CHAPTER 15

DISCRIMINATION LAW

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15.1 Scope of This Chapter. This Chapter discusses the principal federal and state statutes enacted to combat discrimination, including Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Arizona Civil Rights Act.

Sections 15.2 - 15.26 address the application of the anti-discrimination laws in the context of employment by state agencies and other entities. Independent of the statutes discussed in this Chapter, other sources of law, including the state or federal constitutions, statutes and regulations, and the common law of contract and torts, may affect state employer-employee relationships, including claims of discrimination in the workplace. Accordingly, in addressing issues related to discrimination, state employers should consult with their legal counsel to ensure that all relevant laws are considered. For a general discussion of personnel issues, see Chapter 3 of this Handbook.

Section 15.27 addresses the important issue of preventing discrimination against persons with disabilities in the provision of public services or in public accommodations.

Other useful resources for topics addressed in this Chapter include:

For employment topics, the website for the U.S. Equal Employment Opportunity Commission at www.eeoc.gov, which includes general information and copies of pertinent policies, guidelines, and manuals.

For issues related to the Americans with Disabilities Act (ADA), the website at www.usdoj.gov/crt/ada/adahom1.htm or the Department of Justice ADA information line at 800-514-0301 (voice) or 800-514-0383 (TDD).

15.2 Title VII and the Civil Rights Act of 1991. The major modern antidiscrimination legislation affecting employment is Title VII of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000e to 2000e-17. Title VII prohibits discrimination in employment based on any of the following: race, color, religion, sex, national origin, or a person's association with a protected class member. Title VII also prohibits retaliation against an individual who has opposed a discriminatory practice, filed a discrimination charge, or otherwise participated in a judicial or administrative proceeding concerning a discrimination complaint. Title VII protects employees from discrimination in all aspects of the employment relationship, including hire, terms and conditions, benefits, promotion, layoff, and termination.

Title VII covers state and local governmental employers. Title III of the Civil Rights Act of 1991, 2 U.S.C. § 1220 (subsequently transferred to 42 U.S.C. §2000e-16c), gave previously exempt state employees many of the same procedural and substantive rights that Title VII provided. Title III covers members of an elected official's personal staff, those serving an elected official on a policy-making level, and those serving an elected official as immediate advisors with respect to the exercise of the office's constitutional or legal powers.[1]

The courts interpreted Title VII expansively throughout the 1970s and early 1980s, and the resulting developments included the disparate impact theory discussed below. In the latter half of the 1980s, the United States Supreme Court narrowed its interpretation of Title VII, making proof of discrimination by disparate impact more difficult. However, the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at Titles 2, 16, 29, 42 [including §§ 1981, 1981a, and 1988]), legislatively reversed in whole or in part these and other narrowing interpretations. *See, e.g.,* 42 U.S.C. § 2000e-2(k)(1), (n)(1). Other legislative reversals include the addition of § 2000e-2(m) (providing that a violation occurs if discriminatory intent is a motivating factor for any employment decision, even though there are other motivating factors) and 42 U.S.C. § 2000e(f) (providing protection for extraterritorial employment).

Federal decisions that predate November 21, 1991, should not be relied upon without checking the 1991 Act to see if the decisions remain intact. Where pre-1991 law is cited in this Chapter, the citations are either to decisions that the 1991 Act "reinstated" or to those that the Act did not affect.

15.3 The Arizona Civil Rights Act. When enacted in 1974, the Arizona Civil Rights Act, A.R.S. §§ 41-1401 to -1493.02, was similar to Title VII of the Civil Rights Act and included substantially identical substantive prohibitions, administrative remedies, and enforcement mechanisms. The Arizona Civil Rights Act has been amended several times. Currently it prohibits discrimination based on race, color, sex, religion, national origin, age, physical or mental disability, and genetic testing results, and prohibits retaliation because a person has opposed discriminatory practices, filed a discrimination charge, or otherwise participated in a judicial or administrative proceeding concerning a discrimination complaint. A.R.S. §§ 41-1463, -1464. The Arizona Civil Rights Act also created the Civil Rights

[1] This enactment was not, however, an amendment to Title VII. Under Title VII's definition of "employee," employees who serve elected officials still appear to be entirely exempt. *See* 42 U.S.C. § 2000e(f). Rules concerning the employment discrimination complaints of previously exempt state and local governmental employees can now be found at 29 C.F.R. §§ 1603.100 to 1603.215.

Division within the Arizona Attorney General's Office as a state counterpart to the federal Equal Employment Opportunity Commission (EEOC), A.R.S. § 41-1401(A); provided an administrative procedure for the filing and investigation of discrimination charges, A.R.S. § 41-1481(A) to (C); gave the Civil Rights Division (Division) the authority to go to court to enforce its discrimination findings, *id*. § (D); and gave the charging party the right to seek relief in court whether or not the Division found cause to believe that discrimination had occurred. *Id.*

To be covered by Title VII or the Arizona Civil Rights Act, the employer generally must have had fifteen or more employees for twenty or more weeks during the current or preceding year. 42 U.S.C. § 2000e(b); A.R.S. § 41-1461(6)(a). However, if the employee alleges sexual harassment under the Arizona Civil Rights Act, the employer need only have had one employee during the current or preceding calendar year. A.R.S. § 41-1461(6)(a).[2]

Title VII discrimination charges must be filed with the EEOC within 300 days of the most recent discriminatory action, 42 U.S.C. § 2000e-5(e)(1). Discrimination charges filed under the Arizona Civil Rights Act must be filed "within [180] days after the alleged unlawful employment practice occurred." A.R.S. § 41-1481(A).

The most common types of discrimination complaints include sexual harassment, pregnancy discrimination, failure to accommodate an individual's disability, or differential treatment based on race, sex, national origin, age, or disability. Other types of complaints include racial and ethnic harassment, disparate impact claims, pay disparity, and retaliation. Each of these bases is discussed below.

15.4 Race and Color Discrimination. Discrimination based on race or color,

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[2] The federal Equal Pay Act (EPA), 29 U.S.C. § 206, which is part of the Fair Labor Standards Act (FLSA), uses the FLSA's definition of "employer." That definition generally covers all persons whom an employer suffers or permits to work for it. 29 U.S.C. § 203(g). Exceptions exist for employees in the legislative branch who are not employed in the legislative library and for elected officials, members of their personal staffs, persons whom they appoint to policy-making positions, and their immediate advisors with respect to their constitutional or legal powers. *Id.* § 203(e)(2)(C). Other exemptions exist for certain federal employees, *id.* § 203(e)(2)(A); postal employees, *id.* § 203(e)(2)(B); agricultural employees, *id.* § 203(e)(3); and certain volunteers for state or local governments, *id.* § 203(e)(4). The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 to -634, contains similar exemptions, but also requires that an employer employ twenty or more employees for twenty or more weeks during the current or preceding calendar year. *Id.* § 630(b). This numerical requirement does not exist under the EPA.

which includes discrimination based on physical characteristics and skin color, violates Title VII and the Arizona Civil Rights Act. Title VII and the Arizona Civil Rights Act are violated when an individual is treated differently because of these factors or when an employer uses facially neutral criteria that disproportionately exclude individuals because of their race, unless the criteria are necessary to the safe and efficient operation of an employer's business. In addition, both acts prohibit harassment of an individual because of the individual's race or color or because the individual associates with persons of a different race or color. Race cannot be a bona fide occupational qualification. 42 U.S.C. § 2000e-2(e); A.R.S. § 41-1463(G)(1). *See* Section 15.17.1 for an explanation of a bona fide occupational qualification.

Like Title VII and the Arizona Civil Rights Act, 42 U.S.C. § 1981 also prohibits discrimination against members of majority groups such as whites or males. The operative language of § 1981 is "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." Caucasians, as well as minorities, may claim remedies for race discrimination under this section. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 286-87 (1976).

Other persons who are now usually considered to be Caucasians, such as Arabs and Jews, are also protected. *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (Arabs); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617-18 (1987) (Jews). Although there are no United States Supreme Court decisions on the precise issue, most courts agree that Hispanic Americans are also protected. *See*, *e.g., Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968. 970 (10th Cir. 1979); *Gomez v. Pima Cnty.*, 426 F. Supp. 816, 818 (D. Ariz. 1976).

15.5 National Origin Discrimination. National origin discrimination, which includes discrimination based on place of origin or on a physical, cultural, or linguistic characteristic of an identifiable group, violates Title VII and the Arizona Civil Rights Act. Theoretically, employers can claim that a particular national origin is a bona fide occupational qualification. 42 U.S.C. § 2000e-2(e); A.R.S. § 41-1463(G)(1). However, use of this defense has been minimal. The major issues relating to national origin discrimination are language and alienage. Decision makers facing either of these issues should consult their legal counsel.

15.5.1 Language. The EEOC has promulgated National Origin Discrimination Guidelines. 29 C.F.R. §§ 1606.1 to 1606.8. One of the guidelines discusses circumstances in which employers may and may not require that English be spoken on the job. *Id.* § 1606.7. This guideline provides that a "Speak English Only" rule that is applied at all times and at all places in the workplace presumptively violates Title VII. *Id.* § 1606.7(a). A more limited rule requiring employees to speak English at certain times and certain places violates Title VII unless the employer can show that business necessity justifies the rule. *Id.* § 1606.7(b). A limited rule that meets the business necessity requirement (such

as one related to health and safety concerns) will be acceptable only if the affected employee has notice of it. *Id.* § 1606.7(c). Regardless of the permissibility of such a rule during work hours, an employer should not restrict employees to the English language during lunch or break periods.

The Ninth Circuit has limited the EEOC rule with respect to bilingual employees. *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993). In *Spun Steak*, the court held that employees fluent in English and Spanish did not suffer harm when they were required to speak English on the job, absent other evidence of discriminatory behavior or unequal enforcement. *Id.* at 1489. Entities that serve the public, however, may have to take different considerations into account when dealing with bilingual employees. The Arizona Constitution requires that English be the exclusive language used by government representatives in official actions, but it also allows for unofficial communication in other languages. Ariz. Const. art. XXVIII, § 5. This allowance was made in response to the Arizona Supreme Court's 1998 holding that restricting non-English speakers' ability to seek and obtain information and services from the government is unconstitutional. *Ruiz v. Hull*, 191 Ariz. 441, 459, 957 P.2d 984, 1002 (1998), *cert. denied*, 525 U.S. 1093 (1999). Because many bilingual state employees can serve an important role in facilitating non-English speaking residents' efforts to communicate with the government, agencies should exercise caution concerning the use of language restrictions for staff.

Similarly, a requirement that an employee speak English not accented by a "foreign" pronunciation should be scrutinized for disparate impact under 29 C.F.R. § 1606.6(b)(1). A foreign accent that does not interfere with a worker's ability to perform his or her duties is not a legitimate justification under Title VII for an adverse employment decision. *Carino v. Univ. of Okla. Bd. of Regents*, 750 F.2d 815, 819 (10th Cir. 1984). *But see Fragante v. City of Honolulu*, 888 F.2d 591, 598-99 (9th Cir. 1989) (upholding a decision not to hire an individual of Filipino national origin as a clerk at an information counter where his accent prevented effective communication with the public).

15.5.2 Alienage. If a state agency excludes from employment non-citizens who have valid work authorizations, it must ensure that the decision does not have the effect of discriminating against applicants based on national origin. 29 C.F.R. § 1606.5(a). The agency must also comply with the Equal Protection Clause of the United States Constitution. A state agency may exclude a resident alien from employment based on the employee's need to formulate, execute, or review public policy in the position at issue, but not based on economic costs. *Compare, e.g., Cabell v. Chavez-Salido*, 454 U.S. 432, 445-46 (1982) (upholding exclusion of resident aliens from employment as peace officers); *Sugarman v. Dougall*, 413 U.S. 634, 646 (1973) (invalidating an exclusion of all resident aliens from employment in the competitive civil service for the purpose of reducing costs).

