidence in *Price Waterhouse* was of this nature. The plaintiff was a woman who was passed over for partnership at an accounting firm, and some of the adverse comments about her work appeared to criticize her for being forceful and insufficiently "feminin[e]." *Id.* , at 235–236, 109 S.Ct. 1775.

The main issue in *Price Waterhouse* —the proper allocation of the burdens of proof in a so-called mixed motives Title VII case—is not relevant here, but the plurality opinion, endorsed by four Justices, commented on the issue of sex stereotypes. The plurality observed that "sex stereotypes do not inevitably prove that gender played a part in a particular employment decision" but "can certainly be *evidence* that gender played a part." *Id.* , at 251, 109 S.Ct. 1775.[17] And the plurality made it clear that "[t]he plaintiff must show that the employer actually relied on her gender in making its decision." *Ibid.*

[17] Two other Justices concurred in the judgment but did not comment on the issue of stereotypes. See *id.* , at 258–261, 109 S.Ct. 1775 (opinion of White, J.); *id.* , at 261–279, 109 S.Ct. 1775 (opinion of O'Connor, J.). And Justice Kennedy reiterated on behalf of the three Justices in dissent that "Title VII creates no independent cause of action for sex stereotyping," but he added that " [e]vidence of use by decisionmakers of sex stereotypes is, of course, quite relevant to the question of discriminatory intent." *Id.* , at 294, 109 S.Ct. 1775.

Plaintiffs who allege that they were treated unfavorably because of their sexual orientation or gender identity are not in the same position as the plaintiff in *Price Waterhouse* . In cases involving discrimination based on sexual orientation or gender identity, the grounds for the employer's decision—that individuals should be sexually attracted only to persons of the opposite biological sex or should identify with their biological sex—apply equally to men and women. " [H]eterosexuality is not a *female* stereotype; it not a *male* stereotype; it is not a *sexspecific* stereotype at all." *Hively* , 853 F.3d at 370 (Sykes, J., dissenting).

To be sure, there may be cases in which a gay, lesbian, or transgender individual can make a claim like the one in *Price Waterhouse* . That is, there may be cases where traits or behaviors that some people associate with gays, lesbians, or transgender individuals are tolerated or valued in persons of one biological sex but not the other. But that is a different matter.

2

A second prominent argument made in support of the result that the Court now reaches analogizes discrimination against gays and lesbians to discrimination against a person who is married to or has an intimate relationship with a person of a different race. Several lower court cases have held that discrimination on this ground violates Title VII. See, *e.g.* , *Holcomb v. Iona College* , 521 F.3d 130 (CA2 2008) ; *Parr v. Woodmen of World Life Ins. Co.* , 791 F.2d 888 (CA11 1986). And the 1765*1765 logic of these decisions, it is argued, applies equally where an employee or applicant is treated unfavorably because he or she is married to, or has an intimate relationship with, a person of the same sex.

This argument totally ignores the historically rooted reason why discrimination on the basis of an interracial relationship constitutes race discrimination. And without taking history into account, it is not easy to see how the decisions in question fit the terms of Title VII.

Recall that Title VII makes it unlawful for an employer to discriminate against an individual "because of *such individual's race* ." 42 U.S.C. § 2000e–2(a) (emphasis added). So if an employer is happy to employ whites and blacks but will not employ any employee in an interracial relationship, how can it be said that the employer is discriminating against either whites or blacks "because of such individual's race"? This employer would be applying the same rule to all its employees regardless of their race.

The answer is that this employer is discriminating on a ground that history tells us is a core form of race discrimination.[18] "It would require absolute blindness to the history of racial discrimination in this country not to understand what is at stake in such cases .... A prohibition on 'race-mixing' was ... grounded in bigotry against a particular race and was an integral part of preserving the rigid hierarchical distinction that denominated members of the black race as inferior to whites." 883 F.3d at 158–159 (Lynch, J., dissenting).

[18] Notably, Title VII recognizes that in light of history distinctions on the basis of race are always disadvantageous, but it permits certain distinctions based on sex. Title 42 U.S.C. § 2000e–2(e)(1) allows for "instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise." Race is wholly absent from this list.

Discrimination because of sexual orientation is different. It cannot be regarded as a form of sex discrimination on the ground that applies in race cases since discrimination because of sexual orientation is not historically tied to a project that aims to subjugate either men or women. An employer who discriminates on this ground might be called "homophobic" or "transphobic," but not sexist. See *Wittmer v. Phillips 66 Co.* , 915 F.3d 328, 338 (CA5 2019) (Ho, J., concurring).

3

The opinion of the Court intimates that the term "sex" was not universally understood in 1964 to refer just to the categories of male and female, see *ante* , at 1739, and while the Court does not take up any alternative definition as a ground for its decision, I will say a word on this subject.

As previously noted, the definitions of "sex" in the unabridged dictionaries in use in the 1960s are reproduced in Appendix A, *infra* . Anyone who examines those definitions can see that the

primary definition in every one of them refers to the division of living things into two groups, male and female, based on biology, and most of the definitions further down the list are the same or very similar. In addition, some definitions refer to heterosexual sex acts. See Random House Dictionary 1307 ("coitus," "sexual intercourse" (defs. 5–6)); American Heritage Dictionary, at 1766 1187 ("sexual intercourse" (def. 5)).[19] *1766 Aside from these, what is there? One definition, "to neck passionately," Random House Dictionary 1307 (def. 8), refers to sexual conduct that is not necessarily heterosexual. But can it be seriously argued that one of the aims of Title VII is to outlaw employment discrimination against employees, whether heterosexual or homosexual, who engage in necking? And even if Title VII had that effect, that is not what is at issue in cases like those before us.

[19] See American Heritage Dictionary 1188 (1969) (defining "sexual intercourse"); Webster's Third New International Dictionary 2082 (1966) (same); Random House Dictionary of the English Language 1308 (1966) (same).

That brings us to the two remaining subsidiary definitions, both of which refer to sexual urges or instincts and their manifestations. See the fourth definition in the American Heritage Dictionary, at 1187 ("the sexual urge or instinct as it manifests itself in behavior"), and the fourth definition in both Webster's Second and Third ("[p]henomena of sexual instincts and their manifestations," Webster's New International Dictionary, at 2296 (2d ed.); Webster's Third New International Dictionary 2081 (1966)). Since both of these come after three prior definitions that refer to men and women, they are most naturally read to have the same association, and in any event, is it plausible that Title VII prohibits discrimination based on *any* sexual urge or instinct and its manifestations? The urge to rape?

Viewing all these definitions, the overwhelming impact is that discrimination because of "sex" was understood during the era when Title VII was enacted to refer to men and women. (The same is true of current definitions, which are reproduced in Appendix B, *infra* .) This no doubt explains why neither this Court nor any of the lower courts have tried to make much of the dictionary definitions of sex just discussed.

II

A

So far, I have not looked beyond dictionary definitions of "sex," but textualists like Justice Scalia do not confine their inquiry to the scrutiny of dictionaries. See Manning, Textualism and the Equity of the Statute, 101 Colum. L. Rev. 1, 109 (2001). Dictionary definitions are valuable because they are evidence of what people at the time of a statute's enactment would have understood its words to mean. *Ibid.* But they are not the only source of relevant evidence, and what matters in the end is the answer to the question that the evidence is gathered to resolve: How would the terms of a statute have been understood by ordinary people at the time of enactment?

Justice Scalia was perfectly clear on this point. The words of a law, he insisted, "mean *what they conveyed to reasonable people at the time.* " Reading Law, at 16 (emphasis added).[20]

[20] See also *Chisom v. Roemer* , 501 U.S. 380, 405, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991) (Scalia, J., dissenting) ("We are to read the words of [a statutory] text as any ordinary Member of Congress would have read them ... and apply the meaning so determined").

Leading proponents of Justice Scalia's school of textualism have expounded on this principle and explained that it is grounded on an understanding of the way language works. As Dean John F. Manning explains, "the meaning of language depends on the way a linguistic community uses

words and phrases in context." What Divides Textualists From Purposivists? 106 Colum. L. Rev. 70, 78 (2006). "[O]ne can make sense of others' communications only by placing them in their appropriate social and linguistic context," *id* ., at 79–80, and this is no less true of statutes than any other verbal communications. "[S]tatutes convey meaning only because members of a relevant linguistic community apply shared 1767background conventions for understanding *1767 how particular words are used in particular contexts." Manning, The Absurdity Doctrine, 116 Harv. L. Rev. 2387, 2457 (2003). Therefore, judges should ascribe to the words of a statute "what a reasonable person conversant with applicable social conventions would have understood them to be adopting." Manning, 106 Colum. L. Rev., at 77. Or, to put the point in slightly different terms, a judge interpreting a statute should ask " 'what one would ordinarily be understood as saying, given the circumstances in which one said it.' " Manning, 116 Harv. L. Rev., at 2397–2398.

Judge Frank Easterbrook has made the same points:

> "Words are arbitrary signs, having meaning only to the extent writers and readers share an understanding.... Language in general, and legislation in particular, is a social enterprise to which both speakers and listeners contribute, drawing on background understandings and the structure and circumstances of the utterance." *Herrmann v. Cencom Cable Assocs., Inc.* , 978 F.2d 978, 982 (CA7 1992).

Consequently, "[s]licing a statute into phrases while ignoring ... the setting of the enactment ... is a formula for disaster." *Ibid* . ; see also *Continental Can Co. v. Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund* , 916 F.2d 1154, 1157 (CA7 1990) ("You don't have to be Ludwig Wittgenstein or Hans-Georg Gadamer to know that successful communication depends on meanings shared by interpretive communities").

Thus, when textualism is properly understood, it calls for an examination of the social context in which a statute was enacted because this may have an important bearing on what its words were understood to mean at the time of enactment. Textualists do not read statutes as if they were messages picked up by a powerful radio telescope from a distant and utterly unknown civilization. Statutes consist of communications between members of a particular linguistic community, one that existed in a particular place and at a particular time, and these communications must therefore be interpreted as they were understood by that community at that time.

For this reason, it is imperative to consider how Americans in 1964 would have understood Title VII's prohibition of discrimination because of sex. To get a picture of this, we may imagine this scene. Suppose that, while Title VII was under consideration in Congress, a group of average Americans decided to read the text of the bill with the aim of writing or calling their representatives in Congress and conveying their approval or disapproval. What would these ordinary citizens have taken "discrimination because of sex" to mean? Would they have thought that this language prohibited discrimination because of sexual orientation or gender identity?

B

The answer could not be clearer. In 1964, ordinary Americans reading the text of Title VII would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity. The *ordinary meaning* of discrimination because of "sex" was discrimination because of a person's biological sex, not sexual orientation or gender identity. The possibility that discrimination on

either of these grounds might fit within some exotic understanding of sex discrimination would not have crossed their minds.

1

In 1964, the concept of prohibiting discrimination 1768"because of sex" was no novelty. *1768 It was a familiar and well-understood concept, and what it meant was equal treatment for men and women.

Long before Title VII was adopted, many pioneering state and federal laws had used language substantively indistinguishable from Title VII's critical phrase, "discrimination because of sex." For example, the California Constitution of 1879 stipulated that no one, "*on account of sex* , [could] be disqualified from entering upon or pursuing any lawful business, vocation, or profession." Art. XX, § 18 (emphasis added). It also prohibited a student's exclusion from any state university department "on account of sex." Art. IX, § 9; accord, Mont. Const., Art. XI, § 9 (1889).

Wyoming's first Constitution proclaimed broadly that "[b]oth male and female citizens of this state shall equally enjoy all civil, political and religious rights and privileges," Art. VI, § 1 (1890), and then provided specifically that "[i]n none of the public schools ... shall distinction or discrimination be made *on account of sex* ," Art. VII, § 10 (emphasis added); see also § 16 (the "university shall be equally open to students of both sexes"). Washington's Constitution likewise required "ample provision for the education of all children ... without distinction or preference *on account of ... sex* ." Art. IX, § 1 (1889) (emphasis added).

The Constitution of Utah, adopted in 1895, provided that the right to vote and hold public office "shall not be denied or abridged *on account of sex* ." Art. IV, § 1 (emphasis added). And in the next sentence it made clear what "on account of sex" meant, stating that "[b]oth male and female citizens ... shall enjoy equally all civil, political and religious rights and privileges." *Ibid* .

The most prominent example of a provision using this language was the Nineteenth Amendment, ratified in 1920, which bans the denial or abridgment of the right to vote "on account of sex." U.S. Const., Amdt. 19. Similar language appeared in the proposal of the National Woman's Party for an Equal Rights Amendment. As framed in 1921, this proposal forbade all "political, civil or legal disabilities or inequalities *on account of sex* , [o]r on account of marriage." Women Lawyers Meet: Representatives of 20 States Endorse Proposed Equal Rights Amendment, N. Y. Times, Sept. 16, 1921, p. 10.

Similar terms were used in the precursor to the Equal Pay Act. Introduced in 1944 by Congresswoman Winifred C. Stanley, it proclaimed that "[d]iscrimination against employees, in rates of compensation paid, *on account of sex* " was "contrary to the public interest." H.R. 5056, 78th Cong., 2d Sess.

In 1952, the new Constitution for Puerto Rico, which was approved by Congress, 66 Stat. 327, prohibited all "discrimination ... *on account of ... sex* ," Art. II, Bill of Rights § 1 (emphasis added), and in the landmark Immigration and Nationality Act of 1952, Congress outlawed discrimination in naturalization "*because of ... sex* ." 8 U.S.C. § 1422 (emphasis added).

In 1958, the International Labour Organisation, a United Nations agency of which the United States is a member, recommended that nations bar employment discrimination "made *on the basis of ... sex* ." Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, Art. 1(a), June 25, 1958, 362 U. N. T. S. 32 (emphasis added).

In 1961, President Kennedy ordered the Civil Service Commission to review and modify personnel policies "to assure that selection for any

career position is hereinafter made solely on the
1769 basis of individual *1769 merit and fitness, *without regard to sex* ."[21] He concurrently established a "Commission on the Status of Women" and directed it to recommend policies "for overcoming discriminations in government and private employment *on the basis of sex* ." Exec. Order No. 10980, 3 CFR 138 (1961 Supp.) (emphasis added).

21 J. Kennedy, Statement by the President on the Establishment of the President's Commission on the Status of Women 3 (Dec. 14, 1961) (emphasis added), https://www.jfklibrary.org/asset-viewer/archives/JFKPOF/093/JFKPOF-093-004.

In short, the concept of discrimination "because of," "on account of," or "on the basis of " sex was well understood. It was part of the campaign for equality that had been waged by women's rights advocates for more than a century, and what it meant was equal treatment for men and women.[22]

22 Analysis of the way Title VII's key language was used in books and articles during the relevant time period supports this conclusion. A study searched a vast database of documents from that time to determine how the phrase "discriminate against ... because of [some trait]" was used. Phillips, The Overlooked Evidence in the Title VII Cases: The Linguistic (and Therefore Textualist) Principle of Compositionality (manuscript, at 3) (May 11, 2020) (brackets in original), https://ssrn.com/abstract=3585940. The study found that the phrase was used to denote discrimination against "someone ... motivated by prejudice, or biased ideas or attitudes ... directed at people with that trait in particular." *Id.* , at 7 (emphasis deleted). In other words, "*discriminate against* " was "associated with negative treatment directed at members of a discrete group." *Id.,* at 5. Thus, as used in 1964, "discrimination because of sex" would have been understood to mean discrimination against a woman or a man based on "unfair beliefs or attitudes" about members of that particular sex. *Id.,* at 7.

2

Discrimination "because of sex" was not understood as having anything to do with discrimination because of sexual orientation or transgender status. Any such notion would have clashed in spectacular fashion with the societal norms of the day.

For most 21st-century Americans, it is painful to be reminded of the way our society once treated gays and lesbians, but any honest effort to understand what the terms of Title VII were understood to mean when enacted must take into account the societal norms of that time. And the plain truth is that in 1964 homosexuality was thought to be a mental disorder, and homosexual conduct was regarded as morally culpable and worthy of punishment.

In its then-most recent Diagnostic and Statistical Manual of Mental Disorders (1952) (DSM–I), the American Psychiatric Association (APA) classified same-sex attraction as a "sexual deviation," a particular type of "sociopathic personality disturbance," *id.* , at 38–39, and the next edition, issued in 1968, similarly classified homosexuality as a "sexual deviatio[n]," Diagnostic and Statistical Manual of Mental Disorders 44 (2d ed.) (DSM–II). It was not until the sixth printing of the DSM–II in 1973 that this
1770 was changed.[23] *1770 Society's treatment of homosexuality and homosexual conduct was consistent with this understanding. Sodomy was a crime in every State but Illinois, see W. Eskridge, Dishonorable Passions 387–407 (2008), and in the District of Columbia, a law enacted by Congress made sodomy a felony punishable by imprisonment for up to 10 years and permitted the indefinite civil commitment of "sexual psychopath[s]," Act of June 9, 1948, §§ 104, 201–207, 62 Stat. 347–349.[24]

23 APA, Homosexuality and Sexual Orientation Disturbance : Proposed Change in DSM–II, 6th Printing, p. 44 (APA Doc. Ref. No. 730008, 1973) (reclassifying "homosexuality" as a "[s]exual orientation disturbance," a category "for individuals whose sexual interests are directed primarily toward people of the same sex and who are either disturbed by ... or wish to change their sexual orientation," and explaining that "homosexuality ... by itself does not constitute a psychiatric disorder"); see also APA, Diagnostic and Statistical Manual of Mental Disorders 281–282 (3d ed. 1980) (DSM–III) (similarly creating category of "Ego-dystonic Homosexuality" for "homosexuals for whom changing sexual orientation is a persistent concern," while observing that "homosexuality itself is not considered a mental disorder"); *Obergefell* v. *Hodges* , 576 U.S. 644, 661, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015).

24 In 1981, after achieving home rule, the District attempted to decriminalize sodomy, see D. C. Act No. 4–69, but the House of Representatives vetoed the bill, H. Res. 208, 97th Cong., 1st Sess. (1981); 127 Cong. Rec. 22764–22779 (1981). Sodomy was not decriminalized in the District until 1995. See Anti-Sexual Abuse Act of 1994, § 501(b), 41 D. C. Reg. 53 (1995), enacted as D. C. Law 10–257.

This view of homosexuality was reflected in the rules governing the federal work force. In 1964, federal "[a]gencies could deny homosexual men and women employment because of their sexual orientation," and this practice continued until 1975. GAO, D. Heivilin, Security Clearances: Consideration of Sexual Orientation in the Clearance Process 2 (GAO/NSIAD–95–21, 1995). See, *e.g.* , *Anonymous v. Macy* , 398 F.2d 317, 318 (CA5 1968) (affirming dismissal of postal employee for homosexual acts).

In 1964, individuals who were known to be homosexual could not obtain security clearances, and any who possessed clearances were likely to lose them if their orientation was discovered. A 1953 Executive Order provided that background investigations should look for evidence of "sexual perversion," as well as "[a]ny criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct." Exec. Order No. 10450, § 8(a)(1)(iii), 3 CFR 938 (1949–1953 Comp.). "Until about 1991, when agencies began to change their security policies and practices regarding sexual orientation, there were a number of documented cases where defense civilian or contractor employees' security clearances were denied or revoked because of their sexual orientation." GAO, Security Clearances, at 2. See, *e.g.* , *Adams v. Laird* , 420 F.2d 230, 240 (CADC 1969) (upholding denial of security clearance to defense contractor employee because he had "engaged in repeated homosexual acts"); see also *Webster v. Doe* , 486 U.S. 592, 595, 601, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988) (concluding that decision to fire a particular individual because he was homosexual fell within the "discretion" of the Director of Central Intelligence under the National Security Act of 1947 and thus was unreviewable under the APA).

The picture in state employment was similar. In 1964, it was common for States to bar homosexuals from serving as teachers. An article summarizing the situation *15 years after Title VII became law* reported that "[a]ll states have statutes that permit the revocation of teaching certificates (or credentials) for immorality, moral turpitude, or unprofessionalism," and, the survey added, "[h]omosexuality is considered to fall within all three categories."[25]

25 Rivera, Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States, 30 Hastings L. J. 799, 861 (1979).

The situation in California is illustrative. California laws prohibited individuals who engaged in "immoral conduct" (which was

construed to include homosexual behavior), as well as those convicted of "sex offenses" (like sodomy), from employment as teachers. Cal. Educ. Code Ann. §§ 13202, 13207, 13209, 13218, 13255 (West 1960). The teaching certificates of individuals convicted of engaging in homosexual
1771 acts were *1771 revoked. See, *e.g.* , *Sarac v. State Bd. of Ed.* , 249 Cal.App.2d 58, 62–64, 57 Cal.Rptr. 69, 72–73 (1967) (upholding revocation of secondary teaching credential from teacher who was convicted of engaging in homosexual conduct on public beach), overruled in part, *Morrison v. State Bd. of Ed.* , 1 Cal.3d 214, 461 P.2d 375, 82 Cal.Rptr. 175 (1969).

In Florida, the legislature enacted laws authorizing the revocation of teaching certificates for "misconduct involving moral turpitude," Fla. Stat. Ann. § 229.08(16) (1961), and this law was used to target homosexual conduct. In 1964, a legislative committee was wrapping up a 6-year campaign to remove homosexual teachers from public schools and state universities. As a result of these efforts, the state board of education apparently revoked at least 71 teachers' certificates and removed at least 14 university professors. Eskridge, Dishonorable Passions, at 103.

Individuals who engaged in homosexual acts also faced the loss of other occupational licenses, such as those needed to work as a "lawyer, doctor, mortician, [or] beautician."[26] See, *e.g.* , *Florida Bar v. Kay* , 232 So.2d 378 (Fla. 1970) (attorney disbarred after conviction for homosexual conduct in public bathroom).

[26] Eskridge, Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, *Nomos* , and Citizenship, 1961–1981, 25 Hofstra L. Rev. 817, 819 (1997).

In 1964 and for many years thereafter, homosexuals were barred from the military. See, *e.g.* , Army Reg. 635–89, § I(2) (a) (July 15, 1966) ("Personnel who voluntarily engage in homosexual acts, irrespective of sex, will not be permitted to serve in the Army in any capacity, and their prompt separation is mandatory"); Army Reg. 600–443, § I(2) (April 10, 1953) (similar). Prohibitions against homosexual conduct by members of the military were not eliminated until 2010. See Don't Ask, Don't Tell Repeal Act of 2010, 124 Stat. 3515 (repealing 10 U.S.C. § 654, which required members of the Armed Forces to be separated for engaging in homosexual conduct).

Homosexuals were also excluded from entry into the United States. The Immigration and Nationality Act of 1952 (INA) excluded aliens "afflicted with psychopathic personality." 8 U.S.C. § 1182(a)(4) (1964 ed.). In *Boutilier v. INS* , 387 U.S. 118, 120–123, 87 S.Ct. 1563, 18 L.Ed.2d 661 (1967), this Court, relying on the INA's legislative history, interpreted that term to encompass homosexuals and upheld an alien's deportation on that ground. Three Justices disagreed with the majority's interpretation of the phrase "psychopathic personality."[27] But it apparently did not occur to anyone to argue that the Court's interpretation was inconsistent with the INA's express prohibition of discrimination "because of sex." That was how our society—and this Court—saw things a half century ago. Discrimination because of sex and discrimination because of sexual orientation were viewed as two entirely different concepts.

[27] Justices Douglas and Fortas thought that a homosexual is merely "one, who by some freak, is the product of an arrested development." *Boutilier* , 387 U.S. at 127, 87 S.Ct. 1563 (Douglas, J., dissenting); see also *id.* , at 125, 87 S.Ct. 1563 (Brennan, J., dissenting) (based on lower court dissent).

To its credit, our society has now come to recognize the injustice of past practices, and this recognition provides the impetus to "update" Title VII. But that is not our job. Our duty is to understand what the terms of Title VII were understood to mean when enacted, and in doing so, we must take into account the societal norms

1772 of that time. We must therefore ask *1772 whether ordinary Americans in 1964 would have thought that discrimination because of "sex" carried some exotic meaning under which private-sector employers would be prohibited from engaging in a practice that represented the official policy of the Federal Government with respect to its own employees. We must ask whether Americans at that time would have thought that Title VII banned discrimination against an employee for engaging in conduct that Congress had made a felony and a ground for civil commitment.

The questions answer themselves. Even if discrimination based on sexual orientation or gender identity could be squeezed into some arcane understanding of sex discrimination, the context in which Title VII was enacted would tell us that this is not what the statute's terms were understood to mean at that time. To paraphrase something Justice Scalia once wrote, "our job is not to scavenge the world of English usage to discover whether there is any possible meaning" of discrimination because of sex that might be broad enough to encompass discrimination because of sexual orientation or gender identity. *Chisom v. Roemer* , 501 U.S. 380, 410, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991) (dissenting opinion). Without strong evidence to the contrary (and there is none here), our job is to ascertain and apply the "*ordinary* meaning" of the statute. *Ibid* . And in 1964, ordinary Americans most certainly would not have understood Title VII to ban discrimination because of sexual orientation or gender identity.

The Court makes a tiny effort to suggest that at least some people in 1964 might have seen what Title VII really means. *Ante* , at 1750 - 1751. What evidence does it adduce? One complaint filed in 1969, another filed in 1974, and arguments made in the mid-1970s about the meaning of the Equal Rights Amendment. *Ibid* . To call this evidence merely feeble would be generous.

C

While Americans in 1964 would have been shocked to learn that Congress had enacted a law prohibiting sexual orientation discrimination, they would have been bewildered to hear that this law also forbids discrimination on the basis of "transgender status" or "gender identity," terms that would have left people at the time scratching their heads. The term "transgender" is said to have been coined " 'in the early 1970s,' "[28] and the term "gender identity," now understood to mean "[a]n internal sense of being male, female or something else,"[29] apparently first appeared in an academic article in 1964.[30] Certainly, neither term was in common parlance; indeed, dictionaries of the time 1773 *1773 still primarily defined the word "gender" by reference to grammatical classifications. See, *e.g.* , American Heritage Dictionary, at 548 (def. 1(a)) ("Any set of two or more categories, such as masculine, feminine, and neuter, into which words are divided ... and that determine agreement with or the selection of modifiers, referents, or grammatical forms").

28 Drescher, Transsexualism, Gender Identity Disorder and the DSM, 14 J. Gay & Lesbian Mental Health 109, 110 (2010).

29 American Psychological Association, 49 Monitor on Psychology, at 32.

30 Green, Robert Stoller's *Sex and Gender* : 40 Years On, 39 Archives Sexual Behav. 1457 (2010); see Stoller, A Contribution to the Study of Gender Identity, 45 Int'l J. Psychoanalysis 220 (1964). The term appears to have been coined a year or two earlier. See Haig, The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles, 1945–2001, 33 Archives Sexual Behav. 87, 93 (2004) (suggesting the term was first introduced at 23rd International Psycho-Analytical Congress in Stockholm in 1963); J. Meyerowitz, How Sex Changed 213 (2002) (referring to founding of "Gender Identity Research Clinic" at UCLA in 1962). In his book, Sex and Gender, published in 1968, Robert Stoller referred

to "*gender identity* " as "a working term" "associated with" his research team but noted that they were not "fixed on copyrighting the term or on defending the concept as one of the splendors of the scientific world." Sex and Gender, p. viii.

While it is likely true that there have always been individuals who experience what is now termed "gender dysphoria," *i.e.* , "[d]iscomfort or distress related to an incongruence between an individual's gender identity and the gender assigned at birth,"[31] the current understanding of the concept postdates the enactment of Title VII. Nothing resembling what is now called gender dysphoria appeared in either DSM–I (1952) or DSM–II (1968). It was not until 1980 that the APA, in DSM–III, recognized two main psychiatric diagnoses related to this condition, "Gender Identity Disorder of Childhood" and "Transsexualism" in adolescents and adults.[32] DSM–III, at 261–266.

[31] American Psychological Association, 49 Monitor on Psychology, at 32.

[32] See Drescher, *supra* , at 112.

The first widely publicized sex reassignment surgeries in the United States were not performed until 1966,[33] and the great majority of physicians surveyed in 1969 thought that an individual who sought sex reassignment surgery was either " 'severely neurotic' " or " 'psychotic.' "[34]

[33] Buckley, A Changing of Sex by Surgery Begun at Johns Hopkins, N. Y. Times, Nov. 21, 1966, p. 1, col. 8; see also J. Meyerowitz, How Sex Changed 218–220 (2002).

[34] Drescher, *supra* , at 112 (quoting Green, Attitudes Toward Transsexualism and Sex-Reassignment Procedures, in Transsexualism and Sex Reassignment 241–242 (R. Green & J. Money eds. 1969)).

It defies belief to suggest that the public meaning of discrimination because of sex in 1964 encompassed discrimination on the basis of a concept that was essentially unknown to the public at that time.

D

1

The Court's main excuse for entirely ignoring the social context in which Title VII was enacted is that the meaning of Title VII's prohibition of discrimination because of sex is clear, and therefore it simply does not matter whether people in 1964 were "smart enough to realize" what its language means. *Hively,* 853 F.3d at 357 (Posner, J., concurring). According to the Court, an argument that looks to the societal norms of those times represents an impermissible attempt to displace the statutory language. *Ante* , at 1750 - 1751.

The Court's argument rests on a false premise. As already explained at length, the text of Title VII does not prohibit discrimination because of sexual orientation or gender identity. And what the public thought about those issues in 1964 is relevant and important, not because it provides a ground for departing from the statutory text, but because it helps to explain what the text was understood to mean when adopted.

In arguing that we must put out of our minds what we know about the time when Title VII was enacted, the Court relies on Justice Scalia's opinion for the Court in *Oncale v. Sundowner Offshore Services, Inc.* , 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). But *Oncale* is nothing like these cases, and no one should be taken in by the majority's effort to enlist Justice
1774 Scalia in its updating project.*1774 The Court's unanimous decision in *Oncale* was thoroughly unremarkable. The Court held that a male employee who alleged that he had been sexually harassed at work by other men stated a claim under Title VII. Although the impetus for Title

VII's prohibition of sex discrimination was to protect women, anybody reading its terms would immediately appreciate that it applies equally to both sexes, and by the time *Oncale* reached the Court, our precedent already established that sexual harassment may constitute sex discrimination within the meaning of Title VII. See *Meritor Savings Bank, FSB v. Vinson* , 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). Given these premises, syllogistic reasoning dictated the holding.

What today's decision latches onto are *Oncale* 's comments about whether " 'male-on-male sexual harassment' " was on Congress's mind when it enacted Title VII. *Ante* , at 1751 (quoting 523 U.S. at 79, 118 S.Ct. 998). The Court in *Oncale* observed that this specific type of behavior "was assuredly not the *principal evil* Congress was concerned with when it enacted Title VII," but it found that immaterial because "statutory prohibitions often go beyond the *principal evil* to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the *principal concerns* of our legislators by which we are governed." 523 U.S. at 79, 118 S.Ct. 998 (emphasis added).

It takes considerable audacity to read these comments as committing the Court to a position on deep philosophical questions about the meaning of language and their implications for the interpretation of legal rules. These comments are better understood as stating mundane and uncontroversial truths. Who would argue that a statute applies only to the "principal evils" and not lesser evils that fall within the plain scope of its terms? Would even the most ardent "purposivists" and fans of legislative history contend that congressional intent is restricted to Congress's "*principal* concerns"?

Properly understood, *Oncale* does not provide the slightest support for what the Court has done today. For one thing, it would be a wild understatement to say that discrimination because of sexual orientation and transgender status was not the "principal evil" on Congress's mind in 1964. Whether we like to admit it now or not, in the thinking of Congress and the public at that time, such discrimination would not have been evil at all.

But the more important difference between these cases and *Oncale* is that here the interpretation that the Court adopts does not fall within the ordinary meaning of the statutory text as it would have been understood in 1964. To decide for the defendants in *Oncale* , it would have been necessary to carve out an exception to the statutory text. Here, no such surgery is at issue. Even if we totally disregard the societal norms of 1964, the text of Title VII does not support the Court's holding. And the reasoning of *Oncale* does not preclude or counsel against our taking those norms into account. They are relevant, not for the purpose of creating an exception to the terms of the statute, but for the purpose of better appreciating how those terms would have been understood at the time.

2

The Court argues that two other decisions—*Phillips v. Martin Marietta Corp.* , 400 U.S. 542, 91 S.Ct. 496, 27 L.Ed.2d 613 (1971) (*per curiam*), and *Los Angeles Dept. of Water and Power v. Manhart* , 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) —buttress its decision, but those cases merely held that Title VII prohibits employer conduct that plainly constitutes
1775 discrimination *1775 because of biological sex. In *Philips* , the employer treated women with young children less favorably than men with young children. In *Manhart* , the employer required women to make larger pension contributions than men. It is hard to see how these holdings assist the Court.

The Court extracts three "lessons" from *Phillips* , *Manhart* , and *Oncale* , but none sheds any light on the question before us. The first lesson is that "it's irrelevant what an employer might call its

discriminatory practice, how others might label it, or what else might motivate it." *Ante* , at 1744. This lesson is obviously true but proves nothing. As to the label attached to a practice, has anyone ever thought that the application of a law to a person's conduct depends on how it is labeled? Could a bank robber escape conviction by saying he was engaged in asset enhancement? So if an employer discriminates because of sex, the employer is liable no matter what it calls its conduct, but if the employer's conduct is not sex discrimination, the statute does not apply. Thus, this lesson simply takes us back to the question whether discrimination because of sexual orientation or gender identity is a form of discrimination because of biological sex. For reasons already discussed, see Part I–A, *supra* , it is not.

It likewise proves nothing of relevance here to note that an employer cannot escape liability by showing that discrimination on a prohibited ground was not its sole motivation. So long as a prohibited ground was a motivating factor, the existence of other motivating factors does not defeat liability.

The Court makes much of the argument that "[i]n *Phillips* , the employer could have accurately spoken of its policy as one based on 'motherhood.' " *Ante* , at 1744; see also *ante,* at 1745. But motherhood, by definition, is a condition that can be experienced only by women, so a policy that distinguishes between motherhood and parenthood is necessarily a policy that draws a sex-based distinction. There was sex discrimination in *Phillips* , because women with children were treated disadvantageously compared to men with children.

Lesson number two—"the plaintiff 's sex need not be the sole or primary cause of the employer's adverse action," *ante* , at 1744—is similarly unhelpful. The standard of causation in these cases is whether sex is necessarily a "motivating factor" when an employer discriminates on the basis of sexual orientation or gender identity. 42 U.S.C. § 2000e–2(m). But the essential question—whether discrimination because of sexual orientation or gender identity constitutes sex discrimination—would be the same no matter what causation standard applied. The Court's extensive discussion of causation standards is so much smoke.

Lesson number three—"an employer cannot escape liability by demonstrating that it treats males and females comparably as groups," *ante* , at 1744, is also irrelevant. There is no dispute that discrimination against an individual employee based on that person's sex cannot be justified on the ground that the employer's treatment of the average employee of that sex is at least as favorable as its treatment of the average employee of the opposite sex. Nor does it matter if an employer discriminates against only a subset of men or women, where the same subset of the opposite sex is treated differently, as in *Phillips* . That is not the issue here. An employer who discriminates equally on the basis of sexual orientation or gender identity applies the same criterion to every affected *individual* regardless of sex. See Part I–A, *supra* .*1776

1776

III

A

Because the opinion of the Court flies a textualist flag, I have taken pains to show that it cannot be defended on textualist grounds. But even if the Court's textualist argument were stronger, that would not explain today's decision. Many Justices of this Court, both past and present, have not espoused or practiced a method of statutory interpretation that is limited to the analysis of statutory text. Instead, when there is ambiguity in the terms of a statute, they have found it appropriate to look to other evidence of "congressional intent," including legislative history.

So, why in these cases are congressional intent and the legislative history of Title VII totally ignored? Any assessment of congressional intent

or legislative history seriously undermines the Court's interpretation.

B

As the Court explained in *General Elec. Co. v. Gilbert* , 429 U.S. 125, 143, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), the legislative history of Title VII's prohibition of sex discrimination is brief, but it is nevertheless revealing. The prohibition of sex discrimination was "added to Title VII at the last minute on the floor of the House of Representatives," *Meritor Savings Bank* , 477 U.S. at 63, 106 S.Ct. 2399, by Representative Howard Smith, the Chairman of the Rules Committee. See 110 Cong. Rec. 2577 (1964). Representative Smith had been an ardent opponent of the civil rights bill, and it has been suggested that he added the prohibition against discrimination on the basis of "sex" as a poison pill. See, *e.g.* , *Ulane v. Eastern Airlines, Inc.* , 742 F.2d 1081, 1085 (CA7 1984). On this theory, Representative Smith thought that prohibiting employment discrimination against women would be unacceptable to Members who might have otherwise voted in favor of the bill and that the addition of this prohibition might bring about the bill's defeat.[35] But if Representative Smith had been looking for a poison pill, prohibiting discrimination on the basis of sexual orientation or gender identity would have been far more potent. However, neither Representative Smith nor any other Member said one word about the possibility that the prohibition of sex discrimination might have that meaning. Instead, all the debate concerned discrimination on the basis of biological sex.[36] See 110 Cong. Rec. 2577–2584.

35 See Osterman, Origins of a Myth: Why Courts, Scholars, and the Public Think Title VII's Ban on Sex Discrimination Was an Accident, 20 Yale J. L. & Feminism 409, 409–410 (2009).

36 Recent scholarship has linked the adoption of the Smith Amendment to the broader campaign for women's rights that was underway at the time. *E.g.* , Osterman, *supra* ; Freeman, How Sex Got Into Title VII: Persistent Opportunism as a Maker of Public Policy, 9 L. & Ineq. 163 (1991); Barzilay, Parenting Title VII: Rethinking the History of the Sex Discrimination Provision, 28 Yale J. L. & Feminism 55 (2016) ; Gold, A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth, 19 Duquesne L. Rev. 453 (1981). None of these studies has unearthed evidence that the amendment was understood to apply to discrimination because of sexual orientation or gender identity.

Representative Smith's motivations are contested, 883 F.3d at 139–140 (Lynch, J., dissenting), but whatever they were, the meaning of *the adoption of the prohibition* of sex discrimination is clear. It was no accident. It grew out of "a long history of women's rights advocacy that had increasingly been gaining mainstream recognition and acceptance," and it marked a landmark 1777achievement in the path toward fully *1777 equal rights for women. *Id.* , at 140. "Discrimination against gay women and men, by contrast, was not on the table for public debate ... [i]n those dark, pre-Stonewall days." *Ibid* .

For those who regard congressional intent as the touchstone of statutory interpretation, the message of Title VII's legislative history cannot be missed.

C

Post-enactment events only clarify what was apparent when Title VII was enacted. As noted, bills to add "sexual orientation" to Title VII's list of prohibited grounds were introduced in every Congress beginning in 1975, see *supra* , at 1754 - 1755, and two such bills were before Congress in 1991[37] when it made major changes in Title VII. At that time, the three Courts of Appeals to reach the issue had held that Title VII does not prohibit discrimination because of sexual orientation,[38] two

other Circuits had endorsed that interpretation in dicta,[39] and no Court of Appeals had held otherwise. Similarly, the three Circuits to address the application of Title VII to transgender persons had all rejected the argument that it covered discrimination on this basis.[40] These were also the positions of the EEOC.[41] In enacting substantial changes to Title VII, the 1991 Congress abrogated numerous judicial decisions with which it disagreed. If it also disagreed with the decisions regarding sexual orientation and transgender discrimination, it could have easily overruled those as well, but it did not do so.[42]

37 H.R. 1430, 102d Cong., 1st Sess., § 2(d) (as introduced in the House on Mar. 13, 1991); S. 574, 102d Cong., 1st Sess., § 5 (as introduced in the Senate on Mar. 6, 1991).

38 See *Williamson v. A. G. Edwards & Sons, Inc.* , 876 F.2d 69, 70 (CA8 1989) (*per curiam*), cert. denied, 493 U.S. 1089, 110 S.Ct. 1158, 107 L.Ed.2d 1061 (1990) ; *DeSantis v. Pacific Tel. & Tel. Co.* , 608 F.2d 327, 329–330 (CA9 1979) ; *Blum v. Gulf Oil Corp.* , 597 F.2d 936, 938 (CA5 1979) (*per curiam*).

39 *Ruth v. Children's Med. Ctr.* , 1991 WL 151158, *5 (CA6, Aug. 8, 1991) (*per curiam*); *Ulane v. Eastern Airlines, Inc.* , 742 F.2d 1081, 1084–1085 (CA7 1984), cert. denied, 471 U.S. 1017, 105 S.Ct. 2023, 85 L.Ed.2d 304 (1985).

40 See *Ulane* , 742 F.2d at 1084–1085 ; *Sommers v. Budget Mktg., Inc.* , 667 F.2d 748, 750 (CA8 1982) (*per curiam*); *Holloway v. Arthur Andersen & Co.* , 566 F.2d 659, 661–663 (CA9 1977).

41 *Dillon* v. *Frank* , 1990 WL 1111074, *3–*4 (EEOC, Feb. 14, 1990) ; *LaBate* v. *USPS* , 1987 WL 774785, *2 (EEOC, Feb. 11, 1987).

42 In more recent legislation, when Congress has wanted to reach acts committed because of sexual orientation or gender identity, it has referred to those grounds by name. See, *e.g.* , 18 U.S.C. § 249(a)(2)(A) (hate crimes) (enacted 2009); 34 U.S.C. § 12291(b)(13)(A) (certain federally funded programs) (enacted 2013).

After 1991, six other Courts of Appeals reached the issue of sexual orientation discrimination, and until 2017, every single Court of Appeals decision understood Title VII's prohibition of "discrimination because of sex" to mean discrimination because of biological sex. See, *e.g.* , *Higgins v. New Balance Athletic Shoe, Inc.* , 194 F.3d 252, 259 (CA1 1999) ; *Simonton v. Runyon* , 232 F.3d 33, 36 (CA2 2000) ; *Bibby v. Philadelphia Coca Cola Bottling Co.* , 260 F.3d 257, 261 (CA3 2001), cert. denied, 534 U.S. 1155, 122 S.Ct. 1126, 151 L.Ed.2d 1018 (2002) ; *Wrightson v. Pizza Hut of Am., Inc.* , 99 F.3d 138, 143 (CA4 1996) ; *Hamm v. Weyauwega Milk Products, Inc.* , 332 F.3d 1058, 1062 (CA7 2003) ; *Medina v. Income Support Div., N. M.* , 413 F.3d 1131, 1135 (CA10 2005) ; *Evans v. Georgia Regional Hospital* , 850 F.3d 1248, 1255 (CA11), cert. denied, 583 U.S. ——, 138 S.Ct. 557, 199 L.Ed.2d 446 (2017). Similarly, the other Circuit to formally address *1778 whether Title VII applies to claims of discrimination based on transgender status had also rejected the argument, creating unanimous consensus prior to the Sixth Circuit's decision below. See *Etsitty v. Utah Transit Authority* , 502 F.3d 1215, 1220–1221 (CA10 2007).

The Court observes that "[t]he people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms," *ante* , at 1749, but it has no qualms about disregarding over 50 years of uniform judicial interpretation of Title VII's plain text. Rather, the Court makes the jaw-dropping statement that its decision exemplifies "judicial humility." *Ante* , at 1753. Is it humble to maintain, not only that Congress did not

understand the terms it enacted in 1964, but that all the Circuit Judges on all the pre-2017 cases could not see what the phrase discrimination "because of sex" really means? If today's decision is humble, it is sobering to imagine what the Court might do if it decided to be bold.

IV

What the Court has done today—interpreting discrimination because of "sex" to encompass discrimination because of sexual orientation or gender identity—is virtually certain to have far-reaching consequences. Over 100 federal statutes prohibit discrimination because of sex. See Appendix C, *infra* ; *e.g.* , 20 U.S.C. § 1681(a) (Title IX); 42 U.S.C. § 3631 (Fair Housing Act); 15 U.S.C. 1691(a)(1) (Equal Credit Opportunity Act). The briefs in these cases have called to our attention the potential effects that the Court's reasoning may have under some of these laws, but the Court waves those considerations aside. As to Title VII itself, the Court dismisses questions about "bathrooms, locker rooms, or anything else of the kind." *Ante* , at 1753. And it declines to say anything about other statutes whose terms mirror Title VII's.

The Court's brusque refusal to consider the consequences of its reasoning is irresponsible. If the Court had allowed the legislative process to take its course, Congress would have had the opportunity to consider competing interests and might have found a way of accommodating at least some of them. In addition, Congress might have crafted special rules for some of the relevant statutes. But by intervening and proclaiming categorically that employment discrimination based on sexual orientation or gender identity is simply a form of discrimination because of sex, the Court has greatly impeded—and perhaps effectively ended—any chance of a bargained legislative resolution. Before issuing today's radical decision, the Court should have given some thought to where its decision would lead.

As the briefing in these cases has warned, the position that the Court now adopts will threaten freedom of religion, freedom of speech, and personal privacy and safety. No one should think that the Court's decision represents an unalloyed victory for individual liberty.

I will briefly note some of the potential consequences of the Court's decision, but I do not claim to provide a comprehensive survey or to suggest how any of these issues should necessarily play out under the Court's reasoning.[43]

[43] Contrary to the implication in the Court's opinion, I do not label these potential consequences "undesirable." *Ante* , at 1753. I mention them only as possible implications of the Court's reasoning.

"[B]athrooms, locker rooms, [and other things] of [that] kind." The Court may wish to avoid this subject, but it is a matter of concern to many people who are reticent about disrobing or using
1779 toilet facilities *1779 in the presence of individuals whom they regard as members of the opposite sex. For some, this may simply be a question of modesty, but for others, there is more at stake. For women who have been victimized by sexual assault or abuse, the experience of seeing an unclothed person with the anatomy of a male in a confined and sensitive location such as a bathroom or locker room can cause serious psychological harm.[44]

[44] Brief for Defend My Privacy et al. as *Amici Curiae* 7–10.

Under the Court's decision, however, transgender persons will be able to argue that they are entitled to use a bathroom or locker room that is reserved for persons of the sex with which they identify, and while the Court does not define what it means by a transgender person, the term may apply to individuals who are "gender fluid," that is, individuals whose gender identity is mixed or changes over time.[45] Thus, a person who has not undertaken any physical transitioning may claim

the right to use the bathroom or locker room assigned to the sex with which the individual identifies at that particular time. The Court provides no clue why a transgender person's claim to such bathroom or locker room access might not succeed.

45 See 1 Sadock, Comprehensive Textbook of Psychiatry, at 2063 (explaining that "gender is now often regarded as more *fluid* " and "[t]hus, gender identity may be described as masculine, feminine, or somewhere in between").

