GENDER/AGE
DISCRIMINATION

There are steps you can take to minimize the chances of your organization being accused of discrimination:

- **Review the criteria** for hiring, promotion and firing throughout your company. You must be able to demonstrate that any test or criterion is job related, has a business necessity and does not have a disparate impact.
- **Be consistent**, fair and clear in your policies and procedures.
- **Make sure your managers are trained** to enforce anti-discrimination laws to protect you from hostile-environment and retaliation lawsuits.

**Caution:** It’s more important than ever to independently check supervisors’ disciplinary recommendations to ensure they have no ulterior motives, in light of a U.S. Supreme Court ruling in 2011:

The court said an employer can be found liable for the discriminatory intent of supervisors who influence—but don’t ultimately make—an adverse employment decision. The justices concluded that a member of the military reserves had been fired from his job because of his bosses’ anti-military bias, even though the HR person who actually terminated him didn’t know that the supervisors were discriminating against him. *Staub v. Proctor Hospital*, No. 09-400. The only way to avoid liability in such cases, the court said, is if an employer (1) conducts an independent investigation and (2) that investigation concludes that the decision was entirely justified regardless of the supervisor’s input.

In 2000, the Supreme Court ruled unanimously that workers don’t need direct evidence that their employer intended to discriminate against them. Workers have to show only that they suffered adverse treatment (like firing or demotion) and the company’s explanation for it was false. Then a jury would be allowed to decide whether the company’s real motive was discriminatory.

In 2006, the Supreme Court decided a landmark retaliation lawsuit that created a broad national standard for Title VII retaliation claims.

The new legal standard says that, to successfully bring retaliation claims to court, employees must prove two elements:

1. **They engaged in a protected activity** (i.e., filed an EEOC charge, testified in an investigation, reported discrimination to the company, etc.).

2. **Their employer subjected them** to an “adverse action” because of that protected activity.
The second element is problematic in that the court defined “adverse action” quite broadly. To be retaliation, an employer’s alleged action must be “materially adverse” to the point that it would dissuade an individual from making a discrimination charge.

The question no longer is whether an employee was fired, demoted or denied a promotion because she charged discrimination. Instead, the question is whether the action would intimidate a reasonable employee. For example, while a schedule change might not bother some employees, it might create a big problem for a mother with young children.

In the Supreme Court case, Sheila White worked as a forklift operator before she filed sexual harassment charges. Soon afterward, the company transferred her to a more physically demanding job and suspended her without pay for a short time.

Although she was reinstated with full pay just 37 days later, the Supreme Court still concluded the employer had retaliated against her. It pointed to the toll that time without pay can take. Also, the court noted that requiring an employee to spend more time on “the arduous duties and less time on those that are easier and more agreeable” would be a good way to “discourage an employee … from bringing discrimination charges.” Burlington Northern & Santa Fe Railway Co. v. White, No. 05-259 (2006)

“Third-party” retaliation: In 2011, the U.S. Supreme Court widened the circle of people who can bring retaliation lawsuits under Title VII. The court said it was illegal for a company to retaliate against an employee who had filed a discrimination complaint by firing her fiancé, who worked at the same company. It said Title VII was clearly intended to protect everyone who might be harmed by retaliation, not just those who file discrimination complaints. Thompson v. North American Stainless, No. 09-291

The Thompson case has important implications for all employers, especially now that retaliation claims have surpassed race claims to become the No. 1 job discrimination complaint with the EEOC.

Oral complaints protected from retaliation: In 2011, the Supreme Court ruled that an employee’s Fair Labor Standards Act complaints don’t have to be written to be protected from retaliation by their employers. It said an employee’s oral complaints about his employer’s time clocks were just as valid as a written complaint. Kasten v. Saint-Gobain Performance Plastics, No. 09-834

It’s now harder to sue for bias, retaliation

A pair of U.S. Supreme Court rulings handed down in 2013 now make it more difficult for employees to file lawsuits claiming job discrimination or retaliation:

■ New definition of “supervisor” in discrimination cases: The Supreme Court ruled that only someone with the power to take “tangible employment action” can be considered a “supervisor” in Title VII discrimination cases.