The Privileges and Immunities Clause of the United States Constitution also limits state rules that exclude out-of-state residents from employment. *See, e.g., Hicklin v. Orbeck*, 437 U.S. 518, 534 (1978) (invalidating hiring preference for Alaska residents in the oil and gas development area). In addition, the Immigration Reform and Control Act of 1986, as amended, restricts the employment of undocumented aliens, but prohibits discrimination based on a person's citizenship status or national origin and provides remedies for such discrimination. *See* 8 U.S.C. §§ 1324a(a), 1324b(a), 1324b(b). Similarly, the Legal Arizona Workers Act prohibits knowing or intentional employment of unauthorized aliens, A.R.S. §§ 23-212(A), -212.01(A), but also prohibits the investigation of unauthorized alien employment if that investigation is pursuant to a complaint "based solely upon race, color or national origin." *See* A.R.S. §§ 23-212(B), -212.01(B). The Supreme Court held that the Immigration Reform and Control Act does not preempt the Legal Arizona Workers Act. *Chamber of Commerce v. Whiting*, 131 S.Ct. 1968, 1987 (2011).

15.6 Religious Discrimination. It is unlawful to discriminate against a person because of his or her religion. Title VII and the Arizona Civil Rights Act also require an employer to accommodate the religious beliefs and practices of its employees. Making decisions about religious practices and beliefs as they affect the workplace requires the decision maker to consider factors different from those involved in other Title VII claims.

The EEOC has promulgated Religious Discrimination Guidelines, 29 C.F.R. §§ 1605.1 to 1605.3 to provide guidance. The following general principles govern an employer's duty to accommodate employees' religious beliefs and practices:

1. An employer is required to do more than treat persons of all religions in the same way. An employer is required to reasonably accommodate an employee's religious practice and belief if it can do so without undue hardship. 42 U.S.C. § 2000e(j); A.R.S. § 41-1461(13).

2. An employer has a duty to reasonably accommodate and not to discriminate not only with respect to religious beliefs, but also with respect to religious practices. 42 U.S.C. § 2000e(j); 29 C.F.R. § 1605.2; A.R.S. § 41-1461(13).

3. A religious belief or practice includes a moral or ethical belief as to what is right and wrong that is sincerely held with the strength of traditional religious views. 29 C.F.R. § 1605.1 (following the standard of *United States v. Seeger*, 380 U.S. 163 (1965)). An atheist employee may be protected. *Young v. Southwestern Sav. & Loan Ass'n*, 509 F.2d 140, 144-45 (5th Cir. 1975). Unless the employee's claimed belief or religious practice is bizarre, the State may not inquire into its sincerity. *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 715-16 (1981).

4. An employer's duty to accommodate a religious practice arises only if the accommodation does not impose an undue hardship. The duty does not require an employer to incur more than minimal costs or to take actions such as altering a seniority system or involuntarily transferring other employees. *Trans World Airlines v. Hardison*, 432 U.S. 63, 84 (1977). The employer is not required to accept an employee's suggested accommodation, but only to offer a reasonable one that removes the conflict. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67 (1986). However, speculative future difficulties do not constitute undue hardship. "[The] mere possibility that there would be an unfulfillable number of additional requests for similar accommodations by others cannot constitute undue hardship." *Opuku-Boateng v. California*, 95 F.3d 1461, 1474 (9th Cir. Cal. 1996). "A claim of undue hardship cannot be supported by merely conceivable or hypothetical hardships; instead, it must be supported by proof of 'actual imposition on co-workers or disruption of the work routine.'" *EEOC v. Alamo Rent-A-Car L.L.C.*, 432 F. Supp. 2d 1006, 1015 (D. Ariz. 2006).

An employer must show that it made an effort to reasonably accommodate, offered a reasonable accommodation that would eliminate the religious conflict, or that it would have been an undue hardship to accept the employee's request. *Opuku-Boeteng*, 95 F.3d at 1467. Reasonable accommodations may include schedule changes, leaves, or transfers. An employer's duty to accommodate also includes attire and grooming practices, but safety issues are considered. *See, e.g., Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1384 (9th Cir. 1984) (holding that religious requirement not to shave could not be accommodated because of safety reasons). An employer's proposal to allow an employee to wear a religious head covering only when not interacting with clients is not a reasonable accommodation. *Alamo Rent-A-Car L.L.C.*, 432 F. Supp. 2d at 1013.

If the employer is a governmental entity or if it engages in state action, it must consider the interplay among the First Amendment to the United States Constitution; article II, section 12 of the Arizona Constitution; and state and federal provisions that require employers to reasonably accommodate religious beliefs and practices. An employer is not required to accommodate an employee's desire to impose his religious beliefs on his co-workers, *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 607 (9th Cir. 2004), and the First Amendment does not protect such activities, *Bodett v. COXCOM, Inc.*, 366 F.3d 736, 748, 1007 (9th Cir. 2004); *see also* Ariz. Const. art. II, § 6 ("every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right"). Thus, the State, as an employer, has the right and the duty to prevent religious proselytizing by both coworkers and supervisors.

Decision makers facing problems that involve preferring or disadvantaging one religion over another or a religious institution over a nonreligious entity or that involve the

sincerity of or the need to accommodate a religious belief or practice should consult their legal counsel.

15.7 Sex Discrimination. Sex discrimination violates Title VII and the Arizona Civil Rights Act. Claims of sex discrimination may be analyzed in any of three ways: facial discrimination, disparate treatment, or disparate impact.

The EEOC has promulgated Sex Discrimination Guidelines. 29 C.F.R. §§ 1604.1 to 1604.11. These Guidelines recognize that facial discrimination charges may be defended on the grounds that sex is a bona fide occupational qualification. *Id.* § 1604.2; *see also* A.R.S. § 41-1463(G)(1). The EEOC interprets this defense very narrowly, recognizing that excluding one sex is appropriate only under very limited circumstances, such as when an actor must be of one sex to preserve a production's authenticity. 29 C.F.R. § 1604.2(a)(2).

The Guidelines indicate that an employer cannot establish that sex is a bona fide qualification when its defense is based on assumptions about comparative employment characteristics of women (such as the assumption that women experience a higher turnover rate than men), when it is based on stereotypes about the sexes (such as the assumption that women lack aggressiveness), or when it is based on the preferences of the employer, coworkers, clients, or customers. *Id.* § 1604.2(a).

15.7.1 Pregnancy/Maternity Discrimination. Congress amended Title VII in 1978 to define sex discrimination to include discrimination based on pregnancy, childbirth, or related medical conditions. 42 U.S.C. § 2000e(k). Although the Arizona Civil Rights Act (ACRA) did not subsequently undergo a similar change, Arizona courts have held that discrimination based on pregnancy and pregnancy-related conditions is sex discrimination prohibited by state law, including A.R.S. § 41-1463(B) of the ACRA. *See, e.g., Broomfield v. Lundell*, 159 Ariz. 349, 353, 767 P.2d 697, 701 (App. 1989) (superseded by statute on other grounds); *Godfrey v. Indus. Comm'n*, 124 Ariz.153, 157, 602 P.2d 821, 825 (App. 1979).

A real barrier for women exists when positions for which they have applied are denied because of a pending pregnancy or a related maternity leave. This practice is prohibited and on its face violates Title VII. 42 U.S.C. § 2000e-2; *see also* A.R.S. § 41-1463(E).

Employers are required to treat disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery the same as they do all other temporary disabilities. *See* 42 U.S.C. § 2000e(k); 29 C.F.R. § 1604.10. Employers must apply policies and practices concerning the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits, and reinstatement and payment under any health or disability insurance or sick leave plan to disabilities due to

pregnancy-related conditions on the same terms and conditions as they apply them to other disabilities. 29 C.F.R. § 1604.10(b). Nevertheless, an employer may opt to provide greater benefits to pregnant employees than it does to nonpregnant employees without violating the discrimination provisions. *Cal. Fed. Sav. & Loan Ass'n v. Guerra,* 479 U.S. 272, 287 (1987); *Wimberly v. Labor & Indus. Comm'n*, 479 U.S. 511, 522 (1987). For example, an employer may opt to provide leave and reinstatement benefits to pregnant employees when it does not provide these benefits to nonpregnant employees or to provide medical coverage for pregnancy-related expenses during an exclusion period when it does not similarly waive the exclusion for nonpregnancy-related preexisting conditions. *See* Appendix to 29 C.F.R. § 1604—Questions and Answers on the Pregnancy Discrimination Act.

Although an employer's leave policy may generally limit the amount of leave that an employee may take, application of the policy to pregnant women based on pregnancy-related conditions may nevertheless constitute discrimination. Insufficient leave policies (typically less than six weeks) that adversely affect pregnant employees and for which there is no business necessity are illegal. *See* 29 C.F.R. § 1604.10(c). When making decisions about leave for pregnancy or maternity-based conditions, the employer also must consider the requirements of the Federal Family Medical Leave Act, 29 U.S.C. § 2611.

15.7.2 Sexual Harassment. Beginning in approximately 1976, some courts identified sexual harassment as a form of sex discrimination, but it was not until 1986 that the Supreme Court first dealt definitively with the issue. At that time, the EEOC had listed the following elements of a cause of action for sexual harassment:

> [U]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly a term of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a).

In *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57, 72-73 (1986), the Court approved these Guidelines and recognized that a sexually hostile environment may violate Title VII even when no specific economic or monetary harm results. The Court also held that determining whether sexual harassment has occurred turns on whether the alleged victim indicated by conduct that the alleged sexual advances were welcome, not

whether participation in the sexual conduct was voluntary. *Id.* at 68.

In 1992, the Court held that for a sexually hostile environment to be actionable under Title VII, it must be both objectively and subjectively offensive, *i.e.,* one that a reasonable person would find to be hostile or abusive and one that the victim in fact perceived to be so. In making this determination, the fact finder should consider the totality of the circumstances, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Sys.*, *Inc.*, 510 U.S. 17 (1992).

Meritor and *Harris* accepted the quid pro quo and hostile environment analyses that lower courts had adopted in dealing with sexual harassment cases. Under those theories, an employer was liable for quid pro quo harassment when the employee proved her reaction to the harassment affected tangible aspects of her compensation or the terms, conditions, or privileges of her employment; in hostile environment cases, the employer was liable when the employee's working conditions were changed and, as a result of the harassment, she was compelled to work in a hostile, intimidating, and offensive environment. Employers were liable for quid pro quo harassment if even one incident was proven, while liability under a hostile environment theory arose only when the conduct was severe or pervasive.

Subsequently, the Supreme Court held that same-sex sexual harassment is a form a sexual harassment. *Oncale v. Sundowner Offshore Servs.*, *Inc.*, 523 U.S. 75, 79-80 (1998).

15.7.2.1 Hostile Work Environment Sexual Harassment.

In *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998), the Supreme Court applied *respondeat superior* principles to refine possible grounds for an employer's liability for hostile work environment sexual harassment. If harassment is established and the harasser is so highly ranked to be considered an alter-ego for the company, the employer has no defense to liability. *Ellerth*, 524 U.S. at 758. If harassment is established and the harasser is a supervisor, the employer has no defense to liability if the employee suffers tangible harm, such as discharge, demotion, or undesirable reassignment, as a result of the harassment. *Faragher*, 524 U.S. at 808. If the employee has not suffered tangible harm but has been sexually harassed by a supervisor, then the employer may avoid liability if it can prove (1) that it exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and (2) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities that the employer provided or to otherwise avoid harm. *Ellerth*, 524 U.S. at 765.

In *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013), the Supreme Court held that an employee is a "supervisor" for purposes of vicarious liability under the *Ellerth/Farragher* framework if that employee is empowered by the employer to take tangible employment actions against the plaintiff. Under *Vance*, "tangible employment actions" are defined as actions that "effect a significant change in employment status," such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. *Id.* at 2443.