A similar issue has arisen under Title IX, which prohibits sex discrimination by any elementary or secondary school and any college or university that receives federal financial assistance.[46] In 2016, a Department of Justice advisory warned that barring a student from a bathroom assigned to individuals of the gender with which the student identifies constitutes unlawful sex discrimination,[47] and some lower court decisions have agreed. See *Whitaker v. Kenosha Unified School Dist. No. 1 Bd. of Ed.* , 858 F.3d 1034, 1049 (CA7 2017) ; *G. G. v. Gloucester Cty. School Bd.* , 822 F.3d 709, 715 (CA4 2016), vacated and remanded, 580 U.S. ——, 137 S.Ct. 1239, 197 L.Ed.2d 460 (2017) ; *Adams v. School Bd. of St. Johns Cty.* , 318 F.Supp.3d 1293, 1325 (MD Fla. 2018) ; cf. *Doe* v. *Boyertown Area*

46 Title IX makes it unlawful to discriminate on the basis of sex in education: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

47 See Dept. of Justice & Dept. of Education, Dear Colleague Letter on Transgender Students, May 13, 2016 (Dear Colleague Letter), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.

School Dist. , 897 F.3d 518, 533 (CA3 2018), cert. denied, 587 U.S. ——, 139 S.Ct. 2636, 204 L.Ed.2d 300 (2019).

Women's sports . Another issue that may come up under both Title VII and Title IX is the right of a transgender individual to participate on a sports team or in an athletic competition previously reserved for members of one biological sex.[48] This issue has already arisen under Title IX, where it threatens to undermine one of that law's major achievements, giving young women an equal opportunity to participate in sports. The effect of the Court's reasoning may be to force young women to compete against students who have a very significant biological advantage, including
1780 students who have the size and strength of a *1780 male but identify as female and students who are taking male hormones in order to transition from female to male. See, *e.g.* , Complaint in *Soule* v. *Connecticut Assn. of Schools* , No. 3:20–cv–00201 (D Conn., Apr. 17, 2020) (challenging Connecticut policy allowing transgender students to compete in girls' high school sports); Complaint in *Hecox* v. *Little* , No. 1:20–cv–00184 (D Idaho, Apr. 15, 2020) (challenging state law that bars transgender students from participating in school sports in accordance with gender identity). Students in these latter categories have found success in athletic competitions reserved for females.[49]

48 A regulation allows single-sex teams, 34 CFR § 106.41(b) (2019), but the statute itself would of course take precedence.

49 "[S]ince 2017, two biological males [in Connecticut] have collectively won 15 women's state championship titles (previously held by ten different Connecticut girls) against biologically female track athletes." Brief for Independent Women's Forum et al. as

Amici Curiae in No. 18–107, pp. 14–15.

At the college level, a transgendered woman (biological male) switched from competing on the men's Division II track team to the women's Division II track team at Franklin Pierce University in New Hampshire after taking a year of testosterone suppressants. While this student had placed "eighth out of nine male athletes in the 400 meter hurdles the year before, the student won the women's competition by over a second and a half—a time that had garnered tenth place in the men's conference meet just three years before." *Id.* , at 15.

A transgender male—*i.e* ., a biological female who was in the process of transitioning to male and actively taking testosterone injections—won the Texas girls' state championship in high school wrestling in 2017. Babb, Transgender Issue Hits Mat in Texas, Washington Post, Feb. 26, 2017, p. A1, col. 1.

The logic of the Court's decision could even affect professional sports. Under the Court's holding that Title VII prohibits employment discrimination because of transgender status, an athlete who has the physique of a man but identifies as a woman could claim the right to play on a women's professional sports team. The owners of the team might try to claim that biological sex is a bona fide occupational qualification (BFOQ) under 42 U.S.C. § 2000e–2(e), but the BFOQ exception has been read very narrowly. See *Dothard v. Rawlinson* , 433 U.S. 321, 334, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977).

Housing . The Court's decision may lead to Title IX cases against any college that resists assigning students of the opposite biological sex as roommates. A provision of Title IX, 20 U.S.C. § 1686, allows schools to maintain "separate living facilities for the different sexes," but it may be argued that a student's "sex" is the gender with which the student identifies.[50] Similar claims may be brought under the Fair Housing Act. See 42 U.S.C. § 3604.

[50] Indeed, the 2016 advisory letter issued by the Department of Justice took the position that under Title IX schools "must allow transgender students to access housing consistent with their gender identity." Dear Colleague Letter 4.

Employment by religious organizations . Briefs filed by a wide range of religious groups—Christian, Jewish, and Muslim—express deep concern that the position now adopted by the Court "will trigger open conflict with faithbased employment practices of numerous churches, synagogues, mosques, and other religious institutions."[51] They argue that "[r]eligious organizations need employees who actually live the faith,"[52] and that compelling a religious organization to employ individuals whose conduct flouts the tenets of the organization's faith forces the group to communicate an objectionable
1781 message.*1781 This problem is perhaps most acute when it comes to the employment of teachers. A school's standards for its faculty "communicate a particular way of life to its students," and a "violation by the faculty of those precepts" may undermine the school's "moral teaching."[53] Thus, if a religious school teaches that sex outside marriage and sex reassignment procedures are immoral, the message may be lost if the school employs a teacher who is in a same-sex relationship or has undergone or is undergoing sex reassignment. Yet today's decision may lead to Title VII claims by such teachers and applicants for employment.

[51] Brief for National Association of Evangelicals et al. as *Amici Curiae* 3; see also Brief for United States Conference of Catholic Bishops et al. as *Amici Curiae* in No. 18–107, pp. 8–18.

[52] Brief for National Association of Evangelicals et al. as *Amici Curiae* 7.

53 McConnell, Academic Freedom in Religious Colleges and Universities, 53 Law & Contemp. Prob. 303, 322 (1990).

At least some teachers and applicants for teaching positions may be blocked from recovering on such claims by the "ministerial exception" recognized in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* , 565 U.S. 171, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012). Two cases now pending before the Court present the question whether teachers who provide religious instruction can be considered to be "ministers."[54] But even if teachers with those responsibilities qualify, what about other very visible school employees who may not qualify for the ministerial exception? Provisions of Title VII provide exemptions for certain religious organizations and schools "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on" of the "activities" of the organization or school, 42 U.S.C. § 2000e–1(a) ; see also § 2000e–2(e)(2), but the scope of these provisions is disputed, and as interpreted by some lower courts, they provide only narrow protection.[55]

54 See *Our Lady of Guadalupe School* v. *Morrissey-Berru* , No. 19–267; *St. James School* v. *Biel* , No. 19–348.

55 See, *e.g.* , *EEOC v. Kamehameha Schools/Bishop Estate* , 990 F.2d 458, 460 (CA9 1993) ; *EEOC v. Fremont Christian School* , 781 F.2d 1362, 1365–1367 (CA9 1986) ; *Rayburn v. General Conference of Seventh-day Adventists* , 772 F.2d 1164, 1166 (CA4 1985) ; *EEOC v. Mississippi College* , 626 F.2d 477, 484–486 (CA5 1980) ; see also Brief for United States Conference of Catholic Bishops et al. as *Amici Curiae* in No. 18–107, at 30, n. 28 (discussing disputed scope). In addition, 42 U.S.C. § 2000e–2(e)(1) provides that religion may be a BFOQ, and allows religious schools to hire religious employees, but as noted, the BFOQ exception has been read narrowly. See *supra* , at 1780.

Healthcare . Healthcare benefits may emerge as an intense battleground under the Court's holding. Transgender employees have brought suit under Title VII to challenge employer-provided health insurance plans that do not cover costly sex reassignment surgery.[56] Similar claims have been brought under the Affordable Care Act (ACA), which broadly prohibits sex discrimination in the provision of healthcare.[57] *1782 Such claims present difficult religious liberty issues because some employers and healthcare providers have strong religious objections to sex reassignment procedures, and therefore requiring them to pay for or to perform these procedures will have a severe impact on their ability to honor their deeply held religious beliefs.

56 See, *e.g.* , Amended Complaint in *Toomey* v. *Arizona* , No. 4:19–cv–00035, 2020 WL 1068269 (D Ariz., Mar. 2, 2020). At least one District Court has already held that a state health insurance policy that does not provide coverage for sex reassignment surgery violates Title VII. *Fletcher v. Alaska* , —— F. Supp. 3d ——, ——, 2020 WL 2487060, *5 (D Alaska, Mar. 6, 2020).

57 See, *e.g.* , Complaint in *Conforti* v. *St. Joseph's Healthcare System* , No. 2:17–cv–00050, 2017 WL 67114 (D NJ, Jan. 5, 2017) (transgender man claims discrimination under the ACA because a Catholic hospital refused to allow a surgeon to perform a hysterectomy). And multiple District Courts have already concluded that the ACA requires health insurance coverage for sex reassignment surgery and treatment. *Kadel v. Folwell* , —— F. Supp. 3d ——, ——, 2020 WL 1169271, *12 (MDNC, Mar. 11, 2020) (allowing claims of discrimination under ACA, Title IX, and Equal Protection Clause); *Tovar v. Essentia Health* , 342

F.Supp.3d 947, 952–954 (D Minn. 2018) (allowing ACA claim).

Section 1557 of the ACA, 42 U.S.C. § 18116, provides:

"Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 794 of title 29, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection." (Footnote omitted.)

Freedom of speech . The Court's decision may even affect the way employers address their employees and the way teachers and school officials address students. Under established English usage, two sets of sex-specific singular personal pronouns are used to refer to someone in the third person (he, him, and his for males; she, her, and hers for females). But several different sets of gender-neutral pronouns have now been created and are preferred by some individuals who do not identify as falling into either of the two traditional categories.[58] Some jurisdictions, such as New York City, have ordinances making the failure to use an individual's preferred pronoun a punishable offense,[59] and some colleges have similar rules.[60] After today's decision, plaintiffs may claim that the failure to use their preferred pronoun violates one of the federal laws prohibiting sex discrimination. See *Prescott v. Rady Children's Hospital San Diego* , 265 F.Supp.3d 1090, 1098–1100 (SD Cal. 2017) (hospital staff 's refusal to use preferred pronoun 1783*1783 violates ACA).[61]

58 See, *e.g.* , University of Wisconsin Milwaukee Lesbian, Gay, Bisexual, Transgender, Queer Plus (LGBTQ+) Resource Center, Gender Pronouns (2020), https://uwm.edu/lgbtrc/support/gender-pronouns/ (listing six new categories of pronouns: (f)ae, (f)aer, (f)aers; e/ey, em, eir, eirs; per, pers; ve, ver, vis; xe, xem, xyr, xyrs; ze/zie, hir, hirs).

59 See 47 N.Y.C.R.R. § 2–06(a) (2020) (stating that a "deliberate refusal to use an individual's self-identified name, pronoun and gendered title" is a violation of N.Y.C. Admin. Code § 8–107 "where the refusal is motivated by the individual's gender"); see also N.Y.C. Admin. Code §§ 8–107(1), (4), (5) (2020) (making it unlawful to discriminate on the basis of "gender" in employment, housing, and public accommodations); cf. D.C. Mun. Regs., tit. 4, § 801.1 (2020) (making it "unlawful ... to discriminate ... on the basis of ... actual or perceived gender identity or expression" in "employment, housing, public accommodations, or educational institutions" and further proscribing "engaging in verbal ... harassment").

60 See University of Minn., Equity and Access: Gender Identity, Gender Expression, Names, and Pronouns, Administrative Policy (Dec. 11, 2019), https://policy.umn.edu/operations/gendereq uity ("University members and units are expected to use the names, gender identities, and pronouns specified to them by other University members, except as legally required"); *Meriwether v. Trustees of Shawnee State Univ.* , 2020 WL 704615, *1 (SD Ohio, Feb. 12, 2020) (rejecting First Amendment challenge to university's nondiscrimination policy brought by

evangelical Christian professor who was subjected to disciplinary actions for failing to use student's preferred pronouns).

61 Cf. Notice of Removal in *Vlaming* v. *West Point School Board* , No. 3:19–cv–00773 (ED Va., Oct. 22, 2019) (contending that high school teacher's firing for failure to use student's preferred pronouns was based on nondiscrimination policy adopted pursuant to Title IX).

The Court's decision may also pressure employers to suppress any statements by employees expressing disapproval of same-sex relationships and sex reassignment procedures. Employers are already imposing such restrictions voluntarily, and after today's decisions employers will fear that allowing employees to express their religious views on these subjects may give rise to Title VII harassment claims.

Constitutional claims . Finally, despite the important differences between the Fourteenth Amendment and Title VII, the Court's decision may exert a gravitational pull in constitutional cases. Under our precedents, the Equal Protection Clause prohibits sex-based discrimination unless a "heightened" standard of review is met. *Sessions* v. *Morales-Santana* , 582 U.S. ——, ——, 137 S.Ct. 1678, 1689, 198 L.Ed.2d 150 (2017); *United States v. Virginia* , 518 U.S. 515, 532–534, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996). By equating discrimination because of sexual orientation or gender identity with discrimination because of sex, the Court's decision will be cited as a ground for subjecting all three forms of discrimination to the same exacting standard of review.

Under this logic, today's decision may have effects that extend well beyond the domain of federal antidiscrimination statutes. This potential is illustrated by pending and recent lower court cases in which transgender individuals have challenged a variety of federal, state, and local laws and policies on constitutional grounds. See, *e.g.* , Complaint in *Hecox* , No. 1: 20–CV–00184 (state law prohibiting transgender students from competing in school sports in accordance with their gender identity); Second Amended Complaint in *Karnoski* v. *Trump* , No. 2:17–cv–01297 (WD Wash., July 31, 2019) (military's ban on transgender members); *Kadel v. Folwell* , —— F. Supp. 3d ——, —— – ——, 2020 WL 1169271, *10–*11 (MDNC, Mar. 11, 2020) (state health plan's exclusion of coverage for sex reassignment procedures); Complaint in *Gore* v. *Lee* , No. 3:19–cv–00328 (MD Tenn., Mar. 3, 2020) (change of gender on birth certificates); Brief for Appellee in *Grimm* v. *Gloucester Cty. School Bd.* , No. 19–1952 (CA4, Nov. 18, 2019) (transgender student forced to use gender neutral bathrooms at school); Complaint in *Corbitt* v. *Taylor* , No. 2:18–cv–00091 (MD Ala., July 25, 2018) (change of gender on driver's licenses); *Whitaker* , 858 F.3d at 1054 (school policy requiring students to use the bathroom that corresponds to the sex on birth certificate); *Keohane v. Florida Dept. of Corrections Secretary* , 952 F.3d 1257, 1262–1265 (CA11 2020) (transgender prisoner denied hormone therapy and ability to dress and groom as a female); *Edmo v. Corizon, Inc.* , 935 F.3d 757, 767 (CA9 2019) (transgender prisoner requested sex reassignment surgery); cf. *Glenn v. Brumby* , 663 F.3d 1312, 1320 (CA11 2011) (transgender individual fired for gender non-conformity).

Although the Court does not want to think about the consequences of its decision, we will not be able to avoid those issues for long. The entire Federal Judiciary will be mired for years in disputes about the reach of the Court's reasoning.

* * *

The updating desire to which the Court succumbs no doubt arises from humane and generous impulses. Today, many *1784 Americans know individuals who are gay, lesbian, or transgender and want them to be treated with the dignity,

consideration, and fairness that everyone deserves. But the authority of this Court is limited to saying what the law *is* .

The Court itself recognizes this:

> "The place to make new legislation ... lies in Congress. When it comes to statutory interpretation, our role is limited to applying the law's demands as faithfully as we can in the cases that come before us." *Ante* , at 1753.

It is easy to utter such words. If only the Court would live by them.

I respectfully dissent.

APPENDIXES

A

Webster's New International Dictionary 2296 (2d ed. 1953):

sex (seks), *n.* [F. *sexe* , fr. L. *sexus;* prob. orig., division, and akin to L. *secare* to cut. See SECTION .] **1.** One of the two divisions of organisms formed on the distinction of male and female; males or females collectively. **2.** The sum of the peculiarities of structure and function that distinguish a male from a female organism; the character of being male or female, or of pertaining to the distinctive function of the male or female in reproduction. *Conjugation,* or *fertilization* (union of germplasm of two individuals), a process evidently of great but not readily explainable importance in the perpetuation of most organisms, seems to be the function of differentiation of sex, which occurs in nearly all organisms at least at some stage in their life history. Sex is manifested in the conjugating cells by the larger size, abundant food material, and immobility of the female gamete (*egg* , *egg cell* , or *ovum*), and the small size and the locomotive power of the male gamete (*spermatozoon* or *spermatozoid*), and in the adult organisms often by many structural, physiological, and (in higher forms) psychological characters, aside from the necessary modification of the reproductive apparatus. Cf. HERMAPHRODITE , 1. In botany the term *sex* is often extended to the distinguishing peculiarities of staminate and pistillate flowers, and hence in dioecious plants to the individuals bearing them.

In many animals and plants the body and germ cells have been shown to contain one or more chromosomes of a special kind (called *sex chromosomes; idiochromosomes; accessory chromosomes*) in addition to the ordinary paired autosomes. These special chromosomes serve to determine sex. In the simplest

case, the male germ cells are of two types, one with and one without a single extra chromosome (*X chromosome* , or *monosome*). The egg cells in this case all possess an *X chromosome* , and on fertilization by the two types of sperm, male and female zygotes result, of respective constitution *X* , and *XX* . In many other animals and plants (probably including man) the male organism produces two types of gametes, one possessing an *X chromosome* , the other a *Y chromosome* , these being visibly different members of a pair of chromosomes present in the diploid state. In this case also, the female organism is *XX* , the eggs *X* , and the zygotes respectively male (*XY*) and female (*XX*). In another type of sex determination, as in certain moths and possibly in the fowl, the female produces two kinds of eggs, the male only one kind of sperm. Each type of egg contains one member of a pair of differentiated chromosomes,

1785*1785

called respectively *Z chromosomes* and *W chromosomes* , while all the sperm cells contain a *Z* chromosome. In fertilization, union of a *Z* with a *W* gives rise to a female, while union of two *Z* chromosomes produces a male. Cf. SECONDARY SEX CHARACTER .

3. a The sphere of behavior dominated by the relations between male and female. **b** *Psychoanalysis* . By extension, the whole sphere of behavior related even indirectly to the sexual functions and embracing all affectionate and pleasure-seeking conduct.

4. Phenomena of sexual instincts and their manifestations.

5. Sect;—a confused use.

Syn. — SEX, GENDER. SEX refers to physiological distinctions; GENDER , to distinctions in grammar.

—the sex . The female sex; women, in general.

sex, *adj* . Based on or appealing to sex.

sex, *v. t.* To determine the sex of, as skeletal remains.

Webster's Third New International Dictionary 2081 (1966):

[1] sex \'seks\ n *–ES often attrib* [ME, fr. L *sexus;* prob. akin to L *secare* to cut–more at SAW] **1:** one of the two divisions of organic esp. human beings respectively designated male or female < a member of the opposite ~>**2:** the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change, that in its typical dichotomous occurrence is usu. genetically controlled and associated with special sex chromosomes, and that is typically manifested as maleness and femaleness with one or the other of these being present in most higher animals though both may occur in the same individual in many plants and some invertebrates and though no such distinction can be made in many lower forms (as some fungi, protozoans, and possibly bacteria and viruses) either because males and females are replaced by mating types or because the participants in sexual reproduction are indistinguishable —compare HETEROTHALLIC, HOMOTHALLIC; FERTILIZATION, MEIOSIS, MENDEL'S LAW; FREEMARTIN, HERMAPHRODITE, INTERSEX **3:** the sphere of interpersonal behavior esp. between male and female most directly associated with, leading up to, substituting for, or resulting from genital union < agree that the Christian's attitude toward ~ should not be considered apart from love, marriage, family—M. M. Forney>**4:** the phenomena of sexual instincts and their manifestations < with his customary combination of philosophy, insight, good will toward the world, and entertaining interest in ~—Allen Drury> < studying and assembling what modern scientists have discovered about ~— *Time*>; *specif* : SEXUAL INTERCOURSE < an old law imposing death for ~ outside marriage—William Empson>

[2] sex \"\ *vt* –ED/–ING/–ES **1:** to determine the sex of (an organic being) < it is difficult to ~ the animals at a distance—E. A. Hooton>—compare AUTOSEXING **2 a:** to increase the sexual appeal or attraction of—usu. used with *up* < titles must be *~ed* up to attract 56 million customers—*Time*> **b:** to arouse the sexual instincts or desires of—usu. used with *up* < watching you *~ing* up that bar kitten—Oakley Hall>

1786*1786

9 Oxford English Dictionary 577–578 (1933):

Sex (seks), *sb* . Also 6–7 sexe, (6 seex, 7 pl. sexe, 8 *poss* . sexe's). [ad. L. *sexus* (*u* -stem), whence also F. *sexe* (12th c.), Sp., Pg. *sexo* , It. *sesso* . Latin had also a form *secus* neut. (indeclinable).]

1. Either of the two divisions of organic beings distinguished as male and female respectively; the males or the females (of a species, etc., esp. of the human race) viewed collectively.

1382 WYCLIF *Gen* . vi. 19 Of alle thingis hauynge sowle of ony flehs, two thow shalt brynge into the ark, that maal sex and femaal lyuen with thee. **1532** MORE *Confut. Tindale* II. 152, I had as leue he bare them both a bare cheryte, as wyth the frayle feminyne sexe fall to far in loue. **1559** ALYMER *Harborowe* E 4 b, Neither of them debarred the heires female .. as though it had ben .. vnnatural for that sexe to gouern. **1576** GASCOIGNE *Philomene* xcviii, I speake against my sex. *a* **1586** SIDNEY *Arcadia* II. (1912) 158 The sexe of womankind of all other is most bound to have regardfull eie to mens judgements. **1600** NASHE *Summer's Last Will* F 3 b, A woman they imagine her to be, Because that sexe keepes nothing close they heare. **1615** CROOKE *Body of Man* 274 If wee respect the .. conformation of both the Sexes, the Male is sooner perfected .. in the wombe. **1634** SIR T. HERBERT *Trav.* 19 Both sexe goe naked. **1667** MILTON *P. L.* IX, 822 To add what wants In Femal Sex. **1671—** *Samson* 774 It was a weakness In me, but incident to all our sex. **1679** DRYDEN *Troilus & Cr.* I. ii, A strange dissembling sex we women are. **1711** ADDISON *Spect.* No. 10 ¶ 6 Their Amusements .. are more adapted to the Sex than to the Species. **1730** SWIFT *Let. to Mrs. Whiteway* 28 Dec., You have neither the scrawl nor the spelling of your sex. **1742** GRAY *Propertius* II. 73 She .. Condemns her fickle Sexe's fond Mistake. **1763** G. WILLIAMS in Jesse *Selwyn & Contemp.* (1843) I. 265 It would astonish you to see the mixture of sexes at this place. **1780** BENTHAM *Princ. Legisl.* VI. § 35 The sensibility of the female sex appears .. to be greater than that of the male. **1814** SCOTT *Ld. of Isles* VI. iii, Her sex's dress regain'd. **1836** THIRLWALL *Greece* xi. II. 51 Solon also made regulations for the government of the other sex. **1846** *Ecclesiologist* Feb. 41 The propriety and necessity of dividing the sexes during the publick offices of the Church. **1848** THACKERAY *Van. Fair* xxv, She was by no means so far superior to her sex as to be above jealousy. **1865** DICKENS *Mut. Fr.* II. i, It was a school for both sexes. **1886** MABEL COLLINS *Prettiest Woman* ii, Zadwiga had not yet given any serious attention to the other sex.

b. *collect.* followed by plural verb. *rare.*

1768 GOLDSM . *Good. n. Man* IV. (Globe) 632/2 Our sex are like poor tradesmen. **1839** MALCOM *Trav.* (1840) 40/I Neither sex tattoo any part of their bodies.

c. *The fair(er), gentle(r), soft(er), weak(er) sex; the devout sex* ; *the second sex* ; † *the woman sex* : the female sex, women. *The* † *better, sterner sex* : the male sex, men.

[**1583** STUBBES *Anat. Abus.* E vij b, Ye magnificency & liberalitie of that gentle sex. **1613** PURCHAS *Pilgrimage* (1614) 38 Strong Sampson and wise Solomon are witnesses, that the strong men are slaine by this weaker sexe.]

1641 BROME *Jovial Crew* III. (1652) H 4,

I am bound by a strong vow to kisse all of the woman sex I meet this morning. **1648** J. BEAUMONT *Psyche* XIV. I,

1787*1787

The softer sex, attending Him And his still-growing woes. **1665** SIR T. HERBERT *Trav.* (1677) 22 Whiles the better sex seek prey abroad, the women (therein like themselves) keep home and spin. **1665** BOYLE *Occas. Refl.* v. ix. 176 Persons of the fairer Sex. a **1700** EVELYN *Diary* 12 Nov. an. 1644, The Pillar .. at which the devout sex are always rubbing their chaplets. **1701** STANHOPE *St. Aug. Medit.* I. xxxv. (1704) 82, I may .. not suffer my self to be outdone by the weaker Sex. **1732** [see FAIR a. I b]. **1753** HOGARTH *Anal. Beauty* x. 65 An elegant degree of plumpness peculiar to the skin of the softer sex. **1820** BYRON *Juan* IV. cviii, Benign Ceruleans of the second sex! Who advertise new poems by your looks. **1838** *Murray's Hand-bk. N. Germ.* 430 It is much frequented by the fair sex. **1894** C. D. TYLER in *Geog. Jrnl.* III. 479 They are beardless, and usually wear a shock of unkempt hair, which is somewhat finer in the gentler sex.

¶d. Used occas. with extended notion. *The third sex* : eunuchs. Also *sarcastically* (see quot. 1873).

1820 BYRON *Juan* IV. lxxxvi, From all the Pope makes yearly, 'twould perplex To find three perfect pipes of the third sex. *Ibid* . V. xxvi, A black old neutral personage Of the third sex stept up. [**1873** LD. HOUGHTON *Monogr.* 280 Sydney Smith .. often spoke with much bitterness of the growing belief in three Sexes of Humanity—Men, Women, and Clergymen.]

e. *The sex* : the female sex. [F. *le sexe* .] Now *rare.*

1589 PUTTENHAM *Eng. Poesie* III. xix. (Arb.) 235 As he that had tolde a long tale

before certaine noble women, of a matter somewhat in honour touching the Sex. **1608** D. T[UVILL] *Ess. Pol. & Mor.* 101 b, Not yet weighing with himselfe, the weaknesse and imbecillitie of the sex. **1631** MASSINGER *Emperor East* I. ii, I am called The Squire of Dames, or Servant of the Sex. **1697** VANBRUGH *Prov. Wife* II. ii, He has a strange penchant to grow fond of me, in spite of his aversion to the sex. **1760-2** GOLDSM . *Cit. W.* xcix, The men of Asia behave with more deference to the sex than you seem to imagine. **1792** A. YOUNG *Trav. France* I. 220 The sex of Venice are undoubtedly of a distinguished beauty. **1823** BYRON *Juan* XIII. lxxix, We give the sex the *pas* . **1863** R. F. BURTON *W. Africa* I. 22 Going ‘up stairs’, as the sex says, at 5 a.m. on the day after arrival, I cast the first glance at Funchal.

f. Without *the* , in predicative quasi-adj. use=feminine. *rare.*

***a* 1700** DRYDEN *Cymon & Iph.* 368 She hugg'd th' Offender, and forgave th' Offence, Sex to the last!

2. Quality in respect of being male or female.

a. With regard to persons or animals.

1526 *Pilgr. Perf.* (W. de. W. 1531) 282 b, Ye bee, whiche neuer gendreth with ony make of his kynde, nor yet hath ony distinct sex. **1577** T. KENDALL *Flowers of Epigr.* 71 b, If by corps supposd may be her seex, then sure a virgin she. **1616** T. SCOTT *Philomythie* I. (ed. 2) A 3 Euen as Hares change shape and sex, some say Once euery yeare. **1658** SIR T. BROWNE *Hydriot* . iii. 18 A critical view of bones makes a good distinction of sexes. **a 1665** DIGBY *Chym. Secrets* (1682) II. 225 Persons of all Ages and Sexes. **1667** MILTON *P. L.* I. 424 For Spirits when they please can either Sex assume, or both. **1710-11** SWIFT *Jrnl. to Stella* 7 Mar., I find I was mistaken in the sex, 'tis a boy. **1757** SMOLLETT *Reprisal* IV. v, As for me, my sex protects me. **1825** SCOTT *Betrothed* xiii, I am but a poor and neglected woman,

1788*1788

feeble both from sex and age. **1841** ELPHINSTONE *Hist. India* I. 349 When persons of different sexes walk together, the woman always follows the man. **1882** TENSION-WOODS *Fish N. S. Wales* 116 Oysters are of distinct sexes.

b. with regard to plants (see FEMALE *a* . 2, MALE *a* . 2).

1567 MAPLET *Gr. Forest* 28 Some seeme to haue both sexes and kindes: as the Oke, the Lawrell and such others. **1631** WIDDOWES *Nat. Philos.* (ed. 2) 49 There be sexes of hearbes .. namely, the Male or Female. **1720** P. BLAIR *Bot. Ess.* iv. 237 These being very evident Proofs of a necessity of two Sexes in Plants as well as in Animals. **1790** SMELLIE *Philos. Nat. Hist.* I. 245 There is not a notion more generally adopted, that that vegetables have the distinction of sexes. **1848** LINDLEY *Introd. Bot.* (ed. 4) II. 80 Change of Sex under the influence of external causes.

3. The distinction between male and female in general. In recent use often with more explicit notion: The sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these; the class of phenomena with which these differences are concerned.

Organs of sex: the reproductive organs in sexed animals or plants.

***a* 1631** DONNE *Songs & Sonn., The Printrose* Poems 1912 I. 61 Should she Be more then woman, she would get above All thought of sexe, and think to move My heart to study her, and not to love. ***a* 1643** CARTWRIGHT *Siedge* III. vi, My Soul's As Male as yours; there's no Sex in the mind. **1748** MELMOTH *Fitzosborne Lett.* lxii. (1749) II. 119 There may be a kind of sex in the very soul. **1751** HARRIS *Hermes* Wks. (1841) 129 Besides number, another characteristic, visible in substances, is that of sex. **1878** GLADSTONE *Prim. Homer* 68 Athenè .. has nothing of sex except the gender, nothing of the woman except the form. **1887** K. PEARSON *Eth. Freethought* xv. (1888) 429 What is the true type of social (moral) action in matters of sex? **1895** CRACKANTHORPE in 19*th Cent.* Apr. 607 (art.) Sex in modern literature. *Ibid.* 614 The writers and readers who have strenuously refused to allow to sex its place in creative art. **1912** H. G. WELLS *Marriage* ii. § 6. 72 The young need .. to be told .. all we know of three fundamental things; the first of which is God, .. and the third Sex.

¶ 4. Used, by confusion, in senses of SECT (q. v. I, 4 b, 7, and cf. I d *note*).

1575-85 ABP. SANDYS *Serm.* xx. 358 So are all sexes and sorts of people called vpon. **1583** MELBANCKE *Philotimus* L iij b, Whether thinkest thou better sporte & more absurd, to see an Asse play on an harpe contrary to his sex, or heare [etc.]. **1586** J. HOOKER *Hist. Irel.* 180/2 in *Holinshed* , The whole sex of the Oconhours. **1586** T. B. *La Primaud. Fr. Acad.* I. 359 O detestable furie, not to be found in most cruell beasts, which spare the blood of their sexe. **a 1704** T BROWN *Dial. Dead, Friendship* Wks. 1711 IV. 56 We have had enough of these Christians, and sure there can be no worse among the other Sex of Mankind [i.e. Jews and Turks]? **1707** ATTERBURY *Large Vind. Doctr.* 47 Much less can I imagine, why a

Jewish Sex (whether of Pharisees or Saducees) should be represented, as [etc.].

5. *attrib.* and *Comb.,* as *sex-distinction, function,* etc.; *sex-abusing, transforming* adjs.; sex-cell, a reproductive

1789*1789

cell, with either male or female function; a sperm-cell or an egg-cell.

1642 H. MORE *Song of Soul* I. III. lxxi, Mad-making waters, sex trans-forming springs. **1781** COWPER *Expost.* 415 Sin, that in old time Brought fire from heav'n, the sex-abusing crime. **1876** HARDY *Ethelberta* xxxvii, You cannot have celebrity and sex-privilege both. **1887** *Jrnl. Educ.* No. 210. 29 If this examination craze is to prevail, and the sex-abolitionists are to have their way. **1889** GEDDES & THOMSON *Evol. Sex* 91 Very commonly the sex-cells originate in the ectoderm and ripen there. **1894** H. DRUMMOND *Ascent of Man* 317 The sex-distinction slowly gathers definition. **1897** J. HUTCHINSON *in Arch. Surg.* VIII. 230 Loss of Sex Function.

Sex (seks), *v.* [f. SEX *sb.*] *trans.* To determine the sex of, by anatomical examination; to label as male or female.

1884 GURNEY *Diurnal Birds Prey* 173 The specimen is not sexed, neither is the sex noted on the drawing. **1888** A. NEWTON in *Zoologist* Ser. 111. XII. 101 The .. barbarous phrase of ‘collecting a specimen’ and then of ‘sexing’ it.

Concise Oxford Dictionary of Current English 1164 (5th ed. 1964):

sex, n. Being male or female or hermaphrodite (*what is its ~?; ~ does not matter; without distinction of age or ~*), whence ~'LESS a., ~**'le?ss** NESS n., ~'Y^2 a., immoderately concerned with ~; males or females collectively (*all ranks & both ~es; the fair, gentle, softer, weaker, ~, &* joc. *the ~,* women; *the sterner ~,* men; *is the fairest of her ~*); (attrib.) arising from difference, or consciousness, of ~ (~ *antagonism* , *~ instinct* , *~ urge*); *~ appeal* , attractiveness arising from difference of ~. [f. L *sexus –us;* partly thr. F]

Random House Dictionary of the English Language 1307 (1966):

sex (seks), *n.* **1.** The fact or character of being either male or female: *persons of different sex.* **2.** either of the two groups of persons exhibiting this character: *the stronger sex; the gentle sex.* **3.** the sum of the structural and functional differences by which the male and female are distinguished, or the phenomena or behavior dependent on these differences. **4.** the instinct or attraction drawing one sex toward another, or its manifestation in life and conduct. **5.** coitus. **6. to have sex,** *Informal* . to engage in sexual intercourse. *–v.t.* **7.** to ascertain the sex of, esp. of newly hatched chicks. **8. sex it up,** *Slang* . to neck passionately: *They were really sexing it up last night* . **9. sex up,** *Informal.* **a.** to arouse sexually: *She certainly knows how to sex up the men.* **b.** to increase the appeal of; to make more interesting, attractive, or exciting: *We've decided to sex up the movie with some battle scenes.* [ME < L *sex* (*us*), akin to *secus* , deriv. of *secare* to cut, divide; see SECTION]

American Heritage Dictionary 1187 (1969):

sex (seks) *n.* **1. a.** The property or quality by which organ-isms are classified according to their reproductive functions. **b.** Either of two divisions, designated *male* and *female* , of this classification. **2.** Males or females collectively. **3.** The condition or character of being male or female; the physiological, functional, and psychological differences that distinguish the male and the female. **4.** The sexual urge or instinct as it manifests itself in behavior. **5.** Sexual intercourse. *–tr.v.* **sexed, sexing, sexes.** To determine the sex of (young chickens). [Middle English, from Old
1790 French *sexe* , from Latin *sexus* †.]*1790 B

Webster's Third New International Dictionary 2081 (2002):

1 sex \'seks\ n – ES *often attrib* [ME, fr. L *sexus* ; prob. akin to L *secare* to cut—more at SAW] **1:** one of the two divisions of organic esp. human beings respectively designated male or female < a member of the opposite ~>**2:** the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change, that in its typical dichotomous occurrence is usu. genetically controlled and associated with special sex chromosomes, and that is typically manifested as maleness and femaleness with one or the other of these being present in most higher animals though both may occur in the same individual in many plants and some invertebrates and though no such distinction can be made in many lower forms (as some fungi, protozoans, and possibly bacteria and viruses) either because males and females are replaced by mating types or because the participants in sexual reproduction are indistinguishable —compare HETEROTHALLIC, HOMOTHALLIC; FERTILIZATION, MEIOSIS, MENDEL'S LAW; FREEMARTIN, HERMAPHRODITE, INTERSEX **3:** the sphere of interpersonal behavior esp. between male and female most directly associated with, leading up to, substituting for, or resulting from genital union < agree that the Christian's attitude toward ~ should not be considered apart from love, marriage, family—M. M. Forney>**4:** the phenomena of sexual instincts and their manifestations < with his customary combination of philosophy, insight, good will toward the world, and entertaining interest in ~—Allen Drury> < studying and assembling what modern scientists have discovered about ~— *Time*>; *specif* : SEXUAL INTERCOURSE

< an old law imposing death for ~ outside marriage—William Empson>

[2] sex \"\ *vt* –ED/–ING/–ES **1:** to determine the sex of (an organic being) < it is difficult to ~ the animals at a distance—E. A. Hooton>—compare AUTOSEXING **2 a:** to increase the sexual appeal or attraction of—usu. used with *up* < titles must be *~ed* up to attract 56 million customers—*Time*> **b:** to arouse the sexual instincts or desires of—usu. used with *up* < watching you *~ing* up that bar kitten—Oakley Hall>

Random House Webster's Unabridged Dictionary 1754 (2d ed. 2001):

Sex (seks), *n* . **1** . either the male or female division of a species, esp. as differentiated with reference to the reproductive functions. **2** . the sum of the structural and functional differences by which the male and female are distinguished, or the phenomena or behavior dependent on these differences. **3** . the instinct or attraction drawing one sex toward another, or its manifestation in life and conduct. **4** . coitus. **5** . genitalia. **6** . **to have sex** , to engage in sexual intercourse. – *v.t.* **7** . to ascertain the sex of, esp. of newly-hatched chicks. **8** . **sex up** , *Informal* . **a** . to arouse sexually: *The only intent of that show was to sex up the audience* . **b** . to increase the appeal of; to make more interesting, attractive, or exciting: *We've decided to sex up the movie with some battle scenes* . [1350–1400; ME < L *Sexus* , perh. akin to *secare* to divide (see SECTION)]

1791*1791

American Heritage Dictionary 1605 (5th ed. 2011):

Sex (seks) *n* . **1a.** Sexual activity, especially sexual intercourse: *hasn't had sex in months* . **b** . The sexual urge or instinct as it manifests itself in behavior: *motivated by sex* . **2a** . Either of the two divisions, designated female and male, by which most organisms are classified on the basis of their reproductive organs and functions: *How do you determine the sex of a lobster?* **b** . The fact or condition of existing in these two divisions, especially the collection of characteristics that distinguish female and male: *the evolution of sex in plants; a study that takes sex into account.* See Usage Note at **gender. 3.** Females or males considered as a group: *dormitories that house only one sex.* **4** . One's identity as either female or male. **5** . The genitals. *tr.v.* **sexed, sex-ing, sex-es 1.** To determine the sex of (an organism). **2.** *Slang* **a.** To arouse sexually. Often used with *up* . **b** . To increase the appeal or attractiveness of. Often used with *up* [Middle English < Latin *sexus.*]

C

Statutes Prohibiting Sex Discrimination

• 2 U.S.C. § 658a(2) (Congressional Budget and Fiscal Operations; Federal Mandates)

• 2 U.S.C. § 1311(a)(1) (Congressional Accountability; Extension of Rights and Protections)

• 2 U.S.C. § 1503(2) (Unfunded Mandates Reform)

• 3 U.S.C. § 411(a)(1) (Presidential Offices; Employment Discrimination)

• 5 U.S.C. § 2301(b)(2) (Merit System Principles)

• 5 U.S.C. § 2302(b)(1) (Prohibited Personnel Practices)

• 5 U.S.C. § 7103(a)(4)(A) (Labor-Management Relations; Definitions)

• 5 U.S.C. § 7116(b)(4) (Labor-Management Relations; Unfair Labor Practices)

• 5 U.S.C. § 7201(b) (Antidiscrimination Policy; Minority Recruitment Program)

• 5 U.S.C. § 7204(b) (Antidiscrimination; Other Prohibitions)

• 6 U.S.C. § 488f(b) (Secure Handling of Ammonium Nitrate; Protection From Civil Liability)

• 7 U.S.C. § 2020(c)(1) (Supplemental Nutrition Assistance Program)

• 8 U.S.C. § 1152(a)(1)(A) (Immigration; Numerical Limitations on Individual Foreign States)

• 8 U.S.C. § 1187(c)(6) (Visa Waiver Program for Certain Visitors)

• 8 U.S.C. § 1522(a)(5) (Authorization for Programs for Domestic Resettlement of and Assistance to Refugees)

• 10 U.S.C. § 932(b)(4) (Uniform Code of Military Justice; Article 132 Retaliation)

• 10 U.S.C. § 1034(j)(3) (Protected Communications; Prohibition of Retaliatory Personnel Actions)

• 12 U.S.C. § 302 (Directors of Federal Reserve Banks; Number of Members; Classes)

• 12 U.S.C. § 1735f–5(a) (Prohibition Against Discrimination on Account of Sex in Extension of Mortgage Assistance)

• 12 U.S.C. § 1821(d)(13)(E)(iv) (Federal Deposit Insurance Corporation; Insurance Funds)

• 12 U.S.C. § 1823(d)(3)(D)(iv) (Federal Deposit
1792 Insurance Corporation; Corporation Moneys)*1792

• 12 U.S.C. § 2277a–10c(b)(13)(E)(iv) (Farm Credit System Insurance Corporation; Corporation as Conservator or Receiver; Certain Other Powers)

• 12 U.S.C. § 3015(a)(4) (National Consumer Cooperative Bank; Eligibility of Cooperatives)

• 12 U.S.C. §§ 3106a(1)(B) and (2)(B) (Foreign Bank Participation in Domestic Markets)

• 12 U.S.C. § 4545(1) (Fair Housing)

• 12 U.S.C. § 5390(a)(9)(E)(v) (Wall Street Reform and Consumer Protection; Powers and Duties of the Corporation)

• 15 U.S.C. § 631(h) (Aid to Small Business)

• 15 U.S.C. § 633(b)(1) (Small Business Administration)

• 15 U.S.C. § 719 (Alaska Natural Gas Transportation; Civil Rights)

• 15 U.S.C. § 775 (Federal Energy Administration; Sex Discrimination; Enforcement; Other Legal Remedies)

• 15 U.S.C. § 1691(a)(1) (Equal Credit Opportunity Act)

• 15 U.S.C. § 1691d(a) (Equal Credit Opportunity Act)

• 15 U.S.C. § 3151(a) (Full Employment and Balanced Growth; Nondiscrimination)

• 18 U.S.C. § 246 (Deprivation of Relief Benefits)

• 18 U.S.C. § 3593(f) (Special Hearing To Determine Whether a Sentence of Death Is Justified)

• 20 U.S.C. § 1011(a) (Higher Education Resources and Student Assistance; Antidiscrimination)

• 20 U.S.C. § 1011f(h)(5)(D) (Disclosures of Foreign Gifts)

• 20 U.S.C. § 1066c(d) (Historically Black College and University Capital Financing; Limitations on Federal Insurance Bonds Issued by Designated Bonding Authority)

• 20 U.S.C. § 1071(a)(2) (Federal Family Education Loan Program)

• 20 U.S.C. § 1078(c)(2)(F) (Federal Payments To Reduce Student Interest Costs)

• 20 U.S.C. § 1087–1(e) (Federal Family Education Loan Program; Special Allowances)

• 20 U.S.C. § 1087–2(e) (Student Loan Marketing Association)

• 20 U.S.C. § 1087–4 (Discrimination in Secondary Markets Prohibited)

• 20 U.S.C. § 1087tt(c) (Discretion of Student Financial Aid Administrators)

• 20 U.S.C. § 1231e(b)(2) (Education Programs; Use of Funds Withheld)

• 20 U.S.C. § 1681 (Title IX of the Education Amendments of 1972)

• 20 U.S.C. § 1701(a)(1) (Equal Educational Opportunities; Congressional Declaration of Policy)

• 20 U.S.C. § 1702(a)(1) (Equal Educational Opportunities; Congressional Findings)

• 20 U.S.C. § 1703 (Denial of Equal Educational Opportunity Prohibited)

• 20 U.S.C. § 1705 (Assignment on Neighborhood Basis Not a Denial of Equal Educational Opportunity)

• 20 U.S.C. § 1715 (District Lines)

• 20 U.S.C. § 1720 (Equal Educational Opportunities; Definitions)

• 20 U.S.C. § 1756 (Remedies With Respect to School District Lines)

• 20 U.S.C. § 2396 (Career and Technical Education; Federal Laws Guaranteeing Civil Rights)*1793 • 20 U.S.C. § 3401(2) (Department of Education; Congressional Findings)

• 20 U.S.C. § 7231d(b)(2)(C) (Magnet Schools Assistance; Applications and Requirements)

• 20 U.S.C. § 7914 (Strengthening and Improvement of Elementary and Secondary Schools; Civil Rights)

• 22 U.S.C. § 262p–4n (Foreign Relations and Intercourse; Equal Employment Opportunities)

• 22 U.S.C. § 2304(a)(1) (Human Rights and Security Assistance)

• 22 U.S.C. § 2314(g) (Furnishing of Defense Articles or Related Training or Other Defense Service on Grant Basis)

• 22 U.S.C. § 2426 (Discrimination Against United States Personnel)

• 22 U.S.C. § 2504(a) (Peace Corps Volunteers)

• 22 U.S.C. § 2661a (Foreign Contracts or Arrangements; Discrimination)

• 22 U.S.C. § 2755 (Discrimination Prohibited if Based on Race, Religion, National Origin, or Sex)

• 22 U.S.C. § 3901(b)(2) (Foreign Service; Congressional Findings and Objectives)

• 22 U.S.C. § 3905(b)(1) (Foreign Service; Personnel Actions)

• 22 U.S.C. § 4102(11)(A) (Foreign Service; Definitions)

• 22 U.S.C. § 4115(b)(4) (Foreign Service; Unfair Labor Practices)

• 22 U.S.C. § 6401(a)(3) (International Religious Freedom; Findings; Policy)

• 22 U.S.C. § 8303(c)(2) (Office of Volunteers for Prosperity)

• 23 U.S.C. § 140(a) (Federal-Aid Highways; Nondiscrimination)

• 23 U.S.C. § 324 (Highways; Prohibition of Discrimination on the Basis of Sex)

• 25 U.S.C. § 4223(d)(2) (Housing Assistance for Native Hawaiians)

• 26 U.S.C. § 7471(a)(6)(A) (Tax Court; Employees)

• 28 U.S.C. § 994(d) (Duties of the United States Sentencing Commission)

