



Employment Issues

Summary of Major Employment Laws

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Public Employment Relations Act of 1974

(IOWA CODE Chapter 20)

The PERA gives Iowa's public sector, non-supervisory employees the rights to join employee organizations, to bargain collectively and to refrain from such activity. The PERA bans all public employees' strikes and establishes the Public Employment Relations Board (PERB) to administer the act's representation, prohibited practice and impasse resolution provisions.

A petition for representation election can be filed with PERB by a public employer that has received a request for recognition and bargaining or by an employee organization, supported by a 30 percent "showing of interest" among unit employees. The parties can stipulate to the unit description or PERB may hear and determine appropriate unit and voting eligibility questions. The PERA states that PERB makes appropriate unit determinations based on

community of interest factors, the extent of public employee organization, geographical location and the parties' recommendations. Professional and non-professional employees cannot be in the same unit unless a majority of both groups agree.

The PERB conducts a secret ballot election among unit employees and a majority voting must approve of union representation. A public employer's duty to recognize and bargain with an employee organization arises only when an organization is certified. PERB rules provide that certain objectionable conduct invalidates the election. That conduct includes electioneering within 300 feet of the polling place, campaign speeches to groups of employees during working hours and within the 24-hour period before the election, misuse of board documents indicating PERB enforces any choice or misstatements of material fact without time for an adequate response. No election can be held within one year of a certification of results.

Unlike the National Labor Relations Act, the PERA contains a statutory management rights provision and requires negotiations on 18 specified mandatory bargaining topics. Non-mandatory or permissive bargaining subjects can be proposed and discussed in negotiations but cannot be submitted to impasse hearings without mutual agreement. The PERA, similar to the NLRA, defines the duty to bargain in general terms: the obligation to meet at reasonable times and negotiate in good faith on the mandatory subjects and reduce agreed-upon terms to a written agreement.

If the parties reach an "impasse," a failure to agree on one or more mandatory subjects, they may use any negotiated impasse procedures or they must use statutory procedures. For all school units involving classified employees, mediation is used first commencing 120 days before the employer's budget submission date. For units involving

licensed employees, mediation begins 120 days before May 31. For classified units, mediation is followed by fact-finding. A fact-finder conducts an evidentiary hearing on all impasse items and issues a report and recommendations for settlement. The PERA omits fact-finding for teachers' units. In all cases, arbitration—a hearing conducted by a three-person board or single arbitrator—is the last step. In a teacher's case, the arbitrator(s) must select the "most reasonable" final offer of one party on each impasse item, without modification. In a classified unit case, the arbitrator(s) must select among the employer, association or fact-finder's final positions on each item.

Fact-finders, generally, and arbitrators specifically are required to apply the statutory decisional criteria: (1) the parties' past collective bargaining contracts and negotiations history; (2) comparability with similar classifications of public employees, particularly in the area (3) the interest and welfare of the public, the ability of the employer to finance adjustments and their effect on the normal standard of services, and (4) the power of the public employer to levy taxes and appropriate funds for the conduct of its operations. Although an arbitration award is reviewable by the Iowa courts under the Iowa Administrative Procedure Act, the appellant must make a strong showing that the arbitrator(s) ignored the evidence or the decisional criteria in order to overturn an award.

Like the NLRA, the PERA lists prohibited practices by employers and employee organizations. There is a 90 day limitation period for the filing of a complaint with PERB. The agency, unlike the NLRB, does not investigate complaints but sets the matter down for a hearing before the PERB or its administrative law judge. Appeal to the Iowa courts is permitted.

Iowa Civil Rights Act of 1965

(IOWA CODE Chapter 216)

Chapter 216 of the IOWA CODE permits "any person claiming to be aggrieved" to file a complaint with the Iowa Civil Rights Commission, alleging discrimination by an employer in discharging an employee because of the age, race, creed, color, sex, national origin, religion or disability of the employee. The complaint must be filed within 180 days of the alleged discrimination for the

commission to have jurisdiction over the complaint. The 180 day limit begins when the complaining party knew or had reason to know that discrimination was occurring. Absent extenuating circumstances, the limit begins when the employee is first informed of the employment decision that he or she alleges was discriminatory. This means that in a discharge case, employee's limitations period will begin when the school corporation informs the employee that the board has terminated his or her employment contract. In a promotion dispute case, the limitations period will ordinarily begin when the employee is informed that another applicant is going to get the job or that the school corporation is not even considering the employee for the job.