Neither *Ellerth* or *Farragher* dealt with coworker sexual harassment. However, lower courts consistently have held that an employer is liable for the sexual harassment of an employee by a nonsupervisory coworker when the employer knew or reasonably should have known that the harassment was occurring and failed to take preventive or curative measures. *See, e.g., Dawson v. Entek Int'l*, 630 F.3d 928, 938 (9th Cir. 2011); *see also* 29 C.F.R. § 1604.11(f). In addition, courts have held employers liable for the sexual harassment of employees by third parties when the employer was aware of the harassment and failed to respond appropriately. *Lockard v. Pizza Hut*, 162 F.3d 1062, 1072-73 (10th Cir. 1998).

In determining whether hostile work environment sexual harassment has occurred, the fact finder must evaluate the offensiveness of the conduct from the perspective of a reasonable victim of the same sex as the complainant. *Oncale,* 523 U.S. at 81; *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991). In this regard, offensive conduct does not need to be expressly sexual to establish a claim for sexual harassment; the issue is whether the alleged harasser's behavior affected employees of one sex more adversely than it affected employees of the other sex. *EEOC v. National Educ. Ass'n,* 422 F.3d 840, 845 (9th Cir. 2005). The fact finder also must ensure that the victim is not left in a worse position as a result of making the complaint. *See Ellison*, 924 F.2d at 882. Finally, in deciding whether to take action, an employer must balance the need to take effective action against the potential liability for terminating an individual accused of unlawful sexual harassment. *See Snipes v. United States Postal Serv.*, 677 F.2d 375, 377-78 (4th Cir. 1982). To justify terminating an alleged harasser, an employer must demonstrate that it had a reasonable basis for believing that the alleged harasser engaged in the unlawful conduct and that termination was appropriate under the circumstances. *See id.* at 376-78.

Summary of hostile work-environment sexual harassment claims and defenses:

If the harasser is a:	*Then the employer is liable for the harassment when*	*Unless the employer can show that*
person who is high-ranking enough to be considered the alter ego of company or public entity	**harassment occurs.**	
supervisor	**harassment occurs and results in a negative employment action.**	
supervisor	**harassment occurs and causes a hostile working environment.**	**it took reasonable steps to prevent and to quickly stop harassing behavior and the employee unreasonably failed to take advantage of the employer's efforts to prevent or stop the harassing conduct or to avoid harm.**
coworker	**the employer knew or should have known about the discrimination.**	**it took immediate and appropriate corrective action.**
nonemployee (e.g., customer, student, sales personnel)	**the employer knew or should have known about the discrimination.**	**it took immediate and appropriate corrective action.**

15.7.2.2 Quid Pro Quo Sexual Harassment.

Claims of quid pro quo sexual harassment follow the *McDonnell Douglas* model for proving inferential disparate treatment claims. *Heyne v. Caruso*, 69 F.3d 1475, 1478 (9th Cir. 1995). In order to establish a prima facie case of quid pro quo sexual harassment, the evidence must show that the employer "explicitly or implicitly condition[ed] a job, a job benefit, or the absence of a job detriment, upon [the employee's] acceptance of sexual conduct." *Id*. If the employee establishes a prima facie case of quid pro quo sexual harassment, then the employer must articulate a legitimate, non-discriminatory reason for its conduct. If the employer meets this burden, the employee can still prevail if the evidence as a whole demonstrates that the employer's explanation is pretextual and that it is more likely than not that the real reason for the employment decision (*e.g.,* undesirable

reassignment, termination) was that the employee refused the sexual advances of the employer. *Id.* at 1478-79.

15.8 Equal Pay Discrimination. The federal Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), prohibits an employer from paying an employee of one sex less than it pays an employee of the opposite sex when the two perform substantially equal work involving substantially equal skill, effort, and responsibility under substantially similar working conditions. The employer may defend against an alleged violation by proving that the wage differential is based on its seniority system, merit system, piecework system, or any factor other than sex. 29 U.S.C. § 206(d)(1). These four exclusive affirmative defenses have been incorporated into the Arizona Civil Rights Act. *Higdon v. Evergreen Int'l Airlines, Inc.*, 138 Ariz. 163, 165, 673 P.2d 907, 909 (1983); *see also* A.R.S. § 41-1463(I)(1).

The Equal Pay Act does not require that an employer have any minimum number of employees to be subject to its requirements. 29 U.S.C. § 206(d); *see also* 29 U.S.C. § 203(d), (e) (defining "employer" and "employee"). In contrast, the Arizona Civil Rights Act only applies to employers that have fifteen or more employees. A.R.S. § 41-1461(5), (6).

Once an employee has established that the employer pays him or her less than it pays a member of the opposite sex for substantially equal work, the burden shifts to the employer to show that the wage differential is justified under one of the Equal Pay Act's four exceptions. *Higdon*, 138 Ariz. at 166, 673 P.2d at 910. To establish the "factor other than sex" defense, an employer must demonstrate that use of the factor is reasonable in light of the employer's stated purpose as well as its other practices. *Id*.

Under the federal scheme, violations that occur during different pay periods constitute separate violations. *Soler v. G & U Inc.,* 86 F.R.D. 524, 528 (S.D.N.Y. 1980) (interpreting 29 U.S.C. § 255(a)). Where liability is found, the employer is liable for double the wage differential. 29 U.S.C. § 216(b). An employee has two years in which to bring a claim under the Equal Pay Act. 29 U.S.C. § 255. The Arizona Civil Rights Act, however, imposes a 180-day filing requirement for a discrimination charge, A.R.S. § 41-1481(A). It also requires an employee to file a lawsuit based on disparity in pay within one year from the date of filing the discrimination complaint. A.R.S. § 41-1481(D). There are exceptions to these time periods for continuing systemic violations.

The employer may not lower the wage of a more highly paid employee in response to this type of claim. 29 U.S.C. § 206(d)(1). Claims for unequal wages may also be brought under Title VII.

15.9 Lilly Ledbetter Fair Pay Act. In *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621 (2007), the Supreme Court held that an employer's decision with respect to setting pay is a discrete act of discrimination, and that the relevant period of limitations

for a pay discrimination claim begins to run when the act first occurs. The Court held that a plaintiff who alleges that she is paid less today than her male colleagues solely because, during an earlier period of time (outside of Title VII's limitations period), she was denied appropriate salary increases on account of her sex, does not state a claim cognizable under Title VII. More particularly, the Court held that each paycheck a plaintiff receives that she asserts is less than it would be but for past discrimination does not constitute an actionable wrong. *Id*. at 628.

Congress superseded the *Ledbetter* decision by enacting the Lilly Ledbetter Fair Pay Act of 2009 ("Ledbetter Act"), Pub. L. No. 111-2, S 181, 123 Stat. 5 (2009), which amended Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, Americans with Disabilities Act of 1990, and the Rehabilitation Act of 1973. The Ledbetter Act provides that discrimination in compensation occurs when either (1) a discriminatory compensation decision or other practice is adopted; (2) an individual becomes subject to a discriminatory compensation decision or other practice; or (3) 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. *Id.* § 2000e-5(e)(3)(A). The Act applies not only to direct compensation decisions but also to any other practice that in whole or part impacts wages, benefits, or other compensation. *Id*.

The Ledbetter Act deems each paycheck issued pursuant to a discriminatory compensation decision or pay structure an independent, actionable act. *Id*. It applies to all claims of discrimination in compensation that are or were pending on or after May 28, 2007. Ledbetter Act, sec. 6. Thus, the Ledbetter Act effectively restarts the statute of limitations for any claim that present compensation would be more but for past discrimination with the issuance of each paycheck.

However, the Supreme Court has held that the Ledbetter Act does not apply to employer actions that were not discriminatory at the time at which they were taken, but were later made unlawfully discriminatory through legislation. *AT&T Corp. v. Hulteen*, 129 S. Ct. 1962, 1972-73 (2009). In *Hulteen*, an employer calculated seniority differently for men and women based upon whether medical leave had been taken for pregnancy. *Id.* at 1967. When such disparate calculation was made illegal, the employer amended its calculation procedure to account for the new legislation but did not retroactively amend the seniority calculations made prior to the legislation. *Id*. The Supreme Court held that no retroactive amendment is necessary if the calculation was lawful at the time at which it was made and the calculation was part of a "bona fide seniority system." *Id.* at 1967-69.

15.10 Harassment. Harassment cases most often involve sexual harassment, but may also involve color, national origin, age, religion, or disability. In general, these harassment claims are analyzed under the same legal standard. *See* EEOC Enforcement

Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, *available at* www.eeoc.gov/policy/docs/harassment.pdf. To constitute discrimination, the harassing conduct must be unwelcome and either severe or pervasive enough to interfere with an individual's work performance or to create an intimidating, hostile, or offensive working environment. *See, e.g.,Vasquez v. Cnty. of Los Angeles*, 349 F.3d 634,642 (9th Cir. 2003) (harassment based on race), *Kang v. U. Lim America, Inc.*, 296 F.3d 810, 817 (9th Cir. 2002) (harassment based on national origin).

15.11 Age Discrimination. The federal Age Discrimination in Employment Act (ADEA) prohibits age-based discrimination against employees forty years of age or older. 29 U.S.C. §§ 621 to 634. The Arizona Civil Rights Act mirrors that provision. A.R.S. § 41-1465. Because the ADEA prohibits discrimination based on age rather than on class membership, the appropriate inquiry under it is whether a younger person (who may still be over 40) was treated more favorably than a significantly older person, not whether one person is in the protected age category and the other is not. *O'Connor v. Consol. Coin Caterers*, 517 U.S. 308, 311-12 (1996). The EEOC has published guidelines on age discrimination. 29 C.F.R. §§ 1625.1 – .32.

In addition to prohibiting actual age discrimination, the ADEA makes it unlawful for an employer to print or publish any notice or advertisement relating to employment that reflects a preference, limitation, specification, or discrimination based on age. 29 U.S.C. § 623(e). To prove intentional discrimination under the ADEA, the plaintiff must establish that his or her age was the but-for cause of the employer's allegedly discriminatory conduct. *Ross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176 (2009).

An employer may violate the ADEA through neutral policies that have a disparate impact on older employees as well as through practices that are facially discriminatory. For example, an employer that prohibits retired employees from returning to work may be discriminating against older workers because there is a close correlation between age and retirement—the factor upon which the discrimination is based. *E.E.O.C. v. Local 350*, 998 F.2d 641, 646, 648 n.2 (9th Cir. 1992). Other policies that may negatively impact older employees include a requirement of a "recent" educational degree and a prohibition on employing individuals who are receiving social security benefits. Absent a justification of business necessity, a neutral policy that affects older employees more than younger ones is impermissible.

If an employer does set an age limitation for employment, the limitation must be justified as a bona fide occupational qualification. 29 U.S.C. § 623(f)(1); A.R.S. § 41-1463(G)(1). To justify an age cap, the employer must show (1) that having employees younger than that age in that position is reasonably necessary to the essence of the employer's business and (2) that the employer has a factual basis for believing that all or substantially all persons over the set age are unable to safely and efficiently perform that

job or that it is impracticable to make determinations of ability on an individual basis. *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236-37 (5th Cir. 1976). The Ninth Circuit has adopted the *Usery* standard. *EEOC v. Santa Barbara Cnty.*, 666 F.2d 373, 376 (9th Cir. 1982); s*ee also EEOC v. L.A. County*, 706 F.2d 1039, 1042-1043 (9th Cir. 1983).

Firefighters and law enforcement officers whom the State or the State's political subdivisions employ are subject to special coverage. It does not violate the ADEA for a State or political subdivision to refuse to hire or to discharge a person because of the person's age if "the individual has attained the age of hiring or retirement in effect under applicable . . . law on March 3, 1983." 29 U.S.C. § 623. A 1996 amendment to the ADEA permits state or local entities to enact new legislation (1) establishing a maximum age for hiring law enforcement officers and firefighters, as long as the maximum age for hiring is not lower than the one set on March 3, 1983, and (2) establishing a new age for mandatory retirement or discharge of law enforcement officers and firefighters as long as that age is not less than fifty-five. If the state law sets an age other than fifty-five for discharge or retirement, the legally permissible age will be the older of age fifty-five or the age set out in a state law enacted after September 30, 1996. *Id.* § 623(j)(1). Any such age-based hiring or discharge must be made pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the ADEA's purposes. *Id.* § 623(j)(2). The Arizona Civil Rights Act has not contained an age exemption since 1994, and it covers any person forty years of age or over. A.R.S. § 41-1465. Therefore, state law age limitations on the hiring, discharge, and forced retirement of firefighters and law enforcement officers must be justified as bona fide occupational qualifications.