That’s an important distinction. By law, employers are typically presumed liable for discrimination caused by a supervisor. However, when it comes to discrimination between co-workers who have little power over one another, employers are liable only if management does nothing in response to bias complaints.

This ruling clarified exactly who is a “supervisor” in such cases. It said a supervisor must have the power to take a “tangible employment action” such as “to hire, fire, demote, promote, transfer, or discipline.” Now, anyone without that authority will be considered only a co-worker in Title VII lawsuits. Previously, most courts (and the EEOC) took the position that a supervisor was someone
who was simply in a position to direct an employee’s work. *Vance v. Ball State University*, No. 11-556

**Court sets higher bar for retaliation lawsuits:** The Supreme Court said employees can win retaliation lawsuits only if they can prove their employer retaliated against them *solely* because of the employee’s protected activity. This decision could lead to fewer retaliation lawsuits against employers.

The questions before the Court:

- Must an employee prove his protected status or activity was the *only* reason that he suffered retaliation? (That’s the so-called “but-for” standard, as in “But for the protected status or activity, would the employer have retaliated?”)
- Or, can protected status or activity be just one of many motives for the retaliation? (The “mixed-motive” argument.)

The court decided that the first, more restrictive definition should be the standard. *University of Texas Southwestern Medical Center v. Nassar*, No. 12-484

**GENDER ISSUES**

Your supervisors probably understand that they can’t pay a male more than a female to perform the same job or dole out promotions only to males. What they may not appreciate are the more subtle forms that gender discrimination may take. They may not make an effort to scrutinize their decisions to uncover any entrenched patterns of discrimination and practices that discourage women from applying for promotions or asking for raises.

Even if you’re not looking for patterns, be aware that plaintiffs’ attorneys are. Take one disgruntled female and one contingent-fee employment lawyer, add some discovery, and you may face a class action lawsuit. Every year, at least one major employer settles a class action filed on behalf of its female employees.

In a highly anticipated ruling in 2011, the U.S. Supreme Court said a huge lawsuit on behalf of 1.5 million female Walmart employees cannot proceed as a single class-action case. Experts say the important ruling will make it more difficult for employees to band together in giant class-action cases against employers. *Walmart v. Dukes*, No. 10-277

The *Walmart* decision reversed a ruling by the 9th Circuit that gave the green light to the class action by current and former female employees who claimed Walmart consistently promoted men over women and paid men more for similar work. The issue in the case wasn’t whether the company discriminated, but whether such a large group could link together in a class action. The Supreme Court said the plaintiffs’ claims didn’t have enough in common to be banded together into a single case.

Three major federal laws outline how you must treat female workers: the Equal Pay Act, the Pregnancy Discrimination Act and the Civil Rights Act. Together, they provide a great deal of protection for women in the workforce.

While sexual harassment is the gender issue that makes the most headlines, many employees, especially those with young families, are more concerned with balancing home and work. Many employers have attempted to address work/life balance issues through flexible scheduling, family leave, on-site day care facilities and the like.
Unfortunately, making life easier for families may also lead to resentment among employees who are single, childless or have already raised their families. This may lead to unconscious discrimination, especially among managers who may believe they’ve already paid their dues and risen in the ranks while juggling family/work schedules without help from their employers or entitlement programs such as the Family and Medical Leave Act. The result may be less overt discrimination.

**EQUAL PAY ACT**

The Equal Pay Act of 1963 prohibits employers from paying different wages on the basis of gender for “equal work on jobs the performance of which requires equal skill, effort, and responsibility and which are performed under similar working conditions. …” Female employees must receive the same level of benefits as their male colleagues.

The EEOC administers the law. The agency can conduct audits even if it hasn’t received a complaint and can initiate suits on behalf of those whose rights have allegedly been violated.

Some employers wrongly believe that they’re not vulnerable to an EPA lawsuit if the two jobs in question aren’t identical. But female employees don’t need to meet such a high standard to bring their equal pay claim to court. The EEOC says females need only prove that they’re paid less than men who work in “substantially equal” jobs.