• 28 U.S.C. § 1862 (Trial by Jury; Discrimination Prohibited)

• 28 U.S.C. § 1867(e) (Trial by Jury; Challenging Compliance With Selection Procedures)

• 29 U.S.C. § 206(d)(1) (Equal Pay Act of 1963)

• 29 U.S.C. §§ 2601(a)(6) and (b)(4) (Family and Medical Leave; Findings and Purposes)

• 29 U.S.C. § 2651(a) (Family and Medical Leave; Effect on Other Laws)

• 29 U.S.C. § 3248 (Workforce Development Opportunities; Nondiscrimination)

• 30 U.S.C. § 1222(c) (Research Funds to Institutes)

• 31 U.S.C. § 732(f) (Government Accountability Office; Personnel Management System)

• 31 U.S.C. § 6711 (Federal Payments; Prohibited Discrimination)

• 31 U.S.C. § 6720(a)(8) (Federal Payments; Definitions, Application, and Administration)

• 34 U.S.C. § 10228(c) (Prohibition of Federal Control Over State and Local Criminal Justice Agencies; Prohibition of Discrimination)

• 34 U.S.C. § 11133(a)(16) (Juvenile Justice and Delinquency Prevention; State Plans)

• 34 U.S.C. § 12161(g) (Community Schools Youth Services and Supervision Grant Program)

1794*1794 • 34 U.S.C. § 12361 (Violent Crime Control and Law Enforcement; Civil Rights for Women)

• 34 U.S.C. § 20110(e) (Crime Victims Fund; Administration Provisions)

• 34 U.S.C. § 50104(a) (Emergency Federal Law Enforcement Assistance)

• 36 U.S.C. § 20204(b) (Air Force Sergeants Association; Membership)

• 36 U.S.C. § 20205(c) (Air Force Sergeants Association; Governing Body)

• 36 U.S.C. § 21003(a)(4) (American GI Forum of the United States; Purposes)

• 36 U.S.C. § 21004(b) (American GI Forum of the United States; Membership)

• 36 U.S.C. § 21005(c) (American GI Forum of the United States; Governing Body)

• 36 U.S.C. § 21704A (The American Legion)

• 36 U.S.C. § 22703(c) (Amvets; Membership)

• 36 U.S.C. § 22704(d) (Amvets; Governing Body)

• 36 U.S.C. § 60104(b) (82nd Airborne Division Association, Incorporated; Membership)

• 36 U.S.C. § 60105(c) (82nd Airborne Division Association, Incorporated; Governing Body)

• 36 U.S.C. § 70104(b) (Fleet Reserve Association; Membership)

• 36 U.S.C. § 70105(c) (Fleet Reserve Association; Governing Body)

• 36 U.S.C. § 140704(b) (Military Order of the World Wars; Membership)

• 36 U.S.C. § 140705(c) (Military Order of the World Wars; Governing Body)

• 36 U.S.C. § 154704(b) (Non Commissioned Officers Association of the United States of America, Incorporated; Membership)

• 36 U.S.C. § 154705(c) (Non Commissioned Officers Association of the United States of America, Incorporated; Governing Body)

• 36 U.S.C. § 190304(b) (Retired Enlisted Association, Incorporated; Membership)

• 36 U.S.C. § 190305(c) (Retired Enlisted Association, Incorporated; Governing Body)

• 36 U.S.C. § 220522(a)(8) and (9) (United States Olympic Committee; Eligibility Requirements)

• 36 U.S.C. § 230504(b) (Vietnam Veterans of America, Inc.; Membership)

• 36 U.S.C. § 230505(c) (Vietnam Veterans of America, Inc.; Governing Body)

• 40 U.S.C. § 122(a) (Federal Property and Administrative Services; Prohibition on Sex Discrimination)

• 40 U.S.C. § 14702 (Appalachian Regional Development; Nondiscrimination)

• 42 U.S.C. § 213(f) (Military Benefits)

• 42 U.S.C. § 290cc–33(a) (Projects for Assistance in Transition From Homelessness)

• 42 U.S.C. § 290ff–1(e)(2)(C) (Children With Serious Emotional Disturbances; Requirements With Respect to Carrying Out Purpose of Grants)

• 42 U.S.C. § 295m (Public Health Service; Prohibition Against Discrimination on Basis of Sex)

• 42 U.S.C. § 296g (Public Health Service; Prohibition Against Discrimination by Schools on Basis of Sex)

• 42 U.S.C. § 300w–7(a)(2) (Preventive Health and Health Services Block Grants; 1795 Nondiscrimination Provisions)*1795 • 42 U.S.C. § 300x–57(a)(2) (Block Grants Regarding Mental Health and Substance Abuse; Nondiscrimination)

• 42 U.S.C. § 603(a)(5)(I)(iii) (Block Grants to States for Temporary Assistance for Needy Families)

• 42 U.S.C. § 708(a)(2) (Maternal and Child Health Services Block Grant; Nondiscrimination Provisions)

• 42 U.S.C. § 1975a(a) (Duties of Civil Rights Commission)

• 42 U.S.C. § 2000c(b) (Civil Rights; Public Education; Definitions)

• 42 U.S.C. § 2000c–6(a)(2) (Civil Rights; Public Education; Civil Actions by the Attorney General)

• 42 U.S.C. § 2000e–2 (Equal Employment Opportunities; Unlawful Employment Practices)

• 42 U.S.C. § 2000e–3(b) (Equal Employment Opportunities; Other Unlawful Employment Practices)

• 42 U.S.C. § 2000e–16(a) (Employment by Federal Government)

• 42 U.S.C. § 2000e–16a(b) (Government Employee Rights Act of 1991)

• 42 U.S.C. § 2000e–16b(a)(1) (Discriminatory Practices Prohibited)

• 42 U.S.C. § 2000h–2 (Intervention by Attorney General; Denial of Equal Protection on Account of Race, Color, Religion, Sex or National Origin)

• 42 U.S.C. § 3123 (Discrimination on Basis of Sex Prohibited in Federally Assisted Programs)

• 42 U.S.C. § 3604 (Fair Housing Act; Discrimination in the Sale or Rental of Housing and Other Prohibited Practices)

• 42 U.S.C. § 3605 (Fair Housing Act; Discrimination in Residential Real Estate-Related Transactions)

• 42 U.S.C. § 3606 (Fair Housing Act; Discrimination in the Provision of Brokerage Services)

• 42 U.S.C. § 3631 (Fair Housing Act; Violations; Penalties)

• 42 U.S.C. § 4701 (Intergovernmental Personnel Program; Congressional Findings and Declaration of Policy)

• 42 U.S.C. § 5057(a)(1) (Domestic Volunteer Services; Nondiscrimination Provisions)

• 42 U.S.C. § 5151(a) (Nondiscrimination in Disaster Assistance)

• 42 U.S.C. § 5309(a) (Community Development; Nondiscrimination in Programs and Activities)

• 42 U.S.C. § 5891 (Development of Energy Sources; Sex Discrimination Prohibited)

• 42 U.S.C. § 6709 (Public Works Employment; Sex Discrimination; Prohibition; Enforcement)

• 42 U.S.C. § 6727(a)(1) (Public Works Employment; Nondiscrimination)

• 42 U.S.C. § 6870(a) (Weatherization Assistance for Low-Income Persons)

• 42 U.S.C. § 8625(a) (Low-Income Home Energy Assistance; Nondiscrimination Provisions)

• 42 U.S.C. § 9821 (Community Economic Development; Nondiscrimination Provisions)

• 42 U.S.C. § 9849 (Head Start Programs; Nondiscrimination Provisions)

• 42 U.S.C. § 9918(c)(1) (Community Services Block Grant Program; Limitations on Use of Funds)

• 42 U.S.C. § 10406(c)(2)(B)(i) (Family Violence Prevention and Services; Formula Grants to States)

• 42 U.S.C. § 11504(b) (Enterprise Zone
1796 Development; Waiver of Modification *1796 of Housing and Community Development Rules in Enterprise Zones)

• 42 U.S.C. § 12635(a)(1) (National and Community Service State Grant Program; Nondiscrimination)

• 42 U.S.C. § 12832 (Investment in Affordable Housing; Nondiscrimination)

• 43 U.S.C. § 1747(10) (Loans to States and Political Subdivisions; Discrimination Prohibited)

• 43 U.S.C. § 1863 (Outer Continental Shelf Resource Management; Unlawful Employment Practices; Regulations)

• 47 U.S.C. § 151 (Federal Communications Commission)

• 47 U.S.C. § 398(b)(1) (Public Broadcasting; Equal Opportunity Employment)

• 47 U.S.C. §§ 554(b) and (c) (Cable Communications; Equal Employment Opportunity)

• 47 U.S.C. § 555a(c) (Cable Communications; Limitation of Franchising Authority Liability)

• 48 U.S.C. § 1542(a) (Virgin Islands; Voting Franchise; Discrimination Prohibited)

• 48 U.S.C. § 1708 (Discrimination Prohibited in Rights of Access to, and Benefits From, Conveyed Lands)

• 49 U.S.C. § 306(b) (Duties of the Secretary of Transportation; Prohibited Discrimination)

• 49 U.S.C. § 5332(b) (Public Transportation; Nondiscrimination)

• 49 U.S.C. § 40127 (Air Commerce and Safety; Prohibitions on Discrimination)

• 49 U.S.C. § 47123(a) (Airport Improvement; Nondiscrimination)

• 50 U.S.C. § 3809(b)(3) (Selective Service System)

• 50 U.S.C. § 4842(a)(1)(B) (Anti-Boycott Act of 2018)

1804 D *1797 *1798 *1799 *1800 *1801 *1802 *1803 *1804 1812 *1805 *1806 *1807 *1808 *1809 *1810 *1811 *1812 1820 *1813 *1814 *1815 *1816 *1817 *1818 *1819 *1820 1822 *1821 *1822

Justice KAVANAUGH, dissenting.

Like many cases in this Court, this case boils down to one fundamental question: Who decides? Title VII of the Civil Rights Act of 1964 prohibits

employment discrimination "because of " an individual's "race, color, religion, sex, or national origin." The question here is whether Title VII should be expanded to prohibit employment discrimination because of sexual orientation. Under the Constitution's separation of powers, the responsibility to amend Title VII belongs to Congress and the President in the legislative process, not to this Court.

The political branches are well aware of this issue. In 2007, the U.S. House of Representatives voted 235 to 184 to prohibit employment discrimination on the basis of sexual orientation. In 2013, the U.S. Senate voted 64 to 32 in favor of a similar ban. In 2019, the House again voted 236 to 173 to 1823 outlaw employment discrimination *1823 on the basis of sexual orientation. Although both the House and Senate have voted at different times to prohibit sexual orientation discrimination, the two Houses have not yet come together with the President to enact a bill into law.

The policy arguments for amending Title VII are very weighty. The Court has previously stated, and I fully agree, that gay and lesbian Americans "cannot be treated as social outcasts or as inferior in dignity and worth." *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n* , 584 U.S. ——, ——, 138 S.Ct. 1719, 1727, 201 L.Ed.2d 35 (2018).

But we are judges, not Members of Congress. And in Alexander Hamilton's words, federal judges exercise "neither Force nor Will, but merely judgment." The Federalist No. 78, p. 523 (J. Cooke ed. 1961). Under the Constitution's separation of powers, our role as judges is to interpret and follow the law as written, regardless of whether we like the result. Cf. *Texas v. Johnson* , 491 U.S. 397, 420–421, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (Kennedy, J., concurring). Our role is not to make or amend the law. As written, Title VII does not prohibit employment discrimination because of sexual orientation.[1]

[1] Although this opinion does not separately analyze discrimination on the basis of gender identity, this opinion's legal analysis of discrimination on the basis of sexual orientation would apply in much the same way to discrimination on the basis of gender identity.

I

Title VII makes it unlawful for employers to discriminate because of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a)(1).[2] As enacted in 1964, Title VII did not prohibit other forms of employment discrimination, such as age discrimination, disability discrimination, or sexual orientation discrimination.

[2] In full, the statute provides:

"*It shall be an unlawful employment practice for an employer* —

"(1) to fail or refuse to hire or to discharge any individual, or otherwise *to discriminate against any individual* with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's race, color, religion, sex, or national origin* ; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a) (emphasis added).

As the Court today recognizes, Title VII contains an important exemption for religious organizations. § 2000e–1(a) ; see also § 2000e–2(e). The First Amendment also safeguards the employment decisions of religious employers. See *HosannaTabor Evangelical Lutheran Church and School v. EEOC* , 565 U.S. 171, 188–195, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012). So too, the Religious Freedom Restoration Act of 1993 exempts employers from federal laws

> that substantially burden the exercise of religion, subject to limited exceptions. § 2000bb–1.

Over time, Congress has enacted new employment discrimination laws. In 1967, Congress passed and President Johnson signed the Age Discrimination in Employment Act. 81 Stat. 602. In 1973, Congress passed and President Nixon signed the Rehabilitation Act, which in substance prohibited disability discrimination against federal and certain other employees. 87 Stat. 355. In 1990, Congress passed and President George H. W. Bush signed the comprehensive Americans with Disabilities Act. 104 Stat. 327.

To prohibit age discrimination and disability discrimination, this Court did not unilaterally rewrite or update the law. Rather, Congress and the President enacted new legislation, as prescribed by the Constitution's separation of
1824 powers.*1824 For several decades, Congress has considered numerous bills to prohibit employment discrimination based on sexual orientation. But as noted above, although Congress has come close, it has not yet shouldered a bill over the legislative finish line.

In the face of the unsuccessful legislative efforts (so far) to prohibit sexual orientation discrimination, judges may not rewrite the law simply because of their own policy views. Judges may not update the law merely because they think that Congress does not have the votes or the fortitude. Judges may not predictively amend the law just because they believe that Congress is likely to do it soon anyway.

If judges could rewrite laws based on their own policy views, or based on their own assessments of likely future legislative action, the critical distinction between legislative authority and judicial authority that undergirds the Constitution's separation of powers would collapse, thereby threatening the impartial rule of law and individual liberty. As James Madison stated: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for *the judge* would then be *the legislator* ." The Federalist No. 47, at 326 (citing Montesquieu). If judges could, for example, rewrite or update securities laws or healthcare laws or gun laws or environmental laws simply based on their own policy views, the Judiciary would become a democratically illegitimate super-legislature—unelected, and hijacking the important policy decisions reserved by the Constitution to the people's elected representatives.

Because judges interpret the law as written, not as they might wish it were written, the first 10 U.S. Courts of Appeals to consider whether Title VII prohibits sexual orientation discrimination all said no. Some 30 federal judges considered the question. All 30 judges said no, based on the text of the statute. 30 out of 30.

But in the last few years, a new theory has emerged. To end-run the bedrock separation-of-powers principle that courts may not unilaterally rewrite statutes, the plaintiffs here (and, recently, two Courts of Appeals) have advanced a novel and creative argument. They contend that discrimination "because of sexual orientation" and discrimination "because of sex" are actually not separate categories of discrimination after all. Instead, the theory goes, discrimination because of sexual orientation always qualifies as discrimination because of sex: When a gay man is fired because he is gay, he is fired because he is attracted to men, even though a similarly situated woman would not be fired just because she is attracted to men. According to this theory, it follows that the man has been fired, at least as a literal matter, because of his sex.

Under this literalist approach, sexual orientation discrimination automatically qualifies as sex discrimination, and Title VII's prohibition against sex discrimination therefore also prohibits sexual orientation discrimination—and actually has done

so since 1964, unbeknownst to everyone. Surprisingly, the Court today buys into this approach. *Ante* , at 1758 - 1760.

For the sake of argument, I will assume that firing someone because of their sexual orientation may, as a very literal matter, entail making a distinction based on sex. But to prevail in this case with their literalist approach, the plaintiffs must *also* establish one of two other points. The plaintiffs must establish that courts, when interpreting a statute, adhere to literal meaning rather than ordinary meaning. Or alternatively, the plaintiffs must establish that the ordinary meaning of
1825 "discriminate *1825 because of sex"—not just the literal meaning—encompasses sexual orientation discrimination. The plaintiffs fall short on both counts.

First , courts must follow ordinary meaning, not literal meaning. And courts must adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase.

There is no serious debate about the foundational interpretive principle that courts adhere to ordinary meaning, not literal meaning, when interpreting statutes. As Justice Scalia explained, "the good textualist is not a literalist." A. Scalia, A Matter of Interpretation 24 (1997). Or as Professor Eskridge stated: The "prime directive in statutory interpretation is to apply the meaning that a reasonable reader would derive from the text of the law," so that "for hard cases as well as easy ones, the *ordinary meaning* (or the 'everyday meaning' or the 'commonsense' reading) of the relevant statutory text is the anchor for statutory interpretation." W. Eskridge, Interpreting Law 33, 34–35 (2016) (footnote omitted). Or as Professor Manning put it, proper statutory interpretation asks "how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context. This approach recognizes that the literal or dictionary definitions of words will often fail to account for settled nuances or background conventions that qualify the literal meaning of language and, in particular, of legal language." Manning, The Absurdity Doctrine, 116 Harv. L. Rev. 2387, 2392–2393 (2003). Or as Professor Nelson wrote: No "mainstream judge is interested solely in the literal definitions of a statute's words." Nelson, What Is Textualism?, 91 Va. L. Rev. 347, 376 (2005). The ordinary meaning that counts is the ordinary public meaning at the time of enactment—although in this case, that temporal principle matters little because the ordinary meaning of "discriminate because of sex" was the same in 1964 as it is now.

Judges adhere to ordinary meaning for two main reasons: rule of law and democratic accountability. A society governed by the rule of law must have laws that are known and understandable to the citizenry. And judicial adherence to ordinary meaning facilitates the democratic accountability of America's elected representatives for the laws they enact. Citizens and legislators must be able to ascertain the law by reading the words of the statute. Both the rule of law and democratic accountability badly suffer when a court adopts a hidden or obscure interpretation of the law, and not its ordinary meaning.

Consider a simple example of how ordinary meaning differs from literal meaning. A statutory ban on "vehicles in the park" would literally encompass a baby stroller. But no good judge would interpret the statute that way because the word "vehicle," in its ordinary meaning, does not encompass baby strollers.

The ordinary meaning principle is longstanding and well settled. Time and again, this Court has rejected literalism in favor of ordinary meaning. Take a few examples:

The Court recognized that beans may be seeds "in the language of botany or natural history," but concluded that beans are not seeds "in commerce" or "in common parlance." *Robertson v. Salomon* , 130 U.S. 412, 414, 9 S.Ct. 559, 32 L.Ed. 995 (1889).

The Court explained that tomatoes are literally "the fruit of a vine," but "in the common language of the people," tomatoes are vegetables. *Nix v. Hedden* , 149 U.S. 304, 307, 13 S.Ct. 881, 37 L.Ed. 745 (1893).

The Court stated that the statutory term "vehicle" does not cover an aircraft: "No doubt etymologically it is possible to use the word to
1826 signify a conveyance working *1826 on land, water or air .... But in everyday speech 'vehicle' calls up the picture of a thing moving on land." *McBoyle v. United States* , 283 U.S. 25, 26, 51 S.Ct. 340, 75 L.Ed. 816 (1931).

The Court pointed out that "this Court's interpretation of the three-judge-court statutes has frequently deviated from the path of literalism." *Gonzalez v. Automatic Employees Credit Union* , 419 U.S. 90, 96, 95 S.Ct. 289, 42 L.Ed.2d 249 (1974).

The Court refused a reading of "mineral deposits" that would include water, even if "water is a 'mineral,' in the broadest sense of that word," because it would bring about a "major ... alteration in established legal relationships based on nothing more than an overly literal reading of a statute, without any regard for its context or history." *Andrus v. Charlestone Stone Products Co.* , 436 U.S. 604, 610, 616, 98 S.Ct. 2002, 56 L.Ed.2d 570 (1978).

The Court declined to interpret "facilitating" a drug distribution crime in a way that would cover purchasing drugs, because the "literal sweep of 'facilitate' sits uncomfortably with common usage." *Abuelhawa v. United States* , 556 U.S. 816, 820, 129 S.Ct. 2102, 173 L.Ed.2d 982 (2009).

The Court rebuffed a literal reading of "personnel rules" that would encompass any rules that personnel must follow (as opposed to human resources rules *about* personnel), and stated that no one "using ordinary language would describe" personnel rules "in this manner." *Milner v. Department of Navy* , 562 U.S. 562, 578, 131 S.Ct. 1259, 179 L.Ed.2d 268 (2011).

The Court explained that, when construing statutory phrases such as "arising from," it avoids "uncritical literalism leading to results that no sensible person could have intended." *Jennings* v. *Rodriguez* , 583 U.S. ——, —— – ——, 138 S.Ct. 830, 840, 200 L.Ed.2d 122 (2018) (plurality opinion) (internal quotation marks omitted).

Those cases exemplify a deeply rooted principle: When there is a divide between the literal meaning and the ordinary meaning, courts must follow the ordinary meaning.

Next is a critical point of emphasis in this case. The difference between literal and ordinary meaning becomes especially important when—as in this case—judges consider *phrases* in statutes. (Recall that the shorthand version of the phrase at issue here is "discriminate because of sex.")[3] Courts must heed the ordinary meaning of the *phrase as a whole* , not just the meaning of the words in the phrase. That is because a phrase may have a more precise or confined meaning than the literal meaning of the individual words in the phrase. Examples abound. An "American flag" could literally encompass a flag made in America, but in common parlance it denotes the Stars and Stripes. A "three-pointer" could literally include a field goal in football, but in common parlance, it is a shot from behind the arc in basketball. A "cold war" could literally mean any wintertime war, but in common parlance it signifies a conflict short of open warfare. A "washing machine" could literally refer to any machine used for washing any item, but in everyday speech it means a machine for washing clothes.

[3] The full phrasing of the statute is provided above in footnote 2. This opinion uses "discriminate because of sex" as shorthand for "discriminate ... because of ... sex." Also, the plaintiffs do not dispute that the ordinary meaning of the statutory phrase

> "discriminate" because of sex is the same as the statutory phrase "to fail or refuse to hire or to discharge any individual" because of sex.

This Court has often emphasized the importance of sticking to the ordinary meaning *of a phrase* , 1827 rather than the *1827 meaning of words in the phrase. In *FCC v. AT&T Inc.* , 562 U.S. 397, 131 S.Ct. 1177, 179 L.Ed.2d 132 (2011), for example, the Court explained:

> "AT&T's argument treats the term 'personal privacy' as simply the sum of its two words: the privacy of a person.... But two words together may assume a more particular meaning than those words in isolation. We understand a golden cup to be a cup made of or resembling gold. A golden boy, on the other hand, is one who is charming, lucky, and talented. A golden opportunity is one not to be missed. 'Personal' in the phrase 'personal privacy' conveys more than just 'of a person.' It suggests a type of privacy evocative of human concerns—not the sort usually associated with an entity like, say, AT&T." *Id.,* at 406, 131 S.Ct. 1177.

Exactly right and exactly on point in this case.

Justice Scalia explained the extraordinary importance of hewing to the ordinary meaning of a phrase: "Adhering to the *fair meaning* of the text (the textualist's touchstone) does not limit one to the hyperliteral meaning of each word in the text. In the words of Learned Hand: 'a sterile literalism ... loses sight of the forest for the trees.' The full body of a text contains implications that can alter the literal meaning of individual words." A. Scalia & B. Garner, Reading Law 356 (2012) (footnote omitted). Put another way, "the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes." *Helvering v. Gregory* , 69 F.2d 809, 810–811 (CA2 1934) (L. Hand, J.). Judges must take care to follow ordinary meaning "when two words combine to produce a meaning that is not the mechanical composition of the two words separately." Eskridge, Interpreting Law, at 62. Dictionaries are not "always useful for determining the ordinary meaning of word clusters (like 'driving a vehicle') or phrases and clauses or entire sentences." *Id.* , at 44. And we must recognize that a phrase can cover a "dramatically smaller category than either component term." *Id.,* at 62.

If the usual evidence indicates that a statutory phrase bears an ordinary meaning different from the literal strung-together definitions of the individual words in the phrase, we may not ignore or gloss over that discrepancy. "Legislation cannot sensibly be interpreted by stringing together dictionary synonyms of each word and proclaiming that, if the right example of the meaning of each is selected, the 'plain meaning' of the statute leads to a particular result. No theory of interpretation, including textualism itself, is premised on such an approach." 883 F.3d 100, 144, n. 7 (CA2 2018) (Lynch, J., dissenting).[4]

> [4] Another longstanding canon of statutory interpretation—the absurdity canon—similarly reflects the law's focus on ordinary meaning rather than literal meaning. That canon tells courts to avoid construing a statute in a way that would lead to absurd consequences. The absurdity canon, properly understood, is "an implementation of (rather than ... an exception to) the ordinary meaning rule." W. Eskridge, Interpreting Law 72 (2016). "What the rule of absurdity seeks to do is what all rules of interpretation seek to do: *make sense* of the text." A. Scalia & B. Garner, Reading Law 235 (2012).

In other words, this Court's precedents and longstanding principles of statutory interpretation teach a clear lesson: Do not simply split statutory phrases into their component words, look up each in a dictionary, and then mechanically put them together again, as the majority opinion today

mistakenly does. See *ante* , at 1756 - 1759. To reiterate Justice Scalia's caution, that approach 1828misses the forest for the trees.*1828 A literalist approach to interpreting phrases disrespects ordinary meaning and deprives the citizenry of fair notice of what the law is. It destabilizes the rule of law and thwarts democratic accountability. For phrases as well as terms, the "linchpin of statutory interpretation is *ordinary meaning* , for that is going to be most accessible to the citizenry desirous of following the law *and* to the legislators and their staffs drafting the legal terms of the plans launched by statutes *and* to the administrators and judges implementing the statutory plan." Eskridge, Interpreting Law, at 81; see Scalia, A Matter of Interpretation, at 17.

Bottom line: Statutory Interpretation 101 instructs courts to follow ordinary meaning, not literal meaning, and to adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase.

Second , in light of the bedrock principle that we must adhere to the ordinary meaning of a phrase, the question in this case boils down to the ordinary meaning of the phrase "discriminate because of sex." Does the ordinary meaning of that phrase encompass discrimination because of sexual orientation? The answer is plainly no.

On occasion, it can be difficult for judges to assess ordinary meaning. Not here. Both common parlance and common legal usage treat sex discrimination and sexual orientation discrimination as two distinct categories of discrimination—back in 1964 and still today.

As to common parlance, few in 1964 (or today) would describe a firing because of sexual orientation as a firing because of sex. As commonly understood, sexual orientation discrimination is distinct from, and not a form of, sex discrimination. The majority opinion acknowledges the common understanding, noting that the plaintiffs here probably did not tell their friends that they were fired because of their sex. *Ante* , at 1762 - 1763. That observation is clearly correct. In common parlance, Bostock and Zarda were fired because they were gay, not because they were men.

Contrary to the majority opinion's approach today, this Court has repeatedly emphasized that common parlance matters in assessing the ordinary meaning of a statute, because courts heed how "most people" "would have understood" the text of a statute when enacted. *New Prime Inc.* v. *Oliveira* , 586 U.S. ——, —— – ——, 139 S.Ct. 532, 538–539, 202 L.Ed.2d 536 (2019) ; see *Henson* v. *Santander Consumer USA Inc.* , 582 U.S. ——, ——, 137 S.Ct. 1718, 1722, 198 L.Ed.2d 177 (2017) (using a conversation between friends to demonstrate ordinary meaning); see also *Wisconsin Central Ltd.* v. *United States* , 585 U.S. ——, —— – ——, 138 S.Ct. 2067, 2070–2071, 201 L.Ed.2d 490 (2018) (similar); *AT&T* , 562 U.S. at 403–404, 131 S.Ct. 1177 (similar).

Consider the employer who has four employees but must fire two of them for financial reasons. Suppose the four employees are a straight man, a straight woman, a gay man, and a lesbian. The employer with animosity against women (animosity based on sex) will fire the two women. The employer with animosity against gays (animosity based on sexual orientation) will fire the gay man and the lesbian. Those are two distinct harms caused by two distinct biases that have two different outcomes. To treat one as a form of the other—as the majority opinion does—misapprehends common language, human psychology, and real life. See *Hively v. Ivy Tech Community College of Ind.* , 853 F.3d 339, 363 (CA7 2017) (Sykes, J., dissenting).

It also rewrites history. Seneca Falls was not 1829Stonewall. The women's rights *1829 movement was not (and is not) the gay rights movement, although many people obviously support or participate in both. So to think that sexual orientation discrimination is just a form of sex

discrimination is not just a mistake of language and psychology, but also a mistake of history and sociology.

Importantly, an overwhelming body of federal law reflects and reinforces the ordinary meaning and demonstrates that sexual orientation discrimination is distinct from, and not a form of, sex discrimination. Since enacting Title VII in 1964, Congress has *never* treated sexual orientation discrimination the same as, or as a form of, sex discrimination. Instead, Congress has consistently treated sex discrimination and sexual orientation discrimination as legally distinct categories of discrimination.

Many federal statutes prohibit sex discrimination, and many federal statutes also prohibit sexual orientation discrimination. But those sexual orientation statutes expressly prohibit sexual orientation discrimination in addition to expressly prohibiting sex discrimination. *Every single one.* To this day, Congress has never defined sex discrimination to encompass sexual orientation discrimination. Instead, when Congress wants to prohibit sexual orientation discrimination in addition to sex discrimination, Congress explicitly refers to sexual orientation discrimination.[5]

[5] See 18 U.S.C. § 249(a)(2)(A) (criminalizing violence because of "gender, sexual orientation"); 20 U.S.C. § 1092(f)(1)(F)(ii) (requiring funding recipients to collect statistics on crimes motivated by the victim's "gender, ... sexual orientation"); 34 U.S.C. § 12291(b)(13)(A) (prohibiting discrimination on the basis of "sex, ... sexual orientation"); § 30501(1) (identifying violence motivated by "gender, sexual orientation" as national problem); § 30503(a)(1)(C) (authorizing Attorney General to assist state, local, and tribal investigations of crimes motivated by the victim's "gender, sexual orientation"); §§ 41305(b)(1), (3) (requiring Attorney General to acquire data on crimes motivated by "gender ..., sexual orientation," but disclaiming any cause of action including one "based on discrimination due to sexual orientation"); 42 U.S.C. § 294e–1(b)(2) (conditioning funding on institution's inclusion of persons of "different genders and sexual orientations"); see also United States Sentencing Commission, Guidelines Manual § 3A1.1(a) (Nov. 2018) (authorizing increased offense level if the crime was motivated by the victim's "gender ... or sexual orientation"); 2E Guide to Judiciary Policy § 320 (2019) (prohibiting judicial discrimination because of "sex, ... sexual orientation").

That longstanding and widespread congressional practice matters. When interpreting statutes, as the Court has often said, we "usually presume differences in language" convey "differences in meaning." *Wisconsin Central* , 585 U.S., at ——, 138 S.Ct., at 2071 (internal quotation marks omitted). When Congress chooses distinct phrases to accomplish distinct purposes, and does so over and over again for decades, we may not lightly toss aside all of Congress's careful handiwork. As Justice Scalia explained for the Court, "it is not our function" to "treat alike subjects that different Congresses have chosen to treat differently." *West Virginia Univ. Hospitals, Inc. v. Casey* , 499 U.S. 83, 101, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991) ; see *id.,* at 92, 111 S.Ct. 1138.

And the Court has likewise stressed that we may not read "a specific concept into general words when precise language in other statutes reveals that Congress knew how to identify that concept." Eskridge, Interpreting Law, at 415; see *University of Tex. Southwestern Medical Center v. Nassar* , 570 U.S. 338, 357, 133 S.Ct. 2517, 186 L.Ed.2d 503 (2013) ; *Arlington Central School Dist. Bd. of Ed. v. Murphy* , 548 U.S. 291, 297–298, 126 S.Ct. 1830 2455, 165 L.Ed.2d 526 (2006) ; *1830 *Jama v. Immigration and Customs Enforcement* , 543 U.S. 335, 341–342, 125 S.Ct. 694, 160 L.Ed.2d 708 (2005) ; *Custis v. United States* , 511 U.S. 485,

491–493, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994) ; *West Virginia Univ. Hospitals* , 499 U.S. at 99, 111 S.Ct. 1138.

So it is here. As demonstrated by all of the statutes covering sexual orientation discrimination, Congress knows how to prohibit sexual orientation discrimination. So courts should not read that specific concept into the general words "discriminate because of sex." We cannot close our eyes to the indisputable fact that Congress—for several decades in a large number of statutes—has identified sex discrimination and sexual orientation discrimination as two distinct categories.

Where possible, we also strive to interpret statutes so as not to create undue surplusage. It is not uncommon to find some scattered redundancies in statutes. But reading sex discrimination to encompass sexual orientation discrimination would cast aside as surplusage the numerous references to sexual orientation discrimination sprinkled throughout the U.S. Code in laws enacted over the last 25 years.

In short, an extensive body of federal law both reflects and reinforces the widespread understanding that sexual orientation discrimination is distinct from, and not a form of, sex discrimination.

The story is the same with bills proposed in Congress. Since the 1970s, Members of Congress have introduced many bills to prohibit sexual orientation discrimination in the workplace. Until very recently, all of those bills would have expressly established sexual orientation as a separately proscribed category of discrimination. The bills did not define sex discrimination to encompass sexual orientation discrimination.[6]

> 6 See, *e.g.* , H.R. 14752, 93d Cong., 2d Sess., §§ 6, 11 (1974) (amending Title VII "by adding after the word 'sex' " the words " 'sexual orientation,' " defined as "choice of sexual partner according to gender"); H.R. 451, 95th Cong., 1st Sess., §§ 6, 11 (1977) ("adding after the word 'sex,' ... 'affectional or sexual preference,' " defined as "having or manifesting an emotional or physical attachment to another consenting person or persons of either gender, or having or manifesting a preference for such attachment"); S. 1708, 97th Cong., 1st Sess., §§ 1, 2 (1981) ("inserting after 'sex' ... 'sexual orientation,' " defined as " 'homosexuality, heterosexuality, and bisexuality' "); H.R. 230, 99th Cong., 1st Sess., §§ 4, 8 (1985) ("inserting after 'sex,' ... 'affectional or sexual orientation,' " defined as "homosexuality, heterosexuality, and bisexuality"); S. 47, 101st Cong., 1st Sess., §§ 5, 9 (1989) ("inserting after 'sex,' ... 'affectional or sexual orientation,' " defined as "homosexuality, heterosexuality, and bisexuality"); H.R. 431, 103d Cong., 1st Sess., § 2 (1993) (prohibiting discrimination "on account of ... sexual orientation" without definition); H.R. 1858, 105th Cong., 1st Sess., §§ 3, 4 (1997) (prohibiting discrimination "on the basis of sexual orientation," defined as "homosexuality, bisexuality, or heterosexuality"); H.R. 2692, 107th Cong., 1st Sess., §§ 3, 4 (2001) (prohibiting discrimination "because of ... sexual orientation," defined as "homosexuality, bisexuality, or heterosexuality"); H.R. 2015, 110th Cong., 1st Sess., §§ 3, 4 (2007) (prohibiting discrimination "because of ... sexual orientation," defined as "homosexuality, heterosexuality, or bisexuality"); S. 811, 112th Cong., 1st Sess., §§ 3, 4 (2011) (same).

The proposed bills are telling not because they are relevant to congressional intent regarding Title VII. See *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.* , 511 U.S. 164, 186–188, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994). Rather, the proposed bills are telling because they, like the enacted laws, further demonstrate the widespread usage of the English language in the United States: Sexual orientation discrimination is distinct from, and not a form of, sex

discrimination.*1831 Presidential Executive Orders reflect that same common understanding. In 1967, President Johnson signed an Executive Order prohibiting sex discrimination in federal employment. In 1969, President Nixon issued a new order that did the same. Exec. Order No. 11375, 3 CFR 684 (1966–1970 Comp.); Exec. Order No. 11478, *id.,* at 803. In 1998, President Clinton charted a new path and signed an Executive Order prohibiting sexual orientation discrimination in federal employment. Exec. Order No. 13087, 3 CFR 191 (1999). The Nixon and Clinton Executive Orders remain in effect today.

Like the relevant federal statutes, the 1998 Clinton Executive Order expressly added sexual orientation as a new, separately prohibited form of discrimination. As Judge Lynch cogently spelled out, "the Clinton Administration did not argue that the prohibition of sex discrimination in" the prior 1969 Executive Order "already banned, or henceforth would be deemed to ban, sexual orientation discrimination." 883 F.3d at 152, n. 22 (dissenting opinion). In short, President Clinton's 1998 Executive Order indicates that the Executive Branch, like Congress, has long understood sexual orientation discrimination to be distinct from, and not a form of, sex discrimination.

Federal regulations likewise reflect that same understanding. The Office of Personnel Management is the federal agency that administers and enforces personnel rules across the Federal Government. OPM has issued regulations that "govern ... the employment practices of the Federal Government generally, and of individual agencies." 5 CFR §§ 300.101, 300.102 (2019). Like the federal statutes and the Presidential Executive Orders, those OPM regulations separately prohibit sex discrimination and sexual orientation discrimination.

The States have proceeded in the same fashion. A majority of States prohibit sexual orientation discrimination in employment, either by legislation applying to most workers,[7] an executive order applying *1832 to public employees,[8] or both. Almost every state statute or executive order proscribing sexual orientation discrimination expressly prohibits sexual orientation discrimination separately from the State's ban on sex discrimination.

[7] See Cal. Govt. Code Ann. § 12940(a) (West 2020 Cum. Supp.) (prohibiting discrimination because of "sex, ... sexual orientation," etc.); Colo. Rev. Stat. § 24–34–402(1)(a) (2019) (prohibiting discrimination because of "sex, sexual orientation," etc.); Conn. Gen. Stat. § 46a–81c (2017) (prohibiting discrimination because of "sexual orientation"); Del. Code Ann., Tit. 19, § 711 (2018 Cum. Supp.) (prohibiting discrimination because of "sex (including pregnancy), sexual orientation," etc.); D. C. Code § 2–1402.11(a)(1) (2019 Cum. Supp.) (prohibiting discrimination based on "sex, ... sexual orientation," etc.); Haw. Rev. Stat. § 378–2(a)(1)(A) (2018 Cum. Supp.) (prohibiting discrimination because of "sex[,] ... sexual orientation," etc.); Ill. Comp. Stat., ch. 775, §§ 5/1–103(Q), 5/2–102(A) (West 2018) (prohibiting discrimination because of "sex, ... sexual orientation," etc.); Iowa Code § 216.6(1)(a) (2018) (prohibiting discrimination because of "sex, sexual orientation," etc.); Me. Rev. Stat. Ann., Tit. 5, § 4572(1)(A) (2013) (prohibiting discrimination because of "sex, sexual orientation," etc.); Md. State Govt. Code Ann. § 20–606(a)(1)(i) (Supp. 2019) (prohibiting discrimination because of "sex, ... sexual orientation," etc.); Mass. Gen. Laws, ch. 151B, § 4 (2018) (prohibiting discrimination because of "sex, ... sexual orientation," etc.); Minn. Stat. § 363A.08(2) (2018) (prohibiting discrimination because of "sex, ... sexual orientation," etc.); Nev. Rev. Stat. § 613.330(1) (2017) (prohibiting discrimination because of "sex, sexual orientation," etc.); N. H. Rev. Stat. Ann. §

354–A:7(I) (2018 Cum. Supp.) (prohibiting discrimination because of "sex," "sexual orientation," etc.); N. J. Stat. Ann. § 10:5–12(a) (West Supp. 2019) (prohibiting discrimination because of "sexual orientation, ... sex," etc.); N. M. Stat. Ann. § 28–1–7(A) (Supp. 2019) (prohibiting discrimination because of "sex, sexual orientation," etc.); N. Y. Exec. Law Ann. § 296(1)(a) (West Supp. 2020) (prohibiting discrimination because of "sexual orientation, ... sex," etc.); Ore. Rev. Stat. § 659A.030(1) (2019) (prohibiting discrimination because of "sex, sexual orientation," etc.); R. I. Gen. Laws § 28–5–7(1) (Supp. 2019) (prohibiting discrimination because of "sex, sexual orientation," etc.); Utah Code § 34A–5–106(1) (2019) (prohibiting discrimination because of "sex; ... sexual orientation," etc.); Vt. Stat. Ann., Tit. 21, § 495(a)(1) (2019 Cum. Supp.) (prohibiting discrimination because of "sex, sexual orientation," etc.); Wash. Rev. Code § 49.60.180 (2008) (prohibiting discrimination because of "sex, ... sexual orientation," etc.).

[8] See, *e.g.,* Alaska Admin. Order No. 195 (2002) (prohibiting public-employment discrimination because of "sex, ... sexual orientation," etc.); Ariz. Exec. Order No. 2003–22 (2003) (prohibiting public-employment discrimination because of "sexual orientation"); Cal. Exec. Order No. B–54–79 (1979) (prohibiting public-employment discrimination because of "sexual preference"); Colo. Exec. Order (Dec. 10, 1990) (prohibiting public-employment discrimination because of "gender, sexual orientation," etc.); Del. Exec. Order No. 8 (2009) (prohibiting public-employment discrimination because of "gender, ... sexual orientation," etc.); Ind. Governor's Pol'y Statement (2018) (prohibiting public-employment discrimination because of "sex, ... sexual orientation," etc.); Kan. Exec. Order No. 19–02 (2019) (prohibiting public-employment discrimination because of "gender, sexual orientation," etc.); Ky. Exec. Order No. 2008–473 (2008) (prohibiting public-employment discrimination because of "sex, ... sexual orientation," etc.); Mass. Exec. Order No. 526 (2011) (prohibiting public-employment discrimination because of "gender, ... sexual orientation," etc.); Minn. Exec. Order No. 86–14 (1986) (prohibiting public-employment discrimination because of "sexual orientation"); Mo. Exec. Order No. 10–24 (2010) (prohibiting public-employment discrimination because of "sex, ... sexual orientation," etc.); Mont. Exec. Order No. 04–2016 (2016) (prohibiting public-employment discrimination because of "sex, ... sexual orientation," etc.); N. H. Exec. Order No. 2016–04 (2016) (prohibiting public-employment discrimination because of "sex, sexual orientation," etc.); N. J. Exec. Order No. 39 (1991) (prohibiting public-employment discrimination because of "sexual orientation"); Ohio Exec. Order No. 2019–05D (2019) (prohibiting public-employment discrimination because of "gender, ... sexual orientation," etc.); Ore. Exec. Order No. 19–08 (2019) (prohibiting public-employment discrimination because of "sexual orientation"); Pa. Exec. Order No. 2016–04 (2016) (prohibiting public-employment discrimination because of "gender, sexual orientation," etc.); R. I. Exec. Order No. 93–1 (1993) (prohibiting public-employment discrimination because of "sex, ... sexual orientation," etc.); Va. Exec. Order No. 1 (2018) (prohibiting public-employment discrimination because of "sex, ... sexual orientation," etc.); Wis. Exec. Order No. 1 (2019) (prohibiting public-employment discrimination because of "sex, ... sexual orientation," etc.); cf. Wis. Stat. §§ 111.36(1)(d)(1), 111.321 (2016) (prohibiting employment discrimination because of sex, defined as including discrimination because of "sexual orientation"); Mich. Exec.

Directive No. 2019–9 (2019) (prohibiting public-employment discrimination because of "sex," defined as including "sexual orientation").

That common usage in the States underscores that sexual orientation discrimination is commonly understood as a legal concept distinct from sex discrimination.

And it is the common understanding in this Court as well. Since 1971, the Court has employed rigorous or heightened constitutional scrutiny of laws that classify on the basis of sex. See *United States v. Virginia* , 518 U.S. 515, 531–533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) ; *J. E. B. v. Alabama ex rel. T. B.* , 511 U.S. 127, 136–137, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) ; *Craig v. Boren* , 429 U.S. 190, 197–199, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) ; *Frontiero v. Richardson* , 411 U.S. 677, 682–684, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973) (plurality opinion); *Reed v. Reed* , 404 U.S. 71, 75–77, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). Over the last several decades, the Court has also decided many cases involving sexual orientation. But in those cases, the Court never suggested that sexual orientation discrimination is
1833 just a form of sex discrimination. *1833 All of the Court's cases from *Bowers* to *Romer* to *Lawrence* to *Windsor* to *Obergefell* would have been far easier to analyze and decide if sexual orientation discrimination were just a form of sex discrimination and therefore received the same heightened scrutiny as sex discrimination under the Equal Protection Clause. See *Bowers v. Hardwick* , 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986) ; *Romer v. Evans* , 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) ; *Lawrence v. Texas* , 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) ; *United States v. Windsor* , 570 U.S. 744, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013) ; *Obergefell* v. *Hodges* , 576 U.S. 644, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015).

Did the Court in all of those sexual orientation cases just miss that obvious answer—and overlook the fact that sexual orientation discrimination is actually a form of sex discrimination? That seems implausible. Nineteen Justices have participated in those cases. Not a single Justice stated or even hinted that sexual orientation discrimination was just a form of sex discrimination and therefore entitled to the same heightened scrutiny under the Equal Protection Clause. The opinions in those five cases contain no trace of such reasoning. That is presumably because everyone on this Court, too, has long understood that sexual orientation discrimination is distinct from, and not a form of, sex discrimination.

In sum, all of the usual indicators of ordinary meaning—common parlance, common usage by Congress, the practice in the Executive Branch, the laws in the States, and the decisions of this Court—overwhelmingly establish that sexual orientation discrimination is distinct from, and not a form of, sex discrimination. The usage has been consistent across decades, in both the federal and state contexts.

Judge Sykes summarized the law and language this way: "To a fluent speaker of the English language—then and now—... discrimination 'because of sex' is not reasonably understood to include discrimination based on sexual orientation, a different immutable characteristic. Classifying people by sexual orientation is different than classifying them by sex. The two traits are categorically distinct and widely recognized as such. There is no ambiguity or vagueness here." *Hively* , 853 F.3d at 363 (dissenting opinion).

To tie it all together, the plaintiffs have only two routes to succeed here. Either they can say that literal meaning overrides ordinary meaning when the two conflict. Or they can say that the ordinary meaning of the phrase "discriminate because of sex" encompasses sexual orientation discrimination. But the first flouts long-settled principles of statutory interpretation. And the second contradicts the widespread ordinary use of the English language in America.

II

Until the last few years, every U.S. Court of Appeals to address this question concluded that Title VII does not prohibit discrimination because of sexual orientation. As noted above, in the first 10 Courts of Appeals to consider the issue, all 30 federal judges agreed that Title VII does not prohibit sexual orientation discrimination. 30 out
1834 of 30 judges.[9] *1834 The unanimity of those 30 federal judges shows that the question as a matter of law, as compared to as a matter of policy, was not deemed close. Those 30 judges realized a seemingly obvious point: Title VII is not a general grant of authority for judges to fashion an evolving common law of equal treatment in the workplace. Rather, Title VII identifies certain specific categories of prohibited discrimination. And under the separation of powers, Congress—not the courts—possesses the authority to amend or update the law, as Congress has done with age discrimination and disability discrimination, for example.