Both the Arizona Civil Rights Act and the ADEA prohibit mandatory retirement based on age. 29 U.S.C. § 623(f)(2); A.R.S. § 41-1463(G)(4)(b). Since the passage and subsequent amendment of the Older Workers Benefit Protection Act (OWBPA), 29 U.S.C. §§ 621, 623, 626, 630, however, the ADEA's exemption is phrased in different terms than the state law exemption. Among other things, the OWBPA prohibits discrimination against older workers in all employee benefits, except when significant cost considerations justify age-based reductions in employee benefit plans. *Id.* § 623(f)(2). The OWBPA also requires an employer to give its employees notice and to follow detailed steps if it wishes the employees to waive ADEA rights in return, for instance, for severance pay or an enhanced benefit package. *Id.* § 626(f). Employee benefits law, including the portion that governs what age-based distinctions may be permissible, is highly complex and specialized. Only those knowledgeable in that law should make decisions in this area.

15.11.1 Waivers. Older workers can waive the protections that the OWBPA offers them. For such a waiver to be valid, it must be knowing and voluntary. *Id.* § 626(f)(1)**.** An agreement that an employee will not bring an action under the ADEA is enforceable if it meets the following requirements:

1. It is part of a written agreement, *id.* § 626(f)(1)(A);

2. It specifically refers to rights and claims under the ADEA, *id.* § 626(f)(1)(B);

3. "[T]he individual does not waive rights or claims that may arise after the date [of the agreement]," *id.* § 626(f)(1)(C);

4. The employee receives valuable consideration for the waiver in addition to that which the employee would be entitled to receive, *id.* § 626(f)(1)(D);

5. The employee "is advised in writing to consult with an attorney," *id.* § 626 (f)(1)(E);

6. The employee is given at least twenty-one days to review the agreement, *id.* § 626(f)(1)(F);

7. The employee is given at least seven days after signing the agreement to revoke it, *id.* § 626(f)(1)(G);

8. If the agreement is made during a layoff, it meets the additional requirements for waivers made during layoffs, *id.* § 626(f)(1)(H).

An agreement that the employee will not sue the State under the ADEA is not enforceable unless these requirements have been met. An agreement that purports to waive an individual's ADEA rights but that does not strictly comply with these requirements is not enforceable and will not bar a subsequent lawsuit—even if the complainant has retained the consideration that the agreement specified. *Oubre v. Entergy Operations*, 522 U.S. 422, 427-28 (1998).

As with Title VII, employers cannot rely on pre-1990 opinions interpreting the ADEA—particularly those involving benefits or waivers of rights—without checking subsequent legislation.

15.12 Discrimination Based on Disability. Employees are protected from discrimination based on disability by state and federal law. Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 to 12213, is the federal law that prohibits discrimination in employment against individuals with disabilities. The state law, the Arizona Civil Rights Act (ACRA), was amended in 1994 to include disability as a protected category. The ADA was intended to be consistent with Title V of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 to 796, so that agencies that complied with that law would also be in compliance with the ADA. The ADA sets the *minimum* level of

protection afforded to individuals with disabilities; other state or federal law may offer greater protections. 29 C.F.R. § 1630.1(c).

The ADA prohibits all governmental entities from discriminating in employment against individuals with physical or mental disabilities. The ADA also covers private employers with fifteen or more employees. Though Title II of the ADA covers discrimination in employment by governmental entities, the regulations that the EEOC promulgated for Title I are used to interpret Title II's employment provisions. These Title I regulations are at 29 C.F.R. §§ 1630.1 to 1630.16. All references in this section are to those regulations, and further information about compliance with the ADA's employment discrimination provisions should be obtained by referring to the regulations.

Employers may not discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a). Discrimination also includes failure to provide reasonable accommodations for known disabilities (see discussion below). A "qualified individual with a disability" is a person who has a disability and who, with or without reasonable accommodation, can perform the essential functions of the job. *Id.* § 12111(8).

15.12.1 Defining Disability.

The ADA defines disability as:

> (1) a physical or mental impairment that substantially limits one or more of the major life activities of an individual;
> (2) a record of such an impairment; or
> (3) being regarded as having such an impairment.

Id. § 12102(1); 29 C.F.R. § 1630.2(g).

Arizona's definition of "disability" mirrors the federal definition. A.R.S. § 41-1461(4).

In 2008, Congress passed the Americans with Disabilities Act Amendment Act (ADAAA) to reverse the effect of several Supreme Court cases that had narrowed the definition of disability in the years since the passage of the ADA. The ADAAA makes it clear that the definition of disability is to be construed broadly. In 2010, the ACRA was amended to reflect the ADAAA's inclusive understanding of "disability." *See* A.R.S. § 41-1461(9).

When analyzing whether a person has an "actual disability," in other words, whether a person is disabled under the first part of the disability definition, an employer must consider the effect of the individual's impairment upon a major life activity. *Bragdon v. Abbott*, 524 U.S. 624, 637 (1998). Major life activities include such things as walking, sleeping, speaking, breathing, working, concentration, engaging in sex, reproduction, the operation of major bodily functions, including the immune system and endocrine system, and interacting with others. A.R.S. § 41-1461(9)(a). They are basic activities that the average person in the population can perform with little or no difficulty. *McAlindin v. Cnty. of San Diego*, 192 F.3d 1226, 1233 (9th Cir. 1999), *opinion amended*, 201 F.3d 1211 (2000); 29 C.F.R. § 1630.2(i).

The ADAAA's explicit definition of major life activities makes it clear that diseases such as diabetes and cancer are included in the definition of disability. *See* 42 U.S.C. § 12102(2). Whether an impairment substantially limits a major activity does not take into account the effects of mitigating measures such as medication. In other words, whether a person has a disability depends on whether that impairment would substantially limit a major life activity *without* regard to whether mitigating measures eliminate or reduce the impact of the impairment. 29 C.F.R. § 1630.2(j)(vi). In addition, an impairment that is episodic (such as epilepsy) or in remission (such as cancer) is a disability if it would substantially limit a major life activity when active. *Id.* § 1630.2(j)(vii). However, an impairment that is temporary or non-chronic, such as a seasonal flu or a broken bone that is expected to heal completely, does not qualify as a disability.

An individual may be disabled under the ADA and the ACRA if s/he has a record of disability. 42 U.S.C. § 12102(1); A.R.S. § 41-461(4)(b). In this situation, the individual had an impairment that substantially limited one or more major life activity at some point in the past, but is no longer substantially limited. *See* 29 C.F.R. § 1630.2(k)(i). An individual might also meet this prong of the definition if s/he was once misclassified as having a substantially limiting impairment. *Id.* An employer's knowledge of the past impairment is not related to whether the person meets the definition of disabled under this prong (though absence of such knowledge would be relevant to whether the employment made a discriminatory employment decision).

An individual may be "regarded as" having a disability when his or her employer takes an action prohibited by the ADA and the ACRA based on an individual's impairment or an impairment the employer believes the individual has. 42 U.S.C. § 12102(1); A.R.S. § 41-1461(4)(c). For instance, if an employer learns that an employee takes an anti-seizure medication and terminates the employee for that reason, the employer has regarded the employee as having a disability, even if the employer does not know the impairment for which the medication is being used. Under the ADAAA, an employer need not provide a reasonable accommodation for an individual who meets the definition of disabled under this prong. 42 U.S.C. § 12201(h).

If an individual meets one of these three definitions of disability, an employer must consider whether the individual is "qualified" under the ADA and the ACRA. Disability does not include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identify disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, or pyromania. 29 C.F.R. § 1630.3(d).

15.12.2 "Qualified Individual" with a Disability.

The ADA protects a qualified individual with a disability who, with or without a reasonable accommodation, can perform the essential functions of the job. 42 U.S.C. § 12111(8). A person is "qualified" if s/he has the requisite education, skills, experience, licenses, etc. required for the position. 29 C.F.R. § 1630.2(m).

> **For example**: Employer A wants to hire a nurse practitioner to provide specialized nursing care. An individual who has received her certification as a nurse practitioner, who meets the experience requirements of the job, and who has excellent references from former employers applies for the job. She has breast cancer that is in remission. She is a "qualified" individual with a disability.

The ADA prohibits discrimination based on stereotypes or impressions about what individuals with disabilities can or cannot do. *See Bragdon v. Abbott,* 524 U.S. 624, 626 (1998). It requires an employer to make employment decisions based on an individual's qualifications and abilities in light of the specific duties of the job. Employers must avoid making decisions based on stereotypes about disabilities or other fears about an individual's disability. For instance, an employer may not refuse to hire a qualified individual with bipolar disorder because of fear that the individual may require hospitalization in the future or because the employer believes that individuals with bipolar disorder may become violent.

A person who is **currently** engaging in the use of illegal drugs is not a qualified individual with a disability. 29 U.S.C. § 1630.3(a). However, a person who has successfully rehabilitated and is no longer engaging in the illegal use of drugs is considered a qualified individual with disability if s/he meets the other requirements. *Id.* § 1630.3(b).

The ADA and the ACRA also prohibit discrimination against individuals who are associated with others who have disabilities, such as individuals who volunteer at a hospice or persons who have individuals with disabilities living with or dependent upon them. 42 U.S.C. § 12112(b)(4); 29 C.F.R. § 1630.8.

15.12.3 Defenses Available to Employers.

An employer who engages in activity that would otherwise violate the ADA and the ACRA may have a defense in certain situations. If the adverse employment decision was made because of a "legitimate, non-discriminatory reason," the employer will not be liable. 29 C.F.R. §1630.15(a). For instance, if an individual with a disability is terminated and the employer can establish that the termination was due to a violation of policies and procedures (and the termination would have occurred whether the individual had a disability or not), the employer will have established that there was a legitimate, non-discriminatory reason for the termination.

Additionally, an employer may utilize qualifications standards that screen out or tend to screen out individuals with disabilities if those qualification standards are **"job-related and consistent with business necessity."** 29 C.F.R. § 1630.15(b)(1). An employer who requires as a job qualification that an employee meet an otherwise applicable federal safety regulation does not have to justify enforcing the regulation. *See Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 577-78 (1999). However, application of the federal safety standard must be an essential function of the position. For instance, an employer cannot rely on Department of Transportation driving standards to deny employment where they are inapplicable to the type of vehicle the employee actually drives. *See Bates v. United Parcel Servs., Inc.*, 511 F.3d 974, 994 (9th Cir. 2007).

An employer may make an otherwise discriminatory employment decision if the individual poses a direct threat to the health or safety of him/herself or others where the direct threat cannot be eliminated by a reasonable accommodation. 42 U.S.C. § 12113(b). The determination that an individual poses a "direct threat" must be based on an individualized assessment of the employee's or applicant's present ability to safely perform the job's essential functions and on valid medical analyses or other objective evidence. It must be made on a case-by-case basis and must rely on objective, factual evidence—not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes about the nature or effect of the particular disability. *See, e.g., Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1248 (9th Cir. 1999). Employers should take care to explore whether a reasonable accommodation exists that would eliminate the threat or enable the employee to meet the qualification standard before taking an adverse employment action against an individual with a disability.