When deciding whether jobs are substantially equal, titles don’t matter. Duties and responsibilities do. If members of one gender hold most of the high-paying positions, alarm bells should sound.

**PREGNANCY DISCRIMINATION ACT**

Discriminating against a woman because she’s pregnant is a mistake employers can’t afford to make. In 2015, the EEOC received 3,543 new pregnancy discrimination complaints. The Commission resolved 3,439 complaints resulting in damages of $14.8 million. That figure doesn’t even include the cases that made it to court.

The Pregnancy Discrimination Act (PDA) of 1978 prohibits discrimination on the basis of “pregnancy, childbirth and related medical conditions.” A woman cannot be denied a job or a promotion merely because she is pregnant or has had an abortion. She cannot be fired because of her condition or forced to go on leave as long as she is physically capable of performing her job.

In short, the law requires that pregnant employees be treated the same as other employees on the basis of their ability or inability to work. That means you must provide the same accommodations for an expectant worker that you do for any employees unable to perform their regular duties. For example, if you provide other work for an employee who can't lift heavy boxes because of a bad back, you must make similar arrangements for a pregnant worker.

Employers that use light-duty programs to cut workers’ compensation costs often make one big legal mistake: They haphazardly apply their policies, allowing some employees to take light-duty jobs, but not others. That inconsistency is the fastest way to trigger discrimination lawsuits from employees who need light-duty positions temporarily for other reasons, such as some pregnant women.
The Supreme Court made that point very clear in its *Young v. UPS* (No.13-1019, 2015) ruling. When a pregnant employee’s doctor imposed lifting restrictions, the employer informed her she could not work until the restrictions were lifted. Because the employer allowed employees who had been injured on the job to work light-duty positions until their medical restrictions were lifted, she argued the employer was discriminating against her because of her pregnancy. The Supreme Court agreed.

The PDA requires you to provide sick leave and disability benefits on the same basis or conditions that apply to other employees who are granted leave for temporary disability.

Women who take maternity leave must be reinstated under the same conditions as employees returning from disability leave.

At the same time, you are allowed to apply the same requirements that you impose on other employees. Thus, if you usually require employees to obtain a doctor’s note before allowing them to take sick leave and collect benefits, you can impose the same rule on pregnant employees.

Any employer that is subject to Title VII (having 15 or more employees) must comply with the Pregnancy Discrimination Act.

Other provisions of the PDA are:

- You can’t exclude single women from maternity benefits. (The ACA bars this as well.)
- You must provide the same coverage for pregnancy-related conditions as you do for illnesses and disabilities. The FMLA provides eligible parents with up to 12 weeks of unpaid leave for the birth of a child. Should a new mother still be unable to return to work after exhausting her FMLA leave, her condition should be evaluated under the ADA to determine whether additional time off is a reasonable accommodation given her condition. Some states provide longer than 12 weeks for parental leave. Check the laws in your state.
- You can require a pregnant employee to use her vacation benefits before she can collect sick leave or disability pay, as long as you have the same requirement for employees absent for other types of disabilities or illnesses.
- An employee with a single-coverage policy cannot be forced to purchase a family policy in order to be covered when she becomes pregnant. However, she should be allowed to switch to the family plan after the birth so that her child will be covered.

➤ **Observation:** Charges of discrimination on the basis of pregnancy or related conditions are difficult to fight in court. You will lose unless you can clearly prove that the reasons for not hiring or for discharging the plaintiff were unrelated to the pregnancy.

Consider this case: Motherhood Maternity, a Philadelphia-based retailer, paid $375,000 to settle a pregnancy discrimination and retaliation lawsuit brought by the EEOC. The lawsuit charged that the retailer refused to hire qualified female applicants because they were pregnant.

The lawsuit also charged Motherhood with illegally disciplining and firing an assistant manager because management believed she was pregnant and in retaliation for her discrimination complaints. *EEOC v. Mothers Work Inc.*, dba Motherhood Maternity.

With respect to the Pregnancy Discrimination Act, courts employ a three-part analysis (similar to that employed under the ADEA). First, the plaintiff is required to establish a prima facie case by showing that she belonged to a protected class; was qualified for the position from which she was terminated; and persons outside the protected class were retained.
Once a plaintiff establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for her termination. Finally, if the defendant provides such a reason, then the plaintiff must show that the reason was a pretext for a discriminatory motive.