The court has also recognized the theory of a "continuing violation" that permits complaining parties to recover damages for acts of discrimination that occurred beyond the 180-day limit provided the party can prove the acts were part of a pattern of discrimination that occurred within the period covered by the statute. The continuing violation theory cannot, however, be used to link discrete acts of discrimination or to prosecute claims of past discrimination even if the "effect" of that discrimination continues into the present.

Iowa Civil Rights Commission Investigations and Hearings

Similar to the EEOC, the Iowa Civil Rights Commission investigates the discrimination complaints filed and then issues a finding concerning whether there is probable cause to believe discrimination occurred. Unlike the EEOC, the commission also hears and decides cases after a "probable cause" finding has been made. The commission investigatory and adjudicative roles are separate and distinct.

The commission's role as an investigative body begins after a complaint is filed. The complaint must be filed in triplicate and must state the names and addresses of the individuals being charged and the facts that support the alleged acts of discrimination. The commission has a standardized form that it requires complaining parties to use.

After a complaint is filed, the commission must mail a copy of the complaint to each party who is listed as a respondent. At this time, the commission also sends the complaining party and each respondent a detailed questionnaire that the party is

required to complete and return to the commission within 30 days. The commission uses the same basic questionnaire with respect to all civil rights complaints. As a result, many of the questions request the responding party to provide information that is not relevant to the allegations contained in the complaint or are overly burdensome for the responding party to provide. For these reasons, school corporations should consult with their legal counsel before responding to the commission's questionnaire. The responses can potentially bind the school corporation if the case proceeds to a hearing or the complaining party obtains an administrative release and sues the school corporation in state or federal court. The complaining party can obtain a copy of the commission's complete administrative file after obtaining an administrative release or after a probable cause finding has been entered. The commission's file contains the answers each party submitted to the questionnaire as well as any other information the commission gathered.

While approaches vary, many respondents ask their legal counsel to prepare and submit to the commission a letter or position statement that discusses the relevant facts and then answers the specific allegations of discrimination in the complaint. The letter or position statement is submitted in lieu of answering the commission's questionnaire. This approach has at least two benefits. First, it is typically less costly and less burdensome to prepare a comprehensive position statement than it is to answer the commission's standardized questionnaire. Second, submitting a position statement that addresses only the specific allegations contained in the complaint draws the commission's attention to relevant issues and facts. By submitting a position statement the school corporation can strongly suggest which issues are relevant and which issues are not.

The commission's rules state that after the complaint is filed, an authorized member of the commission's staff is required to conduct a prompt investigation of the complaint and "issue a recommendation regarding whether probable cause exists to believe discrimination occurred in the manner alleged." Despite the promise that it will conduct a prompt investigation, the commission does not typically begin investigating complaints until the complaints have been on file for two years.

This delay is due to the commission's restricted budget and its tremendous backlog of cases.

Not every complaint that is filed is investigated. The commission's rules provide that a "screening committee" will meet and decide whether the complaint should be referred for investigation or "screened out." The screening committee's review is cursory and few cases are dismissed without investigation.

The commission's investigation is fairly comprehensive and typically requires the responding parties to produce additional documentation and make key witnesses available for an interview. Again, it is important for school corporations to involve legal counsel in any investigation to ensure that witnesses are well prepared before being interviewed and to ensure the investigation stays within permissible limitations. Counsel can also advise the school corporation regarding what evidence is beyond the scope of proper investigation and should not be disclosed.

Iowa law grants the commission subpoena power to compel responding parties to produce documents and witnesses the commission believes are pertinent. The commission's subpoena power is not, however, absolute and a school corporation can, through its attorney, request that a subpoena be set aside by filing a motion to quash with the commission and then in Iowa District Court. The two biggest mistakes unrepresented parties make during civil rights investigations are that they tend to provide too much information and the information they provide later turns out to be false or purely speculative.

A common issue that arises in civil rights investigations is whether witness interviews should be tape recorded. The commission's investigators typically request to tape record the interviews or simply show up for an interview with their tape recorder in hand. However, there is no law, regulation or rule mandating the tape recording of interviews and a responding party or the witnesses can refuse to participate in a tape-recorded interview.