15.12.4 Reasonable Accommodation. The ADA and the ACRA define discrimination to include failure to provide "reasonable accommodation" to a qualified individual with a disability. A.R.S. § 41-1463(F)(4). An employee should be reasonably accommodated if the accommodation is necessary to give the individual the same opportunity to perform the job or enjoy the same benefits of employment as an individual without disabilities. *See EEOC Enforcement Guidance on Reasonable Accommodation*

and Undue Hardship Under the ADA (October 17, 2002) at www.eeoc.gov/policy/docs/accommodation.html. A "reasonable accommodation" may include but is not limited to the following:

1. An accommodation that is required to ensure equal opportunity in the application process, such as appropriate adjustment or modification of examinations, training materials, or policies;

2. An accommodation that allows the employee to perform the essential functions of the position held or desired, such as part-time or modified work schedules; acquisition or modification of equipment or devices; or the provision of qualified readers or interpreters;

3. An accommodation that enables the employee to enjoy the same benefits or privileges of employment that are enjoyed by other employees without disabilities, such as modification of break rooms, lunch rooms, training rooms, etc.;

4. Job restructuring by reallocating or redistributing nonessential or marginal job duties; and

5. Reassignment or transfer to another vacant position when accommodation within the individual's current position would pose an undue hardship on the employer (though reassignment is not required if it would violate the terms of a collective bargaining agreement).

42 U.S.C. §§ 12111(9), 12112(b)(5); 29 C.F.R. § 1630.2(o)(2). For examples and ideas about accommodations that exist for particular jobs and specific disabilities, employers may consult the *U.S. Department of Labor Job Accommodation Network* at http://askjan.org/.

An employer must accommodate the known disabilities of a qualified applicant or employee. 29 C.F.R. § 1630.9. If the disability or the need for accommodation is not obvious, an employer may request documentation to confirm a disability and the need for an accommodation. *EEOC Enforcement Guidance on Reasonable Accommodation*. Employers **may not** ask for all of the individual's medical records and, if necessary to obtain medical records, should ask for a medical release that is limited to information about the nature of the impairment and the types of functional limitations it causes. Employers may ask that documentation be provided by an appropriate medical professional, which can include medical doctors, psychologists, therapists, nurses, and vocational rehabilitation specialists. *EEOC Enforcement Guidance on Reasonable Accommodation, supra*.

Accommodations must be made on an individual basis because the nature and extent of the impairment and the requirements of the job will vary in each case. An individual's need for an accommodation cannot enter into the decisions that an employer makes regarding hiring, discharge, promotion, or related matters unless the accommodation would impose an undue hardship upon the employer. 29 C.F.R. § 1630.9(b). A reasonable accommodation must be effective. In determining what accommodation(s) will be effective, an employer must engage in the "interactive process" with the employee. This means that the employer and the employee should engage in a dialogue to determine what type of accommodation is needed and whether alternative accommodations exist. The employer does not have to provide the accommodation sought by the individual, so long as the accommodation provided is effective. However, the employee/applicant is often the most knowledgeable person regarding what accommodation(s) would be effective.

An employer is not required to provide an accommodation to a qualified individual with a disability if providing the accommodation would be an undue hardship. 29 C.F.R. § 1630.2(p). "Undue hardship" means "significant difficulty or expense in, or resulting from, the provision of the accommodation." *Id.* To determine whether an employer has demonstrated "undue hardship," the following factors must be considered:

- The nature and cost of the accommodation, taking into account any tax credits, deductions, or outside funding that may be available;

- the overall financial resources of the office or facility at which the accommodation would be provided, including the number of employees at that location;

- the overall financial resources of the covered entity (in other words, the entity that employs the individual), including the number of employees and the number of office or facility locations;

- the impact of the accommodation on the facility.

Id.

An employer that relies on the defense of "undue hardship" must demonstrate that it made all reasonable efforts to provide the needed accommodation, but was unable to do so. 42 U.S.C. § 12112(b). When analyzing a disability case, it is important not to rely on religious accommodation Title VII standards because the duty to provide reasonable accommodations under the ADA is higher. The ADA requires individualized assessment of reasonable accommodations. *See* Sections 15.12 to 15.12.4.

15.12.5 Medical Inquiries and the Confidentiality of Medical Information. In addition to prohibiting discrimination against persons with disabilities and requiring reasonable accommodations, the ADA prohibits employers from making medical inquiries or requiring physical examinations at the pre-offer stage of the selection process. 42 U.S.C. § 12112(d); 29 C.F.R. §§ 1630.13(a), 1630.14(a).

An employer may require a medical examination after it has made a job offer, but before the employee has begun working, if all employees are required to undergo the examination and the employer keeps the medical information confidential. 42 U.S.C. § 12112(d)(3). Employers cannot make medical inquiries or require medical examinations of current employees unless the examination or inquiry is job-related and is consistent with business necessity. 42 U.S.C. § 12112(d)(4); 29 C.F.R. §§ 1630.13(b),1630.14(b). Any information that the employer obtains as a result of a permitted medical inquiry or examination must be kept apart from its general personnel files as a separate, confidential medical record and may be made available only under very limited conditions. 42 U.S.C. § 12112(d)(3)(B), (4)(C); 29 C.F.R. § 1630.14(b), (c). The ADA creates a cause of action for all job applicants and employees, disabled or not, who are injured by impermissible questions about their medical history. *Griffin v. Steeltek, Inc.*, 160 F.3d 591, 594-95 (10th Cir. 1998). The EEOC has issued *Enforcement Guidance on Disability Related Inquires and Medical Examinations of Employees under the ADA* (July 26, 2000) available at www.eeoc.gov/policy/docs/guidance-inquiries.html.

15.12.6 Other Legislation Prohibiting Discrimination Against Persons with Disabilities. The Rehabilitation Act, which has been in effect since 1973, prohibits discrimination based on physical and mental disability. It applies to federal contractors and recipients of federal grants. 29 U.S.C. §§ 701 to 796. The State, as a federal contractor or recipient of federal grants, must comply with the Rehabilitation Act. The definition of disability is the same under the ADA and the Rehabilitation Act. 42 U.S.C. § 12102(1); 29 U.S.C. § 705(9).

15.12.7 Practical Pointers. To ensure compliance with the ADA's requirements regarding employment decisions, the supervisor or manager should keep several things in mind:

1. Hiring decisions must be based on each applicant's qualifications for a particular job.

2. If an employer has prepared a job description or advertisement as part of its recruitment process, that description or advertisement will be evidence of all physical, mental, or other qualifications for the job. Job descriptions should be updated periodically to ensure that they reflect the qualifications actually necessary for the job as it is being performed.

3. The obligation of reasonable accommodation begins with the recruitment process, continues throughout the individual's employment, and includes not only job duties, but the benefits of employment as well. Where an accommodation is not obvious, an employer must engage in an interactive process with the applicant/employee to determine what accommodation(s) may be necessary.

4. The reasonable accommodation obligation may require an employer to treat a disabled employee differently from other employees so as to provide an accommodation that will afford the employee an equal opportunity to work and to enjoy the benefits of work.

5. Reasonable accommodation requires an individualized assessment of the nature and extent of an individual's disability and an analysis of what kinds of accommodation will be most useful in permitting the individual to perform the particular job in question. That information will frequently be most readily available from the individual. The ADA therefore requires the employer and the individual with a disability to engage in an interactive process.

6. An employer may not reject an individual with a disability for employment because of a concern that the individual will require an accommodation to perform the job.

7. After an employer provides a reasonable accommodation to an employee with a disability, the law presumes that the employer will treat the employee exactly as it does nondisabled employees with respect to benefits, opportunities, expectations, and other conditions of employment.

8. The prohibition against disability discrimination also forbids discrimination against those who have a disabled person living with or dependent upon them. This means that it is unlawful to refuse an individual employment because of concerns that the dependent with disabilities will increase the employer's costs of providing insurance or will distract the employee from his or her work.

See generally EEOC Technical Assistance Manual on Employment Provision of Title I of ADA, dated January 27, 1992 at http://askjan.org/links/ADAtam1.html.

15.13 Genetic Information Discrimination. The Genetic Information Nondiscrimination Act of 2008 (GINA) (Pub. L. 110-233), which enacted 26 U.S.C. § 9834, 42 U.S.C. §§ 300gg-53, 1320d-9, and 2000ff to 2000ff-11, amended 26 U.S.C. §§ 9802

and 9832, 29 U.S.C. §§ 216, 1132, 1182, and 1191b, 42 U.S.C. §§ 300gg-1, 300gg-21, 300gg-22, 300gg-61, 300gg-91, and 1395ss, and enacted provisions set out as notes under 26 U.S.C. § 9802, 29 U.S.C. §§ 216 and 1132, and 42 U.S.C. §§ 300gg-1, 1320d-9, 1395ss, and 2000ff, took effect on November 21, 2009. Title II of GINA prohibits the use of genetic information in making employment decisions, restricts acquisition of genetic information by employers and other entities covered by Title II, and strictly limits the disclosure of genetic information. 42 U.S.C. § 2000ff-1; -5.

"Genetic information" under GINA includes information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about any disease, disorder, or condition of an individual's family members (*i.e.,* an individual's family medical history). *Id.* § 2000ff(4).

GINA forbids discrimination on the basis of genetic information when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits, or any other term or condition of employment. *Id.* § 2000ff-1(a); -4(a). Under GINA it is also illegal to harass a person because of his or her genetic information, or to retaliate against an applicant or employee for filing a charge of discrimination, participating in a discrimination proceeding (such as a discrimination investigation or lawsuit), or otherwise opposing discrimination. *Id.* § 2000ff-6(f).

It will usually be unlawful under GINA for an employer to get genetic information, unless it qualifies for one or more of six narrow exceptions:

- Inadvertent acquisitions of genetic information (*e.g.,* a manager overhearing someone talking about a family member's illness) do not violate GINA.

- Genetic information (such as family medical history) may be obtained as part of health or genetic services, including wellness programs, offered by the employer on a voluntary basis, if certain specific requirements are met.

- Genetic information may be acquired as part of the certification process for FMLA leave (or leave under similar state or local laws) where an employee is asking for leave to care for a family member with a serious health condition.

- Acquisition through commercially and publicly available documents like newspapers is permitted, as long as the employer is not searching those sources with the intent of finding genetic information.

- Acquisition through a genetic monitoring program that monitors the biological effects of toxic substances in the workplace is permitted where the monitoring is required by law or, under carefully defined conditions, where the program is voluntary.

- Acquisition of genetic information of employees by employers who engage in DNA testing for law enforcement purposes as a forensic lab or for purposes of human remains identification is permitted, but the genetic information may only be used for analysis of DNA markers for quality control to detect sample contamination.

Id. § 2000ff-1(b).

It is also unlawful for an employer to disclose genetic information about applicants or employees. *Id.* § 2000ff-5. Employers must keep genetic information confidential and in a separate medical file. *Id.* Genetic information may be kept in the same file as other medical information in compliance with the ADA. There are limited exceptions to this non-disclosure rule.

Employment discrimination based on the results of genetic testing has been prohibited under the Arizona Civil Rights Act since 1997. *See* A.R.S. § 41-1463(B)(3).

15.14 Intersectional Discrimination. Courts have recognized that discrimination may not be limited to separate race and sex categories, but rather may be based upon a combination of such categories. In *Lam v. Univ. of Hawaii*, 40 F.3d 1551, 1562 (9th Cir. 1994), the Ninth Circuit noted:

> [W]here two bases for discrimination exist, they cannot be neatly reduced to distinct components. Rather than aiding the decisional process, the attempt to bisect a person's identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences. Like other subclasses under Title VII, Asian women are subject to a set of stereotypes and assumptions shared neither by Asian men nor by white women.

15.15 Retaliation. Retaliatory action by the employer that occurs after the complainant has engaged in protected conduct is illegal under Title VII, the ADEA, the ADA, the EPA, GINA, and the Arizona Civil Rights Act. These statutes make it unlawful to take adverse action against any individual because that person has opposed an unlawful employment practice or has filed a charge or otherwise participated in an investigation, proceeding, or hearing pertaining to a discrimination complaint. *See, e.g.,* 42 U.S.C. § 2000e-3(a); A.R.S. § 41-1464. Both current and former employees are protected. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

An employee's complaints about an employer's treatment of others is considered

protected activity, even if the complaining employee is not in the same protected class as the employees who allegedly suffered discrimination. *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000). It also is unlawful to retaliate against an employee because of the protected actions of someone closely related to or associated with the employee. *Thompson v. North Am. Stainless, L.P.*, 131 S. Ct. 863, 867-68 (2011) (firing employee because his fiancée filed an EEOC discrimination charge violates Title VII's anti-retaliation provisions).