Singling out pregnant employees for any reason can lead to a lawsuit. If supervisors make little jokes about pregnancy and childbirth, rein them in. In one recent case, when a top performer received an award at a luncheon, she was taken aback when her boss casually said, “You’re not gonna get pregnant now, are you?”

As luck would have it, she did become pregnant the following month. Then her boss began calling her “Prego” and soon was criticizing her work. She complained to HR, but the company didn’t investigate. She sued, and the court concluded calling her “Prego” and making comments about pregnancy amounted to a hostile environment. *Zisumbo v. McLeodUSA Telecom*, No. 04-4119 (10th Cir.)

### SEX DISCRIMINATION

The third major law regulating how employers may treat female workers is Title VII of the Civil Rights Act, which outlaws discrimination based on race, color, sex, national origin, religion and disability. Enforced by the EEOC, it gives workers the right to sue their employers in federal court. Sexual harassment is a form of sex discrimination and is illegal under Title VII.

Title VII requires that you treat male and female workers equally in all terms and conditions of employment. That means not only paying and promoting women on the same terms and conditions as men, but also meting out punishment equally. That was the issue in this case decided by the U.S. Supreme Court:

In *Desert Palace v. Costa*, 123 S. Ct. 2148 (2003), the court’s unanimous decision made it much easier for all workers to prove allegations that their employers discriminated against them because of race, sex, national origin, color, religion or disability. The court concluded that direct evidence of discrimination isn’t necessary: Workers can rely on circumstantial evidence.

To protect yourself from sex discrimination claims, follow these guidelines:

- **Before punishing a female worker**, consider how you’ve punished other workers for the same offense. Treat males and females the same. (Don’t treat women with kid gloves, however. That could lead to a reverse discrimination lawsuit by a male.)

  - **Perform a regular audit** of all personnel actions and look for patterns of discrimination. If you find a pattern, make managers aware of the problem and insist that they correct it.

  - **Consider making equal enforcement** of the rules a measure of your managers’ performance. This will reinforce the policy that you’re serious about eliminating sex discrimination.

  - **Review your hiring, promotion and recruiting practices.** Make sure you don’t rely excessively on employee referrals or promotions based on an informal old-boy network. Doing so may mean you are unintentionally excluding qualified applicants and workers. If a female worker can show a statistical pattern of fewer women being hired or promoted, she may be able to make a case of sex discrimination. Intent becomes irrelevant. Use consistent, measurable and sex-blind criteria to hire, fire and promote.
Reverse sex discrimination

Although not as common as discrimination against women, there have been cases of so-called reverse sex discrimination. For example, the EEOC settled a case against a company that maintained sex-segregated job classifications. The employer, Jillian’s Entertainment, operates family restaurants in 25 states and has more than 5,000 employees. A class action lawsuit was filed against it by male workers who alleged that only women were allowed to hold “server” positions, which paid on average more than positions open to the men. The company had to pay the men $350,000 in damages and agreed to rewrite its job descriptions to remove references to gender.

Lilly Ledbetter Fair Pay Act

In January 2009, the Lilly Ledbetter Fair Pay Act took effect, making it easier for women and others to sue for pay discrimination that may date back decades. The law, retroactive to May 2007, liberalizes statutes of limitations on when employees can file such lawsuits.

Drafted in response to a 2007 U.S. Supreme Court decision that said employees had at most 300 days to file pay discrimination complaints, the new law counts each unfairly low paycheck as a fresh discriminatory act. It caps damages at $300,000 and retains current limits on back pay to two years’ worth.

In Ledbetter v. Goodyear Tire & Rubber, 127 S.Ct. 2162, the Supreme Court affirmed a Title VII provision requiring employees to file pay discrimination complaints within 180 days of the alleged discriminatory act (300 days in cases covered by a state or local anti-discrimination law).