[9] See *Higgins v. New Balance Athletic Shoe, Inc.* , 194 F.3d 252, 258–259 (CA1 1999) ; *Simonton v. Runyon* , 232 F.3d 33, 36 (CA2 2000) ; *Bibby v. Philadelphia Coca Cola Bottling Co.* , 260 F.3d 257, 261 (CA3 2001) ; *Wrightson v. Pizza Hut of America, Inc.* , 99 F.3d 138, 143 (CA4 1996) ; *Blum v. Gulf Oil Corp.* , 597 F.2d 936, 938 (CA5 1979) (*per curiam*); *Ruth v. Children's Medical Center* , 1991 WL 151158, *5 (CA6, Aug. 8, 1991) (*per curiam*); *Ulane v. Eastern Airlines, Inc.* , 742 F.2d 1081, 1084–1085 (CA7 1984) ; *Williamson v. A. G. Edwards & Sons, Inc.* , 876 F.2d 69, 70 (CA8 1989) (*per curiam*); *DeSantis v. Pacific Tel. & Tel. Co.* , 608 F.2d 327, 329–330 (CA9 1979) ; *Medina v. Income Support Div., N. M.* , 413 F.3d 1131, 1135 (CA10 2005).

So what changed from the situation only a few years ago when 30 out of 30 federal judges had agreed on this question? Not the text of Title VII. The law has not changed. Rather, the judges' decisions have evolved.

To be sure, the majority opinion today does not openly profess that it is judicially updating or amending Title VII. Cf. *Hively* , 853 F.3d at 357 (Posner, J., concurring). But the majority opinion achieves the same outcome by seizing on literal meaning and overlooking the ordinary meaning of the phrase "discriminate because of sex." Although the majority opinion acknowledges that the meaning of a phrase and the meaning of a phrase's individual words *could* differ, it dismisses phrasal meaning for purposes of this case. The majority opinion repeatedly seizes on the meaning of the statute's individual terms, mechanically puts them back together, and generates an interpretation of the phrase "discriminate because of sex" that is literal. See *ante* , at 1756 - 1759, 1763, 1766 - 1768. But to reiterate, that approach to statutory interpretation is fundamentally flawed. Bedrock principles of statutory interpretation dictate that we look to ordinary meaning, not literal meaning, and that we likewise adhere to the ordinary meaning of phrases, not just the meaning of words in a phrase. And the ordinary meaning of the phrase "discriminate because of sex" does not encompass sexual orientation discrimination.

The majority opinion deflects that critique by saying that courts should base their interpretation of statutes on the text as written, not on the legislators' subjective intentions. *Ante* , at 1764 - 1765, 1766 - 1770. Of course that is true. No one disagrees. It is "the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Services, Inc.* , 523 U.S. 75, 79, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998).

But in my respectful view, the majority opinion makes a fundamental mistake by confusing ordinary meaning with subjective intentions. To briefly explain: In the early years after Title VII was enacted, some may have wondered whether Title VII's prohibition on sex discrimination

protected male employees. After all, covering male employees may not have been the intent of some who voted for the statute. Nonetheless, discrimination on the basis of sex against women and discrimination on the basis of sex against men are both understood as discrimination because of sex (back in 1964 and now) and are therefore encompassed within Title VII. Cf. *id.,* at 78–79, 118 S.Ct. 998 ; see *Newport News Shipbuilding & Dry Dock Co. v. EEOC* , 462 U.S. 669, 682–685, 103 S.Ct. 2622, 77 L.Ed.2d 89 (1983). So too, regardless of what the intentions of the drafters might *1835 have been, the ordinary meaning of the law demonstrates that harassing an employee because of her sex is discriminating against the employee because of her sex with respect to the "terms, conditions, or privileges of employment," as this Court rightly concluded. *Meritor Savings Bank, FSB v. Vinson* , 477 U.S. 57, 64, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) (internal quotation marks omitted).[10]

1835

10 An *amicus* brief supporting the plaintiffs suggests that the plaintiffs' interpretive approach is supported by the interpretive approach employed by the Court in its landmark decision in *Brown v. Board of Education* , 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). See Brief for Anti-Discrimination Scholars as *Amici Curiae* 4. That suggestion is incorrect. *Brown* is a correct decision as a matter of original public meaning. There were two analytical components of *Brown* . One issue was the meaning of "equal protection." The Court determined that black Americans—like all Americans—have an *individual* equal protection right against state discrimination on the basis of race. (That point is also directly made in *Bolling v. Sharpe* , 347 U.S. 497, 499–500, 74 S.Ct. 693, 98 L.Ed. 884 (1954).) Separate but equal is not equal. The other issue was whether that racial nondiscrimination principle applied to public schools, even though public schools did not exist in any comparable form in 1868. The answer was yes. The Court applied the equal protection principle to public schools in the same way that the Court applies, for example, the First Amendment to the Internet and the Fourth Amendment to cars.

This case raises the same kind of inquiry as the *first* question in *Brown* . There, the question was what equal protection meant. Here, the question is what "discriminate because of sex" means. If this case raised the question whether the sex discrimination principle in Title VII applied to some category of employers unknown in 1964, such as to social media companies, it might be a case in *Brown* 's second category, akin to the question whether the racial nondiscrimination principle applied to public schools. But that is not this case.

By contrast, this case involves sexual orientation discrimination, which has long and widely been understood as distinct from, and not a form of, sex discrimination. Until now, federal law has always reflected that common usage and recognized that distinction between sex discrimination and sexual orientation discrimination. To fire one employee because she is a woman and another employee because he is gay implicates two distinct societal concerns, reveals two distinct biases, imposes two distinct harms, and falls within two distinct statutory prohibitions.

To be sure, as Judge Lynch appropriately recognized, it is "understandable" that those seeking legal protection for gay people "search for innovative arguments to classify workplace bias against gays as a form of discrimination that is already prohibited by federal law. But the arguments advanced by the majority ignore the evident meaning of the language of Title VII, the social realities that distinguish between the kinds of biases that the statute sought to exclude from the workplace from those it did not, and the distinctive nature of anti-gay prejudice." 883 F.3d at 162 (dissenting opinion).

The majority opinion insists that it is not rewriting or updating Title VII, but instead is just humbly reading the text of the statute as written. But that assertion is tough to accept. Most everyone familiar with the use of the English language in America understands that the ordinary meaning of sexual orientation discrimination is distinct from the ordinary meaning of sex discrimination. Federal law distinguishes the two. State law distinguishes the two. This Court's cases distinguish the two. Statistics on discrimination distinguish the two. History distinguishes the two. Psychology distinguishes the two. Sociology distinguishes the two. Human resources departments all over America distinguish the two. Sports leagues distinguish the two. Political 1836groups distinguish *1836 the two. Advocacy groups distinguish the two. Common parlance distinguishes the two. Common sense distinguishes the two.

As a result, many Americans will not buy the novel interpretation unearthed and advanced by the Court today. Many will no doubt believe that the Court has unilaterally rewritten American vocabulary and American law—a "statutory amendment courtesy of unelected judges." *Hively* , 853 F.3d at 360 (Sykes, J., dissenting). Some will surmise that the Court succumbed to "the natural desire that beguiles judges along with other human beings into imposing their own views of goodness, truth, and justice upon others." *Furman v. Georgia* , 408 U.S. 238, 467, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Rehnquist, J., dissenting).

I have the greatest, and unyielding, respect for my colleagues and for their good faith. But when this Court usurps the role of Congress, as it does today, the public understandably becomes confused about who the policymakers really are in our system of separated powers, and inevitably becomes cynical about the oft-repeated aspiration that judges base their decisions on law rather than on personal preference. The best way for judges to demonstrate that we are deciding cases based on the ordinary meaning of the law is to walk the walk, even in the hard cases when we might prefer a different policy outcome.

* * *

In judicially rewriting Title VII, the Court today cashiers an ongoing legislative process, at a time when a new law to prohibit sexual orientation discrimination was probably close at hand. After all, even back in 2007—a veritable lifetime ago in American attitudes about sexual orientation—the House voted 235 to 184 to prohibit sexual orientation discrimination in employment. H.R. 3685, 110th Cong., 1st Sess. In 2013, the Senate overwhelmingly approved a similar bill, 64 to 32. S. 815, 113th Cong., 1st Sess. In 2019, the House voted 236 to 173 to amend Title VII to prohibit employment discrimination on the basis of sexual orientation. H.R. 5, 116th Cong., 1st Sess. It was therefore easy to envision a day, likely just in the next few years, when the House and Senate took historic votes on a bill that would prohibit employment discrimination on the basis of sexual orientation. It was easy to picture a massive and celebratory Presidential signing ceremony in the East Room or on the South Lawn.

It is true that meaningful legislative action takes time—often too much time, especially in the unwieldy morass on Capitol Hill. But the Constitution does not put the Legislative Branch in the "position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unsolved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution." Rehnquist, The Notion of a Living Constitution, 54 Texas L. Rev. 693, 700 (1976). The proper role of the Judiciary in statutory interpretation cases is "to apply, not amend, the work of the People's representatives," even when the judges might think that "Congress should reenter the field and alter the judgments it made in the past." *Henson* , 582 U.S., at —— – ——, 137 S.Ct., at 1725.

Instead of a hard-earned victory won through the democratic process, today's victory is brought about by judicial dictate—judges latching on to a novel form of living literalism to rewrite ordinary meaning and remake American law. Under the Constitution and laws of the United States, this Court is the wrong body to change American law in that way. The Court's ruling "comes at a great cost to representative self-government." *Hively* , 853 F.3d at 360 (Sykes, J., dissenting). And the
1837 implications of this Court's usurpation of *1837 the legislative process will likely reverberate in unpredictable ways for years to come.

Notwithstanding my concern about the Court's transgression of the Constitution's separation of powers, it is appropriate to acknowledge the important victory achieved today by gay and lesbian Americans. Millions of gay and lesbian Americans have worked hard for many decades to achieve equal treatment in fact and in law. They have exhibited extraordinary vision, tenacity, and grit—battling often steep odds in the legislative and judicial arenas, not to mention in their daily lives. They have advanced powerful policy arguments and can take pride in today's result. Under the Constitution's separation of powers, however, I believe that it was Congress's role, not this Court's, to amend Title VII. I therefore must respectfully dissent from the Court's judgment.

U.S. Equal Employment Opportunity Commission

Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity

This technical assistance document was issued upon approval of the Chair of the U.S. Equal Employment Opportunity Commission.

OLC Control Number:

NVTA-2021-1

Concise Display Name:

Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity

Issue Date:

06-15-2021

General Topics:

Sex Discrimination, Sexual Orientation, Gender Identity, Sex Harassment, Retaliation

Summary:

This document briefly explains the Supreme Court's decision in Bostock v. Clayton County and the EEOC's established legal positions on sexual-orientation- and gender-identity-related workplace discrimination issues

Citation:

Title VII

Document Applicant:

Applicants for employment, employees, employers covered by Title VII; related representatives and practitioners

Previous Revision:

No.

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

On June 15, 2020, the Supreme Court of the United States issued its landmark decision in the case *Bostock v. Clayton County*,**[1] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_edn1)** which held that the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964 (Title VII) includes employment discrimination against an individual on the basis of sexual orientation or transgender status.

This fact sheet briefly explains what the *Bostock* decision means for LGBTQ+ workers (and all covered workers) and for employers across the country. It also explains the Equal Employment Opportunity Commission's (EEOC or Commission) established

legal positions on LGBTQ+-related matters, as voted by the Commission.
Before *Bostock*, the Commission decided an array of matters involving employment discrimination based on sexual orientation and gender identity. For example, the EEOC has authority under Title VII to decide employment discrimination appeals by employees of the federal government and, in 2012, decided that discrimination against an applicant for federal employment based on gender identity is discrimination based on sex.**[2] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_edn2)** In 2015, in a federal sector matter involving a decision not to permanently hire an individual, the Commission decided that sexual orientation discrimination states a claim of sex discrimination under Title VII.**[3] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_edn3)** More recently, the Commission also applied the *Bostock* decision in the federal sector.**[4] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_edn4)**

This information is not new policy. This publication in itself does not have the force and effect of law and is not meant to bind the public in any way. It is intended only to provide clarity to the public regarding existing requirements under the law.

1. What happened in the *Bostock* case?

The *Bostock* case involved a trio of cases alleging discrimination against LGBTQ+ workers, which the Supreme Court decided together in a single opinion. Gerald Bostock, a child welfare services coordinator, was fired after his employer learned he had joined a gay softball league. Donald Zarda, a skydiving instructor, was fired after his employer learned he was gay. In a case filed by the EEOC, funeral director Aimee Stephens was fired after her employer learned that she was going to transition from male to female. In deciding these cases, the Supreme Court held that employment discrimination based on sexual orientation (Bostock and Zarda) or transgender status (Aimee Stephens) is discrimination "because of sex," and is therefore unlawful under Title VII.

The Supreme Court in *Bostock* recognized that to discriminate against a person based on sexual orientation or transgender status is to discriminate against that individual based on sex. Therefore, the Supreme Court held that Title VII makes it unlawful for a covered employer to take an employee's sexual orientation or

transgender status into account in making employment-related decisions. The Court explicitly reserved some issues for future cases.

2. Does Title VII protect all workers?

Title VII protects job applicants, current employees (including full-time, part-time, seasonal, and temporary employees), and former employees, if their employer has 15 or more employees. Employers with fewer than 15 total employees are not covered by Title VII.

Title VII protects employees regardless of citizenship or immigration status, in every state, the District of Columbia, and the United States territories.

Title VII generally does not apply to individuals who are found to be independent contractors. Figuring out whether someone is an employee or an independent contractor is a fact-specific inquiry. To find out more, see the EEOC's guidance on ***Threshold Issues*** **(https://www.eeoc.gov/laws/guidance/section-2-threshold-issues)** .

3. Does Title VII apply to all employers?

Title VII applies to private-sector employers with 15 or more employees, to state and local government employers with 15 or more employees, and to the federal government as an employer. Title VII also applies to unions and employment agencies.

Title VII does not apply to Tribal nations. However, private employers with 15 or more employees are covered by the statute, even if they operate on a Tribal reservation.

Title VII allows "religious organizations" and "religious educational institutions" (those organizations whose purpose and character are primarily religious) to hire and employ people who share their own religion (in other words, it is not unlawful religious discrimination for a qualifying employer to limit hiring in this way). Courts also apply a "ministerial exception" that bars certain employment discrimination claims by the employees of religious institutions because those employees perform vital religious duties at the core of the mission of the religious institution. Courts and the EEOC consider and apply, on a case by case basis, any religious defenses to discrimination claims, under Title VII and other applicable laws. For more information on those defenses and other issues related to religious organizations

and discrimination based on religion, see **EEOC Compliance Manual, Section 12: Religious Discrimination (https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination)** .

Other defenses might also be available to employers depending on the facts of a particular case.

4. Does Title VII protect employees who work in places where state or local law does not prohibit employment discrimination based on sexual orientation or gender identity?

Yes. As a federal law, Title VII applies nationwide and protects employees from discrimination based on sexual orientation or gender identity regardless of state or local laws.

5. What kind of discriminatory employment actions does Title VII prohibit?

Title VII includes a broad range of protections. Among other things, under Title VII employers cannot discriminate against individuals based on sexual orientation or gender identity with respect to:

- hiring
- firing, furloughs, or reductions in force
- promotions
- demotions
- discipline
- training
- work assignments
- pay, overtime, or other compensation
- fringe benefits
- other terms, conditions, and privileges of employment.

Discrimination also includes severe or pervasive harassment. It is unlawful for an employer to create or tolerate such harassment based on sexual orientation or gender identity. Further, if an employee reports such harassment by a customer or client, the employer must take steps to stop the harassment and prevent it from happening again. For more information, visit the EEOC's harassment page at **https://www.eeoc.gov/harassment (https://www.eeoc.gov/harassment)** .

6. Are non-LGBTQ+ job applicants and employees also protected against sexual orientation and gender identity discrimination?

Yes—employers are not allowed to discriminate against job applicants or employees because the applicants or employees are, for example, straight or cisgender (someone whose gender identity corresponds with the sex assigned at birth). Title VII prohibits harassment and other forms of discrimination based on sexual orientation or gender identity.

7. Could an employer's discriminatory action be justified by customer or client preferences?

No. As a general matter, an employer covered by Title VII is not allowed to fire, refuse to hire, or take assignments away from someone (or discriminate in any other way) because customers or clients would prefer to work with people who have a different sexual orientation or gender identity. Employers also are not allowed to segregate employees based on actual or perceived customer preferences. (For example, it would be discriminatory to keep LGBTQ+ employees out of public-facing positions, or to direct these employees toward certain stores or geographic areas.)

8. Is an employer allowed to discriminate against an employee because the employer believes the employee acts or appears in ways that do not conform to stereotypes about the way men or women are expected to behave?

No. Whether or not an employer knows an employee's sexual orientation or gender identity, employers are not allowed to discriminate against an employee because that employee does not conform to a sex-based stereotype about feminine or masculine behavior. For example, employers are not allowed to discriminate against men whom they perceive to act or appear in stereotypically feminine ways, or against women whom they perceive to act or appear in stereotypically masculine ways.

9. May a covered employer require a transgender employee to dress in accordance with the employee's sex assigned at birth?

No. Prohibiting a transgender person from dressing or presenting consistent with that person's gender identity would constitute sex discrimination.**[5] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_edn5)**

10. Does an employer have the right to have separate, sex-segregated bathrooms, locker rooms, or showers for men and women?

Yes. Courts have long recognized that employers may have separate bathrooms, locker rooms, and showers for men and women, or may choose to have unisex or single-use bathrooms, locker rooms, and showers. The Commission has taken the position that employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender identity.**[6] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_edn6)** In other words, if an employer has separate bathrooms, locker rooms, or showers for men and women, all men (including transgender men) should be allowed to use the men's facilities and all women (including transgender women) should be allowed to use the women's facilities.

11. Could use of pronouns or names that are inconsistent with an individual's gender identity be considered harassment?

Yes, in certain circumstances. Unlawful harassment includes unwelcome conduct that is based on gender identity. To be unlawful, the conduct must be severe or pervasive when considered together with all other unwelcome conduct based on the individual's sex including gender identity, thereby creating a work environment that a reasonable person would consider intimidating, hostile, or offensive. In its decision in *Lusardi v. Dep't of the Army*,**[7] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_edn7)** the Commission explained that although accidental misuse of a transgender employee's preferred name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.

12. If a job applicant's or an employee's Title VII rights have been violated, what can the applicant or employee do?

For applicants and employees of private sector employers and state and local government employers, the individual can contact the EEOC for help in deciding what to do next. If the individual decides to file a charge of discrimination with the EEOC, the agency will conduct an investigation to determine if applicable Equal Employment Opportunity (EEO) laws have been violated. Because an individual must file an EEOC charge within 180 days of the alleged violation in order to take

further legal action (or 300 days if the employer is also covered by a state or local employment discrimination law), it is best to begin the process early.

For more information about filing a charge, visit **https://www.eeoc.gov/how-file-charge-employment-discrimination (https://www.eeoc.gov/how-file-charge-employment-discrimination)** . To begin the process of filing a charge of discrimination against a private company or a state or local government employer, go to the EEOC Online Public Portal at **https://publicportal.eeoc.gov (https://publicportal.eeoc.gov/)** or visit your local EEOC office (see **https://www.eeoc.gov/field-office (https://www.eeoc.gov/field-office)** for contact information). For general information, visit the EEOC website at **https://www.eeoc.gov (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity)** , or call 1-800-669-4000 (voice), 1-800-669-6820 (TTY), or 1-844-234-5122 (ASL Video Phone).

The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) enforces regulations that prohibit certain federal contractors from engaging in employment discrimination based on sexual orientation and gender identity, under Executive Order 11246, as amended. Executive Order 11246 applies to businesses with federal contracts and federally assisted construction contracts totaling more than $10,000. For more information, see **https://www.dol.gov/agencies/ofccp/faqs/lgbt (https://www.dol.gov/agencies/ofccp/faqs/lgbt)** and **https://www.dol.gov/agencies/ofccp/jurisdictional-thresholds#Q2 (https://www.dol.gov/agencies/ofccp/jurisdictional-thresholds#Q2)** .

For applicants and employees of the federal government, the process for seeking legal redress for Title VII violations is different than the process that individuals in the private sector and state and local governments must use. Federal applicants and employees must first contact the EEO Office at the specific federal agency that they believe committed the unlawful employment discrimination. In general, federal applicants and employees must start this federal sector EEO process by contacting the relevant federal agency's EEO office to request EEO counseling. *Most federal agencies list contact information for their internal EEO offices on their external agency website.*

A federal applicant or employee generally must request EEO counseling from the appropriate agency **within 45 calendar days of the date of the incident(s) the**

employee or applicant believes to be discriminatory. Failure to adhere to this time limitation could result in an individual forfeiting legal rights and remedies that otherwise would be available. Nevertheless, if a federal applicant or employee alleges that they were subjected to a hostile work environment, and at least one incident occurred within 45 calendar days of contacting an EEO counselor, then incidents occurring outside of the 45-calendar day window may still be considered for investigation.

Federal applicants and employees can also find out more information on the federal sector process for alleging employment discrimination on the EEOC's website **here (https://www.eeoc.gov/federal-sector/federal-employees-job-applicants)** .

Other processes may be available for federal applicants and employees seeking relief for sexual orientation or gender identity discrimination, including filing grievances under applicable collective bargaining agreements and/or filing a prohibited personnel practice complaint under the Civil Service Reform Act of 1978 with the **U.S. Office of Special Counsel (http://www.osc.gov/)** .

13. If I contact the EEOC or file a charge or complaint of discrimination, could I be fired?

It is unlawful for an employer to retaliate against, harass, or otherwise punish any employee for:

- opposing employment discrimination that the employee reasonably believed was unlawful;
- filing an EEOC charge or complaint;
- or participating in any investigation, hearing, or other proceeding connected to Title VII enforcement.

Retaliation is anything that would be reasonably likely to discourage workers from making or supporting a charge of discrimination. To learn more about retaliation, see **https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues (https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues)** .

[1] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_ednref1) 590 U.S. ___, 140 S. Ct. 1731 (2020).

[2] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_ednref2) In *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821 (Apr. 20, 2012), a Commission-voted decision involving an applicant for federal employment, the EEOC determined that transgender discrimination, including discrimination because an employee does not conform to gender norms or stereotypes, is sex discrimination in violation of Title VII based on a plain interpretation of the statutory language prohibiting discrimination because of sex. Specifically, the Commission explained that discrimination based on an employee's gender identity is sex discrimination "regardless of whether an employer discriminates against an employee [for expressing the employee's] gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person."

[3] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_ednref3) In *Baldwin v. Dep't of Transp.*, EEOC Appeal No. 0120133080 (July 15, 2015), a Commission-voted decision involving a failure to permanently hire an individual as an air traffic controller, the Commission concluded that a claim alleging discrimination on the basis of sexual orientation necessarily states a claim of discrimination on the basis of sex under Title VII.

[4] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_ednref4) *See Bart M. v. Dep't of the Interior*, EEOC Appeal No. 0120160543 (Jan. 14, 2021).

[5] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_ednref5) *See Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821 (Apr. 20, 2012).

[6] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_ednref6) *See Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395 (Apr. 1, 2015) (concluding in an EEOC decision involving a federal employee that Title VII is violated where an employer

denies an employee equal access to a common restroom corresponding to the employee's gender identity).

[7] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_ednref7) *Id.*

PLEASE READ

The official text of New Jersey Statutes can be found through the home page of the New Jersey Legislature: http://www.njleg.state.nj.us/

New Jersey Statutes Annotated (N.J.S.A.), published by Thomson West, provides the official annotated statutes for New Jersey.

The statutes in PDF form provided on this website by the Division on Civil Rights are unofficial courtesy copies, which may differ from the official text. Although every effort is made to ensure that the text of the courtesy copies is identical to the official version, if any discrepancies exist between the text on this website and the official version, the official version will govern.

NEW JERSEY

LAW AGAINST DISCRIMINATION

N.J.S.A. 10:5-1 et seq.

Table of Contents

10:5-1. Short title

This act shall be known as "Law Against Discrimination."

L.1945, c. 169, p. 589, s. 1, eff. April 16, 1945.

10:5-2. Police power, enactment deemed exercise of

The enactment hereof shall be deemed an exercise of the police power of the State for the protection of the public safety, health and morals and to promote the general welfare and in fulfillment of the provisions of the Constitution of this State guaranteeing civil rights.

L.1945, c. 169, p. 589, s. 2.

10:5-2.1. Other laws unaffected

Nothing contained in this act or in P.L. 1945, c. 169 (C. 10:5-1 et seq.) shall be construed to require or authorize any act prohibited by law, nor to prevent the award of a contract to a small business enterprise, minority business enterprise or women's business enterprise under P.L. 1985, c. 490 (C. 18A:18A-51 et seq.) nor to conflict with the provisions of chapter 2 (child labor) of Title 34 of the Revised Statutes, nor to require the employment of any person under the age of 18, nor to prohibit the establishment and maintenance of bona fide occupational qualifications or the establishment and maintenance of apprenticeship requirements based upon a reasonable minimum age, nor to prevent the termination or change of the employment of any person who in the opinion of the employer, reasonably arrived at, is unable to perform adequately the duties of employment, nor to preclude discrimination among individuals on the basis of competence, performance, conduct or any other reasonable standards, nor to interfere with the operation of the terms or conditions and administration of any bona fide retirement, pension, employee benefit or insurance plan or program, including any State or locally administered public retirement system, provided that the provisions of those plans or programs are not used to establish an age for mandatory retirement.

1962,c.37,s.8; amended 1980,c.90,s.16; 1985,c.73,s.2; 1985,c.490, s.10; 1988,c.37,s.9.

10:5-2.2. Higher education exception

Notwithstanding the provisions of section 1 of P.L. 1938, c. 295 (C. 10:3-1) and section 8 of P.L. 1962, c. 37 (C. 10:5-2.1), an employee who has attained 70 years of age who is serving under a contract of tenure or similar arrangement providing for tenure at a public or private institution of higher education may, at the option of the institution, be required to retire.

L. 1985, c. 73, s. 4, eff. Oct. 1, 1985.

10:5-3 Findings, declarations.

3. The Legislature finds and declares that practices of discrimination against any of its inhabitants, because of race, creed, color, national origin, ancestry, age, sex, gender identity or expression, affectional or sexual orientation, marital status, familial status, liability for service in the Armed Forces of the United States, disability or nationality, are matters of concern to the government of the State, and that such

discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State; provided, however, that nothing in this expression of policy prevents the making of legitimate distinctions between citizens and aliens when required by federal law or otherwise necessary to promote the national interest.

The Legislature further declares its opposition to such practices of discrimination when directed against any person by reason of the race, creed, color, national origin, ancestry, age, sex, gender identity or expression, affectional or sexual orientation, marital status, liability for service in the Armed Forces of the United States, disability or nationality of that person or that person's family members, partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers, in order that the economic prosperity and general welfare of the inhabitants of the State may be protected and ensured.

The Legislature further finds that because of discrimination, people suffer personal hardships, and the State suffers a grievous harm. The personal hardships include: economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or other irreparable harm resulting from the strain of employment controversies; relocation, search and moving difficulties; anxiety caused by lack of information, uncertainty, and resultant planning difficulty; career, education, family and social disruption; and adjustment problems, which particularly impact on those protected by this act. Such harms have, under the common law, given rise to legal remedies, including compensatory and punitive damages. The Legislature intends that such damages be available to all persons protected by this act and that this act shall be liberally construed in combination with other protections available under the laws of this State.

L.1945,c.169,s.3; amended 1951, c.64, s.2; 1962, c.37, s.2; 1970, c.80, s.8; 1977, c.96, s.1; 1990, c.12, s.1; 1991, c.519, s.1; 1992, c.146, s.1; 2003, c.180, s.3; 2006, c.100, s.2.

10:5-3.1 Findings, declarations relative to discrimination based on pregnancy, childbirth, related medical conditions.

1. The Legislature finds and declares:

a. That pregnant women are vulnerable to discrimination in the workplace in New Jersey, as indicated in reports that women who request an accommodation that will allow them to maintain a healthy pregnancy, or who need a reasonable accommodation while recovering from childbirth, are being removed from their positions, placed on unpaid leave, or fired;

b. It is the intent of the Legislature to combat this form of discrimination by requiring employers to provide reasonable accommodations to pregnant women and those who suffer medical conditions related to pregnancy and childbirth, such as bathroom breaks, breaks for increased water intake, periodic rest, assistance with manual labor, job restructuring or modified work schedules, and temporary transfers to less strenuous or hazardous work; and

c. It is not the intent of the Legislature to require such accommodations if their provision would cause an undue hardship in the conduct of an employer's business.

L.2013, c.220, s.1.

10:5-4 Obtaining employment and privileges without discrimination; civil right.

4. All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, disability, liability for service in the Armed Forces of the United States, nationality, sex, gender identity or expression or source of lawful income used for rental or mortgage payments, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.

L.1945, c.169, s.4; amended 1949, c.11, s.2; 1957, c.66, s.1; 1961, c.106, s.1; 1962, c.37, ss.3,9; 1970, c.80, s.9; 1991, c.519, s.2; 1992, c.146, s.2; 2002, c.82, s.1; 2003, c.180, s.4; 2006, c.100, s.3; 2017, c.184, s.1.

10:5-4.1 Construction of act.

2. All of the provisions of the act to which this act is a supplement shall be construed to prohibit any unlawful discrimination against any person because such person is or has been at any time disabled or any unlawful employment practice against such person, unless the nature and extent of the disability reasonably precludes the performance of the particular employment. It shall be unlawful discrimination under the "Law Against Discrimination," P.L.1945, c.169 (C.10:5-1 et seq.) to discriminate against any buyer or renter because of the disability of a person residing in or intending to reside in a dwelling after it is sold, rented or made available or because of any person associated with the buyer or renter.

L.1972,c.114,s.2; title amended 1978, c.137, s.1. amended 1978, c.137, s.2; 1992, c.146, s.3; 2003, c.180, s.5.

10:5-5 Definitions relative to discrimination.

5. As used in P.L.1945, c.169 (C.10:5-1 et seq.), unless a different meaning clearly appears from the context:

a. "Person" includes one or more individuals, partnerships, associations, organizations, labor organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and fiduciaries.

b. "Employment agency" includes any person undertaking to procure employees or opportunities for others to work.

c. "Labor organization" includes any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining, or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection in connection with employment.

d. "Unlawful employment practice" and "unlawful discrimination" include only those unlawful practices and acts specified in section 11 of P.L.1945, c.169 (C.10:5-12).

e. "Employer" includes all persons as defined in subsection a. of this section unless otherwise

specifically exempt under another section of P.L.1945, c.169 (C.10:5-1 et seq.), and includes the State, any political or civil subdivision thereof, and all public officers, agencies, boards, or bodies.

f. "Employee" does not include any individual employed in the domestic service of any person.

g. "Liability for service in the Armed Forces of the United States" means subject to being ordered as an individual or member of an organized unit into active service in the Armed Forces of the United States by reason of membership in the National Guard, naval militia or a reserve component of the Armed Forces of the United States, or subject to being inducted into such armed forces through a system of national selective service.

h. "Division" means the "Division on Civil Rights" created by P.L.1945, c.169 (C.10:5-1 et seq.).

i. "Attorney General" means the Attorney General of the State of New Jersey or the Attorney General's representative or designee.

j. "Commission" means the Commission on Civil Rights created by P.L.1945, c.169 (C.10:5-1 et seq.).

k. "Director" means the Director of the Division on Civil Rights.

l. "A place of public accommodation" shall include, but not be limited to: any tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp, whether for entertainment of transient guests or accommodation of those seeking health, recreation, or rest; any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind; any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the premises; any garage, any public conveyance operated on land or water or in the air or any stations and terminals thereof; any bathhouse, boardwalk, or seashore accommodation; any auditorium, meeting place, or hall; any theatre, motion-picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement; any comfort station; any dispensary, clinic, or hospital; any public library; and any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education or the Commissioner of Education of the State of New Jersey. Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, and the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed; nor shall anything herein contained be construed to bar any private secondary or post-secondary school from using in good faith criteria other than race, creed, color, national origin, ancestry, gender identity, or expression or affectional or sexual orientation in the admission of students.

m. "A publicly assisted housing accommodation" shall include all housing built with public funds or public assistance pursuant to P.L.1949, c.300, P.L.1941, c.213, P.L.1944, c.169, P.L.1949, c.303, P.L.1938, c.19, P.L.1938, c.20, P.L.1946, c.52, and P.L.1949, c.184, and all housing financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof.

n. The term "real property" includes real estate, lands, tenements and hereditaments, corporeal and

incorporeal, and leaseholds, provided, however, that, except as to publicly assisted housing accommodations, the provisions of this act shall not apply to the rental: (1) of a single apartment or flat in a two-family dwelling, the other occupancy unit of which is occupied by the owner as a residence; or (2) of a room or rooms to another person or persons by the owner or occupant of a one-family dwelling occupied by the owner or occupant as a residence at the time of such rental. Nothing herein contained shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised, or controlled by or in connection with a religious organization, in the sale, lease, or rental of real property, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained. Nor does any provision under this act regarding discrimination on the basis of familial status apply with respect to housing for older persons.

o. "Real estate broker" includes a person, firm, or corporation who, for a fee, commission, or other valuable consideration, or by reason of promise or reasonable expectation thereof, lists for sale, sells, exchanges, buys or rents, or offers or attempts to negotiate a sale, exchange, purchase, or rental of real estate or an interest therein, or collects or offers or attempts to collect rent for the use of real estate, or solicits for prospective purchasers or assists or directs in the procuring of prospects or the negotiation or closing of any transaction which does or is contemplated to result in the sale, exchange, leasing, renting, or auctioning of any real estate, or negotiates, or offers or attempts or agrees to negotiate a loan secured or to be secured by mortgage or other encumbrance upon or transfer of any real estate for others; or any person who, for pecuniary gain or expectation of pecuniary gain conducts a public or private competitive sale of lands or any interest in lands. In the sale of lots, the term "real estate broker" shall also include any person, partnership, association, or corporation employed by or on behalf of the owner or owners of lots or other parcels of real estate, at a stated salary, or upon a commission, or upon a salary and commission or otherwise, to sell such real estate, or any parts thereof, in lots or other parcels, and who shall sell or exchange, or offer or attempt or agree to negotiate the sale or exchange, of any such lot or parcel of real estate.

p. "Real estate salesperson" includes any person who, for compensation, valuable consideration or commission, or other thing of value, or by reason of a promise or reasonable expectation thereof, is employed by and operates under the supervision of a licensed real estate broker to sell or offer to sell, buy or offer to buy or negotiate the purchase, sale, or exchange of real estate, or offers or attempts to negotiate a loan secured or to be secured by a mortgage or other encumbrance upon or transfer of real estate, or to lease or rent, or offer to lease or rent any real estate for others, or to collect rents for the use of real estate, or to solicit for prospective purchasers or lessees of real estate, or who is employed by a licensed real estate broker to sell or offer to sell lots or other parcels of real estate, at a stated salary, or upon a commission, or upon a salary and commission, or otherwise to sell real estate, or any parts thereof, in lots or other parcels.

q. "Disability" means physical or sensory disability, infirmity, malformation, or disfigurement which is caused by bodily injury, birth defect, or illness including epilepsy and other seizure disorders, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impairment, deafness or hearing impairment, muteness or speech impairment, or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or any mental, psychological, or developmental disability, including autism spectrum disorders, resulting from anatomical, psychological, physiological, or neurological conditions which prevents the typical exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. Disability shall also mean AIDS or HIV infection.

r. "Blind person" or "person who is blind" means any individual whose central visual acuity does not exceed 20/200 in the better eye with correcting lens or whose visual acuity is better than 20/200 if accompanied by a limit to the field of vision in the better eye to such a degree that its widest diameter subtends an angle of no greater than 20 degrees.

s. "Guide dog" means a dog used to assist persons who are deaf, or which is fitted with a special harness so as to be suitable as an aid to the mobility of a person who is blind, and is used by a person who is blind and has satisfactorily completed a specific course of training in the use of such a dog, and has been trained by an organization generally recognized by agencies involved in the rehabilitation of persons with disabilities, including, but not limited to, those persons who are blind or deaf, as reputable and competent to provide dogs with training of this type.

t. "Guide or service dog trainer" means any person who is employed by an organization generally recognized by agencies involved in the rehabilitation of persons with disabilities, including, but not limited to, those persons who are blind, have visual impairments, or are deaf or have hearing impairments, as reputable and competent to provide dogs with training, as defined in this section, and who is actually involved in the training process.

u. "Housing accommodation" means any publicly assisted housing accommodation or any real property, or portion thereof, which is used or occupied, or is intended, arranged, or designed to be used or occupied, as the home, residence, or sleeping place of one or more persons, but shall not include any single family residence the occupants of which rent, lease, or furnish for compensation not more than one room therein.

v. "Public facility" means any place of public accommodation and any street, highway, sidewalk, walkway, public building, and any other place or structure to which the general public is regularly, normally, or customarily permitted or invited.

w. "Deaf person" or "person who is deaf" means any person whose hearing is so severely impaired that the person is unable to hear and understand conversational speech through the unaided ear alone, and who must depend primarily on an assistive listening device or visual communication such as writing, lip reading, sign language, and gestures.

x. "Atypical hereditary cellular or blood trait" means sickle cell trait, hemoglobin C trait, thalassemia trait, Tay-Sachs trait, or cystic fibrosis trait.

y. "Sickle cell trait" means the condition wherein the major natural hemoglobin components present in the blood of the individual are hemoglobin A (normal) and hemoglobin S (sickle hemoglobin) as defined by standard chemical and physical analytic techniques, including electrophoresis; and the proportion of hemoglobin A is greater than the proportion of hemoglobin S or one natural parent of the individual is shown to have only normal hemoglobin components (hemoglobin A, hemoglobin A2, hemoglobin F) in the normal proportions by standard chemical and physical analytic tests.

z. "Hemoglobin C trait" means the condition wherein the major natural hemoglobin components present in the blood of the individual are hemoglobin A (normal) and hemoglobin C as defined by standard chemical and physical analytic techniques, including electrophoresis; and the proportion of hemoglobin A is greater than the proportion of hemoglobin C or one natural parent of the individual is shown to have only normal hemoglobin components (hemoglobin A, hemoglobin A2, hemoglobin F) in normal proportions by standard chemical and physical analytic tests.

aa. "Thalassemia trait" means the presence of the thalassemia gene which in combination with another similar gene results in the chronic hereditary disease Cooley's anemia.

bb. "Tay-Sachs trait" means the presence of the Tay-Sachs gene which in combination with another similar gene results in the chronic hereditary disease Tay-Sachs.

cc. "Cystic fibrosis trait" means the presence of the cystic fibrosis gene which in combination with another similar gene results in the chronic hereditary disease cystic fibrosis.

dd. "Service dog" means any dog individually trained to the requirements of a person with a disability including, but not limited to minimal protection work, rescue work, pulling a wheelchair or retrieving dropped items. This term shall include a "seizure dog" trained to alert or otherwise assist persons with epilepsy or other seizure disorders.

ee. "Qualified Medicaid applicant" means an individual who is a qualified applicant pursuant to P.L.1968, c.413 (C.30:4D-1 et seq.).

ff. "AIDS" means acquired immune deficiency syndrome as defined by the Centers for Disease Control and Prevention of the United States Public Health Service.

gg. "HIV infection" means infection with the human immunodeficiency virus or any other related virus identified as a probable causative agent of AIDS.

hh. "Affectional or sexual orientation" means male or female heterosexuality, homosexuality, or bisexuality by inclination, practice, identity, or expression, having a history thereof or being perceived, presumed, or identified by others as having such an orientation.

ii. "Heterosexuality" means affectional, emotional, or physical attraction or behavior which is primarily directed towards persons of the other gender.

jj. "Homosexuality" means affectional, emotional, or physical attraction or behavior which is primarily directed towards persons of the same gender.

kk. "Bisexuality" means affectional, emotional, or physical attraction or behavior which is directed towards persons of either gender.

ll. "Familial status" means being the natural parent of a child, the adoptive parent of a child, the resource family parent of a child, having a "parent and child relationship" with a child as defined by State law, or having sole or joint legal or physical custody, care, guardianship, or visitation with a child, or any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

mm. "Housing for older persons" means housing:

(1) provided under any State program that the Attorney General determines is specifically designed and operated to assist persons who are elderly (as defined in the State program); or provided under any federal program that the United States Department of Housing and Urban Development determines is specifically designed and operated to assist persons who are elderly (as defined in the federal program); or

(2) intended for, and solely occupied by, persons 62 years of age or older; or

(3) intended and operated for occupancy by at least one person 55 years of age or older per unit. In determining whether housing qualifies as housing for older persons under this paragraph, the Attorney General shall adopt regulations which require at least the following factors:

(a) the existence of significant facilities and services specifically designed to meet the physical or social needs of older persons, or if the provision of such facilities and services is not practicable, that such housing is necessary to provide important housing opportunities for older persons; and

(b) that at least 80 percent of the units are occupied by at least one person 55 years of age or older per unit; and

(c) the publication of, and adherence to, policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older.

Housing shall not fail to meet the requirements for housing for older persons by reason of: persons residing in such housing as of September 13, 1988 not meeting the age requirements of this subsection, provided that new occupants of such housing meet the age requirements of this subsection; or unoccupied units, provided that such units are reserved for occupancy by persons who meet the age requirements of this subsection.

nn. "Genetic characteristic" means any inherited gene or chromosome, or alteration thereof, that is scientifically or medically believed to predispose an individual to a disease, disorder, or syndrome, or to be associated with a statistically significant increased risk of development of a disease, disorder, or syndrome.

oo. "Genetic information" means the information about genes, gene products, or inherited characteristics that may derive from an individual or family member.

pp. "Genetic test" means a test for determining the presence or absence of an inherited genetic characteristic in an individual, including tests of nucleic acids such as DNA, RNA, and mitochondrial DNA, chromosomes, or proteins in order to identify a predisposing genetic characteristic.

qq. "Domestic partnership" means a domestic partnership established pursuant to section 4 of P.L.2003, c.246 (C.26:8A-4).

rr. "Gender identity or expression" means having or being perceived as having a gender related identity or expression whether or not stereotypically associated with a person's assigned sex at birth.

ss. "Civil Union" means a legally recognized union of two eligible individuals established pursuant to R.S.37:1-1 et seq. and P.L.2006, c.103 (C.37:1-28 et al.).

tt. "Premium wages" means additional remuneration for night, weekend, or holiday work, or for standby or irregular duty.

uu. "Premium benefit" means an employment benefit, such as seniority, group life insurance, health insurance, disability insurance, sick leave, annual leave, or an educational or pension benefit that is greater than the employment benefit due the employee for an equivalent period of work performed during the regular work schedule of the employee.

vv. "Race" is inclusive of traits historically associated with race, including, but not limited to, hair texture, hair type, and protective hairstyles.

ww. "Protective hair styles" includes, but is not limited to, such hairstyles as braids, locks, and twists.

xx. “Family member” means a child, parent, parent-in-law, sibling, grandparent, grandchild, spouse, partner in a civil union couple, domestic partner, or any other individual related by blood to the person, and any other individual that the person shows to have a close association with the person which is the equivalent of a family relationship.

L.1945, c.169, s.5; amended 1949, c.11, s.3; 1951, c.64, s.3; 1957, c.66, s.2; 1961, c.106, s.2; 1963, c.40, s.1; 1966, c.17, s.1; 1966, c.254, s.1; 1972, c.114, s.1; 1977, c.122, s.1; 1977, c.456, s.1; 1978, c.137, s.3; 1979, c.86, s.1; 1980, c.46, s.4; 1981, c.185, s.1; 1983, c.485, s.3; 1985, c.303, s.1; 1986, c.8, s.1; 1991, c.493; 1991, c.519, s.3; 1992, c.146, s.4; 1996, c.126, s.4; 2003, c.180, s.6; 2003, c.246, s.11; 2003, c.293; 2004, c.130, s.37; 2006, c.100, s.4; 2006, c.103, s.87; 2007, c.325, s.1; 2009, c.205; 2017, c.131, s.8.

10:5-5.1. Division to be known as "Division on Civil Rights"

The Division against Discrimination shall be known as the "Division on Civil Rights."

L.1960, c. 59, p. 491, s. 3, eff. June 21, 1960.

10:5-6. Division on Civil Rights created; powers.

6. There is created in the Department of Law and Public Safety a division known as "The Division on Civil Rights" with power to prevent and eliminate discrimination in the manner prohibited by this act against persons because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, gender identity or expression, familial status, nationality, disability, or sex or because of their liability for service in the Armed Forces of the United States, by employers, labor organizations, employment agencies or other persons and to take other actions against discrimination because of race, creed, color, national origin, ancestry, marital status, sex, familial status, nationality, disability, or age or because of their liability for service in the Armed Forces of the United States, as herein provided; and the division created hereunder is given general jurisdiction and authority for such purposes.

L.1945,c.169,s.6; amended 1951, c.64, s.4; 1961, c.106, s.3; 1962, c.37, ss.4,9; 1963, c.40, s.2; 1970, c.80, s.10; 1991, c.519, s.4; 1992, c.146, s.5; 2003, c.180, s.7; 2006, c.100, s.5.

10:5-7. Composition of division; commission; membership; appointment; term; vacancies; compensation

The said division shall consist of the Attorney General and the commission. The commission shall consist of 7 members; each member shall be appointed by the Governor, with the advice and consent of the Senate, for a term of 5 years and until his successor is appointed and qualified, except that of those first appointed, one shall be appointed for a term of 1 year, one for a term of 2 years, one for a term of 3 years and 2 for a term of 4 years. Vacancies caused other than by expiration of term shall be filled in the same manner but for the unexpired term only. Members of the commission shall serve without compensation but shall be reimbursed for necessary expenses incurred in the performance of

their duties. The first chairman of the commission shall be designated by the Governor and thereafter, the chairman shall be elected by the members, annually.

L.1945, c. 169, p. 590, s. 7. Amended by L.1949, c. 11, p. 40, s. 4; L.1963, c. 40, s. 3.

10:5-8 Attorney General's powers and duties.