Employees are considered to have "opposed" an employment practice when they have opposed what they reasonably perceived to be unlawful discrimination. *Freitag v. Ayers*, 468 F.3d 528, 542 (9th Cir. 2006). Complaining employees must have a factual basis for reasonably believing that their employers engaged in unlawful discrimination within the meaning of the provisions. *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1013 (9th Cir. 1983). But employees need not prove that the conduct that they opposed in fact violated anti-discrimination provisions. *Learned v. City of Bellevue*, 860 F.2d 928, 932 (9th Cir. 1988). An "adverse action" is any employer action that "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Burlington Northern & Sante Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (*quoting Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

However, claims alleging, for example, that the employer retaliated because an employee filed a workers' compensation claim, objected to nonpayment of overtime, reported Occupational Safety Health Association (OSHA) violations, or opposed other activities that fall outside the scope of the discrimination provisions are not proper retaliation claims under the discrimination provisions, absent other evidence of discrimination. *See, e.g., Learned,* 860 F.2d at 932 (suit for "excess damages" under industrial insurance statute that did not involve discrimination allegations not protected activity under Title VII). Remedies for retaliation not based on discrimination can be found in other statutes. *See, e.g.*, A.R.S. § 38-532.

A common form of protected activity is an employee complaint to a supervisor or an affirmative action officer that an employer is engaged in an activity or practice that discriminates because of race or sex. *See, e.g., Ray v. Henderson*, 217 F.3d 1234, 1240 n.3 (9th Cir. 2000) (making an informal discrimination complaint to a supervisor is protected activity). Other protected activities include filing a criminal assault complaint against a supervisor, *EEOC v. Dinuba Med. Clinic*, 222 F.3d 580, 586 (9th Cir. 2000); notifying a customer of EEOC charges and conclusions against the employer, *Crown Zellerbach*, 720 F.2d at 1013-14; and helping another employee file an EEOC charge, *EEOC v. California Psychiatric Transitions, Inc.*, 725 F. Supp. 2d 1100, 1108 (E.D. Cal. 2010). However, an employee's conduct will not be protected if it seriously interferes with his or her job performance—that is, if it interferes to the point that the employee is no longer effective, *Rosser v. Laborers' Int'l Union of N. Am.*, 616 F.2d 221, 223 (5th Cir. 1980), or the

employee otherwise disrupts the employer's operation, for example, by surreptitiously copying confidential documents, *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 762-64 (9th Cir. 1996).

To establish a prima facie case of retaliation, the plaintiff must demonstrate that he or she engaged in protected activity; that the employer subsequently took adverse action; and that there was a causal connection between the protected activity and the adverse action. *Freitag v. Ayers*, 468 F.3d. 528, 541(9th Cir. 1997). Courts often will infer causation when the adverse action follows shortly after protected activity. *See Passantino v. Johnson & Johnson Consumer Prods.*, 212 F.3d 493, 507 (9th Cir. 2000) (discussing Ninth Circuit cases).

Once the plaintiff has established a prima facie case, the burden shifts to the employer to provide a legitimate reason for the adverse action. *Hashimoto v. Dalton*, 118 F.3d 671, 680 (9th Cir. 1997). Once the employer articulates a legitimate, nondiscriminatory reason, the employee may still prevail by proving that the employer's proffered reason is pretextual and that it is more likely than not that the real reason for the retaliatory action was the protected conduct. *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000).

In University of Texas Southwestern Medical Center v. Nassar, 133 S. Ct. 2517, 2534 (2013), the Supreme Court held that to prove retaliation under Title VII, the plaintiff must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer. In contrast, to prove discrimination on the basis of race, color, national origin, sex or religion under Title VII, the plaintiff must show only that the protected classification was a "motivating factor" for the employer's adverse employment decision. *Id.* at 2532-33.

For more information, refer to the EEOC Compliance Manual section on retaliation. www.eeoc.gov/policy/docs/retal.html.

15.16 Affirmative Action as a Component of a Voluntary Plan. Many public agencies explicitly encourage minorities and females to apply for employment. This is not affirmative action—it is promoting equal employment opportunities. When a state agency gives a preference in hiring, however, it must ensure that its actions are justified under Title VII and, because it is a governmental entity, under the Equal Protection Clause of the United States Constitution. (Different considerations govern preferential treatment for those with disabilities because federal and state law require employers to provide "reasonable accommodations" to disabled employees.)

Title VII and the Arizona Civil Rights Act prohibit discrimination based on race, national origin, or gender. In 2010, the Arizona Constitution was amended to prohibit

preferential treatment of (as well as discrimination against) any person or individual on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting in Arizona. Ariz. Const. art. II, § 36(A). Prior to this constitutional amendment, an Arizona agency could use race, ethnicity, or gender as a factor when evaluating qualified candidates for hiring or promotion, provided that such use 1) was part of an affirmative action plan; 2) was done to remedy past discrimination, whether or not intentional; 3) did not bar advancement of white or male employees or require their termination; and 4) would phase out if a racial or gender balance was ever achieved. Historically, courts have upheld appropriate affirmative action plans against Title VII claims. *See, e.g., Johnson v. Transp. Agency of Santa Clara Cnty*., 480 U.S. 616, 641-42 (1987) (upholding the use of gender to promote a female employee over an equally qualified male employee); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208-09 (1979) (upholding a provision that required the employer to award one-half of all skilled craft promotions to black employees until the percentage of black skilled craftsmen approximated the percentage of blacks in the local labor force); *Gilligan v. Dep't of Labor*, 81 F.3d 835, 837 (9th Cir. 1996) (upholding the use of gender, consistent with an existing affirmative action plan, to promote a female employee over a male employee). Following the amendment to Arizona's Constitution, however, an Arizona governmental agency's use of hiring or promotional preferences based on protected classifications may not be permissible, unless such preferences fall within several narrow exceptions to the constitutional prohibition. *See* Ariz. Const. art. II, § 36(B) (excepting from the prohibition on use of preferences (1) sex-based bona fide qualifications, (2) preferences necessary to maintaining federal monies, and (3) court orders and consent decrees that preceded the amendment).

15.16.1 Affirmative Action as a Component of Court-Ordered Relief. Affirmative action plans may also be created by court orders issued after employers lose employment discrimination cases. Title VII and the Arizona Civil Rights Act authorize a court to award prospective relief. See 42 U.S.C. § 2000e-5(g); A.R.S. § 41-1481(G). Courts have also ordered affirmative action to resolve labor disputes. *See, e.g., Local 28, Sheet Metal Workers v. E.E.O.C.*, 478 U.S. 421, 442-43 (1986). Some courts have even ordered affirmative action that establishes quotas for minority hires and promotions. *See, e.g., United States v. Paradise*, 480 U.S. 149, 185-86 (1987) (upholding quotas for black state troopers in the Alabama Department of Public Safety); *Eldredge v. Carpenters 46*, 94 F.3d 1366, 1370 (9th Cir. 1996) (reserving twenty percent of positions in apprenticeship program for women until women comprised twenty percent of the total number of apprentices). Whether such orders can be reconciled with Article II, Section 36 of the Arizona Constitution is an open question.

15.17 Facial Discrimination. There are two distinct theories of intentional discrimination: facial discrimination and disparate treatment.

The first of these two theories, facial discrimination, requires the plaintiff to prove as part of the prima facie case that the employer has a policy or employs a practice that intentionally discriminates against an individual or a class of individuals based on race, color, national origin, religion, age, disability, or sex. For example, a policy of not hiring women for jobs traditionally held by men, such as custodial or janitorial jobs, is discriminatory on its face.

When a plaintiff establishes a prima facie case of facial discrimination, the burden shifts to the employer to justify its discriminatory acts by proving that religion, sex, national origin, or age is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." *See* 42 U.S.C. § 2000e-2(e); A.R.S. § 41-1463(G)(1), (G)(4)(a)**)**; *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (plurality opinion).

15.17.1 Bona Fide Occupational Qualifications. Title VII, the ADEA, and the Arizona Civil Rights Act permit an employer to discriminate against an individual based upon an individual's age, sex, national origin, or religion when the employer can demonstrate that the characteristic is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the employer's business or enterprise. This is an extremely narrow exception to the general prohibition against discrimination. *W. Airlines, Inc. v. Criswell*, 472 U.S. 400, 412 (1985). To demonstrate that a category is a BFOQ, the employer must establish a substantial basis for believing that all or nearly all possible employees outside the specific category lack the qualifications that the position requires. *Id.* at 414.

Race, color, or disability are never bona fide occupational qualifications. *See* A.R.S. § 41-1463(G)(1), (G)(4)(a). To establish a BFOQ defense, the employer must prove that all or substantially all members of the protected group would be unable to perform the job safely and efficiently, *see Diaz v. Pan Am. World Airways, Inc*., 442 F.2d 385, 388 (5th Cir. 1971); *see also Harriss v. Pan Am. World Airways, Inc.,* 649 F.2d 670, 676 (9th Cir. 1980) (adopting the BFOQ standard partially developed in *Diaz*), or that it is impracticable to deal with members of the protected group on an individual basis, *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 228 n.8 (5th Cir. 1976); *see also EEOC v. Santa Barbara Cnty.,* 666 F.2d 373, 376 (9th Cir. 1982); *EEOC v. Los Angeles Cnty*., 706 F.2d 1039, 1042-1043 (9th Cir. 1983). The term "occupational" in BFOQ means that any employment requirement permitted under this exception must be related to an employee's "job-related skills and aptitudes" and not to personal attributes that satisfy some other, subjective requirement. *Int'l Union v. Johnson*, 499 U.S. 187, 201 (1991). The mere preference of the individuals whom the employer serves does not constitute a BFOQ. *See Diaz,* 442 F.2d at 389.

15.18 Disparate Treatment. Disparate treatment is the most commonly used theory of discrimination. It occurs when the employer treats some persons less favorably or differently because of their protected class characteristics or in retaliation for protected activity. Plaintiffs may establish disparate treatment through circumstantial or direct evidence.

To establish a prima facie case of disparate treatment using circumstantial evidence, the plaintiff must make factual allegations that eliminate the most common nondiscriminatory reasons for the alleged harm and that raise an inference that the harm would not have occurred in the absence of unlawful discrimination. The plaintiff always has the ultimate burden of proving discriminatory intent. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Under some circumstances, however, such intent can be inferred where the employer treats a member of a protected group differently from individuals who are not members of that group. *Civil Rights Div. v. Amphitheater Unified Sch. Dist. No. 10*, 140 Ariz. 83, 85, 680 P.2d 517, 519 (App. 1983).

As an example, in a hiring situation, the plaintiff establishes a prima facie case of disparate treatment using circumstantial evidence by demonstrating that he or she applied for a position, was qualified, was rejected, and the position remained open. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The elements of this theory will vary, depending on the specific harm that has been alleged. Once the plaintiff has established the prima facie case, the employer must articulate an admissible, reasonably specific nondiscriminatory reason for its decision. *Amphitheater*, 140 Ariz. at 85, 680 P.2d at 519; *McDonnell Douglas*, 411 U.S. at 802. Once the employer articulates such a reason, the plaintiff bears the burden of showing that the reason was a pretext for the discrimination. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000); *Burdine*, 450 U.S. at 256; *Amphitheater*, 140 Ariz. at 85, 680 P.2d at 519.

The plaintiff may also establish a prima facie case of disparate treatment through direct evidence that demonstrates the employer's discriminatory motivation. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 230 (1989) (plurality opinion). "Direct evidence typically consists of clearly sexist, racist, or similarly discriminatory statements or actions by the employer." *Coghlan v. Am. Seafoods Co.,* 413 F.3d 1090, 1095 (9th Cir. 2005); *see also Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) (holding that plant manager calling black workers "boy" could constitute direct evidence of discriminatory animus). If direct evidence of discrimination is presented, then the *McDonnell Douglas* burden-shifting scheme does not apply and the employer cannot rebut the evidence of discriminatory motive simply by presenting a legitimate reason for the employment decision. *Enlow v. Salem-Keizer Yellow Cab Co., Inc.*, 389 F.3d 802, 812 (9th Cir. 2004). Under Arizona law, however, the employer may have a defense if it can demonstrate that it would have made the ***same decision*** absent any discriminatory animus. *See, e.g., Timmons v. City of Tucson*, 171 Ariz. 350, 356, 830 P.2d 871, 877 (. App. 1991).