In the case, Lilly Ledbetter had argued that each low paycheck she received over the years constituted a new discriminatory act. But the court said the discriminatory act happened decades earlier, when Goodyear first hired her at a pay rate below that of male employees. Since more than 180 days had passed since then, the court said Ledbetter could not sue her employer.

The Ledbetter Fair Pay Act amends Title VII to make clear that each allegedly unfair paycheck shall be considered a fresh incident of discrimination.

Age Discrimination in Employment Act

Under the Age Discrimination in Employment Act (ADEA), enacted in 1967, employers with 20 or more workers cannot engage in personnel practices that discriminate against individuals age 40 and older. (Many states have laws that apply to companies with fewer than 20 workers.)

Although age discrimination suits have traditionally been brought when a worker over 40 loses his or her job, a recent Supreme Court decision allows older workers to challenge any policy that has a disparate impact on older workers. In 2009, the Supreme Court ruled that employees may not bring “mixed-motive” age discrimination cases against employers. In effect, employees must prove that “but for their age” the employer would not have taken the adverse action. Gross v. FBL Financial Services, 129 S. Ct. 2343 (2009)

Workers over 40 who are terminated have two ways to prove age discrimination under the ADEA: the direct method and the indirect. To be successful under the direct method, a plaintiff must produce direct evidence of discrimination. The evidence may consist of deposition testimony
containing discriminatory statements or other evidence revealing an anti-older-worker bias on the part of management.

Under the indirect method, first, a plaintiff must establish a prima facie case of discrimination by showing that he or she:

1. Is within the protected class (age 40 or older).
2. Was performing the job satisfactorily.
3. Was discharged.
4. Similarly situated, substantially younger employees were treated more favorably.

Second, if the plaintiff is able to establish a prima facie case, the burden shifts to the employer to produce evidence of a legitimate, nondiscriminatory reason for the termination. Third, the plaintiff must then show that the employer’s reason was a pretext for discrimination.

However, at this third stage, the plaintiff is not required to produce any new or additional evidence, according to a U.S. Supreme Court ruling in an ADEA case. The high court said if evidence in the record contradicts the employer’s reason, the case can proceed to a jury, which could infer that the employer was attempting to cover up a discriminatory motive. Reeves v. Sanderson Plumbing Products, 530 U.S. 133 (2000)

Most age discrimination cases grow out of wrongful discharge and mandatory retirement policies, but they can involve any adverse change in working conditions, including denial of a promotion or training.

An employer may defend itself on several grounds:

- The employee’s age represented a bona fide occupational qualification (BFOQ)—that is, an older worker could not perform the job by virtue of his age. For example, age qualifies as a BFOQ for pilots, who cannot receive FAA certification if they are older than age 65.
- The employee was terminated for just cause, which may be based on his misconduct, performance or incompetence.
- The employee was discharged for business necessity. In this defense the employer must prove the existence of valid -business reasons, unrelated to age, that required the termination of the employee. These might include a major company reorganization because of financial difficulties.

An employer will often defend an ADEA case on the grounds that the disputed employment decision was not based on age, but rather on “reasonable factors other than age. . . .” [29 U.S.C. §623(f)(1)] In general, the higher cost of salary, overqualification and lesser years of remaining service are not considered “reasonable factors other than age” because they are so closely related to age. These reasons are frequently called “proxies” for age, and a defense based on one of these grounds will probably not be successful.

In 1986 an amendment was added to the ADEA banning mandatory retirement at any age, regardless of early retirement provisions in an employee benefits plan or seniority system. This amendment does not preclude provisions permitting employees to elect early retirement at a specified age or at their option.

➤ Observation: The prohibition against mandatory retirement does not apply to employees who are at least 65 and who, for the two years immediately preceding retirement, are employed in a high
policy-making or bona fide executive position and are entitled to receive employer-financed pensions or other retirements benefits of at least $44,000 annually.

**Waivers/OWBPA**

If you have to terminate a worker, it’s a smart move to ask him to sign an agreement waiving his right to sue for discrimination or wrongful discharge. But that’s not enough if the worker is over 40 years old because he could also sue you for age discrimination under the ADEA.