Whether the school corporation should permit a tape recorded interview will depend on the particular facts of the case. If the interviewer gives the impression that he or she has a bias in favor of

the complainant party, then it is best to politely ask the investigator to rely on his or her notes and not tape record the interview. Also, if a witness has not been properly prepared, is having trouble remembering critical facts, or is easily led by aggressive questioning, then a tape-recorded interview is not advisable. When determining whether to permit the investigator to interview its witnesses, the school corporation should bear in mind that the tapes will remain in the investigation file and can be used at a later date to impeach or discredit a school corporation's witness.

Balanced against this possibility, is the school corporation's desire to appear cooperative and to show the investigator that it has nothing to hide.

After the investigator concludes his or her investigation (which usually takes at least two to three months), the investigator is required to issue a recommendation regarding whether probable cause exists to believe discrimination occurred as alleged. This recommendation is then reviewed by an administrative law judge who also issues a recommendation. The administrative law judge is required to review the entire case file and then issue an independent determination of probable cause or no probable cause. The administrative law judge's conclusion is determinative.

If the administrative law judge concludes there is not probable cause to believe discrimination occurred, the case is effectively dismissed. A complaining party can appeal a finding of "no probable cause" to the entire commission and then to Iowa district court. After a finding of no probable cause is made, a complainant party cannot, however, obtain an administrative release and sue the respondents in state or federal court.

If the administrative law judge concludes there is probable cause to believe discrimination occurred, then the case is assigned to a "staff conciliator" who, according to the commission's rule, must attempt to "eliminate the unfair practice by conference, conciliation, and persuasion." If a conciliation conference is held, the conciliator is required to prepare a synopsis of the facts which led to the probable cause finding and a written recommendation for resolution of the complaint. The commission must, under its own rules, allow at least 30 days for the conciliation efforts to run their course. A respondent is not, however, required to

settle the dispute or even participate in the conciliation process.

When deciding whether to participate in the conciliation process, respondents must recognize that the commission's staff conciliator represents the interests of the commission and does not act as a true neutral intermediary. Listen to your attorney's assessment of the case, not the conciliator's recommendation regarding damages or the likelihood that the complaining party will prevail if the case proceeds to litigation. The complaining party may not recover what the conciliator projects if the matter was tried before an administrative law judge or a court. Furthermore, the recommendation assumes, consistent with the commission's probable cause finding, that discrimination occurred and the respondent is, therefore, liable.

Conciliation is a brief interlude between a probable cause finding and an administrative hearing. If the administrative law judge finds there is probable cause to believe discrimination occurred and conciliation efforts do not resolve the matter, the case is set for a public hearing before a hearing officer. Notice of the time, place and date of the hearing must be sent to all the parties at least 20 days before the hearing is scheduled. During the hearing, the complainant's case is presented by the commission's attorney. The hearing is conducted as provided in the Iowa Administrative Procedure Act, Code Chapter 17A (IAPA). Appeals to the commission and the Iowa courts are permitted, as provided in the IAPA. Likewise, a commission's finding that no probable cause exists may be judicially reviewed.

Administrative Release and Potential Damages

If a complaint has been on file for 120 days and a no probable cause determination has been made, the complaining party may request, and the commission must issue, a release permitting the complainant to commence a private discrimination suit in the appropriate Iowa district court. Such action must be commenced within 90 days of the release. The case is presented to the court, as the Iowa Supreme Court has ruled there is no right to a jury trial on Chapter 216 [claims](#).¹

The remedies available under Iowa's Civil Rights Act are more limited than the remedies for similar claims filed under federal law. Similar to federal law, the Iowa Civil Rights Act permits successful

plaintiffs to recover back pay and front pay, limited compensatory damages, attorneys fees, expert witness fees, court costs and injunctive relief such as reinstatement to a former position. However, unlike its federal counterparts, the Iowa Civil Rights Act does not permit plaintiffs the right to a jury trial or allow successful plaintiffs to recover punitive damages or extensive compensatory damages. There have been attempts to amend IOWA CODE Chapter 216 to make it consistent with federal law. The Legislature has not, however, passed legislation to that effect. The commission, or an Iowa district court, can order reinstatement, back pay (minus interim earnings), "actual damages" (for example, for emotional distress), attorney fees and a cease and desist order.