8. The Attorney General shall:

a. Exercise all powers of the division not vested in the commission.

b. Administer the work of the division.

c. Organize the division into sections, which shall include but not be limited to a section which shall receive, investigate, and act upon complaints alleging discrimination against persons because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, gender identity or expression, familial status, disability, nationality or sex or because of their liability for service in the Armed Forces of the United States; and another which shall, in order to eliminate prejudice and to further good will among the various racial and religious and nationality groups in this State, study, recommend, prepare and implement, in cooperation with such other departments of the State Government or any other agencies, groups or entities both public and private, such educational and human relations programs as are consonant with the objectives of this act; and prescribe the organization of said sections and the duties of his subordinates and assistants.

d. Appoint a Director of the Division on Civil Rights, who shall act for the Attorney General, in the Attorney General's place and with the Attorney General's powers, which appointment shall be subject to the approval of the commission and the Governor, a deputy director and such assistant directors, field representatives and assistants as may be necessary for the proper administration of the division and fix their compensation within the limits of available appropriations. The director, deputy director, assistant directors, field representatives and assistants shall not be subject to the Civil Service Act and shall be removable by the Attorney General at will.

e. Appoint such clerical force and employees as the Attorney General may deem necessary and fix their duties, all of whom shall be subject to the Civil Service Act.

f. Maintain liaison with local and State officials and agencies concerned with matters related to the work of the division.

g. Adopt, promulgate, amend, and rescind suitable rules and regulations to carry out the provisions of this act.

h. Conduct investigations, receive complaints and conduct hearings thereon other than those complaints received and hearings held pursuant to the provisions of this act.

i. In connection with any investigation or hearing held pursuant to the provisions of this act, subpoena witnesses, compel their attendance, administer oaths, take the testimony of any person, under oath, and, in connection therewith, require the production for examination of any books or papers relating to any subject matter under investigation or in question by the division and conduct such discovery procedures which may include the taking of interrogatories and oral depositions as shall be deemed necessary by the

Attorney General in any investigation. The Attorney General may make rules as to the issuance of subpoenas by the director. The failure of any witness when duly subpoenaed to attend, give testimony, or produce evidence shall be punishable by the Superior Court of New Jersey in the same manner as such failure is punishable by such court in a case therein pending.

j. Issue such publications and such results of investigations and research tending to promote good will and to minimize or eliminate discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, gender identity or expression, familial status, disability, nationality or sex, as the commission shall direct, subject to available appropriations.

k. Render each year to the Governor and Legislature a full written report of all the activities of the division.

l. Appoint, subject to the approval of the commission, a panel of not more than five hearing examiners, each of whom shall be duly licensed to practice law in this State for a period of at least five years, and each to serve for a term of one year and until his successor is appointed, any one of whom the director may designate in his place to conduct any hearing and recommend findings of fact and conclusions of law. The hearing examiners shall receive such compensation as may be determined by the Attorney General, subject to available appropriations.

L.1945,c.169,s.8; amended 1947, c.155, s.1; 1949, c.11, s.5; 1951, c.64, s.5; 1960, c.59, s.1; 1962, c.37, ss.5,9; 1963, c.40, s.4; 1966, c.17, s.2; 1970, c.80, s.11; 1991, c.519, s.5; 1992, c.146, s.6; 2003, c.180, s.8; 2006, c.100, s.6.

10:5-8.1 Preparation of statement by Attorney General.

6. a. The Attorney General shall prepare a statement notifying landlords that the "Law Against Discrimination," P.L.1945, c.169 (C.10:5-1et seq.), as amended by P.L.2002, c.82, prohibits discrimination against tenants based on the source of income being used for rental or mortgage payments. In addition, the notification shall include instructions for those wishing to report such discrimination to the Division on Civil Rights.

b. Each agency or entity authorized to issue federal rental assistance vouchers to eligible tenants shall include a copy of the notification required pursuant to subsection a. of this section when issuing such a voucher.

L.2002,c.82,s.6.

10:5-9.1 Enforcement of laws against discrimination in public housing and real property.

1. The Division on Civil Rights in the Department of Law and Public Safety shall enforce the laws of this State against discrimination in housing built with, or leased with the assistance of, public funds or public assistance, pursuant to any law, and in real property, as defined in the law hereby supplemented, because of race, religious principles, color, national origin, ancestry, marital status, affectional or sexual orientation, familial status, disability, liability for service in the Armed Forces of the United States, nationality, sex, gender identity or expression or source of lawful income used for rental or mortgage payments. The said laws shall be so enforced in the manner prescribed in the act to which this act is a

supplement.

L.1954, c.198, s.1; amended 1961, c.106, s.5; 1963, c.40, s.18; 1970, c.80, s.12; 1991, c.519, s.6; 1992, c.146, s.7; 2002, c.82, s.2; 2003, c.180, s.9; 2006, c.100, s.7; 2017, c.184, s.2.

10:5-9.2 Division on Civil Rights qualified as "certified agency."

13. The provisions of this amendatory and supplementary act, P.L.1992, c.146 (C.10:5-12.4 et al.), and P.L.2003, c.180, are intended to permit the Division on Civil Rights in the Department of Law and Public Safety to qualify as a "certified agency" within the meaning of the Federal Fair Housing Amendments Act, Pub.L. 100-430 (42 U.S.C. s.3610 (f)), and shall be construed as consistent with that purpose. Nothing in P.L.1992, c.146 (C.10:5-12.4 et al.) and P.L.2003, c.180, shall be construed to permit conduct prohibited by the "Law Against Discrimination," P.L.1945, c.169 (C.10:5-1 et seq.), prior to the effective date of P.L.2003, c.180.

L.1992,c.146,s.13; amended 2003, c.180, s.10.

10:5-10 Commission's powers and duties; local commissions.

9. The commission shall:

a. Consult with and advise the Attorney General with respect to the work of the division.

b. Survey and study the operations of the division.

c. Report to the Governor and the Legislature with respect to such matters relating to the work of the division and at such times as it may deem in the public interest.

The mayors or chief executive officers of the municipalities in the State may appoint local commissions on civil rights to aid in effectuating the purposes of this act. Such local commissions shall be composed of representative citizens serving without compensation. Such commissions shall attempt to foster through community effort or otherwise, good will, cooperation and conciliation among the groups and elements of the inhabitants of the community, and they may be empowered by the local governing bodies to make recommendations to them for the development of policies and procedures in general and for programs of formal and informal education that will aid in eliminating all types of discrimination based on race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, gender identity or expression, familial status, disability, nationality or sex.

L.1945,c.169,s.9; amended 1949, c.11, s.6; 1962, c.37, ss.6,9; 1963, c.40, s.5; 1970, c.80, s.13; 1991, c.519, s.7; 1992, c.146, s.8; 2003, c.180, s.11; 2006, c.100, s.8.

10:5-11. Evidence in obedience to summons; immunity of witnesses

No person shall be excused from attending and testifying or from producing records, correspondence, documents or other evidence in obedience to the subpoena of the Attorney General, director, or hearing examiner on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or

forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence in accordance with the subpoena, and any such testimony given or evidence produced shall be admissible against him in any proceeding concerning such perjury or contempt. The immunity herein provided shall extend only to natural persons so compelled to testify.

L.1945, c. 169, p. 593, s. 10. Amended by L.1963, c. 40, s. 6; L.1966, c. 17, s. 3, eff. April 7, 1966.

10:5-12 Unlawful employment practices, discrimination.

11. It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:

a. For an employer, because of the race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy or breastfeeding, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual, or because of the refusal to submit to a genetic test or make available the results of a genetic test to an employer, to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment; provided, however, it shall not be an unlawful employment practice to refuse to accept for employment an applicant who has received a notice of induction or orders to report for active duty in the armed forces; provided further that nothing herein contained shall be construed to bar an employer from refusing to accept for employment any person on the basis of sex in those certain circumstances where sex is a bona fide occupational qualification, reasonably necessary to the normal operation of the particular business or enterprise; provided further that nothing herein contained shall be construed to bar an employer from refusing to accept for employment or to promote any person over 70 years of age; provided further that it shall not be an unlawful employment practice for a club exclusively social or fraternal to use club membership as a uniform qualification for employment, or for a religious association or organization to utilize religious affiliation as a uniform qualification in the employment of clergy, religious teachers or other employees engaged in the religious activities of the association or organization, or in following the tenets of its religion in establishing and utilizing criteria for employment of an employee; provided further, that it shall not be an unlawful employment practice to require the retirement of any employee who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policy-making position, if that employee is entitled to an immediate non-forfeitable annual retirement benefit from a pension, profit sharing, savings or deferred retirement plan, or any combination of those plans, of the employer of that employee which equals in the aggregate at least $27,000.00; and provided further that an employer may restrict employment to citizens of the United States where such restriction is required by federal law or is otherwise necessary to protect the national interest.

The provisions of subsections a. and b. of section 57 of P.L.2003, c.246 (C.34:11A-20), and the provisions of section 58 of P.L.2003, c.246 (C.26:8A-11), shall not be deemed to be an unlawful discrimination under P.L.1945, c.169 (C.10:5-1 et seq.).

For the purposes of this subsection, a "bona fide executive" is a top level employee who exercises substantial executive authority over a significant number of employees and a large volume of business. A "high policy-making position" is a position in which a person plays a significant role in developing policy and in recommending the implementation thereof.

For the purposes of this subsection, an unlawful employment practice occurs, with respect to discrimination in compensation or in the financial terms or conditions of employment, each occasion that an individual is affected by application of a discriminatory compensation decision or other practice, including, but not limited to, each occasion that wages, benefits, or other compensation are paid, resulting in whole or in part from the decision or other practice.

In addition to any other relief authorized by the "Law Against Discrimination," P.L.1945, c.169 (C.10:5-1 et seq.) for discrimination in compensation or in the financial terms or conditions of employment, liability shall accrue and an aggrieved person may obtain relief for back pay for the entire period of time , except not more than six years, in which the violation with regard to discrimination in compensation or in the financial terms or conditions of employment has been continuous, if the violation continues to occur within the statute of limitations.

Nothing in this subsection shall prohibit the application of the doctrine of "continuing violation" or the "discovery rule" to any appropriate claim as those doctrines currently exist in New Jersey common law. It shall be an unlawful employment practice to require employees or prospective employees to consent to a shortened statute of limitations or to waive any of the protections provided by the "Law Against Discrimination," P.L.1945, c.169 (C.10:5-1 et seq.).

b. For a labor organization, because of the race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, gender identity or expression, disability, pregnancy or breastfeeding, or sex of any individual, or because of the liability for service in the Armed Forces of the United States or nationality of any individual, to exclude or to expel from its membership such individual or to discriminate in any way against any of its members, against any applicant for, or individual included in, any apprentice or other training program or against any employer or any individual employed by an employer; provided, however, that nothing herein contained shall be construed to bar a labor organization from excluding from its apprentice or other training programs any person on the basis of sex in those certain circumstances where sex is a bona fide occupational qualification reasonably necessary to the normal operation of the particular apprentice or other training program.

c. For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment, or to make an inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, gender identity or expression, disability, nationality, pregnancy or breastfeeding, or sex or liability of any applicant for employment for service in the Armed Forces of the United States, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification.

d. For any person to take reprisals against any person because that person has opposed any practices or acts forbidden under this act or because that person has sought legal advice regarding rights under this act, shared relevant information with legal counsel, shared information with a governmental entity, or filed a complaint, testified or assisted in any proceeding under this act or to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this act.

e. For any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act, or to attempt to do so.

f. (1) For any owner, lessee, proprietor, manager, superintendent, agent, or employee of any place of public accommodation directly or indirectly to refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof, or to discriminate against any person in the furnishing thereof, or directly or indirectly to publish, circulate, issue, display, post or mail any written or printed communication, notice, or advertisement to the effect that any of the accommodations, advantages, facilities, or privileges of any such place will be refused, withheld from, or denied to any person on account of the race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, disability, liability for service in the Armed Forces of the United States or nationality of such person, or that the patronage or custom thereat of any person of any particular race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, pregnancy or breastfeeding status, sex, gender identity or expression, affectional or sexual orientation, disability, liability for service in the Armed Forces of the United States or nationality is unwelcome, objectionable or not acceptable, desired or solicited, and the production of any such written or printed communication, notice or advertisement, purporting to relate to any such place and to be made by any owner, lessee, proprietor, superintendent or manager thereof, shall be presumptive evidence in any action that the same was authorized by such person; provided, however, that nothing contained herein shall be construed to bar any place of public accommodation which is in its nature reasonably restricted exclusively to individuals of one sex, and which shall include but not be limited to any summer camp, day camp, or resort camp, bathhouse, dressing room, swimming pool, gymnasium, comfort station, dispensary, clinic or hospital, or school or educational institution which is restricted exclusively to individuals of one sex, provided individuals shall be admitted based on their gender identity or expression, from refusing, withholding from or denying to any individual of the opposite sex any of the accommodations, advantages, facilities or privileges thereof on the basis of sex; provided further, that the foregoing limitation shall not apply to any restaurant as defined in R.S.33:1-1 or place where alcoholic beverages are served.

(2) Notwithstanding the definition of "a place of public accommodation" as set forth in subsection l. of section 5 of P.L.1945, c.169 (C.10:5-5), for any owner, lessee, proprietor, manager, superintendent, agent, or employee of any private club or association to directly or indirectly refuse, withhold from or deny to any individual who has been accepted as a club member and has contracted for or is otherwise entitled to full club membership any of the accommodations, advantages, facilities or privileges thereof, or to discriminate against any member in the furnishing thereof on account of the race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, pregnancy or breastfeeding, sex, gender identity, or expression, affectional or sexual orientation, disability, liability for service in the Armed Forces of the United States or nationality of such person.

In addition to the penalties otherwise provided for a violation of P.L.1945, c.169 (C.10:5-1 et seq.), if the violator of paragraph (2) of subsection f. of this section is the holder of an alcoholic beverage license issued under the provisions of R.S.33:1-12 for that private club or association, the matter shall be referred to the Director of the Division of Alcoholic Beverage Control who shall impose an appropriate penalty in accordance with the procedures set forth in R.S.33:1-31.

g. For any person, including but not limited to, any owner, lessee, sublessee, assignee or managing agent of, or other person having the right of ownership or possession of or the right to sell, rent, lease, assign, or sublease any real property or part or portion thereof, or any agent or employee of any of these:

(1) To refuse to sell, rent, lease, assign, or sublease or otherwise to deny to or withhold from any person or group of persons any real property or part or portion thereof because of race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, pregnancy or

breastfeeding, sex, gender identity or expression, affectional or sexual orientation, familial status, disability, liability for service in the Armed Forces of the United States, nationality, or source of lawful income used for rental or mortgage payments;

(2) To discriminate against any person or group of persons because of race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, familial status, disability, liability for service in the Armed Forces of the United States, nationality or source of lawful income used for rental or mortgage payments in the terms, conditions or privileges of the sale, rental or lease of any real property or part or portion thereof or in the furnishing of facilities or services in connection therewith;

(3) To print, publish, circulate, issue, display, post or mail, or cause to be printed, published, circulated, issued, displayed, posted or mailed any statement, advertisement, publication or sign, or to use any form of application for the purchase, rental, lease, assignment or sublease of any real property or part or portion thereof, or to make any record or inquiry in connection with the prospective purchase, rental, lease, assignment, or sublease of any real property, or part or portion thereof which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, pregnancy or breastfeeding, sex, gender identity, or expression, affectional or sexual orientation, familial status, disability, liability for service in the Armed Forces of the United States, nationality, or source of lawful income used for rental or mortgage payments, or any intent to make any such limitation, specification or discrimination, and the production of any such statement, advertisement, publicity, sign, form of application, record, or inquiry purporting to be made by any such person shall be presumptive evidence in any action that the same was authorized by such person; provided, however, that nothing contained in this subsection shall be construed to bar any person from refusing to sell, rent, lease, assign or sublease or from advertising or recording a qualification as to sex for any room, apartment, flat in a dwelling or residential facility which is planned exclusively for and occupied by individuals of one sex to any individual of the exclusively opposite sex on the basis of sex provided individuals shall be qualified based on their gender identity or expression;

(4) To refuse to sell, rent, lease, assign, or sublease or otherwise to deny to or withhold from any person or group of persons any real property or part or portion thereof because of the source of any lawful income received by the person or the source of any lawful rent payment to be paid for the real property; or

(5) To refuse to rent or lease any real property to another person because that person's family includes children under 18 years of age, or to make an agreement, rental or lease of any real property which provides that the agreement, rental or lease shall be rendered null and void upon the birth of a child. This paragraph shall not apply to housing for older persons as defined in subsection mm. of section 5 of P.L.1945, c.169 (C.10:5-5).

h. For any person, including but not limited to, any real estate broker, real estate salesperson, or employee or agent thereof:

(1) To refuse to sell, rent, assign, lease or sublease, or offer for sale, rental, lease, assignment, or sublease any real property or part or portion thereof to any person or group of persons or to refuse to negotiate for the sale, rental, lease, assignment, or sublease of any real property or part or portion thereof to any person or group of persons because of race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, familial status, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, liability for service in the Armed Forces of the United States, disability, nationality, or source of lawful income used for rental or mortgage payments, or to represent that any real property or portion thereof is not available for inspection, sale, rental, lease,

assignment, or sublease when in fact it is so available, or otherwise to deny or withhold any real property or any part or portion of facilities thereof to or from any person or group of persons because of race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, familial status, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, disability, liability for service in the Armed Forces of the United States, or nationality;

(2) To discriminate against any person because of race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, familial status, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, disability, liability for service in the Armed Forces of the United States, nationality, or source of lawful income used for rental or mortgage payments in the terms, conditions or privileges of the sale, rental, lease, assignment or sublease of any real property or part or portion thereof or in the furnishing of facilities or services in connection therewith;

(3) To print, publish, circulate, issue, display, post, or mail, or cause to be printed, published, circulated, issued, displayed, posted or mailed any statement, advertisement, publication or sign, or to use any form of application for the purchase, rental, lease, assignment, or sublease of any real property or part or portion thereof or to make any record or inquiry in connection with the prospective purchase, rental, lease, assignment, or sublease of any real property or part or portion thereof which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, familial status, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, disability, liability for service in the Armed Forces of the United States, nationality, or source of lawful income used for rental or mortgage payments or any intent to make any such limitation, specification or discrimination, and the production of any such statement, advertisement, publicity, sign, form of application, record, or inquiry purporting to be made by any such person shall be presumptive evidence in any action that the same was authorized by such person; provided, however, that nothing contained in this subsection h., shall be construed to bar any person from refusing to sell, rent, lease, assign or sublease or from advertising or recording a qualification as to sex for any room, apartment, flat in a dwelling or residential facility which is planned exclusively for and occupied exclusively by individuals of one sex to any individual of the opposite sex on the basis of sex, provided individuals shall be qualified based on their gender identity or expression;

(4) To refuse to sell, rent, lease, assign, or sublease or otherwise to deny to or withhold from any person or group of persons any real property or part or portion thereof because of the source of any lawful income received by the person or the source of any lawful rent payment to be paid for the real property; or

(5) To refuse to rent or lease any real property to another person because that person's family includes children under 18 years of age, or to make an agreement, rental or lease of any real property which provides that the agreement, rental or lease shall be rendered null and void upon the birth of a child. This paragraph shall not apply to housing for older persons as defined in subsection mm. of section 5 of P.L.1945, c.169 (C.10:5-5).

i. For any person, bank, banking organization, mortgage company, insurance company or other financial institution, lender or credit institution involved in the making or purchasing of any loan or extension of credit, for whatever purpose, whether secured by residential real estate or not, including but not limited to financial assistance for the purchase, acquisition, construction, rehabilitation, repair or maintenance of any real property or part or portion thereof or any agent or employee thereof:

(1) To discriminate against any person or group of persons because of race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, pregnancy or breastfeeding,

sex, gender identity or expression, affectional or sexual orientation, disability, liability for service in the Armed Forces of the United States, familial status or nationality, in the granting, withholding, extending, modifying, renewing, or purchasing, or in the fixing of the rates, terms, conditions or provisions of any such loan, extension of credit or financial assistance or purchase thereof or in the extension of services in connection therewith;

(2) To use any form of application for such loan, extension of credit or financial assistance or to make record or inquiry in connection with applications for any such loan, extension of credit or financial assistance which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, disability, liability for service in the Armed Forces of the United States, familial status or nationality or any intent to make any such limitation, specification or discrimination; unless otherwise required by law or regulation to retain or use such information;

(3) (Deleted by amendment, P.L.2003, c.180).

(4) To discriminate against any person or group of persons because of the source of any lawful income received by the person or the source of any lawful rent payment to be paid for the real property; or

(5) To discriminate against any person or group of persons because that person's family includes children under 18 years of age, or to make an agreement or mortgage which provides that the agreement or mortgage shall be rendered null and void upon the birth of a child. This paragraph shall not apply to housing for older persons as defined in subsection mm. of section 5 of P.L.1945, c.169 (C.10:5-5).

j. For any person whose activities are included within the scope of this act to refuse to post or display such notices concerning the rights or responsibilities of persons affected by this act as the Attorney General may by regulation require.

k. For any real estate broker, real estate salesperson or employee or agent thereof or any other individual, corporation, partnership, or organization, for the purpose of inducing a transaction for the sale or rental of real property from which transaction such person or any of its members may benefit financially, to represent that a change has occurred or will or may occur in the composition with respect to race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, familial status, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, disability, liability for service in the Armed Forces of the United States, nationality, or source of lawful income used for rental or mortgage payments of the owners or occupants in the block, neighborhood or area in which the real property is located, and to represent, directly or indirectly, that this change will or may result in undesirable consequences in the block, neighborhood or area in which the real property is located, including, but not limited to the lowering of property values, an increase in criminal or anti-social behavior, or a decline in the quality of schools or other facilities.

l. For any person to refuse to buy from, sell to, lease from or to, license, contract with, or trade with, provide goods, services or information to, or otherwise do business with any other person on the basis of the race, creed, color, national origin, ancestry, age, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, marital status, civil union status, domestic partnership status, liability for service in the Armed Forces of the United States, disability, nationality, or source of lawful income used for rental or mortgage payments of such other person or of such other person's family members, partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers. This subsection shall not prohibit refusals or

other actions (1) pertaining to employee-employer collective bargaining, labor disputes, or unfair labor practices, or (2) made or taken in connection with a protest of unlawful discrimination or unlawful employment practices.

m. For any person to:

(1) Grant or accept any letter of credit or other document which evidences the transfer of funds or credit, or enter into any contract for the exchange of goods or services, where the letter of credit, contract, or other document contains any provisions requiring any person to discriminate against or to certify that he, she or it has not dealt with any other person on the basis of the race, creed, color, national origin, ancestry, age, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, marital status, civil union status, domestic partnership status, disability, liability for service in the Armed Forces of the United States, or nationality of such other person or of such other person's family members, partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers.

(2) Refuse to grant or accept any letter of credit or other document which evidences the transfer of funds or credit, or refuse to enter into any contract for the exchange of goods or services, on the ground that it does not contain such a discriminatory provision or certification.

The provisions of this subsection shall not apply to any letter of credit, contract, or other document which contains any provision pertaining to employee-employer collective bargaining, a labor dispute or an unfair labor practice, or made in connection with the protest of unlawful discrimination or an unlawful employment practice, if the other provisions of such letter of credit, contract, or other document do not otherwise violate the provisions of this subsection.

n. For any person to aid, abet, incite, compel, coerce, or induce the doing of any act forbidden by subsections l. and m. of section 11 of P.L.1945, c.169 (C.10:5-12), or to attempt, or to conspire to do so. Such prohibited conduct shall include, but not be limited to:

(1) Buying from, selling to, leasing from or to, licensing, contracting with, trading with, providing goods, services, or information to, or otherwise doing business with any person because that person does, or agrees or attempts to do, any such act or any act prohibited by this subsection; or

(2) Boycotting, commercially blacklisting or refusing to buy from, sell to, lease from or to, license, contract with, provide goods, services or information to, or otherwise do business with any person because that person has not done or refuses to do any such act or any act prohibited by this subsection; provided that this subsection shall not prohibit refusals or other actions either pertaining to employee-employer collective bargaining, labor disputes, or unfair labor practices, or made or taken in connection with a protest of unlawful discrimination or unlawful employment practices.

o. For any multiple listing service, real estate brokers' organization or other service, organization or facility related to the business of selling or renting dwellings to deny any person access to or membership or participation in such organization, or to discriminate against such person in the terms or conditions of such access, membership, or participation, on account of race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, familial status, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, disability, liability for service in the Armed Forces of the United States or nationality.

p. Nothing in the provisions of this section shall affect the ability of an employer to require employees

to adhere to reasonable workplace appearance, grooming and dress standards not precluded by other provisions of State or federal law, except that an employer shall allow an employee to appear, groom and dress consistent with the employee's gender identity or expression.

q. (1) For any employer to impose upon a person as a condition of obtaining or retaining employment, including opportunities for promotion, advancement or transfers, any terms or conditions that would require a person to violate or forego a sincerely held religious practice or religious observance, including but not limited to the observance of any particular day or days or any portion thereof as a Sabbath or other holy day in accordance with the requirements of the religion or religious belief, unless, after engaging in a bona fide effort, the employer demonstrates that it is unable to reasonably accommodate the employee's religious observance or practice without undue hardship on the conduct of the employer's business. Notwithstanding any other provision of law to the contrary, an employee shall not be entitled to premium wages or premium benefits for work performed during hours to which those premium wages or premium benefits would ordinarily be applicable, if the employee is working during those hours only as an accommodation to his religious requirements. Nothing in this subsection q. shall be construed as reducing:

(a) The number of the hours worked by the employee which are counted towards the accruing of seniority, pension or other benefits; or

(b) Any premium wages or benefits provided to an employee pursuant to a collective bargaining agreement.

(2) For an employer to refuse to permit an employee to utilize leave, as provided for in this subsection q., which is solely used to accommodate the employee's sincerely held religious observance or practice. Except where it would cause an employer to incur an undue hardship, no person shall be required to remain at his place of employment during any day or days or portion thereof that, as a requirement of his religion, he observes as his Sabbath or other holy day, including a reasonable time prior and subsequent thereto for travel between his place of employment and his home; provided that any such absence from work shall, wherever practicable in the reasonable judgment of the employer, be made up by an equivalent amount of time and work at some other mutually convenient time, or shall be charged against any leave with pay ordinarily granted, other than sick leave, and any such absence not so made up or charged, may be treated by the employer of that person as leave taken without pay.

(3) (a) For purposes of this subsection q., "undue hardship" means an accommodation requiring unreasonable expense or difficulty, unreasonable interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system or a violation of any provision of a bona fide collective bargaining agreement.

(b) In determining whether the accommodation constitutes an undue hardship, the factors considered shall include:

(i) The identifiable cost of the accommodation, including the costs of loss of productivity and of retaining or hiring employees or transferring employees from one facility to another, in relation to the size and operating cost of the employer.

(ii) The number of individuals who will need the particular accommodation for a sincerely held religious observance or practice.

(iii) For an employer with multiple facilities, the degree to which the geographic separateness or

administrative or fiscal relationship of the facilities will make the accommodation more difficult or expensive.

(c) An accommodation shall be considered to constitute an undue hardship if it will result in the inability of an employee to perform the essential functions of the position in which he or she is employed.

(d) (i) The provisions of this subsection q. shall be applicable only to reasonable accommodations of religious observances and shall not supersede any definition of undue hardship or standards for reasonable accommodation of the disabilities of employees.

(ii) This subsection q. shall not apply where the uniform application of terms and conditions of attendance to employees is essential to prevent undue hardship to the employer. The burden of proof regarding the applicability of this subparagraph (d) shall be upon the employer.

r. For any employer to take reprisals against any employee for requesting from , discussing with, or disclosing to, any other employee or former employee of the employer, a lawyer from whom the employee seeks legal advice, or any government agency information regarding the job title, occupational category, and rate of compensation, including benefits, of the employee or any other employee or former employee of the employer, or the gender, race, ethnicity, military status, or national origin of the employee or any other employee or former employee of the employer, regardless of whether the request was responded to , or to require, as a condition of employment, any employee or prospective employee to sign a waiver, or to otherwise require an employee or prospective employee to agree, not to make those requests or disclosures. Nothing in this subsection shall be construed to require an employee to disclose such information about the employee herself to any other employee or former employee of the employer or to any authorized representative of the other employee or former employee.

s. For an employer to treat, for employment-related purposes, a woman employee that the employer knows, or should know, is affected by pregnancy or breastfeeding in a manner less favorable than the treatment of other persons not affected by pregnancy or breastfeeding but similar in their ability or inability to work. In addition, an employer of an employee who is a woman affected by pregnancy shall make available to the employee reasonable accommodation in the workplace, such as bathroom breaks, breaks for increased water intake, periodic rest, assistance with manual labor, job restructuring or modified work schedules, and temporary transfers to less strenuous or hazardous work, for needs related to the pregnancy when the employee, based on the advice of her physician, requests the accommodation, and, in the case of a employee breast feeding her infant child, the accommodation shall include reasonable break time each day to the employee and a suitable room or other location with privacy, other than a toilet stall, in close proximity to the work area for the employee to express breast milk for the child, unless the employer can demonstrate that providing the accommodation would be an undue hardship on the business operations of the employer. The employer shall not in any way penalize the employee in terms, conditions or privileges of employment for requesting or using the accommodation. Workplace accommodation provided pursuant to this subsection and paid or unpaid leave provided to an employee affected by pregnancy or breastfeeding shall not be provided in a manner less favorable than accommodations or leave provided to other employees not affected by pregnancy or breastfeeding but similar in their ability or inability to work. This subsection shall not be construed as otherwise increasing or decreasing any employee's rights under law to paid or unpaid leave in connection with pregnancy or breastfeeding.

For the purposes of this section "pregnancy or breastfeeding" means pregnancy, childbirth, and breast feeding or expressing milk for breastfeeding, or medical conditions related to pregnancy, childbirth, or breastfeeding, including recovery from childbirth.

For the purposes of this subsection, in determining whether an accommodation would impose undue hardship on the operation of an employer's business, the factors to be considered include: the overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget; the type of the employer's operations, including the composition and structure of the employer's workforce; the nature and cost of the accommodation needed, taking into consideration the availability of tax credits, tax deductions, and outside funding; and the extent to which the accommodation would involve waiver of an essential requirement of a job as opposed to a tangential or non-business necessity requirement.

t. For an employer to pay any of its employees who is a member of a protected class at a rate of compensation, including benefits, which is less than the rate paid by the employer to employees who are not members of the protected class for substantially similar work, when viewed as a composite of skill, effort and responsibility. An employer who is paying a rate of compensation in violation of this subsection shall not reduce the rate of compensation of any employee in order to comply with this subsection. An employer may pay a different rate of compensation only if the employer demonstrates that the differential is made pursuant to a seniority system, a merit system, or the employer demonstrates:

(1) That the differential is based on one or more legitimate, bona fide factors other than the characteristics of members of the protected class, such as training, education or experience, or the quantity or quality of production;

(2) That the factor or factors are not based on, and do not perpetuate, a differential in compensation based on sex or any other characteristic of members of a protected class;

(3) That each of the factors is applied reasonably;

(4) That one or more of the factors account for the entire wage differential; and

(5) That the factors are job-related with respect to the position in question and based on a legitimate business necessity. A factor based on business necessity shall not apply if it is demonstrated that there are alternative business practices that would serve the same business purpose without producing the wage differential.

Comparisons of wage rates shall be based on wage rates in all of an employer's operations or facilities. For the purposes of this subsection, "member of a protected class" means an employee who has one or more characteristics, including race, creed, color, national origin, nationality, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or liability for service in the armed forces, for which subsection a. of this section prohibits an employer from refusing to hire or employ or barring or discharging or requiring to retire from employment or discriminating against the individual in compensation or in terms, conditions or privileges of employment.

L.1945, c.169, s.11; amended 1949, c.11, s.7; 1951, c.64, s.6; 1961, c.106, s.4; 1962, c.37, ss.7,9; 1962, c.175; 1966, c.17, s.4; 1970, c.80, s.14; 1973, c.276; 1975, c.35; 1977, c.96, s.2; 1977, c.122, s.2; 1979, c.86, s.2; 1981, c.185, s.2; 1985, c.73, s.3; 1991, c.519, s.8; 1992, c.146, s.9; 1996, c.126, s.5; 1997, c.179; 2002, c.82, s.3; 2003, c.180, s.12; 2003, c.246, s.12; 2006, c.100, s.9; 2006, c.103, s.88; 2007, c.325, s.2; 2013, c.154; 2013, c.220, s.2; 2017, c.184, s.3; 2017, c.263; 2018, c.9, s.2.

10:5-12.1 Reinstatement, back pay.

5. Notwithstanding any provision of law to the contrary, relief for having been required to retire in violation of the provisions of section 11 of P.L.1945, c. 169 (C.10:5-12), shall be available to the person aggrieved by that violation solely through the procedure initiated by filing a complaint with the Attorney General under the provisions of P.L.1945, c. 169 (C.10:5-1 et seq.).

Notwithstanding any provision to the contrary of section 16 of P.L.1945, c. 169 (C.10:5-17) or any other law, relief ordered for or granted to a person in connection with the person being required to retire in violation of the provisions of section 11 of P.L.1945, c. 169 (C.10:5-12) shall be limited to the person's reinstatement with back pay and interest.

This section shall not apply to a violation regarding an inquiry as to an applicant's salary history pursuant to section 2 of P.L.2019, c.199 (C.10:4-12.12).

L.1985, c.73, s.5; amended 2019, c.199, s.3.

10:5-12.2. Unlawful discrimination against Medicaid applicants, recipients of public assistance

It shall be an unlawful discrimination for any skilled nursing or intermediate care facility which is a Medicaid provider pursuant to P.L.1968, c.413 (C.30:4D-1 et seq.) and whose Medicaid occupancy level is less than the Statewide occupancy level, to deny admission to a qualified Medicaid applicant or a recipient of public assistance under P.L.1947, c.156 (C.44:8-107 et seq.) when a nursing home bed becomes available; except that this requirement shall not be construed to apply to the transfer of a resident from a residential unit to a nursing care unit within a facility, as defined by regulation, or prohibit a life care community, as defined by regulation, from contracting with its own residents for prior rights to beds in the nursing care unit of the community. The Commissioner of Human Services shall modify this requirement based on the licensed bed capacity and the financial condition of a facility but in no case shall the Medicaid occupancy level of that facility be less than 35%. The commissioner shall by September 1 of each year provide the Institutions, Health and Welfare Committee of the Senate, the Corrections, Health and Human Services Committee of the General Assembly, and the Governor with a report stating in specific detail the adverse financial condition of each facility exempted from this requirement. The criteria used by the commissioner to modify this requirement shall be contained in regulations which he shall adopt pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), and a list of all skilled nursing or intermediate care facilities granted a modification by the commissioner shall be published in the New Jersey Register within one month of the commissioner's granting of the modification. Nothing in this section shall be construed to prohibit a religiously affiliated skilled nursing or intermediate care facility from utilizing religious affiliation as a uniform qualification for admission.

For the purpose of this subsection and section 3 of this amendatory and supplementary act, "Statewide occupancy level" means 45% of the total number of licensed beds in a skilled nursing or intermediate care facility for the first year following the effective date of this amendatory and supplementary act. For each year thereafter, the Commissioner of Human Services shall annually determine the Statewide occupancy level based on the commissioner's projection of the need for nursing facility bed space for qualified Medicaid applicants for that year, but the level shall not be less than 45%. Upon making the determination of what the Statewide occupancy level shall be for the next year, the commissioner shall promptly notify the members of the Senate Institutions, Health and Welfare Committee and General

Assembly Corrections, Health and Human Services Committee, in writing, about the proposed level and the commissioner's rationale for so determining the level. After notifying the committee members, the commissioner shall adopt the Statewide occupancy level by regulation pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.).

For the purpose of this section and section 3 of this amendatory and supplementary act, "Medicaid occupancy level" means the average number of Medicaid recipients and recipients of public assistance under P.L.1947, c.156 (C.44:8-107 et seq.) residing in a skilled nursing or intermediate care facility divided by the total number of licensed beds in the facility during that month. The Department of Human Services shall compile this information on a monthly basis and it shall be made available to the public upon request. This information shall be provided to the Division on Civil Rights on a monthly basis.

L.1985,c.303; amended 1987,c.367.

10:5-12.3. Report of admission denial

A person or agency having knowledge that a skilled nursing or intermediate care facility whose Medicaid occupancy level is less than the Statewide occupancy level has denied admission to a qualified Medicaid applicant shall promptly report this information to the Division on Civil Rights of the Department of Law and Public Safety.

L. 1985, c. 303, s. 3.

10:5-12.4 Failure to use barrier free housing standards, unlawful discrimination.

11. A failure to design and construct any multi-family dwelling of four units or more in accordance with barrier free standards promulgated by the Commissioner of Community Affairs pursuant to section 5 of P.L.1975, c.217 (C.52:27D-123) shall be an unlawful discrimination. The Commissioner of Community Affairs shall ensure that standards established meet or exceed the standards established under the federal "Fair Housing Amendments Act of 1988," Pub. L.100-430. Whenever the Attorney General receives a complaint alleging an unlawful discrimination pursuant to this section, the Attorney General shall refer the complaint to the Commissioner of Community Affairs for a determination and report as to whether there is a violation of such standards. Following receipt of the report, a complaint alleging an unlawful discrimination pursuant to this section shall be investigated and prosecuted in accordance with the provisions of the "Law Against Discrimination," P.L.1945, c.169 (C.10:5-1 et seq.). Nothing in this section shall be construed to limit any enforcement authority of the Commissioner of Community Affairs or the Attorney General otherwise provided by law. Nothing in the "State Uniform Construction Code Act," P.L.1975, c.217 (C.52:27D-119 et seq.) and P.L.1971, c.269 (C.52:32-4 et seq.) shall be deemed to limit the powers of the Attorney General under this act. The Attorney General and the Commissioner of Community Affairs shall adopt regulations to effectuate the purposes of this section.

L.1992,c.146,s.11; amended 2003, c.72, s.1.

10:5-12.5 Regulation of land use, housing, unlawful discrimination.

12. a. It shall be an unlawful discrimination for a municipality, county or other local civil or political subdivision of the State of New Jersey, or an officer, employee, or agent thereof, to exercise the power to

regulate land use or housing in a manner that discriminates on the basis of race, creed, color, national origin, ancestry, marital status, familial status, sex, gender identity or expression, liability for service in the Armed Forces of the United States, nationality or disability.

b. The provisions of subsection a. of this section may only be enforced by initiating an action in Superior Court pursuant to paragraph (2) of subsection a. of section 12 of P.L.1945, c.169 (C.10:5-13). The restrictions of this subsection shall not apply to claims alleging discrimination in housing owned or managed by a municipality, county or other local civil or political subdivision of the State of New Jersey where such discrimination is otherwise prohibited by section 11 of P.L.1945, c.169 (C.10:5-12).

L.1992, c.146, s.12; amended 2003, c.180, s.13; 2006, c.100, s.10; 2017, c.184, s.4.

10:5-12.6 Liability imposed on employers who discharge, discriminate against employee who displays the American flag.

1. No employer, public or private, shall discharge or discriminate against an employee in compensation or in terms, conditions or privileges of employment for displaying the American flag on the employee's person or work station, provided the display does not substantially andmaterially interfere with the employee's job duties. An employer who discharges or discriminates against an employee as described in this section shall be liable to the employee for damages caused by the discharge or discrimination, including punitive damages, and for reasonable attorney's fees as part of the costs of any action for damages. If the court determines that the action for damages was brought without substantial justification, the court may award costs and reasonable attorney's fees to the employer.

L.2001,c.385.

10:5-12.7 Certain waivers in employment contract deemed against public policy and unenforceable.

1. a. A provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable.

b. No right or remedy under the "Law Against Discrimination," P.L.1945, c.169 (C.10:5-1 et seq.) or any other statute or case law shall be prospectively waived.

c. This section shall not apply to the terms of any collective bargaining agreement between an employer and the collective bargaining representative of the employees.

L.2019, c.39, s.1.

10:5-12.8 Certain provisions in employment contract, settlement agreement deemed against public policy and unenforceable.

2. a. A provision in any employment contract or settlement agreement which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment (hereinafter referred to as a "non-disclosure provision") shall be deemed against public policy and unenforceable against a current or former employee (hereinafter referred to as an "employee") who is a party to the

contract or settlement. If the employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable, then the non-disclosure provision shall also be unenforceable against the employer.

b. Every settlement agreement resolving a discrimination, retaliation, or harassment claim by an employee against an employer shall include a bold, prominently placed notice that although the parties may have agreed to keep the settlement and underlying facts confidential, such a provision in an agreement is unenforceable against the employer if the employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable.

c. Notwithstanding any other provision of law to the contrary, this section shall not be construed to prohibit an employer from requiring an employee to sign an agreement:

(1) in which the employee agrees not to enter into competition with the employer during or after employment; or

(2) in which the employee agrees not to disclose proprietary information, which includes only non-public trade secrets, business plan and customer information.

L.2019, c.39, s.2.

10:5-12.9 Liability for enforcing, attempting to enforce provision deemed against public policy, unenforceable.

3. A person who enforces or attempts to enforce a provision deemed against public policy and unenforceable pursuant to P.L.2019, c.39 (C.10:5-12.7 et seq.) shall be liable for the employee's reasonable attorney fees and costs.

L.2019, c.39, s.3.

10:5-12.10 Retaliatory actions prohibited.

4. No person shall take any retaliatory action, including but not limited to failure to hire, discharge, suspension, demotion, discrimination in the terms, conditions, or privileges of employment, or other adverse action, against a person, on grounds that the person does not enter into an agreement or contract that contains a provision deemed against public policy and unenforceable pursuant to P.L.2019, c.39 (C.10:5-12.7 et seq.).

L.2019, c.39, s.4.

10:5-12.11 Grievances, actions.

5. Any person claiming to be aggrieved by a violation of P.L.2019, c.39 (C.10:5-12.7 et seq.) may initiate suit in Superior Court. An action pursuant to this section shall be commenced within two years next after the cause of any such action shall have accrued. All remedies available in common law tort actions shall be available to prevailing plaintiffs. These remedies are in addition to any provided by P.L.2019, c.39 (C.10:5-12.7 et seq.) or any other statute. A prevailing plaintiff shall be awarded reasonable attorney fees and costs.

L.2019, c.39, s.5.

10:5-12.12 Unlawful employment practice; member of protected class.

2. a. Except as otherwise provided by section 1 of P.L.2019, c.199 (C.34:6B-20), if a job applicant is a member of a protected class as defined in subsection t. of section 11 of P.L.1945, c.169 (C.10:5-12), it shall be an unlawful employment practice in violation of P.L.1945, c.169 (C.10:5-1 et seq.) for an employer:

(1) to screen a job applicant based on the applicant's salary history, including, but not limited to, the applicant's prior wages, salaries, or benefits; or

(2) to require that the applicant's salary history satisfy any minimum or maximum criteria.

b. An award of punitive damages shall not be an available remedy for a violation of this section.

L.2019, c.199, s.2.

10:5-13 Filing complaint; prosecution; jury trial; damages.

12. a. (1) Any person claiming to be aggrieved by an unlawful employment practice or an unlawful discrimination may, personally or by an attorney-at-law, make, sign and file with the division a verified complaint in writing which shall state the name and address of the person, employer, labor organization, employment agency, owner, lessee, proprietor, manager, superintendent, or agent alleged to have committed the unlawful employment practice or unlawful discrimination complained of and which shall set forth the particulars thereof and shall contain such other information as may be required by the division. Upon receipt of the complaint, the division shall notify the complainant on a form promulgated by the director of the division and approved by the Attorney General of the complainant's rights under P.L.1945, c.169 (C.10:5-1 et seq.), including the right to file a complaint in the Superior Court to be heard before a jury; of the jurisdictional limitations of the division; and any other provisions of P.L.1945, c.169 (C.10:5-1 et seq.), without interpretation, that may apply to the complaint. The Commissioner of Labor and Workforce Development, the Attorney General, the director, or the Commissioner of Education may, in like manner, make, sign, and file such complaint. Any employer whose employees, or some of them, refuse, or threaten to refuse to cooperate with the provisions of P.L.1945, c.169 (C.10:5-1 et seq.), may file with the division a verified complaint asking for assistance by conciliation or other remedial action.

(2) Any complainant, including any person claiming to be aggrieved by an unlawful employment practice or an unlawful discrimination, the Attorney General, the director, the Commissioner of Labor and Workforce Development, or the Commissioner of Education, may initiate suit in Superior Court under P.L.1945, c.169 (C.10:5-1 et seq.) without first filing a complaint with the division or any municipal office. In such proceedings:

(a) Upon the application of any party, a jury trial shall be directed to try the validity of any claim under P.L.1945, 15 c.169 (C.10:5-1 et seq.) specified in the suit.

(b) All remedies available in common law tort actions shall be available to prevailing plaintiffs, and if the Attorney General or the director is a prevailing plaintiff, those remedies shall be available on behalf of named or unnamed victims. If the suit seeks relief for one or more unnamed members of a

protected class, the Attorney General or the director shall have the discretion to settle the suit on such terms as the Attorney General or the director deems appropriate. The injunctive relief set forth in section 16 of P.L.1945, c.169 (C.10:5-17) shall also be available to prevailing plaintiffs. These remedies are in addition to any other provided by P.L.1945, c.169 (C.10:5-1 et seq.) or any other statute.

(c) In addition to the remedies set forth in subparagraph (b) of this paragraph, the Attorney General or director may seek and obtain from the Superior Court penalties pursuant to section 2 of P.L.1983, c.412 (C.10:5-14.1a). In the alternative, in lieu of these penalties, the Attorney General or director may seek and obtain punitive damages payable to the State upon a finding that the provisions of P.L.1995, c.142 (C.2A:15-5.9 et al.) are satisfied.

Prosecution of such suit in Superior Court under P.L.1945, c.169 (C.10:5-1 et seq.) shall bar the filing of a complaint with the division or any municipal office during the pendency of any such suit.

(d) If a jury or court determines that an employer has committed an unlawful employment practice prohibited by subsection r. or t. of section 11 of P.L.1945, c.169 (C.10:5-12), the judge shall award three times any monetary damages to the person or persons aggrieved by the violation.

(e) Notwithstanding the provisions of section 6 of P.L.1979, c.404 (C.10:5-27.1), if the Attorney General or the director is a prevailing plaintiff, the court shall award reasonable attorney's fees and litigation and investigation costs.

b. At any time after 180 days from the filing of a complaint with the division, a complainant may file a request with the division to present the action personally or through counsel to the Office of Administrative Law. Upon such request, the director of the division shall file the action with the Office of Administrative Law, provided that no action may be filed with the Office of Administrative Law where the director of the division has found that no probable cause exists to credit the allegations of the complaint or has otherwise dismissed the complaint.

c. A party to an action based upon a violation of P.L.1945, c.169 (C.10:5-1 et seq.) shall mail a copy of the initial pleadings or claims, amended pleadings or claims, counterclaims, briefs, and legal memoranda to the division at the same time as filing such documents with the Office of Administrative Law or the court. Upon application to the Office of Administrative Law or to the court wherein the matter is pending, the division shall be permitted to intervene.