To protect yourself, you must put an additional provision in your waiver agreement that specifically deals with ADEA claims. What’s more, it won’t be legally binding unless you also give the worker some extra benefit in return—such as extra severance pay or additional health care coverage.

But you’re still not done yet. To be valid, ADEA waiver agreements must comply with all the requirements spelled out in a 1990 amendment to the ADEA, the Older Workers Benefit Protection Act (OWBPA). The amendment states that ADEA waivers are legal only when workers sign them in a “knowing and voluntary” manner. A waiver applying to an individual worker will meet OWBPA’s requirements as long as it:

- Is written so that the employee can clearly understand it and refers specifically to age-discrimination rights and claims.
- Does not ask the worker to waive rights or claims that might come up after the waiver is executed.
- Offers the worker money or something else of value to which he or she otherwise would not be entitled.
- Advises the worker—in writing—to consult an attorney before signing the agreement.
- Allows the worker at least 21 days to consider signing the agreement. However, the agreement can be withdrawn prior to acceptance. *Ellison v. Premier Salons International*, 164 F.3d 1111 (8th Cir.)
- Gives the worker at least seven days to revoke the agreement after it is signed.

You face additional waiver hurdles whenever you fire, lay off or offer early retirement or severance packages to more than one employee. In these group situations, your waiver also must:

- Give workers at least 45 days, instead of 21, to consider the waiver agreement.
- Provide the job titles and ages of all individuals being laid off or being offered the same early retirement plan. Plus, you must provide the ages of workers in the same job classification or organizational unit who are not eligible or selected for the plan.

**Caution:** Make sure your age-bias waiver procedure is airtight. Workers still retain the right to sue if your waiver policy strays at all from the OWBPA, according to the Supreme Court’s ruling in *Oubre v. Entergy Operations*, 522 U.S. 422 (1998). In the case, a 41-year-old worker was asked to resign after receiving a poor review. She signed a release waiving her rights to sue the company and then received (and spent) her severance pay. She later filed suit, claiming she was pressured into quitting because of her age. Lower courts agreed to dismiss the case, but the Supreme Court said the case could proceed because the company’s waiver procedure didn’t follow OWBPA’s requirements.
The EEOC says the burden is on you—not the fired employee—to prove that a waiver complies with federal law. To read the EEOC’s regulations, “Waivers and Claims Under the ADEA,” go to www.eeoc.gov.

**Equal pay for older workers**

When designing your compensation plans, take into consideration whether the pay schedules have a negative impact on older workers. Several pay discrimination cases have reached the Supreme Court in recent years.

The first case was *General Dynamics v. Cline*, 540 U.S. 581 (2004). At issue was whether an agreement that gave greater health benefits to workers over age 50 than to those between 40 and 50 violated the ADEA. The Supreme Court concluded it did not and ruled that favoring the oldest among the old was not illegal age discrimination.

In 2005, the Supreme Court ruled that the city of Jackson, Miss., didn’t violate the ADEA when it instituted a new pay plan that gave slightly smaller pay increases to police officers with more experience, almost all of whom were over 40. However, the court did state that workers can sue employers when they can identify “any specific test, requirement, or practice … that has an adverse impact on older workers.” In the court’s view, the officers suing in this case failed to meet that standard. *Smith v. City of Jackson*, 125 S. Ct. 1536 (2005)

The Supreme Court’s subsequent decision in *Meacham v. Knolls*, No. 128-2395 (2008) made it easier for employees to bring disparate impact suits under the ADEA:

In 1996, Knolls Atomic Power Lab conducted an involuntary reduction in force. The laboratory asked supervisors to rank employees from 0 to 10 on three factors—performance, flexibility and the criticality of their skills—and then add up to 10 points for years of service. Based on the resulting scores, Knolls laid off 31 workers. All but one of the workers was over age 40. The workers sued, claiming that the subjective scoring criteria discriminated against older workers. A circuit court found for Knolls, ruling that the workers had failed to show that the scoring system was unreasonable. The Supreme Court overturned that decision, finding that it was up to Knolls to prove that its criteria were reasonable.

**Bottom line:** Employers should always be sensitive to how changes affect older workers and never make employment decisions based on age.