The act provides that employers, expressly including school corporations and other political subdivisions of the state, may not refuse to hire, discharge or otherwise discriminate against applicants or employees because of their age, race, creed, color, sex, national origin, religion or disability. Anyone over 18 is protected by the age discrimination prohibition. A person with AIDS is protected under the disability prohibition. The act further provides that disabilities resulting from pregnancy or childbirth cannot be the basis for discharge and must be regarded as temporary disabilities under health or disability insurance or sick leave plans. If no such plan exists, an unpaid leave for the period of the employee's disability or for eight weeks whichever is less, must be granted. The act also prohibits "educational institutions," including school districts, AEAs and community colleges, from discriminating against protected class members in educational or athletic programs.

Equal Pay Act of 1963

(29 U.S.C. Section 206)

The Equal Pay Act is an amendment to the Federal Fair Labor Standards Act which makes it illegal for covered employers, including states' political subdivisions, to pay employees of one sex lower wages than those paid to employees of another sex for work requiring substantially equal skill, effort and responsibility and performed under similar working conditions. Discriminatory intent need not be proven. Unequal payments do not violate the act if they result from the operation of (1) a bona fide seniority system; (2) a merit system; (3) a system

which measures earnings by quantity or quality of production; or (4) any factor other than sex.

An equal pay suit may be filed in state or federal court or, alternatively, the EEOC may sue the employer on behalf of employees after a charge was filed with EEOC and investigated. Jury trials are available. Employees may be awarded back pay, attorney fees, court costs and, for a willful violation, liquidated damages equal to the amount of pay due. The statute of limitations is two years, and three years for willful violations.

Fair Labor Standards Act of 1938, As Amended

(29 U.S.C. Section 201)

This federal statute requires covered employers, including school corporations, to pay all employees the statutory minimum wage per hour for all time employees who are "suffered or permitted to work" (for example, a bus mechanic required to remain at his work site, on call, during his lunch hour). The FLSA also requires employers to pay their employee overtime pay of one and one half times the employee's regular rate for all hours worked in excess of 40 during a given work week. Employees cannot waive their right to FLSA minimum wage or overtime pay. Administrators, teachers, nurses, counselors, and other certified employees are considered "professionals" and are therefore, exempt from the FLSA's minimum wage, overtime and recordkeeping requirements. Classified employees who supervise employees may also be exempt from FLSA requirements provided they are paid a weekly salary of at least \$250 and their primary function is to manage other employees. A school corporation's head custodian or its head cook may, therefore, be exempt depending on how many employees they actually supervise and the amount of time they spend supervising employees and doing custodial or kitchen work.

The FLSA also requires employers to maintain records for at least two years of employees' occupations, daily and weekly hours worked, regular hourly rate of pay, daily or weekly wages, weekly overtime pay, pay dates and pay periods. A poster describing the FLSA's provisions must be displayed in the work place.

Employees, or the United States Department of Labor, after an investigation by its Wage-Hour

Division, can sue for any unpaid minimum wages or overtime that is due the employee. The limitations periods and relief available are summarized under the Equal Pay Act.

Family and Medical Leave Act of 1993

(PI 103-3)

This federal law covers school corporations with 50 or more employees. The law defines a number of terms used in substantive provisions. An "eligible employee" is one employed 12 months and has 1,250 hours of service when the leave is requested. A "serious health condition" is an illness, injury, impairment or continuing treatment by a provider. A son or daughter includes a biological, adopted or foster child, a stepchild, legal ward or child of a person in loco parentis who is under 18 or over 18 and incapable of self-care.

The act guarantees an eligible employee 12 work weeks of leave in the designated 12 month period for (1) birth or care of a son or daughter, (2) placement of the son or daughter with the employee for adoption or foster care, (3) care for the employee's spouse or son, daughter or a parent of the employee for a serious health condition, or (4) a serious health condition rendering the employee unable to perform job functions. The leave is unpaid but the employer can require, or the employee can elect to use, paid vacation, personal leave or family leave for all but the personal medical leave. A returning employee has the right to the same or equivalent position but not to seniority or benefits during leave. Health insurance, however, must be maintained on the same basis as if the employee was continuously employed. The employer can recover premiums from employees not returning unless the reason is recurrence of a health condition qualifying for personal or family health leave.

Leaves for birth, child care or adoption purposes can be taken intermittently or on a reduced work schedule if the employer and employee agree. When an employee requests family or personal illness leave on an intermittent or reduced work schedule that is "foreseeable based on planned medical treatment," the employer may require the employee to temporarily transfer to another available position with equivalent pay and benefits and for which the employee is qualified.