L.1945, c.169, s.12; amended 1949, c.11, s.8; 1960, c.59, s.2; 1963, c.40, s.7; 1979, c.404, s.1; 1990, c.12, s.2; 2018, c.9, s.3.

10:5-14. Investigation of complaint; Attorney General's duties.

13. After the filing of any complaint, the Attorney General shall cause prompt investigation to be made in connection therewith and advise the complainant of the results thereof. During the period beginning with the filing of such complaint and ending with the closure of the case or 45 days from the date of a finding of probable cause, the Attorney General shall, to the extent feasible, engage in conciliation with respect to such complaint. Neither the Attorney General nor any officer or employee of the division shall disclose any conversation between the Attorney General or a representative and the respondent or a

representative at such conference, except that the Attorney General and any officer or employee may disclose the terms of a settlement offer to the complainant or other aggrieved person on whose behalf the complaint was filed.

L.1945,c.169,s.13; amended 1949, c.11, s.9; 1963, c.40, s.8; 1966, c.17, s.5; 1990, c.12, s.3; 1992, c.146, s.10; 2003, c.180, s.14.

10:5-14.1. Enforcement of act; summary proceedings

At any time after the filing of any complaint, or whenever it shall appear to the Attorney General or the director that a person has engaged in, is engaging in, or is about to engage in any practice declared to be unlawful by this act, the Attorney General or the director may proceed against any person in a summary manner in the Superior Court of New Jersey to obtain an injunction prohibiting such person from continuing such practices or engaging therein or doing any acts in furtherance thereof, to compel compliance with any of the provisions of this act, or to prevent violations or attempts to violate any such provisions, or attempts to interfere with or impede the enforcement of any such provisions or the exercise or performance of any power or duty thereunder.

L.1966, c. 17, s. 6.

10:5-14.1a. Penalties; disposition

2. Any person who violates any of the provisions of the "Law Against Discrimination," P.L.1945, c.169 (C.10:5-1 et seq.), shall, in addition to any other relief or affirmative action provided by law, be liable for the following penalties:

a. In an amount not exceeding $10,000 if the respondent has not been adjudged to have committed any prior violation within the five-year period ending on the date of the filing of this charge;

b. In an amount not exceeding $25,000 if the respondent has been adjudged to have committed one other violation within the five-year period ending on the date of the filing of this charge; and

c. In an amount not exceeding $50,000 if the respondent has been adjudged to have committed two or more violations within the seven-year period ending on the date of the filing of this charge. The penalties shall be determined by the director in such amounts as the director deems proper under the circumstances and included in an order following a finding of an unlawful discrimination or an unlawful employment practice pursuant to section 16 of P.L.1945, c.169 (C.10:5-17) or determined by the court in cases brought under subsection b. of section 9 of P.L. , c. (C.) (pending before the Legislature as this bill). Any such amounts collected by the director shall be paid forthwith into the State Treasury for the general purposes of the State.

L.1983,c.412,s.2; amended 2001, c.254.

10:5-14.2. Counties and municipalities over 200,000; office of civil rights; creation and establishment; officers; organization; powers

Any county, except as hereinafter provided or any municipality with a population of at least 200,000 in a county of the first class, may, upon approval of the Attorney General, create and establish, by ordinance or by resolution in counties not authorized to act by ordinance, an office of civil rights to be administered

by a county or municipal director of civil rights who shall be appointed by the appointing authority of the county or municipality. No county in which a municipality has established an office of civil rights prior to the effective date of this amendatory act shall hereafter establish a civil rights office pursuant to this amendatory act. In addition, the governing body may provide for the employment of such other officers including hearing examiners and attorneys, and employees as may be necessary or desirable for the proper conduct of the affairs of the office. The qualifications of the director, hearing examiner and attorneys shall be subject to approval by the Attorney General. A county or municipal office thus established shall have and exercise those powers to enforce the Law Against Discrimination as may be delegated to it as provided in section 2 of this act.

L.1977, c. 121, s. 1, eff. June 6, 1977. Amended by L.1980, c. 87, s. 1, eff. Aug. 21, 1980.

10:5-14.3. Delegation of powers by Attorney General; review of findings and conclusions

Upon a finding that the public interest may be better served thereby, the Attorney General may delegate to such county or municipal office of civil rights the power to investigate complaints and conduct conciliation conferences, in accordance with the provisions of section 13 of P.L.1945, c. 169 (C. 10:5-14), and to proceed in a summary manner in accordance with the provisions of section 6 of P.L.1966, c. 17 (C. 10:5-14.1). In addition, the Attorney General may delegate to such county or municipal office of civil rights the power to conduct hearings and in connection therewith, the power to subpena witnesses, administer oaths, take testimony and conduct discovery procedures including the taking of interrogatories and oral depositions. The findings and conclusions of a county or municipal office resulting from an exercise of the foregoing powers shall not constitute a final administrative decision, but shall be submitted to the Director of the Division on Civil Rights who may rely and act thereupon in accordance with the provisions of section 16 of P.L.1945, c. 169 (C. 10:5-17). The Attorney General shall establish rules of practice to govern, expedite and effectuate the utilization of the foregoing powers by such county or municipal office.

L.1977, c. 121, s. 2, eff. June 6, 1977. Amended by L.1980, c. 87, s. 2, eff. Aug. 21, 1980.

10:5-15. Notice requiring respondent to answer charges; place of hearing

In case of failure so to eliminate such practice or discrimination, or in advance thereof if in his judgment circumstances so warrant, the Attorney General shall cause to be issued and served in the name of the division, a written notice, together with a copy of such complaint, as the same may have been amended, requiring the person, employer, labor organization, employment agency, owner, lessee, proprietor, manager, superintendent, or agent named in such complaint, hereinafter referred to as respondent, to answer the charges of such complaint at a hearing before the director at a time and place to be specified in such notice. The place of any such hearing shall be the office of the Attorney General or such other place as may be designated by him.

L.1945, c. 169, p. 595, s. 14. Amended by L.1949, c. 11, p. 45, s. 10; L.1963, c. 40, s. 9.

10:5-16 Practice and procedure.

15. When the director has issued a finding of probable cause, the case in support of the complaint shall

be filed in Superior Court or presented before the director by the attorney for the division and evidence concerning attempted conciliation shall not be received.

In an action presented before the director, the respondent shall file a written verified answer to the complaint and appear at such hearing in person or by representative, with or without counsel, and submit testimony. The complainant shall be allowed to intervene and present testimony in person and may be represented by counsel. The director or the complainant shall have the power reasonably and fairly to amend any complaint, and the respondent shall have like power to amend its answer. In such an action, the director shall not be bound by the strict rules of evidence prevailing in civil actions in courts of competent jurisdiction of this State. The testimony taken at the hearing shall be under oath and a verbatim record shall be made.

When the director has issued a finding of probable cause in a housing discrimination complaint only, any party to that complaint may elect, in lieu of the administrative proceeding authorized by this section, to have the claim asserted in the finding of probable cause adjudicated in a civil action in Superior Court pursuant to section 12 of P.L.1945, c.169 (C.10:5-13). Such an election shall be made not later than 20 days after receipt of the finding of probable cause. Upon such election, the attorney for the division shall promptly file such an action in Superior Court. Upon application to the court wherein the matter is pending, the complainant shall be permitted to intervene and present testimony in person and may be represented by counsel.

L.1945,c.169,s.15; amended 1963, c.40, s.10; 1979, c.404, s.2; 1980, c.71; 2003, c.180, s.15.

10:5-17 Findings and conclusions of director; actions; remedies or dismissal.

16. If, upon all evidence at the hearing, the director shall find that the respondent has engaged in any unlawful employment practice or unlawful discrimination as defined in P.L.1945, c.169 (C.10:5-1 et seq.), the director shall state his findings of fact and conclusions of law and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful employment practice or unlawful discrimination and to take such affirmative action, including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay, or restoration to membership, in any respondent labor organization, or extending full and equal accommodations, advantages, facilities, and privileges to all persons, as, in the judgment of the director, will effectuate the purpose of P.L.1945, c.169 (C.10:5-1 et seq.), and including a requirement for report of the manner of compliance. If the conduct violative of P.L.1945, c.169 (C.10:5-1 et seq.) constitutes any form of unlawful economic discrimination prohibited in subsection 1., m., or n. of section 11 of P.L.1945, c.169 (C.10:5-12), or any form of unlawful employment practice prohibited by subsection r. or t. of section 11 of P.L.1945, c.169 (C.10:5-12), the affirmative action taken by the director may include the award of three-fold damages to the person or persons aggrieved by the violation. The director shall have the power to use reasonably certain bases, including but not limited to list, catalogue or market prices or values, or contract or advertised terms and conditions, in order to determine particulars or performance in giving appropriate remedy. In addition to any other remedies provided by P.L.1945, c.169 (C.10:5-1 et seq.), a prevailing complainant may recover damages to compensate for emotional distress caused by the activities found to be in violation of P.L.1945, c.169 (C.10:5-1 et seq.) to the same extent as is available in common law tort actions. In any case in which the director, Attorney General, or appropriate organization is a complainant, on behalf of named or unnamed individuals or a class of individuals, any of the remedies or relief allowed by P.L.1945, c.169 (C.10:5-1 et seq.) may be awarded or applied to the named or unnamed individual victims of discrimination. If, upon all evidence, the director shall find that the respondent has not engaged in any such unlawful practice or unlawful discrimination, the director shall state his findings of fact and conclusions of law and shall issue and cause to be served on the

complainant an order dismissing the said complaint as to such respondent.

This section shall not apply to a violation regarding an inquiry as to an applicant's salary history pursuant to section 2 of P.L.2019, c.199 (C.10:4-12.12).

L.1945, c.169, s.16; amended 1949, c.11, s.11; 1963, c.40, s.11; 1966, c.17, s.7; 1977, c.96, s.3; 1979, c.404, s.3; 2003, c.180, s.16; 2018, c.9, s.4; 2019, c.199, s.4.

10:5-18. Rules of practice; limitations

The Attorney General shall establish rules of practice to govern, expedite and effectuate the foregoing procedure and his own actions thereunder. Any complaint filed in the division or in any municipal office pursuant to this act must be so filed within 180 days after the alleged act of discrimination.

L.1945, c. 169, p. 596, s. 17. Amended by L.1963, c. 40, s. 12; L.1979, c. 404, s. 4, eff. Feb. 8, 1980.

10:5-19. Enforcement of orders

Observance of an order of the director issued pursuant to the provisions of this act including collection or enforcement of damages or penalties may be enforced by a summary civil action brought by the director in the Superior Court to obtain such relief as may be necessary to effectuate the terms of said order.

L.1945, c. 169, p. 597, s. 18. Amended by L.1949, c. 11, p. 46, s. 12; L.1953, c. 18, p. 322, s. 41; L.1963, c. 40, s. 13; L.1983, c. 412, s. 1, eff. Jan. 4, 1984.

10:5-21. Appeals

Any person aggrieved by a final order of the director may take an appeal therefrom to the Superior Court, Appellate Division as an appeal from a State administrative agency.

L.1945, c. 169, p. 597, s. 20. Amended by L.1949, c. 11, p. 46, s. 14; L.1953, c. 18, p. 322, s. 43; L.1963, c. 40, s. 14, eff. May 21, 1963.

10:5-24. Transcript of hearing

Any party may require that a transcript of a hearing be prepared at his cost.

L.1945, c. 169, p. 598, s. 23. Amended by L.1949, c. 11, p. 48, s. 17; L.1963, c. 40, s. 15, eff. May 21, 1963; L.1979, c. 404, s. 5, eff. Feb. 8, 1980.

10:5-25. Attorney for division; compensation

The Attorney General shall appoint or assign the attorney for the division who may be a deputy attorney general. If said attorney is not a deputy attorney general he shall receive such compensation as may be determined by the Attorney General subject to available appropriations.

L.1945, c. 169, p. 598, s. 24. Amended by L.1963, c. 40, s. 16.

10:5-26. Resisting or impeding performance of duties; violation of orders; punishment

Any person who shall willfully resist, prevent, impede or interfere with the Attorney General or any representative of the division in the performance of duty under this act, or shall willfully violate an order of the Attorney General, or the director, shall be guilty of a misdemeanor and shall be punishable by imprisonment for not more than one year, or by a fine of not more than $500.00, or by both; but procedure for the review of the order shall not be deemed to be such willful conduct.

L.1945, c. 169, p. 598, s. 25. Amended by L.1949, c. 11, p. 48, s. 18; L.1963, c. 40, s. 17.

10:5-27 Construction of act; other laws not affected; exception; other remedies.

26. The provisions of this act shall be construed fairly and justly with due regard to the interests of all parties. Nothing contained in this act shall be deemed to repeal any of the provisions of the Civil Rights Law or of any other law of this State relating to discrimination because of race, creed, color, national origin, ancestry, marital status, affectional or sexual orientation, disability, gender identity or expression, nationality or sex or liability for service in the Armed Forces of the United States; except that, as to practices and acts declared unlawful by section 11 of this act, the procedure herein provided shall, while pending, be exclusive; and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the individual concerned. Nothing herein contained shall bar, exclude or otherwise affect any right or action, civil or criminal, which may exist independently of any right to redress against or specific relief from any unlawful employment practice or unlawful discrimination. With respect only to affectional or sexual orientation and gender identity or expression, nothing contained herein shall be construed to require the imposition of affirmative action, plans or quotas as specific relief from an unlawful employment practice or unlawful discrimination.

L.1945,c.169,s.26; amended 1949, c.11, s.19; 1951, c.64, s.7; 1970, c.80, s.15; 1991, c.519, s.9; 2003, c.180, s.17; 2006, c.100, s.11.

10:5-27.1 Attorney fees.

6. In any action or proceeding brought under P.L.1945, c.169 (C.10:5-1 et seq.), the prevailing party may be awarded a reasonable attorney's fee as part of the cost, provided however, that no attorney's fee shall be awarded to the respondent unless there is a determination that the complainant brought the charge in bad faith. If the complainant's case was initiated by a housing authority on behalf of a tenant for a violation of paragraph (4) of subsection g. or paragraph (4) of subsection h. of section 11 of P.L.1945, c.169 (C.10:5-12) and the complainant prevailed, reasonable costs, including attorney fees, of the housing authority may be assessed against a nonprevailing respondent. If the complainant's case was presented by the attorney for the division and the complainant prevailed, the reasonable costs, including attorney fees, of such representation may be assessed against a nonprevailing respondent.

Notwithstanding any other provision of law to the contrary, an award of an attorney's fee in accordance with this section shall not be available as a remedy to violations of section 2 of P.L.2019, c.199 (C.10:4-12.12).

L.1979, c.404, s.6; amended 2002, c.82, s.4; 2019, c.199, s.5.

10:5-28. Partial invalidity

If any clause, sentence, paragraph, or part of this act or any amendment or supplement thereto or the application thereof to any person or circumstances, shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this act.

L.1945, c. 169, p. 598, s. 27. Amended by L.1977, c. 96, s. 4, eff. May 19, 1977.

10:5-29 Person with a disability; accompaniment by service or guide dog; use of public facilities; liabilities.

1. Any person with a disability accompanied by a service or guide dog trained by a recognized training agency or school is entitled, with his dog, to the full and equal enjoyment, advantages, facilities and privileges of all public facilities, subject only to the following conditions:

a. A person with a disability, if accompanied by a service or guide dog, shall keep such dog in his immediate custody at all times;

b. A person with a disability accompanied by a service or guide dog shall not be charged any extra fee or payment for admission to or use of any public facility;

c. A person with a disability who has a service or guide dog in his possession shall be liable for any damages done to the premises of a public facility by such dog.

d. (Deleted by amendment; P.L.1981, c. 391.)

L.1971,c.130,s.1; amended 1977, c.456, s.2; 1980, c.46, s.5; 1981, c.391, s.1; 1983, c.485, s.4; 2003, c.180, s.18.

10:5-29.1 Person with a disability; unlawful employment practice.

3. Unless it can be clearly shown that a person's disability would prevent such person from performing a particular job, it is an unlawful employment practice to deny to an otherwise qualified person with a disability the opportunity to obtain or maintain employment, or to advance in position in his job, solely because such person is a person with a disability or because such person is accompanied by a service or guide dog.

L.1977,c.456,s.3; amended 1980, c.46, s.6; 1983, c.485, s.5; 2003,c.180,s.19.

10:5-29.2 Housing accommodations.

4. A person with a disability is entitled to rent, lease or purchase, as other members of the general public, all housing accommodations offered for rent, lease, or compensation in this State, subject to the rights, conditions and limitations established by law. Nothing in this section shall require any person renting, leasing or providing for compensation real property, to modify such property in any way to

provide a higher degree of care for a person with a disability than for any other person. A person with a disability who has a service or guide dog, or who obtains a service or guide dog, or who retains their former service or guide dog as a pet after its retirement from service, shall be entitled to full and equal access to all housing accommodations and shall not be required to pay extra compensation for such service or guide dog or retired pet, but shall be liable for any damages done to the premises by such dog. Any provision in any lease or rental agreement prohibiting maintenance of a pet or pets on or in the premises shall not be applicable to a working service or guide dog, or a retired service or guide dog, owned by a tenant who is a person with a disability.

L.1977, c.456, s.4; amended 1980, c.46, s.7; 1983, c.485, s.6; 2003, c.180, s.20; 2017, c.187.

10:5-29.3 Service, guide dog trainer; access to public facilities; responsibilities.

5. A service or guide dog trainer, while engaged in the actual training process and activities of service dogs or guide dogs, shall have the same rights and privileges with respect to access to public facilities, and the same responsibilities as are applicable to a person with a disability.

L.1977,c.456,s.5; amended 1980, c.46, s.8; 1983, c.485, s.7; 2003, c.180, s.21.

10:5-29.4 Right-of-way for person accompanied by or instructing a guide dog.

6. A person with a disability accompanied by a guide dog, or a guide dog instructor engaged in instructing a guide dog, shall have the right-of-way over vehicles while crossing a highway or any intersection thereof, as provided in section 1 of P.L.1939, c.274 (C.39:4-37.1).

L.1977,c.456,s.6; amended 1999, c.264, s.1; 2003, c.180, s.22.

10:5-29.5 Violations, misrepresentation, interference with disabled persons, guide or service dogs; fine.

7. Any person who violates the provisions of P.L.1977, c.456 in a manner not otherwise prohibited by P.L.1945, c.169 (C.10:5-1 et seq.), or who fits a dog with a harness of the type commonly used by blind persons in order to represent that such dog is a guide dog when training of the type that guide dogs normally receive has not in fact, been provided, or who otherwise intentionally interferes with the rights of a person with a disability, who is accompanied by a guide or service dog, or the function or the ability to function of a guide or service dog, shall be fined not less than $100 and not more than $500.

L.1977,c.456,s.7; amended 2005, c.258.

10:5-29.6 Rights and privileges relative to service dogs.

9. Whenever the law accords rights and privileges to or imposes conditions and restrictions upon blind persons with respect to their use of dogs to countervail their disability, and known and described as "seeing eye" dogs, those rights, privileges, conditions and restrictions shall also apply to persons with disabilities with respect to their use of dogs to countervail their disability, and known and described as

either "service dogs" or "hearing ear" dogs.

L.1980,c.46,s.9; amended 1983, c.485, s.8; 2003, c.180, s.23.

10:5-29.7 Definitions relative to access for certain working dogs.

1. As used in this act:

"Housing accommodation" means the same as the term is defined in subsection u. of section 5 of P.L.1945, c.169 (C.10:5-5);

"Public facility" means the same as the term is defined in subsection v. of section 5 of P.L.1945, c.169 (C.10:5-5); and

"Working dog" means any dog trained for the purpose of human search and rescue, body recovery, arson detection, bomb detection, narcotics detection, criminal apprehension, police assistance or other related purposes, whether in the performance of such tasks or while traveling to or from such tasks.

L.2006, c.88, s.1.

10:5-29.8 Law enforcement, emergency service workers with working dog entitled to full access.

2. Any member of a police, fire, law enforcement or other related emergency service agency, accompanied by a working dog, trained by a recognized training agency or school, is entitled, with the dog, to full and equal access to all public facilities and modes of public transportation, subject only to the following conditions:

a. A member of a police, fire, law enforcement or other related emergency service agency, if accompanied by a working dog, shall keep the dog in immediate custody at all times;

b. A member of a police, fire, law enforcement or other related emergency service agency, accompanied by a working dog, shall not be charged an extra fee or payment for the dog for admission to, or use of, any public facility; and

c. A member of a police, fire, law enforcement or other related emergency service agency, who has possession of a working dog, shall be liable for any damages done to the premises of a public facility by the dog.

L.2006, c.88, s.2.

10:5-29.9 Possessors of working dog, certain, entitlement to housing, business accommodations.

3. A member of a police, fire, law enforcement or other related emergency service agency who possesses a working dog, is entitled to rent, lease or purchase, as other members of the general public, all

housing accommodations and business accommodations offered for rent, lease, or compensation in this State, subject to the rights, conditions and limitations established by law. A member of a police, fire, law enforcement or other related emergency service agency who possesses a working dog, or who obtains a working dog, shall be entitled to full and equal access to all housing accommodations and business accommodations and shall not be required to pay extra compensation for the dog, but shall be liable for any damages done to the premises by the dog. Any provision in any lease or rental agreement prohibiting maintenance of a pet or pets on or in the premises shall not be applicable to a working dog owned by a tenant who is a member of a police, fire, law enforcement or other related emergency service agency.

L.2006, c.88, s.3.

10:5-29.10 Violations; fine.

4. Any person who violates a provision of this act shall be subject to a fine of between $100 and $500.

L.2006, c.88, s.4.

10:5-29.11 Civil penalty concerning person with a disability accompanied by guide or service dogs; complaint, action with Division on Civil Rights.

1. a. Any person who interferes with or denies the access of a person with a disability accompanied by a service or guide dog to any public facility in violation of section 1 of P.L.1971, c.130 (C.10:5-29) shall, in addition to any other relief or affirmative action provided by law, be liable to a civil penalty of not less than:

(1) $250 for the first violation;

(2) $500 for the second violation; and

(3) $1,000 for the third and each subsequent violation.

b. The penalty shall be collected pursuant to the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.), in a summary proceeding before the municipal court having jurisdiction. A law enforcement officer having enforcement authority in that municipality shall issue a summons for a violation of the provisions of subsection a. of this section, and shall serve and execute all process with respect to the enforcement of this section consistent with the Rules of Court.

The issuance of a summons pursuant to this subsection shall not prohibit an aggrieved party from filing a complaint or action with the Division on Civil Rights or in the Superior Court of New Jersey alleging a violation of the "Law Against Discrimination," P.L.1945, c.169 (C.10:5-1 et seq.), based on the same incident or conduct. In any instance where an aggrieved party files a complaint or action with the Division on Civil Rights or in the Superior Court of New Jersey alleging a violation of the "Law Against Discrimination" based on the same incident or conduct for which a civil penalty has been imposed pursuant to subsection a. of this section, the Division on Civil Rights or Superior Court of New Jersey, as the case may be, shall make a de novo ruling and any adjudication by the municipal court shall not constitute res judicata for the complaint or action filed with the Division on Civil Rights or in the Superior Court of New Jersey.

c. The penalties assessed under this section shall be payable to the State Treasurer and shall be

appropriated to the Department of Law and Public Safety to fund educational programs for law enforcement officers on the right of a person with a disability to have a service or guide dog in a place of public accommodation.

d. The Attorney General shall establish a public awareness campaign to inform the public about the provisions of this act.

L.2017, c.169, s.1.

10:5-30. Administration and enforcement

The provisions of this act shall be administered and enforced by the Division of Civil Rights in the Department of Law and Public Safety pursuant to the authority vested in it by the Law Against Discrimination (C. 10:5-1 et seq.).

L.1971, c. 130, s. 2, eff. May 6, 1971.

10:5-31 Definitions.

1. As used in this act:

a. "Public works contract" means any contract to be performed for or on behalf of the State or any county or municipality or other political subdivision of the State, or any agency or authority created by any of the foregoing, for the construction, alteration or repair of any building or public work or for the acquisition of materials, equipment, supplies or services with respect to which discrimination in the hiring of persons for the performance of work thereunder or under any subcontract thereunder by reason of race, creed, color, national origin, ancestry, marital status, affectional or sexual orientation, nationality, gender identity or expression, disability or sex is prohibited under R.S.10:2-1.

b. "Equal employment opportunity" means equality in opportunity for employment by any contractor, subcontractor or business firm engaged in the carrying out of a public works project including its development, design, acquisition, construction, management and operation.

L.1975,c.127,s.1; amended 1991, c.519, s.11; 2003, c.180, s.24; 2006, c.100, s.12.

10:5-32 Public works contract not awarded without agreement and guarantee of equal opportunity.

2. No public works contract shall be awarded by the State, a county, municipality or other political subdivision of the State, or any agency of or authority created by any of the foregoing, nor shall any moneys be paid thereunder to any contractor, subcontractor or business firm which has not agreed and guaranteed to afford equal opportunity in performance of the contract and, except with respect to affectional or sexual orientation, and gender identity or expression, in accordance with an affirmative action program approved by the State Treasurer.

L.1975,c.127,s.2; amended 1991, c.519, s.12; 2006, c.100, s.13.

10:5-33 Contents of bid specs, contract provisions.

3. The State or any county or municipality or other political subdivision of the State, or any agency of or authority created by any of the foregoing, shall include in the bid specifications and the contract provisions of any public works contract the following language:

"During the performance of this contract, the contractor agrees as follows:

a. The contractor or subcontractor, where applicable, will not discriminate against any employee or applicant for employment because of age, race, creed, color, national origin, ancestry, marital status, affectional or sexual orientation, gender identity or expression, disability, nationality or sex. Except with respect to affectional or sexual orientation and gender identity or expression, the contractor will take affirmative action to ensure that such applicants are recruited and employed, and that employees are treated during employment, without regard to their age, race, creed, color, national origin, ancestry, marital status, affectional or sexual orientation, gender identity or expression, disability, nationality or sex. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause;

b. The contractor or subcontractor, where applicable will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to age, race, creed, color, national origin, ancestry, marital status, affectional or sexual orientation, gender identity or expression, disability, nationality or sex;

c. The contractor or subcontractor where applicable, will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under this act and shall post copies of the notice in conspicuous places available to employees and applicants for employment."

In soliciting bids for any public works contract the State or any county or municipality or other political subdivision of the State, or any agency of or authority created by any of the foregoing, shall include in the advertisement and solicitation of bids the following language: "Bidders are required to comply with the requirements of P.L.1975, c.127."

L.1975,c.127,s.3; amended 1976, c.60; 1991, c.519, s.13; 2003, c.180, s.25; 2006, c.100, s.14.

10:5-34 Affirmative action program, submission to State Treasurer; fee; approval.

4. Each prospective bidder on a public works contract or contracts and each subcontract bidder to a prime contract bidder shall formulate and submit to the State Treasurer his or its affirmative action program of equal opportunity whereby he or it guarantees minorities employment in all employment categories; the submission shall be accompanied by a fee in an amount to be fixed by the State Treasurer. For the purposes of this section, equal employment opportunity but not affirmative action is

required with respect to persons identified solely by their affectional or sexual orientation and gender identity or expression. The State Treasurer shall notify the bidder of approval or disapproval of his or its program within 60 days of its submission; failure of the State Treasurer to so act within 60 days shall constitute approval of the program. Any existing federally approved or sanctioned affirmative action program shall be approved by the State Treasurer.

No subcontract bidder who has less than five employees need comply with the provisions of this section.

L.1975,c.127,s.4; amended 1991, c.519, s.14; 2006, c.100, s.15.

10:5-35. Failure to include affirmative action program; nullity of contract; violations; fine

a. Any public works contract including any subcontract awarded thereunder to any contractor which fails to contain the provisions set forth in sections 2 and 3 of this act shall be null and void; provided that if the award and execution of a contract is subject to Federal regulation requiring inclusion of similar contract provisions the same may be inserted in lieu of those required by sections 2 and 3 of this act, and further provided that nothing contained in this act shall operate to affect in any manner whatsoever any existing federally approved or sanctioned affirmative action program.

b. For any violation of this law in addition to all other penalties allowable by law, the violator shall be subject to a fine of up to $1,000.00 for each violation for each day during which the violation continues, said fine to be collected in a summary manner pursuant to the "Penalty Enforcement Law" (N.J.S. 2A:58-1 et seq.).

L.1975, c. 127, s. 5.

10:5-36. State treasurer; enforcement; powers

In carrying out his responsibilities under this act, the State Treasurer, in addition to and without limitation of other powers which he may have by law, shall have the following powers:

a. To investigate and determine the percentage of population of minority groups in the State or areas thereof from which the work force for public works contracts is or may be drawn;

b. To establish and promulgate such percentages as guidelines in determining the adequacy of affirmative action programs submitted for approval pursuant to section 2 of this act;

c. To require all State and local agencies awarding public works contracts to submit for approval their affirmative action programs;

d. To prescribe those affirmative action program provisions to be included in all public works contracts;

e. To provide guidelines to assist governmental agencies in the formulation of and the administration and enforcement of affirmative action programs;

f. To require State and local agencies awarding public works contracts to designate appropriate officers

or employees to maintain liaison with and assist the State Treasurer in the implementation of this act and affirmative action programs adopted pursuant thereto;

g. To prescribe appropriate administrative procedures relating to prequalification of bidders, bidding practices and contract awards to assure equal employment opportunities;

h. To provide staff and technical assistance to public bodies, contractors and subcontractors in furtherance of the objectives of this act;

i. To levy on contractors and subcontractors fees and charges found by him to be reasonable and necessary to accomplish the objectives of this act;

j. To refer to the Attorney General or his designee circumstances which may constitute violations of the "Law Against Discrimination" ;

k. To issue, amend and rescind rules and regulations in accordance with the "Administrative Procedure Act" (C. 52:14B-1 et seq.);

l. To enforce in a court of law the provisions of this act or to join in or assist any enforcement proceeding initiated by any aggrieved person;

m. To make and execute contracts and all other instruments with other public agencies and private firms or individuals necessary or convenient for the exercise of their powers and functions hereunder, including contracts with consultants for rendering professional or technical assistance and advice;

n. To contract for or accept any gifts or grants or loans of funds or property or financial or other aid in any form from the Federal government or any agency or instrumentality thereof, or from the State or any agency or instrumentality thereof, or from any other source and to comply, subject to the provisions of this act, with the terms and conditions thereof.

o. To issue rules and regulations that will expand business opportunities for socially and economically disadvantaged contractors and vendors seeking to provide materials and services for State contracts.

L.1975, c. 127, s. 6. Amended by L.1979, c. 266, s. 1, eff. Jan. 3, 1980.

10:5-37. Costs of project; inclusion of expenses furthering equal employment opportunities

Notwithstanding any provision of any State law, ordinance or regulation to the contrary, there may be included in the costs of a project or facility to which a public works contract relates any expenses incurred by a public body or private firm or individual for the purpose of furthering equal employment opportunities with respect to such project or facility or for the purpose of complying with the provisions of this act, and such expenses may be paid for or financed by any method which may be used to pay or finance other costs of development, acquisition or construction of such project or facility.

L.1975, c. 127, s. 7.

10:5-38. Persons entitled to bring enforcement actions

Any individual who has been discriminated against in violation of the provisions of this act and any organization which represents or acts to further the interests of individuals who have been discriminated against by reason of any violation of the provisions of this act shall have standing in courts of law to institute actions to enforce the provisions of this act.

L.1975, c. 127, s. 8.

10:5-39 Definitions.

1. As used in this act:

a. "Affirmative action program for veterans" means a plan guaranteeing to veterans an equal employment opportunity, which includes but is not limited to the following areas: recruitment, selection, hiring, training, promotion, transfer, layoff, return from layoff, compensation, and fringe benefits.

b. "Public works contract" means any contract exceeding $250,000.00 in price to be performed for or on behalf of the State for the construction, alteration, or repair of any building or public work.

c. "Veteran " means any soldier, sailor, marine, airman, nurse or army field clerk, who has served at least 90 days in the active military, naval or air service of the United States and has been discharged or released therefrom under conditions other than dishonorable, and who has presented to the Civil Service Commission of New Jersey full and convincing evidence of such record of service on or before the date of making application for a position governed by this act. The 90-day requirement for active service is exclusive of any time such veteran was assigned: (1) for a course of education or training under the Army Specialized Training Program or the Navy College Training Program, which course was a continuation of his civilian course and was pursued to completion; or (2) as a cadet or midshipman at one of the service academies; and exclusive of any service performed pursuant to the provisions of section 511(d) of Title 10, United States Code, pursuant to an enlistment in the Army or Air Force National Guard or as a reserve for service in the Army Reserve, Naval Reserve, Air Force Reserve, Marine Corps Reserve, or Coast Guard Reserve; provided, that any person receiving an actual, service-incurred injury or disability shall be classed as a veteran, whether or not he has completed the 90 days' service as herein provided.

L.1983, c.197, s.1; amended 2017, c.184, s.5.

10:5-40 Equal employment opportunities for veterans.

2. Each public works contract shall contain appropriate provisions in which contractors, subcontractors, or their assignees shall guarantee an equal employment opportunity to veterans. If any veteran believes any contractor of the State has failed to comply or refuses to comply with the provisions of the contractor's contract relating to the employment of veterans, such veteran may file a complaint with the State Treasurer, who shall promptly investigate such complaint and take appropriate action.

L.1983, c.197, s.2; amended 2017, c.184, s.6.

10:5-41 Affirmative action program for veterans; investigations.

3. The State Treasurer shall prescribe an affirmative action program for veterans. The Treasurer shall designate an appropriate official in the Department of the Treasury to receive and investigate any complaints charging discriminatory employment practices toward such veterans.

L.1983, c.197, s.3; amended 2017, c.184, s.7.

10:5-42. Penalties

Any person who violates this law or the provisions of a public works contract guaranteeing an equal employment opportunity to veterans shall be subject to any penalties allowable under law.

L.1983, c. 197, s. 4, eff. May 27, 1983.

10:5-43. Short title

1. Sections 1 through 10 of this act shall be known and may be cited as the "Genetic Privacy Act."

L.1996,c.126, s.1.

10:5-44. Findings, declarations relative to genetic information

2. The Legislature finds and declares:

a. The DNA molecule contains information about an individual's probable medical future. This information is written in a code that is rapidly being broken.

b. Genetic information is personal information that should not be collected, retained or disclosed without the individual's authorization.

c. The improper collection, retention or disclosure of genetic information can lead to significant harm to the individual, including stigmatization and discrimination in areas such as employment, education, health care and insurance.

d. An analysis of an individual's DNA provides information not only about an individual, but also about the individual's parents, siblings and children, thereby impacting family privacy, including reproductive decisions.

e. Current legal protections for medical information, tissue samples and DNA samples are inadequate to protect genetic privacy.

f. Laws for the collection, storage and use of identifiable DNA samples and private genetic information obtained from those samples are needed both to protect individual privacy and to permit legitimate genetic research.

g. Progress in mapping the genes that cause breast cancer and other diseases has far outpaced the development of a legal and ethical context in which genetic information can be properly evaluated.

h. Effective tests to determine the presence of genes that cause breast cancer and other diseases carry with them the devastating potential for discrimination against carriers of these genes.

L.1996,c.126, s.2.

10:5-45. Informed consent required to obtain genetic information

6. No person shall obtain genetic information from an individual, or from an individual's DNA sample, without first obtaining informed consent from the individual or the individual's representative according to regulations promulgated by the Commissioner of Health and Senior Services, in consultation with the Commissioner of Banking and Insurance, pursuant to subsection b. of section 9 of P.L.1996, c.126 (C.10:5-48).

a. The requirements of this section shall not apply to genetic information obtained:

(1) By a State, county, municipal or federal law enforcement agency for the purposes of establishing the identity of a person in the course of a criminal investigation or prosecution;

(2) To determine paternity in accordance with the provisions of section 11 of P.L.1983, c.17 (C.9:17-48);

(3) Pursuant to the provisions of the "DNA Database and Databank Act of 1994," P.L.1994, c.136 (C.53:1-20.17 et seq.);

(4) To determine the identity of deceased individuals;

(5) For anonymous research where the identity of the subject will not be released;

(6) Pursuant to newborn screening requirements established by State or federal law; or

(7) As authorized by federal law for the identification of persons.

b. In the case of a policy of life insurance or a disability income insurance contract, informed consent shall be obtained pursuant to the provisions of P.L.1985, c.179 (C.17:23A-1 et seq.).

L.1996,c.126,s.6.

10:5-46. Authorization to retain genetic information

7. a. No person shall retain an individual's genetic information without first obtaining authorization under the informed consent requirement of section 6 of P.L.1996, c.126 (C.10:5-45) from the individual or the individual's representative, unless:

(1) Retention is necessary for the purposes of a criminal or death investigation or a criminal or juvenile proceeding;

(2) Retention is necessary to determine paternity in accordance with the provisions of section 11 of P.L.1983, c.17 (C.9:17-48);

(3) Retention is authorized by order of a court of competent jurisdiction;

(4) Retention is made pursuant to the provisions of the "DNA Database and Databank Act of 1994," P.L.1994, c.136 (C.53:1-20.17 et seq.); or

(5) Retention of information is for anonymous research where the identity of the subject will not be released.

b. The DNA sample of an individual from which genetic information has been obtained shall be destroyed promptly upon the specific request of that individual or the individual's representative, unless:

(1) Retention is necessary for the purposes of a criminal or death investigation or a criminal or juvenile proceeding; or

(2) Retention is authorized by order of a court of competent jurisdiction.

c. A DNA sample from an individual who is the subject of a research project shall be destroyed promptly upon completion of the project or withdrawal of the individual from the project, whichever occurs first, unless the individual or the individual's representative directs otherwise by informed consent.

d. A DNA sample from an individual for insurance or employment purposes shall be destroyed promptly after the purpose for which the sample was obtained has been accomplished unless retention is authorized by order of a court of competent jurisdiction.

e. An individual or an individual's representative, promptly upon request, may inspect, request correction of and obtain genetic information from the records of the individual unless the individual directs otherwise by informed consent pursuant to section 6 of P.L.1996, c.126 (C.10:5-45); except that, in the case of a policy of life insurance or a disability income insurance contract, the provisions of P.L.1985, c.179 (C.17:23A-1 et seq.) shall apply.

f. This section applies only to genetic information that can be identified as belonging to an individual or family. This section does not apply to any law, contract or other arrangement that determines a person's rights to compensation relating to substances or information derived from an individual's DNA sample.

L.1996,c.126,s.7.

10:5-47. Conditions for disclosure of genetic information

8. a. Regardless of the manner of receipt or the source of genetic information, including information received from an individual, a person may not disclose or be compelled, by subpoena or any other means, to disclose the identity of an individual upon whom a genetic test has been performed or to disclose genetic information about the individual in a manner that permits identification of the individual, unless:

(1) Disclosure is necessary for the purposes of a criminal or death investigation or a criminal or juvenile proceeding;

(2) Disclosure is necessary to determine paternity in accordance with the provisions of section 11 of P.L.1983, c.17 (C.9:17-48);

(3) Disclosure is authorized by order of a court of competent jurisdiction;

(4) Disclosure is made pursuant to the provisions of the "DNA Database and Databank Act of 1994," P.L.1994, c.136 (C.53:1-20.17 et seq.);

(5) Disclosure is authorized by the tested individual or the tested individual's representative by signing a consent which complies with the requirements of the Department of Health and Senior Services;

(6) Disclosure is for the purpose of furnishing genetic information relating to a decedent for medical diagnosis of blood relatives of the decedent;

(7) Disclosure is for the purpose of identifying bodies;

(8) Disclosure is pursuant to newborn screening requirements established by State or federal law;

(9) Disclosure is authorized by federal law for the identification of persons; or

(10) Disclosure is by an insurer pursuant to the requirements of P.L.1985, c.179 (C.17:23A-1 et seq.).

b. The provisions of this section apply to any subsequent disclosure by any person after another person has disclosed genetic information or the identity of an individual upon whom a genetic test has been performed.

L.1996,c.126,s.8.

10:5-48. Notice to persons receiving genetic testing

9. a. A person who requires or requests that genetic testing be done or receives records, results or findings of genetic testing shall provide the person tested with notice that the test was performed and that the records, results or findings were received unless otherwise directed by informed consent pursuant to section 6 of P.L.1996, c.126 (C.10:5-45). The notice shall state that the information may not be disclosed to any person without the written consent of the person tested, unless disclosure is made pursuant to one of the exceptions provided for in section 8 of P.L.1996, c.126 (C. 10:5-47).

b. The Commissioner of Health and Senior Services, in consultation with the Commissioner of Banking and Insurance, shall promulgate regulations pursuant to the provisions of the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.) governing procedures for obtaining informed written consent pursuant to P.L.1996, c.126, except where the procedures for obtaining informed written consent already are governed by national standards for informed consent as designated by the Commissioner of Health and Senior Services by regulation, which may include, but need not be limited to, guidelines from the Office of Protection for Research Risk, the Food and Drug Administration or other appropriate federal agencies.

c. The provisions of this section shall not apply to newborn screening requirements established by State or federal law.

L.1996,c.126,s.9.

10:5-49. Violations, penalties for unlawful disclosure of genetic information

10. a. Any person violating the provisions of sections 6 through 9, inclusive, of P.L.1996, c.126 (C.10:5-45 through C.10:5-48) shall be a disorderly person and shall be punished by a fine of $1,000, a prison term of six months, or both.

b. Any person who willfully discloses an individual's genetic information to any third party in violation of P.L.1996, c.126 shall be punished by a fine of $5,000, a prison term of one year, or both.

c. Any person who discloses an individual's genetic information in violation of P.L.1996, c.126, shall be liable to the individual for all actual damages, including damages for economic, bodily, or emotional harm which is proximately caused by the disclosure.

L.1996,c.126,s.10.

U.S. Equal Employment Opportunity Commission

Facts About Sexual Harassment

The U.S. Equal Employment Opportunity Commission

Sexual harassment is a form of sex discrimination that violates **Title VII of the Civil Rights Act of 1964 (https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964)** .

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive work environment.

Sexual harassment can occur in a variety of circumstances, including but not limited to the following:

- The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex.
- The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee.
- The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.
- Unlawful sexual harassment may occur without economic injury to or discharge of the victim.
- The harasser's conduct must be unwelcome.

It is helpful for the victim to directly inform the harasser that the conduct is unwelcome and must stop. The victim should use any employer complaint

mechanism or grievance system available.

When investigating allegations of sexual harassment, EEOC looks at the whole record: the circumstances, such as the nature of the sexual advances, and the context in which the alleged incidents occurred. A determination on the allegations is made from the facts on a case-by-case basis.

Prevention is the best tool to eliminate sexual harassment in the workplace. Employers are encouraged to take steps necessary to prevent sexual harassment from occurring. They should clearly communicate to employees that sexual harassment will not be tolerated. They can do so by establishing an effective complaint or grievance process and taking immediate and appropriate action when an employee complains.

See also: **How To File A Charge of Employment Discrimination (https://www.eeoc.gov/fact-sheet/filing-charge)**

This page was last modified on June 27, 2002.

5 Things You Should Know About Protections from Sexual Harassment Under New Jersey Law

1. **The New Jersey Law Against Discrimination (LAD) prohibits sexual harassment, a form of gender-based discrimination,** in housing, employment, and places of public accommodation (generally, places open to the public, including businesses, restaurants, schools, summer camps, medical providers, etc.).

2. **Sexual harassment can include verbal harassment,** such as obscene language or demeaning comments; physical harassment, such as unwanted touching; or visual harassment, such as displaying pornographic images, cartoons, or drawings.

3. **There are generally two types of sexual harassment:** quid pro quo and hostile environment. Quid pro quo harassment is when a benefit (like a promotion at work, a lease on an apartment, or access to a restaurant) is conditioned on sexual favors, or when an adverse action (like getting fired or evicted) is threatened if you refuse a sexual advance. Hostile environment is when you are subjected to unwanted harassing conduct based on gender that is severe or pervasive.

4. **An employer, housing provider, or place of public accommodation must take action to stop sexual harassment if it knows or should have known about it.** So, for example, if a co-worker inappropriately touches you or discusses your body in graphic detail in front of your supervisor, your employer must take action. Similarly, your landlord must take action if you report that the superintendent requested sexual favors in exchange for repairing your refrigerator, or repeatedly called you "hot-stuff" despite being asked to stop.

5. **An employer, landlord, or place of public accommodation cannot retaliate against you** for objecting to sexual harassment, filing a sexual harassment complaint, or for exercising or attempting to exercise any other rights under the LAD.

To find out more or to file a complaint, go to **NJCivilRights.gov** or call **973-648-2700**

NJ Office of the Attorney General
NJCivilRights.gov
DIVISION ON CIVIL RIGHTS

3.5.20

Preventing and Eliminating Sexual Harassment in New Jersey

Findings and Recommendations from Three Public Hearings

DIVISION ON CIVIL RIGHTS

February 2020

Table of Contents

Authors and Acknowledgments

This report is the result of three public hearings on sexual harassment held in September 2019 by the New Jersey Division on Civil Rights (DCR) in partnership with the New Jersey Coalition Against Sexual Assault (NJCASA). The report was prepared by DCR with substantial and valuable contributions from co-authors NJCASA and the Rutgers Law School International Human Rights Clinic.

About the New Jersey Division on Civil Rights (DCR)

The New Jersey Division on Civil Rights (DCR) was created nearly 75 years ago to enforce the New Jersey Law Against Discrimination (LAD), which prohibits discrimination and harassment based on actual or perceived race, religion, national origin, gender, sexual orientation, gender identity or expression, disability, and other protected characteristics. The law applies in employment, housing, and places of public accommodation (generally, places open to the public, including businesses, restaurants, schools, summer camps, medical providers, etc.). In addition to enforcing the LAD and the New Jersey Family Leave Act, DCR works with stakeholders and members of the public to create a New Jersey free from discrimination and bias-based harassment, where all people are treated with equal dignity and respect and have access to equal opportunities.

Rachel Wainer Apter was appointed Director of DCR in October 2018. She has made combatting sexual harassment a priority, including by issuing this report, hosting the three public hearings that have informed the report's findings and recommendations, undertaking substantial enforcement actions, and working to ensure that individuals know their rights when it comes to sexual harassment. As one example, in September 2019, DCR ordered a company to pay nearly $300,000 in damages, statutory penalties, and costs for subjecting an employee to egregious sexual harassment and ultimately firing her in retaliation for reporting the harassment.