15.19 Disparate Impact. The disparate impact theory of discrimination is used to analyze employment practices that are facially neutral but that result in unnecessary employment barriers based on an impermissible classification. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971); *Civil Rights Div. v. Amphitheater Unified Sch. Dist. No. 10,* 140 Ariz. 83, 85, 680 P.2d 517, 519 (App. 1983). Under this theory, the plaintiff need not show intentional discrimination, but must show that the employment practice itself has the effect of disproportionately excluding a protected group. *See Griggs*, 401 U.S. at 429-30; 42 U.S.C. § 2000e-2(k).

A disparate impact discrimination claim is timely if it is raised within the Title VII or ACRA limitations period following any application of a policy that produces a disparate impact. *Lewis v. City of Chicago,* 560 U.S. 205, 217 (2010). To establish a prima facie case under the disparate impact theory, the plaintiff must show that the employer uses a facially neutral business practice that disproportionately affects the protected group to which the plaintiff belongs. *See Griggs*, 401 U.S. at 429-30; *Paige v. California*, 291 F.3d 1141, 1145 n. 4 (9th Cir. 2002) (proof of disparate impact must be by a preponderance of the evidence). The business practice often takes the form of a test or a height or weight requirement for job applicants. Another example is an English-only policy, which may have a disparate impact on Latino employees.

Once the plaintiff establishes this prima facie case, the burden shifts to the employer to show that the challenged practice is job-related and consistent with business necessity. 42 U.S.C. § 2000e-2(k)(1)(A); *Ricci v. DeStefano,* 557 U.S. 557, 578 (2009); *Amphitheater*, 140 Ariz. at 85, 680 P.2d at 519.. To be deemed a business necessity, the challenged practice "must have a manifest relationship to the employment in question," *Griggs*, 401 U.S. at 432. In the case of a challenged test, the employer must "validate the examination by showing that it is a realistic measure of job performance." *Bouman v.* Block, 940 F.2d 1211, 1228 (9th Cir. 1991) (citing *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 426-27 (1975)). If the employer meets its burden, the employee must show that there are alternative employment practices that would have less impact on the protected person or class. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii); *Ricci,* 557 U.S. at 578. Further, if the employee seeks to invalidate the results of a qualifying test and thereby gives rise to a disparate treatment claim from previously qualified applicants of another protected class, to survive summary judgment, the employee must have a "strong basis in evidence" that vacating the test results is necessary for the employer to avoid liability for disparate impact discrimination. *Id.* at 584.).

15.20 Mixed Motive Cases. Sometimes an employer has more than one motive for taking a particular employment action. A case in which an employer has both a discriminatory and a nondiscriminatory motive is referred to as a "mixed motive" case. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 93 (2003). Under federal law, if an employer

was motivated by a discriminatory factor—such as race, color, religion, sex, or national origin—it has engaged in employment discrimination and the employee is entitled to injunctive relief, costs, and fees. 42 U.S.C. § 2000e-2(m), e-5(g)(2)(B). If the employer proves that it would have made the same decision if it had not considered the discriminatory factor, it is not liable for reinstatement, lost wages, or damages. *Id*. § 2000e-5(g)(2)(B). Arizona law is different. Under the Arizona Civil Rights Act, a defendant may avoid all liability for discriminatory conduct if it proves by a preponderance of the evidence that it would have made the same decision even if it had not considered the discriminatory factor. *See Timmons v. City of Tucson*, 171 Ariz. 350, 356, 830 P.2d 871, 877 (App. 1991).

15.21 Remedies Under the Arizona Civil Rights Act. Under the Arizona Civil Rights Act, remedies for employment discrimination include back and front pay (the only monetary relief), injunctive relief, reinstatement, and attorney's fees. A.R.S. § 41-1481(G), (J). The remedies available under the federal employment laws include monetary relief that is not currently available under the Arizona Civil Rights Act.

15.22 Remedies in Title VII and § 1981 Actions. Before the Civil Rights Act of 1991 became effective, only equitable remedies were generally available under Title VII: a hiring order or reinstatement, back pay, front pay where reinstatement was not feasible, and attorney's fees. The 1991 Act expanded these remedies by providing for compensatory and punitive damages for intentional discrimination against most employers in actions brought pursuant to Title VII and in many actions brought pursuant to the Americans with Disabilities Act (ADA). *See* 42 U.S.C. § 1981a; *see also* Section 15.26. These compensatory and punitive damages combined are capped on a sliding scale depending on the employer's number of employees. For an employer with 500 or more employees, the cap is $300,000 for each complaining party. *42 U.S.C*. § 1981a(b)(3)(D).

The 1991 Act exempts public employers from liability for punitive damages, *Id*. at § 1981a(b)(1), but the size of the combined cap remains the same even when punitive damages are not permitted. This means that a jury may still award damages of up to $300,000 against a large public employer as long as it characterizes those damages as compensatory rather than punitive. Also, since most Title VII race and ethnicity complaints are concurrently brought under 42 U.S.C. § 1981, which has no cap for damages, the cap effectively limits punitive and compensatory damages only for cases that involve gender, religious, or disability discrimination. Excessive punitive damages award under Section 1981, however, are subject to reduction on due process grounds. *See, e.g., Bains v. ARCO Products, Co.*, 405 F.3d 764, 775-77 (9th Cir. 2005). The 1991 Act's provision for an award of damages is separate from and in addition to the equitable remedies, such as back pay, that Title VII, 42 U.S.C. § 2000e-5(g), provides. When a complainant requests compensatory or punitive damages under 42 U.S.C. § 1981a, the parties are entitled to a jury trial of the matter. *Id*. § 1981a(c).

Section 1981 does not create a private right of action against States. *Pittman v. Oregon, Emp't Dep't*, 509 F.3d 1065, 073 (9th Cir. 2007). Section 1981's prohibition on discrimination by a State or its officials can be enforced only by means of 42 U.S.C. § 1983. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 720-21 (1989). However, 42 U.S.C. § 1981 does contain a private right of action against municipalities. *Fed'n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1216 (9th Cir. 1996).

15.23 Attorney's Fees. Title VII permits the court to award attorney's fees to the prevailing party. 42 U.S.C. § 2000e-5(k). The court should ordinarily award fees to a prevailing plaintiff, but may award fees to a defendant employer only where the employee's claim was unreasonable, frivolous, or brought in bad faith. *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 419 (1978). Arizona courts follow this standard. *Sees v. KTUC, Inc.*, 148 Ariz. 366, 369, 714 P.2d 859, 862 (App. 1986).

The Civil Rights Act of 1991 amended the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, to permit an award of fees in an action brought pursuant to 42 U.S.C. § 1981a. Both before and after the amendments, 42 U.S.C. § 1988 permitted an attorney's fees award to the successful plaintiff in a suit premised on 42 U.S.C. § 1981. Fee awards under 42 U.S.C. § 1988 are governed by the same standard as fee awards under Title VII. *See Patton v. County of Kings*, 857 F.2d 1379, 1381 (9th Cir. 1988).

15.24 Remedies for an Equal Pay Act Violation. Remedies for an Equal Pay Act violation include lost wages plus an equal amount as liquidated damages, injunctive relief, and attorney's fees. 29 U.S.C. § 216(c). If the employer shows that it acted in good faith and believed that its actions were legal, the court may limit the award to back wages. *Id*. § 260.

15.25 Remedies Under the ADEA. Remedies under the ADEA include lost wages plus an equal amount as liquidated damages, injunctive relief, reinstatement or front pay, and attorney's fees. *Id*. § 216(c). Liquidated damages can be awarded only for willful violations. A violation is willful if the employer knew that its conduct was prohibited or showed reckless disregard for whether its conduct was unlawful. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 (1985). A violation is not willful if the employer simply knew of the ADEA's potential applicability. *Id*. at 127. The successful plaintiff may recover attorney's fees, but successful defendants may do so only where the action is frivolous or in bad faith. 29 U.S.C. § 216(b); *see Yartzoff v. Oregon*, 745 F.2d 557 (9th Cir. 1984).

In *Kimel v. Florida Board of Regents*, 528 U.S. 62, 91-92 (2000), the Supreme Court held that state governments have sovereign immunity under the Eleventh Amendment from private age discrimination lawsuits for monetary relief under the ADEA. The effect of this decision is that individuals, such as applicants for employment or employees, cannot sue the State for monetary relief for federal age discrimination claims. They still can sue under

the Arizona Civil Rights Act, but as noted above, the monetary relief available is limited to lost wages.

Kimel should not prevent a state employee from seeking injunctive or other non-monetary relief under the federal law, and it does not prevent the EEOC or any other federal agency from suing the State for monetary damages.

15.26 Remedies Under the ADA. Remedies under the ADA for employment discrimination are the same as those under Title VII and are obtained through the same administrative process before the EEOC that is available for other types of discrimination. 42 U.S.C. § 12117. Under the ACRA, plaintiffs' monetary damages are limited to up to two years of back pay. A.R.S. § 41-1481(G).

In addition, the 1991 Civil Rights Act permits discrimination victims to obtain compensatory and punitive damages. *See* 42 U.S.C. § 1981a. In appropriate circumstances, these damages may be as high as $300,000 per incident (where an employer has more than 500 employees). Monetary remedies are capped based on the size of the employer in an action brought under Title I of the ADA. *Id*. § 1981a(b)(3). The ADA does not, however, preempt any law that gives disabled individuals greater protection. 42 U.S.C. § 12201; 29 C.F.R. § 1630.1(c). Attorney's fees are available to the prevailing charging party or plaintiff in both administrative and court proceedings. 42 U.S.C. § 12205.

The ADA prohibits an award of damages for failure to make a reasonable accommodation where the employer made accommodation efforts in good faith. 42 U.S.C. § 1981a(a)(3).

In *University of Alabama v. Garrett*, 531 U.S. 356, 374 (2001), the Supreme Court held that state governments have sovereign immunity under the Eleventh Amendment from private discrimination lawsuits for monetary relief under the ADA's employment provisions. The effect of this decision is that individuals, such as applicants for employment or employees, cannot sue the State for monetary relief for federal disability discrimination claims. Persons with physical disabilities can still sue under the Arizona Civil Rights Act, but as noted above, the monetary relief is limited to back pay.

Garrett does not prevent a state employee from seeking injunctive or other non-monetary relief under the federal law, and it does not prevent the EEOC or any other federal agency from suing the State for monetary damages.

15.27 Disability-based Discrimination in Public Services and Accommodations. Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131 to 12150, prohibits public entities such as the State of Arizona from discriminating based on disability in the provision of services, programs, or activities—this includes ensuring that

public buildings are accessible. Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181 to 12189, prohibits public accommodations (which are private entities)—such as hotels, theaters, museums, golf courses, homeless shelters, dry cleaners, or stores—from discriminating with respect to the public accommodations that they operate. *Id*. § 12181(7). A public accommodation may not discriminate in the provision of goods, services, facilities, privileges, advantages, or accommodations against a person with a disability, a person who has a relationship or association with a person with a disability, or a person who has engaged in protected conduct. *Id*. § 12182; 28 C.F.R. § 36.101 to -.608; A.R.S. § 41-1492. 02(A), (B), (F). *See* United States Department of Justice, *The Americans with Disabilities Act, Title III Technical Assistance Manual*, available at www.ada.gov/taman3.html.