The act contains certain limits. Employees must give 30 days notice for all purposes, if practicable, and for personal or family health leaves must make a "reasonable effort to schedule treatment" so as not to "unduly disrupt operations of the employer." If spouses work for the same employer there is one 12 work-week leave for all purposes except their personal health usage. For personal or family health leaves, an employer can require medical certification and has the right to second or (to break a tie) third opinions, at its cost.

The employee, or the Secretary of Labor under the FLSA's enforcement provisions, can sue the employer in state or federal court. Recoverable amounts include lost compensation, actual damages, liquidated damages, interest, attorney fees and costs. Reinstatement, promotion and an order to hire are also available.

The act contains special rules for employees of a "local educational agency, which includes school corporations. Employees in an "instructional capacity" who request personal or family health leave that would cause them to lose 20 percent of their work time during the period the leave occurs can be required to transfer to another position. In addition, when such leaves occur at the end of the academic year, employees can be required to remain on leave through the end of the term.

Age Discrimination in Employment Act of 1967 ("ADEA")

(29 U.S.C. Section 621)

This federal statute prohibits employers, including states' political subdivisions, from discriminating against persons age 40 or more by refusal to hire, discharge or other discrimination in terms, conditions or privileges of employment because of their age. Differential treatment is permitted if: (1) age is a bona fide occupational qualification; (2) the employer differentiates on the basis of factors other than age; or (3) the employer is observing the terms of a bona fide seniority system or bona fide benefit plan.

The ADEA, like Title VII of the Civil Rights Act of 1964, is administered by and enforced by the Equal Employment Opportunity Commission. This means that any person filing suit under the ADEA must first file a complaint with the EEOC. Unlike Title

VII complaints, an ADEA litigant must only notify the EEOC before filing suit in state or federal court and need not obtain an administrative release or "right to sue" letter from the agency

The damages available to ADEA litigants are the same as those available under Title VII, except that prevailing parties under the ADEA cannot recover compensatory or punitive damages, but can recover liquidated or "double" damages provided the prevailing party proves the violation was "willful." A willful violation exists if the employer knew its conduct would violate the ADEA, but engaged in the conduct anyway or showed a reckless disregard concerning whether its conduct would violate the act.

Congress passed the Older Workers Benefit Protection Act (OWBPA) that amended the ADEA in two crucial respects. First, the OWBPA covers employee benefits. Employers must offer the same level of benefits to their older and younger employees unless the employer can prove that the cost of the benefits offered is greater for older employees than it costs for younger employees. If the cost of providing a benefit increases with age, the OWBPA permits employers to provide older employees with less benefits than it provides younger employees.

The OWBPA also amended the ADEA to include certain requirements that must be met before any person can release or waive an age discrimination claim. Those conditions are:

- The release or waiver must be part of an agreement between the employer and employee written in ordinary English
- The release or waiver must refer specifically to rights or claims arising under the ADEA
- The release or waiver cannot cover rights or claims that may arise after the date on which it is executed
- The waiver must be given in exchange for consideration, money or benefits in addition to anything of value to which the employee was already entitled
- The employee must be advised in writing to consult with an attorney before signing the agreement
- The employee must be given at least 21 days to sign the release or waiver and an additional seven days to revoke the release or waiver after

it is signed. (However, if the waiver is sought in connection with an exit incentive or other termination program offered to a group or class of employees, then the employee must be given at least 45 days to consider the release or waiver.)

Americans With Disabilities Act of 1990

(42 U.S.C. Section 12,100)

The employment provisions of the Americans With Disabilities Act of 1990, applicable to public and private employers with 25 or more employees on July 26, 1992 (with 15 on July 26, 1994), forbid discrimination against a qualified disabled applicant or employee and require reasonable accommodations for the known disability of an otherwise qualified person, unless providing an accommodation would impose an undue hardship on the [employer](#).²

A person with a "disability" has an impairment that substantially limits a major life activity, or a record of such impairment, or is regarded by the employer as having such an impairment. "Major life activities" include walking, seeing, hearing, learning or working. The term "impairment" includes physiological or mental disorders, including such diseases as AIDS, diabetes, epilepsy, cancer or MS. The term "impairment" does not include such characteristics or conditions as faulty judgment, advanced age, lack of education, sexual behavior disorders (such as homosexuality or pedophilia) or temporary illness or injuries (such as influenza or broken bones). The EEOC's regulations provide that whether an impairment is "substantially limiting" is determined by the nature and severity of the impairment, its duration and its long-term impact. A normal pregnancy, for example, is not included.