Any person who has been subjected to sexual harassment in employment, housing, or places of public accommodation is encouraged to contact DCR by visiting www.njcivilrights.gov or by calling 973 648-2700.

About the New Jersey Coalition Against Sexual Assault (NJCASA)

The New Jersey Coalition Against Sexual Assault (NJCASA) elevates the voices of sexual violence survivors and service-providers by advocating for survivor-centered legislation, training allied professionals, and supporting statewide prevention strategies. NJCASA was critical to the success of the three public hearings.

> Staff: Patricia Teffenhart, Executive Director; Robert Baran, Assistant Director; Aaron Potenza, Program Manager; and Marissa Marzano, Communications Manager

About the Rutgers Law School International Human Rights Clinic

The Rutgers International Human Rights Clinic is one of the first US-based legal programs to focus on using human rights law as a tool for positive social change. With the help of her

law students, Professor Penny Venetis, the Clinic's Director, has worked on a wide range of issues in New Jersey, the United States and throughout the world.

The International Human Rights Clinic also engages with the Newark community and with grassroots and governmental organizations in New Jersey on a diverse set of issues that include ending sexual harassment and abuse, fighting human trafficking, and strengthening voting rights. Professor Venetis also played a significant role in enacting cutting-edge federal anti-trafficking legislation, as well as state legislation throughout the country criminalizing "sextortion."

> Director: Penny M. Venetis
> Students: Rachel Newcomb, Kristen Krag, Kaylin Olsen, and Morgan McGoughran

This report is the result of the testimony of the experts, advocates, survivors of sexual harassment, and organizations who came forward at the hearings; the invaluable contributions of our panelists and fellow public servants who delivered opening remarks; and the tireless efforts of DCR's partners and staff. We offer our deep gratitude to all who provided oral or written testimony in connection with the hearings:

> Louis Kimmel and Raina, New Labor; Rosanna Rodríguez, Laundry Workers Center; Iris Sanchez, Unite Here Local 54; Brian Kulas; Namrata Pradhan, Adhikaar; Rita Dentino, CASA Freehold; Jeanne LoCicero, American Civil Liberties Union of New Jersey; Debra Lancaster, Center for Women and Work, Rutgers University School of Management and Labor Relations; Helen Archontou, YWCA of Northern New Jersey – healingSPACE; Nicole Morella, New Jersey Coalition to End Domestic Violence; Claudia Ratzlaff, AVANZAR; Louis Chodoff, Ballard Spahr, LLP; Keith Talbot, Legal Services of New Jersey; Christine Ferro-Saxon, Family Service League / SAVE of Essex County; Milly Silva, 1199 SEIU United Healthcare Workers East; Rayba Watson and Michael Rojas, United States Equal Employment Opportunity Commission; Jill Zinckgraf, Domestic Abuse and Sexual Assault Crisis Center of Warren County; Sue Levine, 180 Turning Lives Around; Sarah McMahon, Center on Violence Against Women & Children, Rutgers University School of Social Work; Penny Venetis, Rutgers Law School International Human Rights Clinic; Marrisa Senteno and Virgilio Aran, National Domestic Workers Alliance – New York Chapter; Andrea Johnson, Ramya Sekaran, Emily Martin, Shiwali Patel, and Hannah Sydnor-Greenberg, National Women's Law Center; Ally Coll, The Purple Campaign; Nancy Erika Smith, Smith Mullin, P.C.; Kirsten Scheurer Branigan, KSBranigan Law P.C.; Employers Association of New Jersey; Michael Campion, Kelly Horan Florio, and Victor Williamson, United States Attorney's Office for the District of New Jersey; David Rebuck, Director, New Jersey Division of Gaming and Enforcement; and the four individuals who testified anonymously.

The following individuals graciously served as hearing co-panelists with Director Wainer Apter and provided important opening remarks:

Panelists:

Sept. 11: Patricia Teffenhart, Executive Director, NJCASA; and Anna D. Martinez, Acting Director, New Jersey Department of Children and Families Division on Women

Sept. 24: Patricia Teffenhart, Executive Director, NJCASA; Patricia Perkins-Auguste and Clara C. Fernandez, Commissioners, New Jersey Civil Rights Commission

Sept. 25: Patricia Teffenhart, Executive Director, NJCASA; and Francis Blanco, Director, Women's Empowerment Initiatives, New Jersey Division on Women

Opening Remarks:

Sept. 11: Anna Maria Farias, Assistant Secretary, Federal Department of Housing and Urban Development

Sept. 24: Gurbir Grewal, Attorney General of New Jersey

Many members of DCR's team worked diligently to ensure that the hearings operated smoothly and contributed to this report, particularly:

Chief of Strategic Initiatives Aaron Scherzer and Legal Specialists Elise Olgin, Danielle Thorne, and Derek Fischer.

Finally, we offer our profound gratitude to Attorney General Gurbir Grewal for supporting the important work of addressing and eradicating sexual harassment in the State. We also offer sincere thanks to Commissioner Carmelyn Malalis and the New York City Commission on Human Rights, whose 2017 public hearing and report on sexual harassment in the workplace provided a model for our own hearings and report, and whose staff provided helpful advice and assistance.

Introduction: A Message from Rachel Wainer Apter, Director of the New Jersey Division on Civil Rights

More than four decades after the phrase "sexual harassment" was first introduced to describe unwanted, hostile behavior based on gender, it remains a shockingly severe, pervasive, and unresolved problem. A recent survey found that 81 percent of women and 43 percent of men have experienced some form of sexual harassment during their lifetime.[1] That includes verbal, physical, and cyber harassment and sexual assault. Sixty-eight percent of women reported being sexually harassed in a public space, 38 percent at work, and 31 percent at their residence.[2]

Even as women make up nearly half of the work force, sexual harassment persists in every sector of the workforce, from male-dominated to female-dominated industries and from low-wage jobs to Hollywood. And it persists in housing and places of public accommodation as well.

Sexual harassment affects people regardless of race, religion, gender, sexual orientation, gender identity or expression, disability, national origin or immigration status. That has become all the more clear in recent years as more survivors have courageously come forward to say "me too."[3] However, because it is fueled by power imbalances, marginalized communities, including women of color, immigrants, domestic workers, LGBTQ+ people and others, are often uniquely vulnerable to sexual harassment. Existing power disparities in the workplace, in housing, and in places of public accommodation increase the likelihood that vulnerable individuals will be sexually harassed, and then work to keep them from reporting. And the lack of reporting has meant that for far too long, sexual harassment has been ignored, overlooked, and normalized.

From the beginning of my tenure as Director of the Division on Civil Rights (DCR), we have recognized that the time has come for New Jersey to review its civil rights laws with a view towards better preventing sexual harassment in the workplace, in housing, and in places of public accommodation. So DCR, in partnership with the New Jersey Coalition

---

[1] U.C. San Diego Center on Gender Equity and Health: Stop Street Harassment, *Measuring #MeToo: A National Study on Sexual Harassment and Assault* 10 (2019), http://www.stopstreetharassment.org/wp-content/uploads/2012/08/2019-MeToo-National-Sexual-Harassment-and-Assault-Report.pdf [hereinafter Stop Street Harassment, *Measuring #MeToo*].

[2] *Id.*

[3] Tarana Burke courageously began using the phrase "me too" in 2006 to support survivors of sexual violence, particularly Black women and girls. In doing so, she joined a storied history of Black women who have been "at the forefront of movements against sexual violence and rape" given the ways in which the intersection of race and gender have made women of color particularly vulnerable to sexual misconduct. *See* Stephanie Zacharek et al., "The Silence Breakers," Time (2017) (interactive feature on Tarana Burke), https://time.com/time-person-of-the-year-2017-silence-breakers/; Me Too Movement, "About," https://metoomvmt.org/about/ (last visited Dec. 24, 2019); Danielle McGuire, "Recy Taylor, Oprah Winfrey and the Long History of Black Women Saying #MeToo," Washington Post (Jan. 9, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/01/09/recy-taylor-oprah-winfrey-and-the-long-history-of-black-women-saying-metoo/; Kimberlé Crenshaw, *Race, Gender, and Sexual Harassment*, 65 So. Cal. L. Rev. 1467 (1992).

Against Sexual Assault (NJCASA), hosted a series of hearings in September 2019 to hear from victims of sexual harassment and experts regarding how laws, policies, and culture should change.[4]

Our first goal was to uncover the depth and breadth of the problem. Because we can't fully address a problem that we don't understand. We also sought to raise up the human side of the staggering statistics: To learn from people's lived experiences as we collected recommendations for a way forward.

At hearings in Asbury Park on September 11, Hackensack on September 24, and Atlantic City on September 25, as well as in written comments, we heard from more than 40 survivors, advocates, and experts from all over the State. We heard from workers and advocates across a wide range of industries, from individual survivors, and from those who wanted to share their recommendations for how we forge a path forward. We owe a deep debt of gratitude to all who provided testimony: the advocates, experts, public servants, and, most importantly, the survivors of sexual harassment, who courageously shared their stories. This project would not have been possible without them.

It is our sincere hope that this report helps all New Jerseyans better understand the harm wrought by sexual harassment and sparks much-needed change. Reporting since we held our hearings has only confirmed that the time to act is now.[5]

This report includes several sections. Part I explains what sexual harassment is and identifies when it is unlawful in New Jersey. Part II identifies the key themes that arose from the public hearings and written testimony. Part III sets forth recommendations for how the Law Against Discrimination should be amended to provide broader and stronger protections against sexual harassment and other forms of bias-based harassment. Finally, Part IV offers employers, housing providers, and places of public accommodation best practices to combat sexual harassment.

---

[4] DCR was created by the New Jersey Law Against Discrimination (LAD), the first state-level civil rights statute in the country. The law was enacted nearly 75 years ago and it tasks DCR with preventing and eliminating discrimination and bias-based harassment in the State. N.J.S.A. 10:5-1-3, 5-6. One of those forms of bias-based harassment is sexual harassment.

[5] *See* Susan K. Livio & Kelly Heyboer, *#MeToo Was Supposed to Fix Things. But Women in N.J. Politics Say They've Been Groped, Harassed – and Worse,* NJ.com (rev. Dec. 30, 2019), https://www.nj.com/news/2019/12/metoo-was-supposed-to-fix-thing-but-women-in-nj-politics-say-theyve-been-groped-harassed-and-worse.html.

Part I. What is Sexual Harassment?

Sexual harassment is a form of discrimination based on sex. It can include unwelcome sexual advances, requests for sexual favors, verbal or physical harassment of a sexual nature, or offensive remarks about a person's gender, or because of a person's gender. It can be verbal, physical or visual, and can occur in person, over the phone or online.[6] Sexual harassment is often, but not always, "sexual" in nature.[7] A boss making sexual comments about how an employee dresses, or an employee inappropriately touching a coworker, is sexual harassment. But so too is any unwanted conduct that is "based on" gender, including sexual orientation and gender identity or expression.[8] That includes, for example, disrespectful or demeaning remarks about stereotypical gender roles, as well as homophobic or transphobic slurs.

Sexual harassment is an "everyday reality … in every corner of the country."[9] Women generally experience sexual harassment more often than men, but sexual harassment affects all genders and people of all sexual orientations and gender identities. Although data on the prevalence of sexual harassment varies, one survey reported that "81% of women and 43% of men reported experiencing some form of sexual harassment and/or assault in their lifetime."[10]

However, the fear of retaliation or of not being believed leads many instances of sexual harassment to go unreported. Indeed, the Equal Employment Opportunity Commission (EEOC) has estimated that "approximately 90% of individuals who say they have experienced harassment [at work] never take formal action against the harassment, such as filing a charge or a complaint," and that "[r]oughly three out of four individuals who

---

[6] For definitions and examples of sexual harassment, see generally N.Y.C. Comm'n on Human Rights, *Combating Sexual Harassment in the Workplace: Trends and Recommendations Based on 2017 Public Hearing Testimony* 2 (2018), https://www1.nyc.gov/assets/cchr/downloads/pdf/SexHarass_Report.pdf; U.S. Equal Employment Opportunity Comm'n, "Harassment," https://www.eeoc.gov/laws/types/harassment.cfm (last visited Dec. 24, 2019) [hereinafter EEOC, "Harassment"]; Equal Rights Advocates, "Know Your Rights At School: Sexual Assault & Sexual Harassment," https://www.equalrights.org/issue/equality-in-schools-universities/sexual-harassment/ (last visited Dec. 24, 2019) [hereinafter ERA, "Schools"]; Equal Rights Advocates, "Know Your Rights At Work: Sexual Harassment," https://www.equalrights.org/issue/economic-workplace-equality/sexual-harassment/ (last visited Dec. 24, 2019); National Women's Law Center, *Frequently Asked Questions About Sexual Harassment in the Workplace* 1-2 (Nov. 2016), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2016/11/Sexual-Harassment-FAQ.pdf [hereinafter NWLC, *FAQ*].

[7] NWLC, *FAQ*, *supra*, at 1.

[8] *Id.* at 1-2.

[9] Diana Boesch et al., "Driving Change in States to Combat Sexual Harassment," Center for American Progress (Jan. 15, 2019), https://www.americanprogress.org/issues/women/reports/2019/01/15/465100/driving-change-states-combat-sexual-harassment/.

[10] Stop Street Harassment, *Measuring #MeToo*, *supra*, at 10.

experienced harassment never even talked to a supervisor, manager, or union representative about the harassing conduct."[11]

Sexual harassment very often intersects with other types of discrimination or bias-based harassment, like discrimination or harassment based on race, national origin, sexual orientation, or gender identity or expression.[12] Individuals with intersecting vulnerabilities—including people of color, immigrants, LGBTQ+ individuals, individuals with disabilities, and low-wage workers—face unique challenges with respect to reporting sexual harassment. This makes sense: those who are most at risk of losing their job or their home are the most fearful of retaliation, and therefore the least able to report even the most egregious forms of sexual harassment.[13]

Sexual harassment has been associated with depression, anxiety, post-traumatic stress disorder (PTSD), and physical health issues like poor sleep and high blood pressure in both the short and long term. It can also reduce a person's ability to perform their job or engage in daily life.[14] It also has been associated with loss of self-esteem, level of comfort, and sense of security.[15] Indeed, one study found that women who had been sexually harassed "had higher education yet more financial strain."[16] And negative effects expand beyond the toll harassment takes on the survivor, reducing faith in our society's ability to treat all people with dignity and reducing faith in our institutions' ability to rectify wrongdoing.

New Jerseyans are protected from sexual harassment under the New Jersey Law Against Discrimination (LAD)[17] as well as Title VII of the federal Civil Rights Act of 1964,[18] the federal Fair Housing Act,[19] and Title IX of the federal Education Amendments of 1972.[20] When sexual harassment is unlawful, employers, housing providers, and places of public accommodation are required by law to take reasonable steps to prevent and address it. We now discuss the legal framework that currently applies to workplace sexual harassment and harassment in housing and places of public accommodation.

---

[11] EEOC, "Harassment," *supra*.
[12] Boesch et al., *supra*.
[13] *Id.*
[14] Rebecca C. Thurston et al., *Association of Sexual Harassment and Sexual Assault with Midlife Women's Mental and Physical Health*, 179 JAMA Intern. Med. 48-53 (2019); Jason N. Houle et al., *The Impact of Sexual Harassment on Depressive Symptoms During the Early Occupational Career*, 2011 Soc. Mental Health 89-105, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3227029/pdf/nihms318538.pdf.
[15] *See, e.g.*, Houle et al., *supra*, at 10-11 (discussing self-doubt and loss of self-esteem, as well as economic strain, after sexual harassment).
[16] Thurston et al., *supra*.
[17] N.J.S.A. 10:5-12(a), (f)-(h).
[18] 42 U.S.C. § 2000e-2(a).
[19] *Id.* §§ 3604-05.
[20] 20 U.S.C. § 1681.

Workplace Sexual Harassment

Background

Sexual harassment in the workplace can take many forms, and can be perpetrated by many people, not just business owners and supervisors. It could include a supervisor threatening to fire a subordinate unless he performs sexual favors, a customer demanding a date with an employee, or a colleague making offensive gestures or hanging inappropriate pictures in the office.

Sexual harassment does not occur only in traditional "office" settings. It disproportionately occurs in industries with large numbers of low-wage workers and women, especially women of color, including hotels, healthcare or long-term care facilities, restaurants, private homes (domestic workers), and farms.[21] A recent study of sexual harassment charges filed with the EEOC over a ten-year period showed that workers in accommodation, food service, retail, trade, manufacturing, social assistance, and health care were responsible for over half of all sexual harassment charges filed.[22] And that likely underestimates the prevalence of sexual harassment in those industries because power imbalances, low pay, and job insecurity make low-wage workers, often in service industries, particularly fearful of reporting.[23]

Quid Pro Quo and Hostile Work Environment Harassment

The LAD and federal law both prohibit two types of sexual harassment: quid pro quo and hostile work environment. "Quid pro quo" harassment is defined under state and federal law as attempting to make an employee's submission to sexual advances a condition of their employment, or indicating that rejecting such advances would result in adverse employment consequences.[24] Under both state and federal law, quid pro quo harassment generally "involves an implicit or explicit threat that if the employee does not accede to the sexual demands, he or she will lose his or her job, receive unfavorable performance reviews, be passed over for promotions, or suffer other adverse employment consequences."[25]

---

[21] Boesch et al., *supra*.
[22] Jocelyn Frye, "Not Just the Rich and Famous," Center for American Progress (Nov. 20, 2017), https://www.americanprogress.org/issues/women/news/2017/11/20/443139/not-just-rich-famous/.
[23] *Id.* ("[W]omen—particularly women of color—are more likely to work lower-wage jobs, where power imbalances are often more pronounced and where fears of reprisals or losing their jobs can deter victims from coming forward.")
[24] *Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. 587, 601 (1993).
[25] *Id.* (describing New Jersey law). Under regulations promulgated by the EEOC, "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" amount to sexual harassment when "submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment" or "submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual." 29 C.F.R. § 1604.11(a); *see Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1296 (3d Cir. 1997) (adopting EEOC's formulation), *abrogated on other grounds by Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

Under the LAD, hostile work environment sexual harassment consists of "discriminatory conduct that a reasonable person of the same sex in the plaintiff's position would consider sufficiently severe or pervasive to alter the conditions of employment and to create an intimidating, hostile, or offensive working environment."[26] A broad range of offensive conduct can create or contribute to a hostile work environment. It may involve sexual comments, comments about the "abilities, capacities, or the 'proper role'" of a particular gender, or inappropriate physical touching.[27] The harassment need not be "sex-based on its face," as long as it "more likely than not … occurred because of the plaintiff's sex."[28]

Under New Jersey law, harassment must be either severe or pervasive to create a hostile work environment. "[O]ne incident of harassing conduct" may be severe.[29] But so too multiple non-severe incidents may "considered together" be "sufficiently pervasive to make the work environment intimidating or hostile."[30] Thus, in applying the severe or pervasive standard, courts are instructed to consider "the cumulative effect" of all incidents alleged.[31]

Title VII's standard for analyzing whether conduct is sufficiently severe or pervasive to create a hostile work environment is similar, but federal courts' articulation of the test is somewhat narrower. For example, the U.S. Supreme Court has said that a "merely offensive"[32] single utterance does not create a hostile work environment, while New Jersey's Supreme Court has found a "single remark … sufficiently severe to have produced a hostile work environment."[33] In addition, federal courts declined to find a hostile work environment in cases where a male employee forced his hand under a female coworker's shirt and fondled her breast,[34] and where a male employee repeatedly made sexual comments to a female coworker and suggested she be spanked.[35] By contrast, a New Jersey court found conduct to be sufficiently severe or pervasive to create a hostile work environment where a supervisor made sexual comments about an employee's body, discussed a threesome, and touched her hand.[36]

That New Jersey courts have at times interpreted the LAD more broadly when it comes to hostile work environment claims can be traced to the New Jersey Supreme Court's recognition that courts should not "hesitat[e] to depart" from federal law in interpreting the LAD "if a rigid application of [Title VII's] standards is inappropriate under the circumstances."[37] The Court also has "emphasize[d] that the LAD is *remedial* legislation,"

---

[26] *Lehmann*, 132 N.J. at 592, 603-04.
[27] *Id.* at 605.
[28] *Id.*
[29] *Taylor v. Metzger*, 152 N.J. 490, 499-500 (1998).
[30] *Lehmann*, 132 N.J. at 607.
[31] *Id.*
[32] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).
[33] *Taylor*, 152 N.J. at 500-01.
[34] *Brooks v. City of San Mateo*, 229 F.3d 917 (9th Cir. 2000).
[35] *Singleton v. Dep't of Corr. Educ.*, 115 Fed. App'x 119 (4th Cir. 2004).
[36] *Velez v. Rocktenn Co.*, 2018 WL 3613393 (N.J. Super. Ct. App. Div. July 30, 2018).
[37] *Lehmann*, 132 N.J. at 601 (internal quotation marks omitted).

with the "very purpose" of *changing* "existing standards of conduct" for the better.[38] In addition, the New Jersey Supreme Court has urged New Jersey courts to recognize both evolving community standards and "the differences in the way sexual conduct on the job is perceived" by different genders when assessing whether conduct constitutes unlawful harassment.[39] In other words, New Jersey courts recognize that conduct that was considered not to be offensive a decade ago may be considered offensive now, and conduct that might be considered "harmless amusement" by one gender might be acutely felt as sexual harassment by another.[40]

Employer Liability and Remedies

Whether an employer is legally responsible for unlawful sexual harassment in a particular case is similar under both the LAD and Title VII. Courts have interpreted both statutes to generally hold an employer responsible when the harasser is a supervisor, or, if the harasser is not a supervisor, when the employer "knows or should know of the harassment and fails to take effective measures to stop it."[41] Whether an employer has sexual harassment policies in place is also relevant under current law; in New Jersey and under federal law, a court may consider an employer's "failure to have in place well-publicized and enforced anti-harassment policies, effective formal and informal complaint structures, training, and/or monitoring mechanisms" in evaluating whether the employer has taken reasonable steps to prevent harassment.[42] In addition, employers may shield themselves from liability by asserting that they "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[43]

When an employer is liable for sexual harassment, remedies can range from monetary relief (like damages or backpay), to affirmative relief, including "hiring or reinstating the harassment victim, disciplining, transferring, or firing the harasser, … or taking preventative and remedial measures at the workplace."[44] In addition, DCR regularly requires employers to adopt or improve anti-sexual harassment policies and to train staff on sexual harassment and how to conduct internal investigations.[45]

---

[38] *Id.* at 612.
[39] *Id.* at 612-14.
[40] *Id.* (internal quotation marks omitted) (quoting Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 Vand. L. Rev. 1183, 1203, 1206 (1989)).
[41] *Id.* at 623-24; *see also* 29 C.F.R. § 1604.11(d); EEOC "Harassment," *supra.*
[42] *Lehmann*, 132 N.J. at 621; *cf. Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) ("Title VII is designed to encourage the creation of antiharassment policies and effective grievances mechanisms.").
[43] *Aguas v. State*, 220 N.J. 494, 499-500 (citing *Burlington*, 524 U.S. at 765, and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998)).
[44] *Lehmann*, 132 N.J. at 617.
[45] *See, e.g.*, *T.S. and Director, Division on Civil Rights, v. Tyce Transportation*, OAL Dkt. No. CRT 05662-18, DCR Dkt. No. EG09WB-63409 (Aug. 12, 2019) (DCR final order requiring an employer "to adopt an anti-discrimination and anti-harassment policy that comports with the LAD" and to require

Additional Key Distinctions Between the LAD and Title VII

There are two additional ways in which the LAD more broadly protects against sexual harassment than Title VII:

- Independent Contractor Protection: Title VII protects only employees of a business from sexual harassment,[46] but the LAD provides protections for independent contractors in addition to employees, via its prohibition on gender-based discrimination in contracting.[47]

- Employer Size: Title VII only applies to employers with at least fifteen employees.[48] By contrast, nearly all employers in New Jersey, regardless of size, are covered by the LAD, although, as discussed in greater depth below,[49] the LAD excludes "any individual employed in the domestic service of any person" from coverage.[50]

Sexual Harassment in Places of Public Accommodation and Housing

Background

Sexual harassment extends beyond the workplace, and can also occur in places of public accommodation and housing. A place of public accommodation is a business, agency, organization or entity that is open to the public—like a school, government building, restaurant, bar, hotel, shopping mall, train, or bus. It does not include streets and sidewalks.[51] In Stop Street Harassment's recent survey, public spaces were among the most frequently listed locations for sexual harassment.[52] Of the individuals surveyed, 68 percent of women and 23 percent of men "reported experiencing sexual harassment in a public space like a street, park[,] store," restaurant, mall, library, movie theater, or gym; 25 percent of women and 10 percent of men experienced sexual harassment on mass transportation; and 37 percent of women and 12 percent of men experienced sexual harassment at a nightlife venue like a concert, bar, or club.[53]

---

all "supervisors and managers … to attend training on the employment discrimination and sexual harassment provisions of the LAD"). Federal courts may also order the adoption of anti-harassment policies and/or training. *E.g.*, *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1534 (M.D. Fla. 1991).

[46] U.S. Equal Employment Opportunity Comm'n, "Coverage," https://www.eeoc.gov/employers/coverage.cfm (last visited Dec. 24, 2019) [hereinafter EEOC, "Coverage"].

[47] N.J.S.A. 10:5-12(*l*); *see J.T.'s Tire Service, Inc. v. United Rentals N. Am. Inc.*, 411 N.J. Super. 236, 241-43 (App. Div. 2010); *Rowan v. Hartford Plaza Ltd.*, 2013 WL 1350095, at *10 (App. Div. Apr. 5, 2013); *see also Rubin v. Chilton*, 359 N.J. Super. 105, 111 (App. Div. 2003).

[48] 42 U.S.C. § 2000e(b).

[49] Parts II and III, *infra*.

[50] N.J.S.A. 10:5-5(f).

[51] N.J.S.A. 10:5-5(*l*).

[52] Stop Street Harassment, *Measuring #MeToo*, *supra*, at 25.

[53] *Id.* at 10, 25-26.

Sexual harassment at schools and universities, like a teacher making sexual advances or peers making offensive sexual remarks about a classmate, is also far too common.[54] A study by the American Association of University Women found that nearly half of "students in grades 7-12 experienced some form of sexual harassment at school during the 2010-11 school year."[55] And in a recent survey commissioned by the Association of American Universities, 41.8 percent of students had experienced "at least one sexually harassing behavior since enrollment."[56] Nearly half of those students "reported sexually harassing behavior that either interfered with their academic or professional performance, limited their ability to participate in an academic program or created an intimidating, hostile or offensive social, academic or work environment."[57]

Sexual harassment is also prevalent in housing.[58] Indeed, "[e]very year, hundreds of state and federal civil lawsuits are filed against landlords, property owners, building superintendents and maintenance workers alleging persistent, pervasive sexual harassment and misconduct, covering everything from sexual remarks to rape."[59] Examples of actions that constitute sexual harassment in housing include: a landlord, landlord's employee, or housing inspector demanding sexual favors from a tenant or prospective tenant, a security guard at an apartment building making comments about a tenant's body and clothes, or a maintenance worker repeatedly propositioning a tenant after being authorized by an apartment manager to enter the tenant's home to conduct repairs.[60] A recent survey showed 31% of women and 15% of men reported being sexually harassed or assaulted in their own homes.[61]

Legal Framework

The LAD prohibits gender-based discrimination and harassment in housing and places of public accommodation, and bans retaliation for reporting harassment in those

---

[54] *See, e.g.*, ERA, "Schools," *supra*; Girls for Gender Equity, "What is Sexual Harassment," https://www.ggenyc.org/about/education/what-is-sexual-harassment/ (last visited Dec. 24, 2019).
[55] AAUW, *Crossing the Line: Sexual Harassment at School* 11 (2011), https://www.aauw.org/files/2013/02/Crossing-the-Line-Sexual-Harassment-at-School.pdf.
[56] Westat, *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct*, at xiii (2019), https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/FULL_2019_Campus_Climate_Survey.pdf (internal quotation marks omitted).
[57] *Id.* (internal quotation marks omitted).
[58] *Cf.* U.S. Dep't of Justice, "What is Sexual Harassment in Housing" (last updated Feb. 26, 2018), https://www.justice.gov/crt/what-sexual-harassment-housing [hereinafter DOJ, "What is Sexual Harassment in Housing?"]; U.S. Dep't of Justice, "Sexual Harassment in Housing Initiative" (last updated Nov. 7, 2018), https://www.justice.gov/crt/sexual-harassment-housing-initiative.
[59] Jessica Lussenhop, "A Woman's Choice – Sexual Favors or Lose Her Home," BBC News (Jan. 11, 2018), https://www.bbc.com/news/world-us-canada-42404270.
[60] *See, e.g.*, DOJ, "What is Sexual Harassment in Housing?," *supra*; U.S. Dep't of Housing and Urban Development, *Questions and Answers on Sexual Harassment under the Fair Housing Act* (Nov. 17, 2008), https://www.hud.gov/sites/documents/QANDASEXUALHARASSMENT.PDF [hereinafter HUD, *Q&A*].
[61] Stop Street Harassment, *Measuring #MeToo*, *supra*, at 25-26.

settings as well.[62] Like in employment, both quid pro quo harassment and hostile environment harassment are unlawful, with the analysis adapted to the relevant situation.

In the education context, for example, whether harassment based on a student's gender is "sufficiently severe or pervasive enough to create an intimidating, hostile, or offensive school environment" is viewed from the perspective of "a reasonable student of the same age, maturity level," and gender.[63] While a school is generally liable if the harasser is a teacher or other staff member (similar to supervisory liability in employment), whether a school is responsible for student-on-student harassment depends on whether the school "knew or should have known of the harassment, but failed to take action reasonably calculated to end the harassment."[64] A similar analysis applies to claims related to other places of public accommodation under the LAD.

By comparison, federal law does not generally prohibit sexual harassment in places of public accommodation. However, educational institutions receiving federal funding under Title IX may be liable in a sexual harassment lawsuit if they are deliberately indifferent to knowledge of severe or pervasive sexual harassment of a student by a school employee or peer.[65] Note that this standard is substantially narrower than the standard for liability under the LAD, in that under the LAD a plaintiff need only prove that the school or university knew or should have known about the harassment and failed to take reasonable action to stop it.[66]

In the housing context, the LAD's prohibitions on gender discrimination apply to a broad range of covered persons and entities, including owners and their agents and employees, as well as realtors and their agents and employees.[67] Because the LAD prohibits housing discrimination based on gender, it prohibits sexual harassment in housing.[68] In addition, housing providers must take reasonable action to stop sexual harassment on their

---

[62] N.J.S.A. 10:5-12(f)-(h); *see L.W. v. Toms River Regional Schools Board of Education*, 189 N.J. 381, 400-03 (2007).
[63] *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 381, 402-03 (2007).
[64] *Id.* at 406-07.
[65] *See* Jared P. Cole and Christine J. Back, *Title IX and Sexual Harassment: Private Rights of Action, Administrative Enforcement, and Proposed Regulations*, Congressional Research Service, at i (2019), https://fas.org/sgp/crs/misc/R45685.pdf (describing Supreme Court cases interpreting Title IX's prohibitions). Although the Department of Education had previously issued guidance that interpreted Title IX to impose liability in a broader set of circumstances, the Department in late 2018 proposed new regulations that would depart from these guidance documents and make it more difficult to hold education institutions liable for sexual harassment. *Id.* Among other things, the proposed regulations would "tether the administrative requirements for schools to the standard set by the Supreme Court, … more narrowly define what conduct qualifies as sexual harassment under Title IX, and also impose new procedural requirements … when schools investigate sexual harassment or assault allegations and make determinations of culpability." *Id.*
[66] *L.W.*, 189 N.J. at 404, 406-07.
[67] N.J.S.A. 10:5-12(g), (h).
[68] *See Godfrey v. Princeton Theological Seminary*, 196 N.J. 178, 195-96 (2008) ("Given that the LAD also protects against discrimination in other settings [aside from the workplace], this Court also has recognized that the LAD's promise of protection from discriminatory sexual harassment extends beyond the workplace to other settings.").

premises, whether by employees, agents, or other tenants, if they know or should have known about it,[69] and may not retaliate against anyone for reporting such harassment.[70]

In addition, the Federal Fair Housing Act[71] and other federal laws which also prohibit sex discrimination in housing have been interpreted to prohibit sexual harassment by housing providers.[72] As the Department of Housing and Urban Development has explained, the Fair Housing Act prohibits quid pro quo and hostile environment sexual harassment in housing.[73] The standards are similar to their equivalents under the LAD.[74] Quid pro quo sexual harassment occurs "when a housing provider, or his or her employee, agent or contractor conditions access to or retention of housing or housing-related services or transactions on a victim's submission to sexual conduct."[75] And hostile environment liability results when "a housing provider or his or her employee, agent or contractor, or in certain circumstances another tenant, engages in sexual behavior of such severity or pervasiveness that it alters the terms or conditions of tenancy and results in an environment that is intimidating, hostile, offensive, or otherwise significantly less desirable."[76] As under the LAD, a property owner or manager not only has a "duty not to engage in sexual harassment," but also must take action to stop harassment if the owner or manager knows or should have known that "an employee, agent, or contractor is sexually harassing applicants, tenants or residents."[77] Some federal courts also "have held owners and managers, including condominium associations, liable in situations where they knew of tenant-on-tenant harassment and did not take remedial action."[78]

---

[69] *See* DOJ, "What is Sexual Harassment in Housing?," *supra; L.W.*, 189 N.J. at 407; N.J. Div. on Civil Rights, *5 Things You Should Know About Protections from Sexual Harassment Under New Jersey Law* (Sept. 10, 2019), https://www.nj.gov/oag/dcr/downloads/fact-SH.pdf.
[70] N.J.S.A. 10:5-12(d).
[71] 42 U.S.C. § 3601 *et seq.*
[72] *See, e.g.*, *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 861 (2018) (discussing 42 U.S.C. § 3604(b)).
[73] HUD, *Q&A*, *supra*, at 1.
[74] *See* U.S. Dep't of Housing and Urban Development, *Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act*, 81 Fed. Reg. 63054-01 *et seq.* (Sept. 14, 2016) (codified at 24 C.F.R. pt. 100) (HUD final rule "defining 'quid pro quo harassment' and 'hostile environment harassment' as conduct prohibited under the Fair Housing Act," "specifying the standards to be used to evaluate whether the particular conduct creates a quid pro quo or hostile environment in violation of the Act," and clarifying "when housing providers and other entities or individuals covered by the Fair Housing Act may be held directly or vicariously liable").
[75] HUD, *Q&A*, *supra*, at 1; *see Honce v. Vigil*, 1 F.3d 1085, 1089 (10th Cir. 1993) (recognizing quid pro quo liability in housing context); 24 C.F.R. § 100.600(a)(1) (codifying quid pro quo liability in housing context).
[76] HUD, *Q&A*, *supra*, at 1; *see Wetzel*, 901 F.3d at 861-62 (discussing elements of hostile housing environment liability); 24 C.F.R. § 100.600(a)(2) (codifying hostile housing environment liability).
[77] *Id.* at 2.
[78] *Id.* at 3.

Part II. Themes Presented at the Public Hearings

More than 40 survivors, advocates, and experts spoke at the three public hearings we held around the State or submitted written comments. This section discusses the common themes presented in the oral and written comments submitted to DCR.

The survivors, advocates, and experts who testified at the hearings provided poignant accounts detailing the pernicious impact sexual harassment has on individuals in workplaces, housing, and public places throughout New Jersey. The hearings served as a clear call to action, challenging New Jersey to take immediate and meaningful steps to address a problem that has persisted for far too long. As Milly Silva, Executive Vice President of 1199 SEIU United Healthcare Workers East testified, "This turn-the-other-cheek mentality and culture when it comes to sexual harassment will … continue to grow and fester if we allow it to do so."[79]

Sexual Harassers Often Take Advantage of Power Imbalances

Numerous witnesses testified that stark power disparities in workplaces, housing and places of public accommodation increase the likelihood that individuals will be sexually harassed.[80] Testimony highlighted how existing power structures work to further marginalize those who are already most vulnerable to sexual harassment, particularly those who work in isolated occupations.

Individuals With Intersecting Vulnerabilities Face An Increased Risk of Sexual Harassment

Andrea Johnson of the National Women's Law Center summarized the testimony of many witnesses when she stated that "sexual harassment often occurs at the intersection of identities."[81] Survivors are rarely harassed on the basis of gender alone.[82] For example, women of color are often harassed based on their race or national origin in addition to their gender.[83] As one person explained, "We know that sexual harassment is not about sex. It's about power, it's about dominance, it's about control, and for the most part African

---

[79] Hearing Transcript, 9/11/2019, at 25 (Testimony of Milly Silva, 1199 SEIU United Healthcare Workers East).
[80] *Id.* at 48-49 (Testimony of Sue Levine, 180 Turning Lives Around) ("There is a power imbalance between an employer or supervisor and a worker, and a landlord or property manager and a tenant. Survivors may not report sexual harassment, as not to risk exposing their immigration status and/or risk losing their job or housing. Employees and tenants need their jobs and homes for their safety and survival, and that of their families.").
[81] Hearing Transcript, 9/25/19, at 35 (Testimony of Andrea Johnson, National Women's Law Center).
[82] Hearing Transcript, 9/24/19, at 60 (Testimony of Jeanne LoCicero, American Civil Liberties Union of New Jersey) ("[W]orkers with disabilities and LGBTQ [workers] face … distinct harassment by virtue of their intersecting identities.").
[83] Hearing Transcript, 9/25/2019, at 35 (Testimony of Andrea Johnson, National Women's Law Center).

American women do not have the power to control, especially in the workplace, so their stories get ignored and they do not speak up."[84]

Similarly, witnesses highlighted the unique vulnerabilities of LGBTQ+ individuals, explaining, "the prevalence of sexual assaults and harassment that are grounded in sexual orientation and gender identity is endemic in the United States."[85] In addition, "[t]he LGBTQ community is … targeted in the workplace and in housing with threats to 'out' them, which can includ[e] outing HIV-status."[86]

Immigrants who lack legal status are often especially vulnerable because their harassers leverage the threat of deportation to silence them. One witness testified that "undocumented women in particular are vulnerable and suffer horrible abuse in the employment context."[87] Several witnesses testified about undocumented workers whose employers targeted them because they were undocumented and subjected them to repeated sexual assaults.[88] One employer explicitly told a victim "that if he did not comply she would contact the authorities and deport him and his family."[89] He was assaulted "every night for weeks."[90] Another undocumented worker was assaulted by her supervisor for six months "until he hurt her in a way that required immediate medical attention."[91]

Individuals Who Are Isolated At Work Are Particularly Vulnerable

Individuals who work in isolated environments are also at an increased risk of experiencing sexual harassment. According to Sue Levine, "[s]exual harassment occurs most often in isolation, without witnesses." [92] Domestic workers, hotel housekeeping staff, and long-term care workers all work in environments where they are often alone with

---

[84] Hearing Transcript, 9/24/2019, at 71 (Testimony of Helen Archontou, YWCA of Northern New Jersey – healingSPACE).
[85] Written Testimony of Carlos Ball, Rutgers University.
[86] Hearing Transcript, 9/11/2019, at 51 (Testimony of Sue Levine, 180 Turning Lives Around).
[87] Hearing Transcript, 9/25/2019, at 20 (Testimony of Keith Talbot, Legal Services of New Jersey).
[88] *See, e.g.*, Hearing Transcript, 9/24/2019, at 41 (Testimony of Christine Ferro-Saxon, Family Service League/SAVE of Essex County) ("In most cases survivors [of sexual assault] who are undocumented are even less likely to seek help out of fear of deportation."); *id.* at 97-98 (Testimony of Jill Zinckgraf, Domestic Abuse and Sexual Assault Crisis Center of Warren County) ("Client A was a migrant, undocumented worker who worked for a couple of years as a laborer before she became the target of a new supervisor. In order for her to collect her money on payday … she was told that she would have to perform oral sex. … [T]his continued for approximately six months and the violence escalated before, during and after each sexual assault, until he hurt her in a way that required immediate medical attention."); *id.* at 40 (Testimony of Christine Ferro-Saxon, Family Service League/SAVE of Essex County) ("Working in a local restaurant for about three months as a dish washer, one survivor found himself being sexually harassed by his supervisor. The harassment started [with] comments about his body and then escalated to unwanted touching and then sexual assault. He was told by his supervisor that if he did not comply she would contact the authorities and deport him and his family. He was sexually assaulted every night for weeks.").
[89] *Id.* at 40-41 (Testimony of Christine Ferro-Saxon, Family Service League/SAVE of Essex County).
[90] *Id.* at 41.
[91] *Id.* at 97-98 (Testimony of Jull Zinckgraf, Domestic Abuse and Sexual Assault Crisis Center of Warren County).
[92] Hearing Transcript, 9/11/2019, at 50 (Testimony of Sue Levine, 180 Turning Lives Around).

potential harassers. In healthcare settings, such as nursing homes and other long-term care environments, this often means being left alone with patients who engage in sexual harassment. For example, one patient "bombarded [a nursing aid] with sexual comments and tried to touch her breasts as she washed him in the morning."[93] Another patient "wanted [his caregiver] to touch his genitals in a sexual manner."[94] Witnesses testified that, too often, managers fail to intervene and instead "excuse or turn a blind eye to harassment committed by patients, in order to keep the beds full and patients satisfied."[95] Similarly, hotel housekeeping staff are often isolated with predatory patrons. One housekeeper testified that guests have asked her, "Can you do a little extra for me? I will pay you."[96] Other housekeepers have been assaulted or raped by guests.[97]

Domestic workers also have been subject to egregious incidents of sexual harassment by their employers. Marrisa Senteno from the National Domestic Workers Alliance testified that domestic workers are "the nannies that take care of our children, they're the housekeepers that bring sanity and order to our homes and they're the home care workers that care for our parents and give independence to people with disabilities."[98] One advocate shared the story of one worker who found her employer naked in the living room.[99] Another worker was required to bring her male employer a towel each time he showered, until one day he touched her sexually in front of his son.[100] A live-in domestic worker reported that her employer climbed into her bed.[101]

Domestic workers are currently not protected by either federal or state anti-discrimination laws.[102] And live-in domestic workers often feel particularly fearful of retaliation when their employers harass them because reporting the employer's conduct puts them at risk of losing their job and their home simultaneously.[103] Existing law thus leaves domestic workers with no external recourse unless the harassment is severe enough to constitute a crime.

---

[93] *Id.* at 23 (Testimony of Milly Silva, 1199 SEIU United Healthcare Workers East).
[94] *Id.*
[95] *Id.*
[96] Hearing Transcript, 9/25/2019, at 24 (Testimony of Iris Sanchez, Unite Here Local 54).
[97] *Id.* at 24-25.
[98] Hearing Transcript, 9/24/2019, at 21 (Testimony of Marrisa Senteno, National Domestic Workers Alliance).
[99] Hearing Transcript, 9/11/2019, at 54 (Testimony of Lou Kimmel, New Labor).
[100] Hearing Transcript, 9/24/2019, at 36-37 (Testimony of Person Number 2, National Domestic Workers Alliance).
[101] Hearing Transcript, 9/25/2019, at 51-52 (Testimony of Namrata Pradhan, Adhikaar).
[102] N.J.S.A. 10:5-5(f) (excluding domestic workers from the definition of employee); 42 U.S.C. § 2000e(b) (defining "employer" to include only employers with 15 or more employees).
[103] Hearing Transcript, 9/11/2019, at 43-47 (Testimony of Person Number 5, CASA Freehold).

Survivors Face Multiple Barriers to Reporting Harassment and to Securing a Just Outcome When They Do Report

Fear of Retaliation May Keep Survivors from Reporting

Survivors of sexual harassment face numerous legal, societal, and cultural barriers that prevent them from reporting sexual harassment and that can also reduce the possibility of a just outcome when they do report. The most pervasive barrier to reporting raised at the hearings was a fear of retaliation. Advocates and community members alike testified that this fear serves as a highly effective deterrent to survivors' willingness to report sexual harassment.[104] As Michael Rojas of the Equal Employment Opportunity Commission testified, surveys show that as many as sixty percent of women have experienced sexual harassment in the workplace, yet the vast majority of them did not report the harassment either to their employers or to federal or state agencies.[105] When asked why they did not report, the most common answer was fear of retaliation.[106]

Retaliation against any person for reporting sexual harassment or any other violation of the LAD is illegal.[107] Even if what the person reports does not end up meeting the legal definition of sexual harassment, the person is still protected from retaliation based on the reporting.[108] But the majority of survivors still do not feel safe filing a complaint.

Despite existing legal protections that prohibit retaliation, "the fear of retaliation is well founded."[109] A recent EEOC report found that "75% of employees who spoke out against workplace mistreatment faced some form of retaliation."[110] Experts who testified at the hearing explained that retaliation can take many forms, including, but not limited to, termination.[111] Thus, if reforms are to make a meaningful impact, they should address the persistent and overwhelming fear of retaliation.

---

[104] Hearing Transcript, 9/24/2019, at 31 (Debra Lancaster, Center for Women and Work, Rutgers University School of Management and Labor Relations) ("[T]here are few avenues for reporting harassment, and those who do have avenues to report seldom do for fear of retaliation …."); *Id.* at 25-26 (Testimony of Marrisa Senteno, National Domestic Workers Alliance) (testifying that barriers to reporting include "fear of retaliation because of their immigration status, language barriers, fear of losing their job and not being able to support themselves and their families").
[105] Hearing Transcript, 9/25/2019, at 15 (Testimony of Michael Rojas, United States Equal Employment Opportunity Commission).
[106] *Id.*
[107] N.J.S.A. 10:5-12(d).
[108] *Tartaglia v. UBS PaineWebber Inc.*, 197 N.J. 81, 126–27 (2008).
[109] Hearing Transcript, 9/11/2019, at 15 (Testimony of Michael Rojas).
[110] U.S. Equal Employment Opportunity Comm'n, Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs (June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm; *see also* Hearing Transcript, 9/24/2019, at 60 (Testimony of Jeanne LoCicero, American Civil Liberties Union of New Jersey).
[111] Hearing Transcript, 9/24/2019, at 60 (Testimony of Jeanne LoCicero, American Civil Liberties Union of New Jersey).

