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EEOC issues revised compliance manual to update information regarding race and color discrimination including “intersectional discrimination” (discrimination based on more than one protected category - e.g. race and gender).

EEOC Revises Compliance Manual to Target More “Contemporary” Forms of Discrimination

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With the stated purpose of reaffirming its commitment to end race-based discrimination in employment, the US Equal Employment Opportunity Commission (EEOC) revised its long-standing Compliance Manual on April 19, 2006, to address what it calls “contemporary discrimination issues,” according to a press release that accompanied the release of the revisions. In addition to defining race and color discrimination, the new Compliance Manual also addresses what it terms “related protected bases”—national origin, religion, and “intersectional discrimination,” i.e., discrimination based upon more than one protected basis, such as both race *and* sex. The Compliance Manual section also applies the new guidelines in the context of recruiting, hiring and promotion, diversity and affirmative action, harassment, discrimination, and retaliation scenarios. This new Compliance Manual section (as well as other selected sections from the new Compliance Manual) is available on the EEOC’s website: www.eeoc.gov.

What Employment Decisions Are Prohibited by Title VII?

The EEOC reiterated that Title VII prohibits race and color discrimination in “every aspect of employment” including:

- Recruitment
- Hiring
- Promotion

- Wages
- Benefits
- Work assignments
- Performance evaluations
- Training
- Transfer
- Leave
- Discipline
- Layoffs

Title VII also prohibits discrimination in any other term, condition, or privilege of employment.

The New Compliance Manual Section

The new Compliance Manual does not present a drastic change from the EEOC’s previous position on race and color discrimination issues. Rather, it is more of a clarification of the EEOC’s race and color discrimination guidelines.

The new Compliance Manual section reaffirms that Title VII encompasses race discrimination based upon not only ancestry and physical traits, but more subtle characteristics such as culture, race-linked illness (such as sickle cell anemia), perception of a person’s race, reverse race discrimination, and even association with a particular racial group.

With respect to color discrimination, in a companion *Questions and Answers About Race and Color Discrimination In Employment* issued in conjunction with its new section of the Compliance

Manual, the EEOC gives further guidance concerning the application of the standards regarding color discrimination. The EEOC notes that “color discrimination occurs when a person is discriminated against based on his/her skin pigmentation (darkness or lightness of the skin), complexion, shade or tone. Color discrimination can occur between persons of different races or ethnicities, or even between persons of the same race or ethnicity.” The inclusion of color bias within the EEOC’s guidelines is intended to help employers identify and prevent discrimination based on the lightness or darkness of a person’s skin, and not just their race or ethnicity.¹ The Questions and Answers state, as an example, that an African American employer would violate Title VII by refusing to hire other African Americans whose skin is either lighter or darker than his own. While the notion that members of a particular race or ethnicity could discriminate against each other under Title VII is nothing new, the EEOC has not previously identified skin color as a basis for such a claim with this level of specificity.

As to the category of “related protected bases,” the EEOC notes that some religions and national origins are also frequently intertwined with particular racial groups. For example, race and national origin frequently overlap with respect to Asian Americans, who may be of the same race but different national origins. Similarly, the Compliance Manual gives the example that, if an employee was both Asian and a Hindu, an employer’s discrimination against the employee might implicate both race and religion.

Following from the EEOC’s category of related protected bases of discrimination is the concept of “intersectional discrimination.” Title VII prohibits discrimination against African American women, for instance, even if there is no evidence of any discrimination against Caucasian women or African American men. Employers therefore need to be aware that, when evaluating claims of

discrimination, all possible protected categories need to be taken into account.

The new Compliance Manual section also restates that Title VII prohibits employers from specifically targeting or excluding particular ethnic groups in recruiting. However, it also clarifies that disparate impact may be shown where an employer recruits from nondiverse sources, such as certain neighborhoods, schools, religious institutions, and even word-of-mouth referrals from a nondiverse workforce. This has an important impact on employers, who may unintentionally violate Title VII by recruiting from largely homogenous sources. It is therefore essential that employers evaluate their recruiting procedures to ensure that they are selecting from a diverse pool of candidates.

Implications for Employers

It is clear that the EEOC is becoming more sophisticated in its approach to claims of race and color discrimination, as this new Compliance Manual section shows. Employers, too, will have to follow suit and become more sophisticated in their HR policies and practices. No longer is simply preventing and responding to just the most blatant claims of discrimination going to be enough. This new Compliance Manual section necessitates a thorough review of recruitment processes, as well as a heightened awareness of possible race and color discrimination and/or harassment claims by employees which might arise from subtle fact patterns. The good news is that the Compliance Manual provides helpful guidance in recognizing those less obvious race and color discrimination claims from employees, and those claims which might involve more than one protected basis. Of course, when problematic situations arise, experienced employment counsel should be consulted.

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¹ The EEOC reported on its website that color bias charges have risen from 413 in 1994 to 932 in 2004, an increase of over 125%. <http://www.eeoc.gov/types/race.html> Color bias still represents a fairly small sliver of total charges of discrimination filed with the EEOC under Title VII, however; a total 31,656 charges were filed in 1994 and 27,696 in 2004. Color bias charges thus represented a total of only 1.4% of the overall charges in 1994 and 3.3% in 2004. Id.