A person with a disability is "qualified" for a job if he or she can perform its "essential functions" with or without reasonable accommodation. A job's essential functions are its principal duties and responsibilities. The employer has the right to impose education, experience, skill, training or license requirements, and the ADA does not negate state or local requirements. The EEOC's *Technical Assistance Manual* gives the following examples:

The first step in determining whether an accountant who has cerebral palsy is qualified for a certified public accountant job is to determine if the person is a CPA. If not, he/she is not qualified. Or, if it is a company's policy that all its managers have at least three years' experience working with the company, an individual with a disability who has worked for two years for the company would not be qualified for a managerial position.

A job's "essential functions" are determined from the job description, the employer's judgment (which is given deference, although not conclusive effect), the amount of time required to perform them and the past or current experience of others on the job. The job description should be prepared before the job is advertised and should, to be credible, accurately reflect functions actually performed.

EEOC regulations require reasonable accommodations on three levels: (1) to ensure equal opportunity for the handicapped during the application process; (2) to enable disabled applicants and employees to perform essential job functions; and (3) to permit such employees to enjoy employment benefits and privileges such as fringe benefits and facilities. It is the responsibility of applicants and employees to notify the employer that accommodations are necessary. The EEOC takes the position that accommodations should be developed through an "informal, interactive process" between the disabled person and the employer. The employer need not accept every suggested accommodation and it may require documentation (for example, a written recommendation from a psychologist or therapist) to support accommodations that are not readily apparent.

Some examples of reasonable accommodations during the application process are a wheelchair ramp to the employment office, the placement of job information at a site accessible to mobility-impaired persons, providing extra testing time for persons with learning disabilities and transcribed job advertisements for persons with visual difficulties.

Reasonable accommodations, according to the ADA, include at least the following efforts: (1) job restructuring (for example, reallocating non-essential functions); (2) modified work schedules (for example, to accommodate medical

appointments); and (3) supplying personal assistants or readers or interpreters or special equipment or reassignment to a vacant position.

An employer is not required to remove or reassign the essential functions of a job. If the only available vacancy is to a lower-related job and the employer's usual practice is to pay a lower rate, such practice can be followed. Examples of facilities modifications include a reserved parking space for easy ingress, rearranging office furniture or equipment and installation of access ramps. Equipment accommodations include providing telephone amplifiers for the hearing impaired, braille markings on equipment for persons with reading disabilities and telephone headsets for those with manual difficulties. There is no obligation to provide accommodations solely for an applicant's or employee's personal use.

Whether an employer will suffer an "undue hardship," relieving it of an accommodation obligation, is determined by the nature and cost of the accommodation, the overall financial resources of the facility involved, the impact of the accommodation on its operation, the overall resources, size, number and nature of the employer's facilities and the type of operations involved. The employer bears the burden of demonstrating an undue hardship. That employees do not approve the proposed accommodation is of no consequence. What if a particular accommodation—the transfer of a disabled person to another job, displacing the incumbent—violates an employer's collective bargaining agreement (for example, requiring that all transfers be based on seniority)? This question is unresolved. The EEOC merely says the agreement "may be relevant."

Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000e)

This federal statute makes it unlawful for an employer of 15 or more employees, including school corporations, to discriminate against any applicant or employee in hiring, firing, compensation or any other terms, conditions or privileges of employment on the basis of race, color, religion, sex or national origin. Title VII also prohibits segregating or classifying employees in any way that deprives a person of employment opportunities or adversely affects an individual's employment status. However, differential treatment on the basis of sex, national origin or religion is

permitted when such a factor is a bona fide occupational qualification reasonably necessary for the particular business. Differential treatment based on race, color, religion, sex or national origin is permitted where the employer observes a bona fide seniority or merit system. The courts narrowly interpret these exceptions.

There are two recognized theories of discrimination under Title VII: disparate treatment, involving intentionally differential treatment of individuals based on their protected class status; and disparate impact, where the application of a facially neutral rule, policy or practice has a disproportionately high adverse impact on protected class members.

The Health Insurance Portability and Accountability Act

("HIPAA") Act of 1996

HIPAA improves the portability and continuity of health insurance coverage in the group and individual markets. HIPAA accomplishes this through provisions that limit pre-existing conditions exclusions, prohibit discrimination against participants and beneficiaries based on health status, guarantee availability and renewability of coverage for certain employers and individuals, prevent health care fraud and abuse, clarify and expand certain provisions of COBRA, increase the attractiveness of long-term care insurance, and authorize medical spending accounts for small employers and self-employed individuals.