Arizona enacted the Arizonans with Disabilities Act (AzDA) to encompass the protections of Title II and Title III of the ADA. A.R.S. § 41-1492. The AzDA differs from Title II because it only requires a public entity to ensure that buildings and facilities that are leased or constructed in whole or part with state or local monies or the monies of political subdivisions are accessible. A.R.S. § 41-1492.01. Although the AzDA does not contain the Title II provisions regarding services, programs, and activities, the State must still comply with Title II, and therefore, a plaintiff would have a federal claim, though not a state claim, if a state program, for instance, refused to allow the individual to participate in a program because of disability. The AzDA's provision governing public accommodations is as broad as Title III's. The AzDA states that compliance with Title II and Title III of the ADA and its implementing regulations constitutes compliance with the AzDA.

For purposes of Title II and III of the ADA and the AzDA, "disability" is defined the same way that it is under the ADA's employment provisions as "a[ny] physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; a record of such an impairment; or being regarded as having such an impairment." 42 U.S.C. § 12102; A.R.S. § 41-1492(6); 28 C.F.R. § 35.104. *See* Section 15.11. The prohibition against discrimination in the provision of services, programs, or activities is read broadly to include most, if not all, activities of public entities. *See*, *e.g., Penn. Dep't of Corr. v. Yeskey,* 524 U.S. 206, 210 (1998).

The ADA protects persons with a disability and persons who have a relationship with or who associate with persons with a disability. 28 C.F.R. § 35.130(g). It also protects persons who engage in protected activity. *Id*. § 35.134. This Section only discusses Title II's general provisions, which appear in Part A. The United States Department of Justice has published regulations concerning Title II, *id*. §§ 35.101 to 35.190, as well as a *Title II Technical Assistance Manual*, available at www.ada.gov/taman2.html. New Title II regulations, which adopt the 2004 ADAAG revisions and significantly alter service animal provisions, become effective on March 15, 2011, and are available at www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.pdf. New Title III regulations, which adopt the 2004 ADAAG revisions and significantly alter service animal provisions,

also become effective on March 15, 2011, and are available at www.ada.gov/regs2010/titleIII_2010/titleIII_2010_regulations.pdf.

Complaints concerning violations of Titles II or III of the ADA should be filed by email (preferred) to ada.complaint@usdoj.gov or by mail to the United States Department of Justice, Disability Rights Section, Civil Rights Division, P.O. Box 66738, Washington, D.C. 20035-6738. *See* www.ada.gov/fact_on_complaint.htm#1 for information about filing an ADA complaint.

15.27.1 General Discrimination Prohibitions. Title II's general discrimination prohibitions prevent public entities, such as the State of Arizona, from excluding or segregating individuals with disabilities in providing governmental services, programs, or activities. *See* 28 C.F.R. § 35.130. It also prevents governmental entities from using stereotypes, presumptions, fears, and patronizing attitudes about individuals with disabilities as reasons for denying such individuals the same opportunities or services that others enjoy. The ADA and its implementing regulations broadly define unlawful discrimination as actions that adversely affect individuals with disabilities. These actions include:

1. Denying individuals with disabilities the right to participate in or benefit from the aid, benefit, or service that a governmental entity provides, 28 C.F.R. § 35.130(b)(1)(i);

2. Providing individuals with disabilities with a lower level of services, aids, or benefits than is provided to similarly situated persons without disabilities, *id.* § 35.130(b)(1)(ii);

3. Providing individuals with disabilities with aids, benefits, services, or special programs that are less effective than those provided to individuals without disabilities or providing such individuals different or separate aids, benefits, or services unless necessary for effectiveness, *id.* § 35.130(b)(1)(iii) & (iv);

4. "Providing significant assistance to an agency, organization, or person that discriminates on the basis of disability," *id.* § 35.130(b)(1)(v);

5. Limiting individuals with disabilities "in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others," *id.* § 35.130(b)(1)(vii);

6. "Establish[ing] requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability," *id.* § 35.130(b)(6).

7. Failing to "make reasonable modifications in policies, practices, or procedures when . . . necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that [the only reasonable modification] would fundamentally alter the nature of the service, program, or activity," *id.* § 35.130(b)(7);

8. Using criteria in selecting procurement contractors that subject otherwise qualified contractors to discrimination based on disability, *id.* § 35.130(b)(5);

9. Imposing "eligibility criteria that screen out or tend to screen out an individual with a disability . . . unless such criteria [are] necessary" for the provision of the program, service, or activity, *id.* § 35.130(b)(8); and

10. Failing to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities," *id.* § 35.130(d).

15.27.2 Eliminating Segregation and Other Barriers. Requiring a person with a disability to receive services only in segregated facilities perpetuates unwarranted assumptions that the person is incapable or unworthy of participating in community life and is a not permitted under the ADA. *Olmstead v. L.C., ex rel. Zimring,* 527 U.S. 581, 583 (1999). This does not mean that persons with disabilities who are unable to handle or benefit from community settings or who do not wish to use them are required to do so. *Id.* at 602.

The ADA also requires public entities to provide their services, programs, and activities in the most integrated setting that is appropriate to the needs of qualified individuals with disabilities, *i.e.,* in a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible. 28 C.F.R. § 35.130(b)(1)(iv), (b)(2).

15.27.3 Physical Accessibility Requirements. Title II requires a public entity to maintain in operable condition those features of its facilities and equipment that are necessary to make such facilities and equipment readily accessible to and usable by individuals with disabilities. *Id*. § 35.133(a). It is insufficient to provide accessible routes, elevators, or ramps if those features are not maintained in a manner that enables individuals with disabilities to use them. Isolated or temporary interruptions in service or access due to maintenance or repairs are permissible; however, allowing obstructions to persist beyond a reasonable period violates the ADA. Violations may also occur through repeated mechanical failures due to improper or inadequate maintenance, failure to ensure that accessible routes are properly maintained and free of obstructions, and failure to

arrange prompt repair of inoperable elevators or other equipment intended to provide access. *See id*. § 35.133(a).

15.27.4 Program Accessibility. The concept of program accessibility that applied to federally conducted programs or activities under § 504 of the Federal Rehabilitation Act is extended by the ADA to all programs, whether or not they receive federal assistance. Each service, activity, or program that a public entity conducts, when viewed in its entirety, must be readily accessible to and usable by individuals with disabilities. *Id*. § 35.150. Standards used in this section are the same as the standards established in Title III of the ADA. The only exceptions to the accessibility requirement involve cases in which ensuring accessibility would result in (a) the threatened destruction of historically significant property; (b) a fundamental alteration in the program's nature; or (c) undue financial and administrative burdens. *Id*. § 35.150(a)(2), (3). In determining whether providing accessibility would pose undue financial and administrative burdens, consideration is given to all public entity resources available for use in the funding and operation of the service, program, or activity. *Id*. § 35.150(a)(3). Where full accessibility can be assured only by actions that would result in a fundamental alteration in the program's nature or in undue financial and administrative burdens, the public entity is required to take other steps necessary to ensure that individuals with disabilities receive the benefits or services that the entity provides. *Id*. § 35.150(a)(3).

15.27.5 Communications. The ADA requires public entities to take all appropriate steps necessary to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others. *Id*. § 35.160(a). When necessary, this requires a public entity to provide auxiliary aids and services to afford an individual with a disability an opportunity to participate in and enjoy the benefits of the public entity's service, program, or activity. *Id*. § 35.160(b)(1). Public entities are also required to provide an opportunity for individuals with disabilities to request the auxiliary aid and service of their choice, to give that choice primary consideration, and to honor the choice unless another effective means of communication exists or the individual's choice is not required by the ADA. *See Id*. § 35.160(b)(2).

Auxiliary aids and services include: qualified interpreters on-site or through video remote interpreting (VRI) services; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing; qualified readers; taped texts; audio recordings;

Brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision. *Id*. § 35.104. The ADA requires governmental entities to provide any aids or accommodations at no charge to the individual with a disability, since requiring individuals to pay for the aids or accommodations would impose a barrier to equal access to services or benefits that the entities do not impose upon individuals without disabilities. *Id*. § 35.130(f).

The auxiliary aid or service required to satisfy the communication requirements of Title II will vary based on the method of communication utilized by the individual with a disability and the nature, length, and complexity of the communication. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability. *Id*. § 35.160(b)(2). A public entity **may not** do the following regarding interpretive services or to facilitate communication:

- Require the individual with the disability to bring his/her own interpreter;

- Rely on an adult accompanying the individual unless there is an emergency situation involving imminent threat to the safety or welfare of the individual or the public or the individual with a disability and the adult accompanying him/her specifically requests that the adult facilitate the communication, but even then, only if it is appropriate in the circumstances;

- Rely on a minor child unless there is an emergency situation involving an imminent threat to the safety or welfare of the individual or the public.

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Id. § 25.160(c).

When a public entity uses an automated-attendant system, including, but not limited to, voice mail and messaging, or an interactive voice response system, for receiving and directing incoming telephone calls, that system must provide effective real-time communication with individuals using auxiliary aids and services, including TTYs and all forms of FCC-approved telecommunications relay system, including Internet-based relay systems. A public entity must respond to telephone calls from a telecommunications relay service in the same manner that it responds to other telephone calls. *Id.* § 35.161(c).

15.27.6 Service Animals. Titles II and III of the ADA and the AzDA require public entities and public accommodations to modify their policies to permit the use of service animals by an individual with a disability. *Id*. §§ 35.136; 36.302(c); A.R.S. § 11-1024.

In 2010, the Department of Justice's regulations defined service animals as a dog or miniature horse that is individually trained to do work or perform a task for an individual with a disability. The task(s) the animal performs must be directly related to the handler's disability. 28 C.F.R. §§ 35.104; 36.104. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. *Id.* §§ 35.104; 36.104. A public entity generally may not inquire as to the disability of the individual. *Id.* § 35.136(f). A public entity may ask if the animal is required because of a disability and what work or task the animal has been trained to perform. *Id.* A public entity shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. *Id.* Generally, a public entity may not make these inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability (for example, a dog guiding an individual with a visual impairment). *Id.* § 35.134.

A public entity may exclude a service animal only if the animal is out of the handler's control and the handler does not re-establish control or if the animal is not housebroken. *Id.* §§ 35.136(b); 36.302(c)(2). If the service animal is properly excluded, the public entity must give the individual with a disability the opportunity to participate in the program or activity without the service animal. *Id.* §§ 35.136(c); 36.302(c)(3). A public entity may not charge a fee or surcharge for a service animal, even if the entity typically charges for other animals. *Id.* §§ 35.136(h); 36.302(c)(8). A public entity may charge for damage caused by a service animal. *Id.* §36.302(c)(3).

Finally, the ADA requires all public entities to provide information concerning accessible services, activities, and facilities to individuals with disabilities. *Id*. § 35.163. This requires: (1) that the entity provide signage at all inaccessible entrances to each of its facilities that directs users to accessible entrances or to locations at which they will find information about accessible entrances; and (2) that where TDD-equipped pay phones or portable TDDs exist, clear signage be posted indicating their location. *Id*. § 35.162.

15.27.7 New Construction and Alterations. The ADA requires that buildings that are designed, constructed, or altered by, on behalf of, or for the use of a public entity after January 26, 1992, meet certain design and construction standards. *Id*. § 35.151. Public entities seeking information on those standards should consult their legal counsel.

15.27.8 Remedies.

Under the Arizonans with Disabilities Act, the victim can obtain actual damages, compensatory damages, injunctive relief, attorney's fees, and civil penalties. A.R.S. § 41-1492.09.

Remedies available under Title II of the ADA include all remedies available under § 504 of the Federal Rehabilitation Act of 1973. 29 U.S.C. § 794a. These include damages, injunctive relief, attorney's fees, and costs. Both Title II, 42 U.S.C. § 12133, and the Rehabilitation Act, 29 U.S.C. § 794a, provide remedies equivalent to those authorized in Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7. A federal contracting or granting agency has the power under the Rehabilitation Act to terminate a contract. *Id*. § 2000d-1. In addition, under Title VI, a person may bring a private cause of action in tort against governmental entities and federal contractors or grantees for intentional discrimination. *Guardians Ass'n v. New York City Civil Serv. Comm'n*, 463 U.S. 582, 584 (1983). The Title I caps on recoverable damages would not apply in such an action.

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