The Short Statute of Limitations May Keep Survivors from Reporting

Survivors and advocates testified to an array of other barriers that prevent survivors from reporting and addressing sexual harassment. Many individuals are unaware of their rights,[112] and the short window in which legal claims must be filed at DCR serves as a barrier to those traumatized by harassment.[113] Research on the neurobiology of trauma suggests that "[t]rauma and fear cause specific short-term and long-term changes to the brain that will affect a victim's behavior."[114] Specifically, following a traumatic event, many survivors experience a number of symptoms that may cause a delay in processing the event and reporting it.[115] As one advocate explained, it is therefore incredibly challenging for survivors who are traumatized by harassment to act within the current six-month timeframe for filing a claim with DCR, especially when an individual does not know their rights. Individuals have to be able to acknowledge the harassment, decide to seek help, learn about their options, and overcome their fear of retaliation, all while continuing to shoulder their work and family responsibilities.[116]

Lack of Clarity in an Employer's Policies May Keep Survivors from Reporting

These barriers are also compounded because many employers lack clear policies that define and prohibit harassment and provide instructions on how to report it. Employers, schools, universities, and others often either do not have sexual harassment policies at all or have policies that do not clearly address how to report harassment internally.[117] Even

---

[112] Hearing Transcript, 9/24/2019, at 25 (Testimony of Marrisa Senteno, National Domestic Workers Alliance).
[113] *Id.*; *see also id.* at 61 (Testimony of Jeanne LoCicero, American Civil Liberties Union of New Jersey).
[114] Deborah Smith, "What Judges Need to Know About the Neurobiology of Sexual Assault," Nat'l Center for State Courts, https://www.ncsc.org/microsites/trends/home/Monthly-Trends-Articles/2017/What-Judges-Need-to-Know-About-the-Neurobiology-of-Sexual-Assault.aspx (last visited Feb. 13, 2020).
[115] Michael Henry, et al., *The 7 Deadly Sins of Title IX Investigations: The 2016 White Paper* 4 (2016), https://cdn.atixa.org/website-media/atixa.org/wp-content/uploads/2016/02/12193411/7-Deadly-Sins_Short_with-Teaser_Reduced-Size.pdf; Beverly Engel, *Stop Shaming Victims of Sexual Assault for Not Reporting*, Psychology Today (Sept. 23, 2018), https://www.psychologytoday.com/us/blog/the-compassion-chronicles/201809/stop-shaming-victims-sexual-assault-not-reporting.
[116] *Id.* (Testimony of Jeanne LoCicero, American Civil Liberties Union of New Jersey ("The current 180 days for administering complaints is just too short and people seeking [redress] of their civil rights face many barriers [to] acting within six months, including not knowing their rights, fearing retaliation and then shouldering their work and family responsibilities ….").
[117] *Id.* at 82-83 (Testimony of Penny Venetis, Rutgers Law School International Human Rights Clinic) ("In law school I was sexually harassed by a fellow student who was in a position of authority over me. I reported him immediately and went to file a complaint against him. It turns out that neither the law school nor the university had a sexual harassment policy. As a response to my complaint the University put together a working group of faculty and students and adopted the sexual harassment policy that our committee recommended, which was terrific, but the student who harassed me was never disciplined because there was no policy in place when I reported the abuse and the University enacted the policy after the student had graduated.").

where policies exist, employers too often have not taken additional steps needed to ensure their employees have faith in the effectiveness or safety of the reporting systems.[118]

Existing Legal Doctrines May Prevent Survivors from Securing a Just Outcome When They Do Report

When survivors do attempt to file a legal claim, certain legal doctrines serve as perceived or actual barriers to obtaining a just result.[119] For example, numerous experts testified that New Jersey's application of the "severe or pervasive" standard prevents survivors from reporting or successfully prosecuting claims, based on a belief that the harassment they suffered won't constitute sexual harassment under the law.[120]

The severe or pervasive standard requires a complainant to allege "the complained of conduct (1) would not have occurred but for the employee's [membership in a protected class]; and it was (2) severe or pervasive enough to make a (3) reasonable [person belonging to that protected class] believe that (4) the conditions of employment are altered and the working environment is hostile or abusive."[121]

As noted above, under current law, harassment must be either severe *or* pervasive to create a hostile work environment; it need not be both. "[O]ne incident of harassing conduct" may be severe. And multiple non-severe incidents may "considered together" be "sufficiently pervasive to make the work environment intimidating or hostile." Thus, in applying the severe or pervasive standard, courts are instructed to consider "the cumulative effect" of all incidents alleged.[122]

However, some state and federal cases in New Jersey have ignored these instructions and found that no reasonable jury could find "severe or pervasive" harassment even when the complainant had been grievously harmed by serious harassment.[123]

---

[118] Hearing Transcript, 9/11/2019, at 22 (Testimony of Milly Silva, 1199 SEIU United Healthcare Workers East).
[119] Hearing Transcript, 9/25/2019, at 40-41 (Testimony of Ramya Sekaran, National Women's Law Center).
[120] *See, e.g.*, Written Testimony of Andrea Johnson and Ramya Sekaran, National Women's Law Center ("[V]ictims may not step forward and make a complaint or seek help because they fear the harassment they are being subjected to would not be legally actionable."); Hearing Transcript, 9/24/2019, at 55 (Testimony of Nancy Erika Smith, Smith Mullin, P.C.).
[121] *Lehmann v. Toys R Us, Inc.*, 132 N.J. 587, 603-04 (1993); *Taylor v. Metzger*, 152 N.J. 490, 498 (1998).
[122] *Lehmann v. Toys R Us, Inc.*, 132 N.J. 587, 606-07 (1993).
[123] *See, e.g.*, *Clayton v. City of Atlantic City*, 538 Fed. Appx. 124, 129 (3d Cir. 2013) (holding that an incident in which a supervisor intentionally grabbed an employee's buttocks did not rise to the level of severe or pervasive conduct); *Godfrey v. Princeton Theological Seminary*, 196 N.J. 178, 198 (2008) (describing the incidents "in sterile terms, stripped of the overlay of [plaintiffs'] subjective reactions to these interactions," because, in the court's view, those reactions were not relevant to "the determination of whether the conduct is severe or pervasive," and holding that the alleged harasser's "repeated and unwelcome behavior was one of the socially uncomfortable situations that many women encounter in the course of their lives when someone in whom they are not interested persists in trying to persuade them otherwise."); *id.* at 201 (harassing conduct not directed at or witnessed by

Experts testified to similar problems with the *Aguas*/*Faragher-Ellerth* affirmative defense. As earlier noted, under both federal and New Jersey law, employers may raise as an affirmative defense to liability that they exercised reasonable care to prevent sexual harassment from occurring and that the plaintiff unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer or to otherwise avoid harm.[124]

In New Jersey, under *Aguas v. State*, five factors are relevant to the assessment of whether an employer exercised reasonable care: (1) whether there are formal policies prohibiting harassment in the workplace; (2) whether there are formal and informal complaint structures for employees to report violations of the policy; (3) whether the employer provides anti-harassment training to all employees, including mandatory training for supervisors and managers; (4) whether the employer has effective sensing or monitoring mechanisms to check the trustworthiness of the policies and complaint structures; and (5) whether the employer has demonstrated "an unequivocal commitment from the highest levels of the employer that harassment [will] not be tolerated, and demonstration of that policy commitment by consistent practice."[125]

Aguas is clear that merely having a policy or training in place is insufficient to establish the affirmative defense; rather, the assessment is focused on the efficacy of the employer's remedial program.[126] Yet witnesses testified that courts have too often applied *Faragher-Ellerth* and *Aguas* in ways that enable employers to escape liability for harassment even where their policies or procedures were demonstrably ineffective or when the plaintiff attempted to take advantage of the procedures but was rebuffed by the

---

plaintiff cannot factor into analysis of a hostile work environment claim); *Fernandez v. Pathmark Stores, Inc.*, 2006 WL 3093717 at *1-5 (N.J. App. Div. Sept. 27, 2006) (finding no reasonable jury could find severe or pervasive sexual harassment where plaintiff and the alleged harasser had an intimate relationship for about one year and after she ended the relationship the alleged harasser, *inter alia*, (1) followed her to her car, tried to grab her keys, slapped her in the face, and "repeatedly called her a bitch"; (2) "accused her of having sex with" a coworker "and spilled a can of soda on her"; (3) followed her to the bathroom and grabbed her on the shoulder; (4) told her husband they were having an affair; (5) "stopped plaintiff in the parking lot" and told her he loved her; (6) found plaintiff in another department and grabbed her by her wrist; and (7) told other employees he was "crazy in love" with plaintiff, causing plaintiff to go out on disability leave for over a year because of depression and anxiety); *Anastasia v. Cushman Wakefield*, 455 Fed. Appx. 236, 237-240 (3d Cir. 2011) (finding no reasonable jury could find severe or pervasive harassment where (1) plaintiff's superior informed her that "he was romantically attracted to her and had been for years," and then, over that day and the following day, followed her to the parking lot and gently grabbed her arm, asked her for a photograph of her and her new boyfriend, "concocted a pretext to have [plaintiff] meet him alone in a break room"; (2) plaintiff immediately took a temporary leave of absence, while her superior continued to call and send emails and text messages to her, despite her repeated statements that his further contact was unwanted; and (3) plaintiff refused to return to work when her employer refused to create an arrangement under which she would not ultimately have to report to the alleged harasser).

[124] *Aguas*, 220 N.J. 494; *see also Burlington*, 524 U.S. 742; *Faragher*, 524 U.S. 775.

[125] *Aguas*, 220 N.J. at 513 (quoting *Gaines v. Bellino*, 173 N.J. 301, 313 (2002)).

[126] *Id.*

employer.[127] For example, witnesses noted that under *Aguas*, courts have sometimes found that a policy or training alone is sufficient, without engaging in the required assessment of efficacy.[128] Witnesses at the hearings thus spoke out strongly in favor of eliminating the *Aguas/Faragher-Ellerth* affirmative defense to liability[129] and instead allowing employers to present evidence of effective policies and procedures to mitigate damages.[130]

Preventing Sexual Harassment Requires Proactive Work

Witnesses stressed that efforts to address sexual harassment once it has occurred are insufficient to change workplace culture in any meaningful way. Instead, witnesses detailed the need for proactive efforts designed to prevent sexual harassment from occurring by promoting a culture of prevention and institutional accountability.[131] Numerous witnesses called for increased anti-harassment education in schools and universities,[132] increased training in the workplace, with a focus on interactive live training,[133] and increased outreach to educate the public on their rights and inform employers, housing providers, and places of public accommodation of their responsibilities.[134] Multiple witnesses also testified to the need to hold institutions accountable by promoting transparency, including by requiring that employers report information about harassment complaints to DCR.[135]

---

[127] Hearing Transcript, 9/25/2019, at 41.
[128] Hearing Transcript, 9/25/2019, at 41 (Testimony of Ramya Sekaran, National Women's Law Center).
[129] *Aguas*, 220 N.J. 494.
[130] Hearing Transcript, 9/25/2019, at 41.
[131] *Id.*
[132] Hearing Transcript, 9/24/2019, at 62-63 (Testimony of Jeanne LoCicero, American Civil Liberties Union of New Jersey); *id.* at 86 (Testimony of Penny Venetis, Rutgers Law School International Human Rights Clinic); Hearing Transcript, 9/11/2019, at 38-39 (Testimony of Jill Zinckgraf, Domestic Abuse and Sexual Assault Crisis Center of Warren County).
[133] Hearing Transcript, 9/11/2019, at 55 (Testimony of Lou Kimmel, New Labor); *id.* at 74 (Testimony of Sarah McMahon, Center on Violence Against Women & Children, Rutgers University School of Social Work); Hearing Transcript, 9/24/2019, at 34 (Testimony of Debra Lancaster, Center for Women and Work, Rutgers University School of Management and Labor Relations); *id.* at 49 (Testimony of Kirsten Scheurer Branigan, KSBranigan Law P.C.); *id.* at 62 (Testimony of Jeanne LoCicero, American Civil Liberties Union of New Jersey); Hearing Transcript, 9/25/2019, at 43 (Testimony of Ramya Sekaran, National Women's Law Center); *id.* at 29-32 (Testimony of Louis Chodoff, Ballard Spahr, LLP).
[134] *See, e.g.*, Hearing Transcript, 9/24/2019, at 86 (Testimony of Penny Venetis; Rutgers Law School International Human Rights Clinic); Hearing Transcript, 9/11/2019, at 52 (Testimony of Sue Levine, 180 Turning Lives Around).
[135] Hearing Transcript, 9/25/2019, at 42 (Testimony of Ramya Sekaran, National Women's Law Center).

Part III. Recommended Legislative Amendments and Outreach Efforts

The key concerns raised at the hearings support two categories of recommendations: recommended legislative amendments, and recommended best practices for employers, housing providers, and places of public accommodation.

The LAD was the first state-level civil rights statute when it went into effect nearly 75 years ago. But the hearing testimony identified numerous ways in which the law should now be amended to adequately prevent sexual harassment and other forms of discrimination and bias-based harassment.

This section discusses recommended legislative amendments, and the next section discusses recommended best practices.

Expand the LAD's Protections to Additional Workers

The LAD explicitly exempts domestic workers from the definition of "employee,"[136] leaving domestic workers without legal protection from sexual harassment and other forms of bias-based harassment.[137]

As discussed in Part II, domestic workers and advocates highlighted at the hearings how the threat of sexual harassment in domestic work is profound and has a disproportionate impact on immigrant women and women of color.[138] The domestic workers who so courageously came forward to share their stories made one simple ask: **"**My ask is for you to include us. We always get excluded from every law out there. All I'm asking is … when this moves forward, please include [domestic workers]."[139]

Witnesses at the hearing highlighted that domestic worker exemptions like those in the LAD "perpetuate racial and gender inequality."[140] In fact, these exemptions have a troubling history. Domestic workers were excluded from the initial wave of labor protection laws passed as part of the New Deal because Southern Democrats refused to support the New Deal if it offered protections for domestic and agricultural workers, who were disproportionately Black.[141] Domestic work continues to be performed predominantly by

---

[136] N.J.S.A. 10:5-5(f).
[137] *See e.g.*, Hearing Transcript, 9/24/2019, at 38 (Testimony of Person Number 2, National Domestic Workers Alliance); *id.* at 23 (Testimony of Marrisa Senteno, National Domestic Workers Alliance) ("Sexual violence in domestic work is prevalent. There's no HR that domestic workers can report to, so there are no spotlights, no microphones in front of them to share their story. There's few laws on the books that can actually protect domestic workers from harassment and exploitation.").
[138] *Id.* at 21 (Testimony of Marrisa Senteno, National Domestic Workers Alliance) ("Domestic workers are mostly immigrant women of color and they're some of the most at risk and invisible workers in the nation.").
[139] *Id.* at 38 (Testimony of Person #2, National Domestic Workers Alliance).
[140] *Id.* at 26 (Testimony of Marrisa Senteno, National Domestic Workers Alliance) (testifying that domestic worker exclusions "perpetuate racial and gender inequality and … have no place in the workplace" and that other states that have amended their statutes to address domestic worker exclusions "have decided to cut those ties … to institutionalize[d] racism").
[141] Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 Ohio St. L.J. 95, 100-17 (2011).

women of color and, increasingly, immigrant women,[142] and the continued exclusion of domestic workers from anti-discrimination and other labor laws therefore continues to disproportionately deprive women of color of protection for bias-based harassment in their workplace.

The LAD should be amended to clearly protect domestic workers from harassment and retaliation.[143]

Witnesses also highlighted that unpaid interns should be explicitly protected by the Law Against Discrimination.[144] DCR thus recommends amending the definition of "employee" in the LAD to include unpaid interns.

Promote Prevention and Increase Accountability

Survivors, advocates, and experts at the hearings emphasized the importance of enacting measures designed to promote a culture of prevention and institutional accountability.[145] In the past few years, several States have passed legislation to require employers to take proactive measures to prevent sexual harassment, including requiring employers to maintain anti-harassment policies,[146] conduct anti-harassment training,[147] and notify employees of their right to be free from sexual harassment at work.[148] Numerous witnesses encouraged New Jersey to adopt similar legislation.[149] In addition, in light of the overwhelming testimony regarding the impact of intersecting identities, reforms intended to address sexual harassment should address all forms of bias-based harassment, including

---

[142] *See* Hearing Transcript, 9/24/2019, at 21 (Testimony of Marrissa Senteno, National Domestic Workers Alliance).

[143] Witnesses also urged New Jersey to follow the example of nine other states and at least one municipality that have passed a Domestic Workers Bill of Rights, which generally seeks to "includ[e] domestic workers in common workplace rights and protections [such as] paid overtime, safe and healthy working conditions, meal and rest breaks, earned sick time, and freedom from workplace harassment." *See* National Domestic Workers Alliance, "National Domestic Workers Bill of Rights," https://www.domesticworkers.org/bill-rights (last visited Dec. 24, 2019). Any such amendment is beyond the scope of this report.

[144] Hearing Transcript, 9/25/2019, at 36 (Testimony of Andrea Johnson, National Women's Law Center; Hearing Transcript, 9/24/2019, at 62 (Testimony of Jeanne LoCicero, American Civil Liberties Union of New Jersey) ("The law should be absolutely clear that employers are liable for harassment when experienced by any worker, regardless of their status on the payroll. We're talking about interns, … vendors, contractors, anyone in the workplace should be protected.").

[145] *See, e.g.*, Written Testimony of Andrea Johnson and Ramya Sekaran, National Women's Law Center.

[146] *See, e.g.*, Cal. Gov. Code § 12950; N.Y. Labor Code § 201-g(1); 19 Del. Code. Ann. § 711A(f); 26 Maine Rev. Stat. Ann. § 807; Mass. Gen. Law. Ann. ch. 151B § 3A(b).

[147] *See, e.g.*, Cal. Gov. Code § 12950.1; Conn. Gen. Stat. Ann. § 46a-54(15)(C); 19 Del. Code. Ann. § 711A(g); N.Y. Labor Code § 201-g(2); 26 Maine Rev. Stat. Ann. § 807(3);

[148] *See, e.g.*, Conn. Gen. Stat. Ann. § 46a-54(15)(A); Del. Code. Ann. 19 § 711A(f); 26 Maine Rev. Stat. Ann. § 807(1)-(2); N.Y. Labor Code § 201-g(2-a).

[149] *See, e.g.*, Written Testimony of Andrea Johnson and Ramya Sekaran, National Women's Law Center.

harassment based on race, sexual orientation, gender identity or expression, and disability, rather than focusing only on harassment based on gender.

Policies

Consistent with this testimony, DCR recommends amending the LAD to require employers to maintain clear, written policies concerning unlawful discrimination and harassment that detail prohibited conduct and outline the consequences of engaging in such conduct.[150] The LAD should require that such policies:

(1) Address discrimination, sexual harassment, and harassment on the basis of any other characteristic protected by the LAD;
(2) Include an unequivocal statement from management that unlawful discrimination and harassment in the workplace will not be tolerated and are considered a form of employee misconduct, and that sanctions will be enforced against individuals engaging in unlawful discrimination or harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue;
(3) Give clear definitions of prohibited conduct with examples;
(4) Clearly describe potential consequences for those who violate the policy;
(5) Detail the process for filing complaints;
(6) Include a statement of the employer's commitment to conducting thorough and impartial investigations;
(7) Provide information to allow survivors to seek redress, including information on how to contact DCR.[151]

The policies should be translated for employees whose primary language is not English and who have a limited ability to read, speak, write, or understand English. In addition, in order to facilitate employer compliance, DCR should be required to create model policies and make them available free of charge on their website.

Trainings

Witnesses also stressed the importance of meaningful training for both employees and supervisory staff.[152] In recent years, at least five States have passed legislation requiring mandatory sexual harassment training.[153] The LAD should be amended to require such training, as follows:

---

[150] Hearing Transcript, 9/25/2019, at 17-18 (Testimony of Michael Rojas, United States Equal Employment Opportunity Commission); *id.* at 27 (Testimony of Louis Chodoff, Ballard Spahr, LLP) ("[Sexual harassment policies] should describe what harassment is, what discrimination is, what retaliation is but not just words, they should include real life and easy to understand examples for employees."); Hearing Transcript, 9/11/2019, at 79 (Sarah McMahon, Center on Violence Against Women & Children, Rutgers University School of Social Work).
[151] *See* Written Testimony of Andrea Johnson and Ramya Sekaran, National Women's Law Center.
[152] Hearing Transcript, 9/25/2019, at 29-32 (Testimony of Louis Chodoff, Ballard Spahr, LLP).
[153] Written Testimony of Andrea Johnson and Ramya Sekaran, National Women's Law Center; *see, e.g.*, Cal. Gov. Code § 12950.1; Conn. Gen. Stat. Ann. § 46a-54(15)(C); 19 Del. Code. Ann. § 711A(g); N.Y. Labor Code § 201-g(2); 26 Maine Rev. Stat. Ann. § 807(3).

(1) To ensure protection for the most marginalized workers, training must
    a. be required in all workplaces,
    b. be accessible to those who do not speak English, and
    c. address sexual harassment, discrimination, and harassment on the basis of other characteristics protected by the LAD.
(2) In addition to training on all of the details of an employer's anti-discrimination and anti-harassment policy discussed above, the training must also address the appropriate responses to policy violations and include a segment on bystander intervention.
(3) There must be a separate training for supervisors on how to proactively prevent and respond to harassment, discrimination, and retaliation.
(4) Larger employers should be required to conduct live, in-person trainings, whereas smaller employers can rely on online training.

In order to facilitate employer compliance, DCR should be required to create model trainings, for both employees and supervisors, and make them available free of charge on its website.

Clarify Applicability of the Aguas/Faragher-Ellerth Affirmative Defense

As noted above, under both Title VII and the LAD, employers can currently raise as an affirmative defense to liability that they exercised reasonable care to prevent sexual harassment from occurring and that the plaintiff employee unreasonably failed to take advantage of preventative or corrective opportunities or to otherwise avoid harm.[154] Under *Aguas*, the five factors relevant to the assessment of whether an employer exercised reasonable care are: (1) whether there are formal policies prohibiting harassment in the workplace; (2) whether there are formal and informal complaint structures for employees to report violations of the policy; (3) whether the employer provides anti-harassment training to all employees, including mandatory training for supervisors and managers; (4) whether the employer has effective sensing or monitoring mechanisms to check the trustworthiness of the policies and complaint structures; and (5) whether the employer has demonstrated "an unequivocal commitment from the highest levels of the employer that harassment [will] not be tolerated, and demonstration of that policy commitment by consistent practice."[155]

However, if as recommended above, the LAD is amended to mandate that all employers (1) adopt formal anti-discrimination and anti-harassment policies in the workplace, including complaint structures for employees to report violations of the policy; and (2) provide anti-discrimination and anti-harassment training to all employees, including mandatory training for supervisors and managers, then permitting employers to use as a complete defense to liability their compliance with those statutory requirements to adopt formal policies and to provide training would mean that no New Jersey employer that complies with the mandatory policy and training requirements would ever be liable for sexual harassment in the future. The LAD amendments regarding mandatory policy and training requirements should therefore specify that an employer's compliance with those

[154] *Aguas*, 220 N.J. 494; *see also Burlington*, 524 U.S. 742; *Faragher*, 524 U.S. 775.
[155] *Aguas*, 220 N.J. at 513 (quoting *Gaines v. Bellino*, 173 N.J. 301, 313 (2002)).

statutory requirements will not be sufficient to establish a defense to liability for harassment under the Act.

Mandatory Reporting

Multiple witnesses identified benefits of promoting reporting around allegations of sexual harassment.[156] Increased reporting empowers survivors and "encourag[es] employers to invest in prevention."[157] Moreover, given the significant barriers for survivors to file complaints regarding sexual harassment identified at the hearings,[158] it is clear that only a subset of harassment incidents are reflected in formal complaints filed with DCR. Accordingly, DCR recommends amending the LAD to:

(1) Require larger employers to report to DCR the type, number, and ultimate resolution of internal discrimination, harassment, and retaliation complaints received;
(2) Require these same employers to maintain records of their internal investigations for a sufficient period to enable further investigation by DCR when warranted.

Remove Barriers to Survivors Obtaining a Just Outcome

Extend the Statute of Limitations

Currently, those who have suffered bias-based harassment have only 180 days to file a complaint with DCR and only two years to sue in court.[159] Many witnesses explained that the current filing deadlines are too short, especially for those who have suffered the trauma of sexual harassment,[160] and recommended that both deadlines be extended.[161]

DCR recommends extending the current statute of limitations for lawsuits in court from two years to three years and doubling the existing statute of limitations for filing claims with DCR from 180 days to one year.

Clarify Legal Standards for Sexual Harassment Claims

As discussed above, witnesses at the hearings expressed significant concern over unduly narrow interpretations of the "severe or pervasive" standard.[162] And some state and

---

[156] *See, e.g.*, *id.* at 42.
[157] *Id.*
[158] *See* Part II, *supra*.
[159] N.J.S.A. 10:5-12.11; *id.* 10:5-18.
[160] Hearing Transcript, 9/24/2019, at 61 (Testimony of Jeanne LoCicero, American Civil Liberties Union of New Jersey) ("The current 180 days for administering complaints is just too short and people seeking [redress] of their civil rights face many barriers [to] acting within six months, including not knowing their rights, fearing retaliation and then shouldering their work and family responsibilities ….").
[161] *See, e.g.*, *id.*; Written Testimony of Andrea Johnson and Ramya Sekaran, National Women's Law Center.
[162] *See* Part II, *supra; see also* Written Testimony of Andrea Johnson and Ramya Sekaran, National Women's Law Center ("[V]ictims may not step forward and make a complaint or seek help because they fear the harassment they are being subjected to would not be legally actionable.").

federal cases in New Jersey have misapplied the "severe or pervasive" standard to find that no reasonable jury could find "severe or pervasive" harassment even when the complainant had been grievously harmed by serious harassment.[163] Several witnesses urged the Legislature to take action,[164] noting that California recently enacted comprehensive legislation clarifying how courts should apply the severe and pervasive standard,[165] while New York recently eliminated the standard altogether.[166]

Because creating a completely new legal standard could cause confusion and lead to unintended consequences, DCR recommends amending the LAD to clarify how the "severe or pervasive" standard should apply. Specifically, DCR recommends that the Legislature clarify that:

- The standard for assessing unlawful harassment claims is that laid out in *Lehmann v. Toys R Us, Inc.*[167] and *Taylor v. Metzger.*[168]
- The existence of a hostile work environment depends upon the totality of the circumstances. When evaluating the severity or pervasiveness of harassing conduct, the cumulative effect of all incidents must be considered as a whole. Individual incidents must not be considered in isolation. While petty slights or trivial inconveniences are not actionable under the LAD, a court may not ignore or filter out abusive or offensive language, jokes, teasing, offensive comments, or isolated incidents when evaluating the totality of the circumstances.
- A single incident of harassing conduct may be sufficiently severe to create a triable issue of fact regarding the existence of a hostile work environment.
- Although the reasonable person standard outlined in *Lehmann* is an objective standard judged from the perspective of a reasonable person belonging to the same protected class as the complainant, the facts should not be assessed in sterile terms, stripped of the overlay of complainant's reactions. Instead, a complainant's subjective responses to the allegedly harassing conduct are part of the totality of the circumstances that are relevant to whether a reasonable person belonging to the same protected class would consider the conduct to be sufficiently severe or pervasive to alter the conditions of employment. In addition, the complainant's knowledge of harassment directed to others may be relevant to evaluating whether a hostile work environment exists, whether or not the complainant witnessed the harassing conduct.
- Harassment need not involve physical touching to qualify as severe or pervasive.

---

[163] *See* note 123, *supra*.
[164] *E.g.*, Hearing Transcript, 9/24/2019, at 55 (Testimony of Nancy Erika Smith, Smith Mullin, P.C.); Written Testimony of Andrea Johnson and Ramya Sekaran, National Women's Law Center.
[165] See Cal. Gov. Code § 12923; id. § 12940(j); Hearing Transcript, 9/25/2019, at 40 (Testimony of Ramya Sekaran, National Women's Law Center).
[166] N.Y. Exec. L. § 296(h); Hearing Transcript, 9/25/2019, at 40 (Ramya Sekaran, National Women's Law Center).
[167] 132 N.J. 587.
[168] 152 N.J. 490.

- Loss of tangible job benefits shall not be necessary in order to establish a hostile work environment. In addition, the complainant need not prove that his or her tangible productivity declined as a result of the harassment.

This legislation would disapprove of cases that have found or implied otherwise.[169]

Expand DCR's Outreach Efforts

Existing legal protections are of little use to survivors who do not know their rights, whether because they do not understand what fits the legal definition of harassment or because they do not know that the law exists at all. And existing legal protections also will not change the behavior of employers, housing providers, or places of public accommodation if those entities are unaware of their legal obligations.

Witnesses at the hearing echoed this theme,[170] and made clear how little New Jersey residents understand about the LAD and what it requires.[171] For example, several witnesses testified to the importance of ensuring that civil rights laws cover employees at small employers, but the LAD already covers all employers, regardless of size. Similarly, witnesses testified that independent contractors should be covered, but as discussed above in Part II, the LAD already provides sexual harassment protections for independent contractors. The testimony underscored the need for DCR to engage in a public outreach campaign to:

(1) Ensure that employers, landlords, and places of public accommodation understand their obligations under the LAD, both with respect to not engaging in unlawful harassment, discrimination, and retaliation, and with respect to how to respond when it occurs.[172]
(2) Prioritize marginalized communities with limited access to information, including domestic workers and others working in isolated professions; immigrant communities; and tenants in public and other subsidized housing.[173]
(3) Publicize and emphasize the LAD's protections against retaliation for reporting harassment and discrimination.[174]

---

[169] *See* note 123, *supra*.
[170] Hearing Transcript, 9/11/2019, at 61-62 (Testimony of Michael Campion, United States Attorney's Office for the District of New Jersey) ("[A]lmost everyone will know that it is wrong when their landlord, property manager or someone else sexually harasses them, but they may not know it's illegal."); Hearing Transcript, 9/24/2019, at 71 (Testimony of Helen Archontou, YWCA of Northern New Jersey – healingSPACE) ("When you're a young woman in a corporate environment things happen and you're not sure what to do about it.").
[171] Hearing Transcript, 9/24/2019, at 86 (Testimony of Penny Venetis, Rutgers Law School International Human Rights Clinic).
[172] *See, e.g.*, Hearing Transcript, 9/24/2019, at 52 (Testimony of Namrata Pradhan, Adhikaar).
[173] *See* Part II, *supra*; Hearing Transcript, 9/25/2019, at 22.
[174] *See* Part II, *supra*.

(4) Evaluate and implement effective programs directed at students in both secondary and post-secondary schools.[175]
(5) Promote public awareness of the ways in which New Jersey law is more protective than federal law[176] including, but not limited to, the following:
    a. The LAD covers all employers, regardless of size, even though Title VII only covers employers with at least 15 employees.[177]
    b. The LAD protects individuals who work as independent contractors rather than employees, even though Title VII protects only "employees" and not independent contractors.[178]

DCR has already created a set of fact sheets to publicize the law, and will engage in a sustained outreach campaign over the next several months.

[175] *See, e.g.*, Hearing Transcript, 9/24/2019, at 72 (Testimony of Helen Archontou, YWCA of Northern New Jersey – healingSPACE); *id.* at 86 (Testimony of Penny Venetis, Rutgers Law School International Human Rights Clinic) ("If a student abuses [during] his college years, that student is likely to be an abusive worker. Today's college students are tomorrow's managers.").
[176] *See* Part II, *supra*.
[177] *Compare* N.J.S.A. 10:5-5(a), 10:5-5(e), *with* 42 U.S.C. § 2000e(b).
[178] EEOC, "Coverage," *supra*; Written Testimony of Andrea Johnson and Ramya Sekaran, National Women's Law Center ("Legal protections against harassment extend only to 'employees' in most states and under federal law, leaving many people unprotected. … No worker should be left without legal recourse when harassment or discrimination occurs.").

Part IV. Best Practices

Survivors, advocates, and experts who testified at the hearings correctly explained that government alone cannot affect the cultural change required to stop the pervasive problem of sexual harassment. Instead, employers, housing providers, schools, and other places of public accommodation should each take responsibility for creating and maintaining a culture in which harassment and other forms of discrimination and bias-based harassment are not tolerated and are swiftly addressed. Witnesses at the hearing provided extensive testimony on best practices that employers and other entities can adopt in order to achieve that goal, and NJCASA is already working with the New Jersey Chamber of Commerce to offer seminars for New Jersey senior level business executives on how they can foster safer working environments. Although this section primarily focuses on best practices for employers, many can also be helpful for housing providers and places of public accommodation, including schools.

Implement Strong Policies and Effective Training

It is important that employers, housing providers, and places of public accommodation (including schools) adopt clear and comprehensive written policies addressing sexual harassment, discrimination, and other forms of bias-based harassment.[179] Strong policies set expectations by sending a top-down message that leadership is engaged in and committed to creating a culture in which unlawful harassment and discrimination do not occur.[180] As testimony at the hearings made clear, policies that are implemented merely to satisfy legal mandates are not nearly as effective in preventing harassment as policies that are developed with participation from impacted parties and that reflect a true commitment from an entity's leadership.[181]

To that end, witnesses offered clear guidance at the hearings regarding elements of the most effective policies (in addition to the proposals set out in Part III above, which would set a minimum floor for employer policies). Employers and other entities who have a code of conduct or other handbook governing behavior should incorporate an anti-harassment policy into its code of conduct.[182] If the entity has multiple policies addressing related topics, they should ensure that the anti-harassment policy is integrated with other relevant policies. For example, a policy addressing internet usage, email, or social media should

---

[179] Hearing Transcript, 9/24/2019, at 92-93 (Testimony of Rayba Watson, United States Equal Employment Opportunity Commission); Hearing Transcript, 9/25/2019, at 27-28 (Testimony of Louis Chodoff, Ballard Spahr, LLP) ("First and foremost … employers must have an appropriate policy in place to deal with sexual harassment and harassment of all kinds.").

[180] Hearing Transcript, 9/11/2019, at 73 (Testimony of Sarah McMahon, Center on Violence Against Women & Children, Rutgers University School of Social Work) ("There must not only be a clear message from the top about behavioral expectations, but that message must be reflected in action."); *id.* at 38 (Testimony of Jill Zinckgraf, Domestic Abuse and Sexual Assault Crisis Center of Warren County).

[181] *Id.* at 38 (Testimony of Jill Zinckgraf, Domestic Abuse and Sexual Assault Crisis Center of Warren County) ("Develop codes of conduct that are not generic or check an insurance's liability box, but rather developed and written by the people that have been impacted and disenfranchised.").

[182] Hearing Transcript, 9/25/2019, at 27 (Testimony of Louis Chodoff, Ballard Spahr, LLP).

make clear that harassment is prohibited over email or online, and a policy addressing fraternization should address prohibited harassment as well.[183] In addition, the most comprehensive policies seek to "prevent things that may not rise to the level of illegal harassment but are unprofessional and unwelcome conduct in the workplace."[184] For example, an isolated "joke" that demeans women or people of color may not rise to the level of illegal harassment (although it may, depending on the circumstances), but it is always unprofessional and unwelcome.

Witnesses also stressed the need for entities to reinforce their policies with effective training. Ultimately, the goal of effective training is to build a culture in which all employees, tenants, students, and patrons feel safe.[185] First, training should be conducted live whenever possible.[186] Live training is not only a more effective format for adult learning, but also allows those in positions of leadership to signal that they take the issue seriously. For this reason, leaders should make a point to attend training alongside those they supervise.[187] Second, as described above in Part III, training should empower participants to intervene appropriately when they witness harassment. This means not only training participants on the requirements of the policy prohibiting harassment and discrimination, but also training participants on tools for response, such as bystander intervention techniques.[188] Bystander intervention training "views everyone as a potential ally in preventing and combating sexual harassment and gives [all employees] the tools and skills to address harassment."[189] And it means emphasizing the negative impacts of harassment and discrimination on productivity, workplace culture, and on the business as a whole and encouraging those who witness either to report it.[190]

---

[183] *Id.* at 28-29 ("The policies should also be integrated with other related policies …. Employees need to know that if they're on the internet, if they're sending emails all of that is subject to the harassment policy as well.").
[184] *Id.* at 28.
[185] Hearing Transcript, 9/11/2019, at 55 (Testimony of Lou Kimmel, New Labor). The best practices recommended here would be in addition to the proposals set out in Part III above, which would set a minimum floor for employer trainings.
[186] Hearing Transcript, 9/24/2019, at 49 (Testimony of Kirsten Scheurer Branigan, KSBranigan Law P.C.) ("I strongly believe, like many others who have testified, that interactive live training is the key to preventing sexual harassment …."); Hearing Transcript, 9/25/2019, at 31 (Testimony of Louis Chodoff, Ballard Spahr, LLP) ("We like to recommend periodic in-person training because we found that the interactive process of the in-person training can be more effective and more engaging; we think people learn more with face to face in person training.").
[187] Hearing Transcript, 9/25/2019, at 29 (Testimony of Louis Chodoff, Ballard Spahr, LLP).
[188] Hearing Transcript, 9/11/2019, at 74 (Testimony of Sarah McMahon, Center on Violence Against Women & Children, Rutgers University School of Social Work) ("There is also evidence that many instances of harassment are witnessed by co-workers and peers, but they do not know how to intervene safely and effectively. We have good models for providing training on bystander intervention in schools and on campuses for sexual assault and I would argue that we need this for workplaces as well.").
[189] Hearing Transcript, 9/24/2019, at 34-35 (Testimony of Debra Lancaster, Center for Women and Work, Rutgers University School of Management and Labor Relations).
[190] Hearing Transcript, 9/25/2019, at 28 (Testimony of Louis Chodoff, Ballard Spahr, LLP).

Third, in addition to the supervisory training discussed above in Part III, supervisors should be held accountable for effectively monitoring and implementing anti-harassment policies.[191] As one expert testified, "It's not good enough for the supervisors just to enforce the policies; they need to act appropriately as well because the rank and file look to them. They set the tone for the organization."[192] Accordingly, the employer should make clear to supervisors that enforcing anti-harassment policies and setting the proper example is part of their job description and part of the evaluation of their job performance.[193]

Actively Encourage Reporting

As noted above, witnesses at the hearing repeatedly testified about survivors' well-founded fear of retaliation for reporting sexual harassment and other forms of bias-based harassment and discrimination. Therefore, it is particularly important that employers, housing providers, and places of public accommodation make a concerted effort to ensure that employees, tenants, students, and patrons feel comfortable using established reporting mechanisms.[194] Experts at the hearing provided guidance on what steps an entity can take to build faith in its reporting systems. First, as described in Part III, an entity's policy should clearly spell out its complaint procedure.[195] Second, it is equally important that an entity's procedure identify multiple avenues through which a survivor can report sexual harassment. For example, in employment, it is insufficient if an employee's only avenue for reporting is to file a report with their supervisor. That leaves many employees without meaningful options to report sexual harassment if their supervisor is the harasser.[196] Third, reporting policies and procedures should actively encourage those who witness harassment to report it.[197] To encourage such reporting, policies should explain that complaints generally will be treated confidentially and emphasize the prohibitions on retaliation,[198] and those to whom complaints may be made should actively welcome complaints.[199] Finally, when complaints are filed, it is essential that they are promptly investigated, that all reporting procedures are enforced, and that consequences follow when violations are found.

---

[191] *Id.* at 31.
[192] *Id.* at 30-31.
[193] *Id.* at 31 ("When you sit down and evaluate a supervisor one of the things that they should be evaluated on is how effectively they implement and monitor the policies, including the harassment policy and if they aren't doing a good job implementing and monitoring the policies it should reflect in their evaluations.").
[194] Hearing Transcript, 9/11/2019, at 22 (Testimony of Milly Silva, 1199 SEIU United Healthcare Workers East) ("It is very vastly underreported due partly through lack of adequate reporting policies, lack of faith in the reporting system, and fear of retaliation."); *id.* at 78-79 (Testimony of Rayba Watson, United States Equal Employment Opportunity Commission) ("Policies must be implemented, clearly articulated and enforced. Regardless of the industry type and size, employers must create a culture in which employees trust that their complaints will be heard and acted on.").
[195] Hearing Transcript, 9/25/2019, at 27 (Testimony of Louis Chodoff, Ballard Spahr, LLP).
[196] *Id.* at 27-28.
[197] Hearing Transcript, 9/24/2019, at 92 (Testimony of Rayba Watson, United States Equal Employment Opportunity Commission).
[198] Written Testimony of Kirsten Scheurer Branigan, KSBranigan Law, P.C.
[199] Kirsten Scheurer Branigan, et al., *Conducting Effective Independent Workplace Investigations in a Post-#MeToo Era*, 74 Dispute Resolution J. 85, 89 (2019).

As one expert testified, "employers must create a culture in which employees trust that their complaints will be heard and acted upon."[200] It is incumbent upon an entity's leadership to not only receive and investigate complaints, but ensure that they hold offenders accountable.[201]

Conduct Prompt, Thorough, and Impartial Investigations

Witnesses explained that when complaints are filed, it is essential that entities conduct prompt and thorough investigations.[202] These witnesses set out best practices for effective investigations, particularly by employers.

First, employers should allocate sufficient resources and authority to those responsible for investigating complaints to ensure a prompt and thorough investigation.[203] Employers should also ensure that those conducting investigations are impartial, objective, and well-trained.[204] This may include engaging experienced third parties trained in conducting impartial, independent investigations.[205]

Second, procedures for all stages of an investigation should be clear, and those procedures should be spelled out in the employer's policy. For example, employers should have clearly defined protocols for what triggers an investigation, how the investigation will be conducted, and how to conduct witness interviews.[206] They should also have clear rules governing how to appropriately conclude an investigation. Those rules should address the issuance of a final report, the retention of notes and other evidence from the investigation, protocols for communicating the results of the investigation to impacted parties, and appropriate post-investigation monitoring mechanisms.[207]

Third, employers should ensure that those participating in the investigations process have faith in the system. Therefore, employers should consistently enforce prohibitions on retaliation throughout the investigations process and maintain the confidentiality of the complainant to the fullest extent possible to prevent retaliation.[208] Moreover, those conducting investigations should treat all parties involved, including complainants, witnesses, and alleged harassers, with respect and compassion.[209]

Finally, employers should empower their investigators to reach meaningful conclusions and follow those conclusions up with corrective action. The employer should

---

[200] Hearing Transcript, 9/11/2019, at 78-79 (Testimony of Rayba Watson, United States Equal Employment Opportunity Commission).
[201] *Id.*; Hearing Transcript, 9/24/2019, at 92 (Testimony of Rayba Watson, United States Equal Employment Opportunity Commission).
[202] Written Testimony of Kirsten Scheurer Branigan, KSBranigan Law, P.C.
[203] Hearing Transcript, 9/24/2019, at 48 (Kirsten Scheurer Branigan, KSBranigan Law P.C.).
[204] *Id.*; Written Testimony of Louis L. Chodoff, Ballard Spahr, LLP.
[205] Branigan, et al., *supra*, at 90; Written Testimony of Louis L. Chodoff, Ballard Spahr, LLP.
[206] Hearing Transcript, 9/24/2019, at 48 (Testimony of Kirsten Scheurer Branigan, KSBranigan Law P.C.).
[207] *Id.* at 49.
[208] *Id.* at 48; Written Testimony of Louis L. Chodoff, Ballard Spahr, LLP, at 4.
[209] Branigan, et al., *supra*, at 89.

provide guidance to those conducting investigations on how to appropriately assess credibility, weigh evidence, make findings, and reach a conclusion.[210] Internal investigations should be substantiated if the investigator finds that it is more likely than not that harassment, discrimination, or retaliation occurred,[211] and employers should ensure that it is clear to investigators and all parties involved that complaints will be substantiated if they meet that threshold. Perhaps most critically, when investigations are substantiated, employers should impose appropriate consequences,[212] up to and including termination.[213]

Monitor for Compliance

Witnesses also testified about the importance of ensuring that employers' policies and procedures are actually working as intended to prevent sexual harassment from occurring. And given the pervasive fear of retaliation and the frequency with which supervisors themselves engage in sexual harassment, formal complaints do not always capture the full scope of the problem. As one witness testified, "Employers must understand that the absence of complaints does not mean that there are no offenses."[214] Rather, it may be a sign that employees are too afraid to report.[215]

Accordingly, employers should engage in proactive efforts to ensure compliance within their workplaces. Anonymous climate surveys are a particularly useful mechanism for monitoring the efficacy of an employer's anti-harassment and anti-discrimination prevention efforts. Climate surveys are "tool[s] used to assess an organization's culture by soliciting employee knowledge, perceptions, and attitudes on various issues."[216] These surveys can help employers get a more accurate measure of the nature and scope of harassment within their workplaces.[217] The information gleaned from climate surveys can help employers identify and address problems before they escalate, and can also better position employers to tailor training programs to the specific needs of their employees.[218]

---

[210] Hearing Transcript, 9/24/2019, at 48-49 (Testimony of Kirsten Scheurer Branigan, KSBranigan Law P.C.).
[211] *Id.* at 47.
[212] Branigan, et al., *supra*, at 89; Written Testimony of Louis L. Chodoff, Ballard Spahr, LLP ("Remedial action must be taken based on the investigation. … The remedial action should be measured to the facts of the situation.").
[213] Hearing Transcript, 9/25/2019, at 32 (Testimony of Louis Chodoff, Ballard Spahr, LLP).
[214] Hearing Transcript, 9/11/2019, at 79 (Testimony of Rayba Watson, United States Equal Employment Opportunity Commission).
[215] *Id.*
[216] Written Testimony of Andrea Johnson and Ramya Sekaran, National Women's Law Center.
[217] Hearing Transcript, 9/25/2019, at 43-44 (Testimony of Ramya Sekaran, National Women's Law Center).
[218] *Id.*

Conclusion

This Report highlights only some of the testimony survivors, advocates, and experts shared at the hearings. The overwhelming and relentless nature of sexual harassment reflected in witnesses' statements underscores that the time to act is now. The Report and the testimony received at the hearings provide support for legislative and policy changes to address the pervasiveness of sexual harassment. They will also inform DCR's efforts to engage in public education and outreach, both to ensure that members of the public know their rights and to ensure that employers, housing providers, and places of public accommodation understand their responsibilities to prevent sexual and other unlawful harassment and to promptly remedy it when it occurs.

Because combatting sexual harassment requires ongoing engagement by all who seek to end it, DCR welcomes further discussion of the issues and additional recommendations to improve the agency's public outreach and policy responses. Continued dialogue will be increasingly helpful as DCR begins creating resources and tools to guide compliance by employers, housing providers, and places of public accommodation.

Any New Jersey resident or employee who has experienced sexual or other unlawful harassment may file a complaint with DCR. New Jersey's LAD includes strong, anti-retaliation provisions designed to protect any person who comes forward. You may file a complaint by calling 973-648-2700, and you can find out more information about DCR on our website at NJCivilRights.gov.

Preventing and Eliminating Sexual Harassment in New Jersey

Findings and Recommendations from Three Public Hearings

DIVISION ON CIVIL RIGHTS

NJCivilRights.gov | 973-648-2700

NewJerseyOAG