Under HIPAA, group health insurance plans and health insurance insurers must limit pre-existing condition exclusions to a maximum of 12 months, or 18 months for late enrollees. Pre-existing condition exclusions generally do not apply to pregnancies, newborns, adopted children, and children placed for adoption so long as the child is enrolled within 30 days following the birth, adoption, or placement for adoption.

The period in which to identify pre-existing conditions is limited to six months before the date of enrollment. Further, the pre-existing condition limitation triggered by the participant's "symptoms" alone is not subject to the pre-existing condition exclusion. Therefore, an individual who displayed symptoms of an illness in the six month "look back" period is not subject to the pre-existing condition limitation so long as the person did not seek

medical advice, diagnosis, or care or treatment for that condition in the six-month "look back" period.

In addition, the pre-existing condition period must be reduced by previous "creditable coverage" from another plan or carrier. "Creditable coverage" includes almost any type of previous health coverage, so long as there was not a break in coverage for more than 63 days. An individual establishes "creditable coverage" through certification provided by the plan or insurance carrier, or through another procedure required by the HIPAA regulations. Insurers and health plan sponsors are required to maintain coverage records and to issue certifications of coverage for periods of coverage occurring after July 1, 1996.

If, for any reason, a person loses health insurance coverage, the group health plan or insurer must make available to that person a certificate of creditable coverage. The certificate must show the dates the person had health coverage so the person can show any new group health plan the certificate to obtain credit toward any pre-existing conditions limitation period that plan might have. Generally, the certificates must be issued within 14 days following termination of coverage or when COBRA continuation terminates. If a person requests a certificate of coverage within 24 months after coverage terminated, the group health plan or insurer must provide that person a certificate.

HIPAA provides two methods of determining creditable coverage periods, one without regard to specific benefits covered during the period, the other with reference to several classes or categories of benefits provided.

In addition, HIPAA provides that health plans and health insurance insurers offering group health insurance coverage cannot deny coverage or require greater premiums from an individual based on the individual's health status, medical condition, medical history, genetic information, or evidence of insurability or disability. Also, group health plans and health insurance issuers who offer group health insurance coverage generally are required to permit late enrollment for individuals who originally declined coverage due to alternative coverage, if the individual loses the other coverage and requests enrollment within 30 days.

Once group coverage is in place, HIPAA requires health insurers to guarantee the renewability of coverage for employer groups and the coverage must be renewed or continued unless one of the following exists: non-payment of premium; fraud; violation of participation or contribution rules; uniform termination of coverage by an insurer subject to the applicable state law; or movement by an employer outside of the service area of an HMO.

Also, if there is a material reduction in covered services or benefits provided under a group health plan, HIPAA requires that a summary description of the modification or change be furnished to participants and beneficiaries no later than 60 days after the date of the adoption of the modification or change.

HIPAA further extended to 29 months the maximum coverage continuation period under the COBRA rules if the qualified beneficiary is determined under the Social Security Act to have been disabled at the time of the qualifying event or if the disability exists at any time during the first 60 days of the COBRA coverage. The definition of "qualified beneficiary" now includes a child born to or placed for adoption with the covered employee during the COBRA coverage period. A qualified beneficiary's COBRA coverage may be terminated if he or she becomes covered under another group health plan, even if the new coverage contains a

preexisting condition provision; provided, however, that the preexisting condition provision under the new coverage does not apply to the person as a result of HIPAA provisions that limits the application of pre-existing conditions.

HIPAA also provides that employer-provided coverage for long-term care insurance, under certain circumstances, is tax-free to covered employees. Long-term care premiums cannot, however, be provided through a cafeteria plan and long-term care expenses cannot be reimbursed under a flexible spending account.

Finally, HIPAA provides that the 10% excise tax for early withdrawals from IRAs will not apply to the extent a withdrawal is used for medical expenses that exceed 7.5% of the individual's adjusted gross income (i.e., the floor for medical expenses). Under certain circumstances, the excise tax will not apply to withdrawals for medical insurance if the individual has received unemployment compensation.

Endnotes

1. [*Smith v. ADM Feed Corp.*](#), 456 N.W. 2d 378 (Iowa 1990).
2. [42 U.S.C. § 12](#), 112(b)(5)(A).