



Chapter 4
Affirmative Action

Employment Law for **BUSINESS** sixth edition

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	<h3>Statutory Basis</h3>
	<p>(1) The Contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. [202, Executive Order 11246.]</p>

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	<h3>The Design and Unstable History</h3>
	<ul style="list-style-type: none"> • 1619—First slaves arrive in America • 1865—The Civil War ends • 1865—The 13th Amendment to the Constitution abolishes slavery • 1964 —Civil Rights Act of 1964 is passed • 1965—Voting Rights Act of 1965 is passed • 1971—First Important Title VII case decided by the U.S. Supreme Court • 1979—First workplace affirmative action case decided by the U.S. Supreme Court • 1980s—Affirmative action is hotly debated • 2004 – The last Civil Ware widow dies

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Affirmative Action Myths

- Affirmative action requires employers to remove qualified whites and males from their jobs and give these jobs to minorities and women whether they are qualified or not.
- Affirmative action prevents employers from hiring white males who are more qualified for the job.
- Under affirmative action, all an employee must be is a female or a minority to be placed in a job.
- Most employees who obtain jobs under affirmative action plans are unqualified for the job.
- Workplace productivity and efficiency always suffer under affirmative action plans.
- There should be no affirmative action because the best person is always the one who gets the job.

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The Design and Unstable History (continued)

- Affirmative action regulations do not apply to everyone, but only to just over **20 percent** of the workforce.
- Affirmative action **does not** require quotas.
- Affirmative action involves the employer bringing qualified women and minorities (or other statutorily mandated groups) into a workplace **from which it has been determined that they are excluded.**

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The Design and Unstable History (continued)

- Actions an employer can take include expanded outreach and recruitment, mentoring, management training, and hiring.
- Negative attitudes about affirmative action ran/run exceedingly deep.
- Affirmative action is used only when there is a **demonstrated** underrepresentation or a finding of discrimination.
- Minorities and women still lag behind in pay, jobs, and promotions.
- “Sins of the father” argument

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The Design and Unstable History (continued)

- Growth of the middle class—FLSA and the GI Bill.
- The first workplace affirmative action case did not reach the U.S. Supreme Court until 1979.
- A workplace should reflect the available workforce from which its employees are drawn.
- Three ways affirmative actions arise:
 - Through Executive order 11246
 - Judicially as a remedy for a finding of discrimination under Title VII
 - Voluntary affirmative action

L02

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Affirmative Action Under Executive Order 11246

- Affirmative action actually stems from a requirement imposed by Executive Order 11246 and its amendments.
- Executive Order 8802
 - Forerunner to E.O. 11246
 - Signed on June 25, 1941
 - Applied only to defense contracts
- Present version signed into law September 24, 1965

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E.O. 11246 Provisions

- Prohibits discrimination in employment
- Requires contractors to remedy inadequate representation of women and minorities in their workplace
- Enforced by the Office of Federal Contract Compliance Programs (OFCCP)
 - Only applies to federal government contracts
- Increases compliance requirements based on the amount of the contract.

L03

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Affirmative Action Plans

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- Must be developed according to the rules set forth in the Code of Federal Regulations Part 60-2
- Underrepresentation
- Underutilization
- Organizational profile
- Job group analysis

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Affirmative Action Plans (continued)

- Availability
 - Based on the **availability** of women and minorities **qualified** for the particular job
- Factors used to determine availability:
 - The percentage of minorities or women with requisite skills in the reasonable recruitment area
 - The percentage of minorities or women among those promotable, transferable, and trainable within the contractor's organization
- Placement goal
- Corporate management compliance evaluations

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Affirmative Actions

- Advertising for applicants in nontraditional sources.
- One-for-one hiring, training, or promotion programs.
- Preferential layoff provisions.
- Extra consideration.
- Lower standards.
- Added points.
- Minority or female "positions."

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Penalties for Noncompliance

- The Secretary of Labor or the appropriate contracting agency can impose a number of penalties on the employer.
- The Secretary of Labor must make **reasonable efforts to secure compliance** by conference, conciliation, mediation, and persuasion before requesting the U.S. Attorney General to act or **before** canceling or surrendering a contract.

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Penalties for Noncompliance (continued)

- What is important to OFCCP:
 - The nature and extent of the contractor’s good faith affirmative action activities.
 - The **appropriateness** of those activities to the problems the contractor has identified in the workplace.

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Judicial Affirmative Action

- There are no specific requirements as to what form an affirmative action plan must take
- *Regents of the University of California v. Bakke*
- *Local 28, Sheet Metal Workers v. E.E.O.C.*
 - Case is over 20 years old

Judicial affirmative action
Affirmative action ordered by a court, rather than arising from Executive Order 11246.

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Voluntary Affirmative Action

- The employer decides to institute an affirmative action plan regardless of the Executive Order, and despite no Title VII cases being brought
- Proactive measure to avoid discrimination claims
- Strict guidelines must be followed

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Reverse Discrimination

- Often considered the flip side of affirmative action
- Reverse discrimination accounts for only about 3 percent of the charges filed with EEOC
- According to the Glass Ceiling Commission Report, white men are only 43 percent of the Fortune 2000 workforce but hold 95 percent of the senior management jobs

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L07

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Affirmative Action and Veterans

- Jobs for Veterans Act of 2002.
- Contractors must take affirmative action to hire and promote qualified veterans.
- Under the law, generally, “qualified targeted veterans are entitled to priority for referral to federal contractor job openings.”

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Valuing Diversity/Multiculturalism

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- **Valuing diversity** is learning to accept and appreciate those who are different from the majority and value their contributions to the workplace.
- **Multiculturalism** is learning to understand, appreciate, and value (not just “tolerate”) the unique aspects of cultures different from one’s own.
- Multiculturalism and valuing diversity contribute to **maximizing production** and **minimizing liability**.

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Management Tips

- Ensure that the hiring, promotion, training, and other such processes are open, fair, and available to all employees on an equal basis.
- If an affirmative action plan is to be adopted voluntarily, work with the union (if there is one) and other employee groups to try to ensure fairness and get early approval from the constituencies affected to ward off potential litigation.
- Make sure voluntary affirmative action plans meet established judicial requirements.

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Management Tips (continued)

- Provide training about the plan so that all employees understand its purpose and intent.
- Implement periodic diversity and related training.

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Summary

- **Affirmative action** is intentional inclusion of women, minorities, and others traditionally excluded in the workplace after demonstrated underrepresentation of these historically disadvantaged groups.
- **Affirmative action plans** may arise voluntarily, as a remedy in a discrimination lawsuit, or as part of an employer's responsibilities as a contractor or subcontractor with the government.
- Employers should conduct voluntary periodic equal employment opportunity **audits** to monitor their workforce for gender, minority, and other inclusion.

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Summary (continued)

- Such plans should not displace nonminority employees or permit people to hold positions for which they are not qualified, simply to meet affirmative action goals.
- A well-reasoned, flexible plan with endorsement at the highest levels of the workplace, applied consistently and diligently, will greatly aid in diminishing negativity surrounding affirmative action and in protecting the employer from adverse legal action.

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