

Antidiscrimination Within Your Medical Practice, Part II

By Margie Satinsky, M.B.A.

(This is the second in a three-part series on antidiscrimination laws and regulations that protect both the workforce and, more recently, patients.)

Last month we focused on new regulations that apply to patients. This month we'll look at antidiscrimination protection for your employees and for those who apply for employment in your practice. Next month we'll make suggestions for future direction in your practice.

What's the purpose of antidiscrimination legislation and programs that protect workforce members?

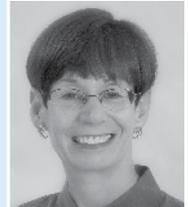
In order to give all workers a fair opportunity to get and keep jobs, the United States Congress, state legislatures and in some cases local governments have

passed laws that prohibit discrimination in the workplace. These laws fall into two major categories: equal employment opportunity (EEO) laws and affirmative action programs. Both are directed toward achieving social equity in the workforce for members of minority groups, women, people with disabilities and others who are members of a legally protected group.

Decisions on hiring, promotion, dismissal, pay increase, benefits, work assignment, leave of absence and other aspects of employment cannot be based on age, race, color, religion, gender or national origin.

Protective legislation for a person or group that has historically been treated differently from other people or groups of people at work is nothing new. Federal, state and

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local laws were first passed in the 1960s. Since then, numerous executive orders and court decisions have added protections to additional groups.

What specific federal laws deal with equal employment opportunity?

The important federal laws that impact EEO are the Equal Pay Act of 1963; Title VII of the Civil Rights Act, including all amendments; the Age Discrimination in Employment Act of 1967, as amended by the Older Workers' Benefit Protection Act; the Vocational Rehabilitation Act of 1973; the Genetic Information Nondiscrimination Act of 2008; the Vietnam Era Veterans Readjustment Act of 1974; the Pregnancy Discrimination Act of 1979; and the Americans with Disabilities Act (ADA) of 1990, including the Americans with Disabilities Amendment Act of 2008.

The Family and Medical Leave Act of 1993 applies to leave for employees after the birth or adoption of a child; to care for a

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seriously ill child, spouse or parent; or in the case of the employee's own serious illness. It also may include "military caregiver leave" in certain circumstances.

What federal laws deal with affirmative action?

The original basis for affirmative action programs was Executive Order 11246, issued in 1965 and later amended by Executive Order 11375. Over the years, Congress mandated affirmative action programs through grant authorization statutes included in the Law Enforcement Assistance Act (LEAA), federal revenue sharing, the Vocational Rehabilitation Act of 1973 and the Vietnam Era Veterans Readjustment Act of 1974.

What impact do state and local laws have on the federal requirements?

State law varies. North Carolina has several governing laws. The Equal Employment Practices Act (NC Gen.Stat. Ann 143-422.1 to 143-422.3) makes it illegal for an employer to discriminate on the basis of race, religion, color, national origin, age, sex or handicap (disability). Another statute prohibits discrimination on the basis of traits for sickle cell or hemoglobin C or other genetic information. Still another statute deals with discrimination on the basis of AIDS or HIV condition.

More recent laws such as House Bill 2 (HB2), a law that prevents transgender people from using government-run bathrooms corresponding to the gender with which they identify, have generated a great deal of controversy not only in the LGBT community but throughout the state and the country. Aside from the huge economic impact of HB2, many criticize not only the content of the law but the fact that it overrode a local law that was meant to expand, not shrink protection.

Do the EEO and affirmative action requirements apply to all employers?

Size matters. The EEO Act of 1972 strengthened the provisions of the original

1964 Civil Rights legislation by extending antidiscrimination programs to state and local governments, labor organizations and employers with 15 or more full- or part-time employees/members. Most state laws, including those in North Carolina, impose similar prohibitions against discrimination. In some cases, state laws are broader than federal law and apply to employers with fewer than 15 employees/members.

The Family and Medical Leave (FML) Act applies to employers with 50 or more employees. Smaller companies that are legally exempt from the requirement retain the right to set up programs. Should they do so, however, they should be clear that they are not providing statutory FML, lest they leave themselves open to an employee's asserting a contract claim. Furthermore, employers that are not quite at the 50-employee level should be mindful of the way in which the 50 is counted. Once they hit 50 as legally defined, they are required to offer FML.

The federal Age Discrimination and Employment Act applies to private businesses with 20 or more employees and to the federal government as an employer. It prohibits age discrimination against those who are 40 years or older. Read the fine print carefully. You can't treat employees under 40 more favorably, but you can treat older workers more favorably. For example, you might offer continuation of health insurance benefits to current employees who are 50 or older.

Affirmative action applies to fewer organizations than EEO. Executive Order 11246 requires that federal contractors and subcontractors with 50 or more employees and contracts of \$50,000 or more establish and maintain affirmative action programs. The approved plan must be maintained so it can be produced for the Office of Federal Contract Compliance Programs (OFCCP) in the event of audit, and it must be updated each year.

Are there exceptions to the EEO requirements?

There is an important exception to the EEO requirements called a bona fide occupational qualification (BFOQ). It applies when religion, sex, age or national origin is a business necessity. Race can never be considered a BFOQ. Here's an example of a special circumstance that would qualify as a BFOQ. If the employer is a religious organization that employs counselors who respond to inquiries from those interested in becoming members of that religion, the organization is allowed to make membership in that religion a requirement for the counselor position.

Why should my practice concern itself with compliance with EEO and affirmative action requirements?

There's a very practical reason to comply with EEO and affirmative action requirements. Should a job candidate, a workforce member or someone else raise a concern and file a complaint with the Equal Employment Opportunity Commission (EEOC), the burden on you will be onerous. Preparation, investigation and litigation are time consuming and expensive. Practices caught up in contentious situations generally require professional defense that doesn't come cheap.

Aside from cost and time, compliance makes good business sense. Demonstration of respect for all employees' rights can improve morale.

In North Carolina, where the 2016 passage of HB2 and subsequent federal challenges to the state law have created an awkward situation for all employers, be mindful of the law. Although Title VII of the Civil Rights Act of 1964 does not explicitly include sexual orientation or gender identity in its list of protected bases, the EEOC takes the position that employment actions motivated by gender stereotyping are unlawful sex discrimination.