



All for Equity and Equity for All

A guide to discrimination law for design professionals

RLI[®]
DIFFERENT WORKS

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DIFFERENT WORKS

Introduction

The Cost of Discrimination in the Workplace

Legal Fees

Increased absenteeism

Fines

Low employee morale

High employee turnover

Tarnished public image

Identifying, addressing, and mitigating discrimination in your workplace and your practice is an important component of any risk management strategy. This course will address some of the key considerations when undertaking this process to help you avoid expensive mistakes, legal nightmares, and ethical faux pas, to help you maintain a safe, respectful working environment for all.

Learning Objectives

Participants in this session will:

1. Discuss relevant anti-discrimination laws affecting design firms;
2. Study real life and hypothetical examples of how discrimination occurs;
3. Review the AIA Rules and Ethical Standards regarding equity and inclusion and the purpose of these changes; and
4. Learn what steps design firms can do to build a culture of inclusion, respect, and high performance.

Anti-Discrimination Laws

Employment Discrimination Laws

Prohibit an employer from taking adverse employment action against an individual based on their membership in a protected class.

Step 1: Adverse Employment Action

Examples of “employment action”:

Hiring

Firing

Term & Conditions of Employment

Step 2: Based on “Protected Class”

Examples of “protected classifications”:



Race, Color, National Origin

Gender

Religion

Disability

Age

Discrimination Laws

Federal Laws

Some examples include:

- Civil Rights Act
- 42 U.S.C. 1981
- Americans with Disabilities Act
- Age Discrimination in Employment Act
- Equal Pay Act
- Vietnam Era Veterans Readjustment Assistance Act
- Genetic Information and Nondiscrimination Act

State & Local Laws

You may also be subject to state and local laws prohibiting discrimination against members of protected classes.

“Lifestyle Discrimination” Laws

Lifestyle Discrimination Laws

Prohibit an employer from taking adverse employment action based on an Individual’s “lifestyle choices” [ie: a decision to smoke, or obesity].

KY's "Lifestyle Discrimination" Law

Ken. Rev. Statutes Title XXVII §344.040

It is an unlawful practice for an employer:

(a) **to fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's race, color, national origin, sex, age forty (40) and over, because the person is a qualified person with a disability, or because the individual is a smoker or nonsmoker, as long as the person complies with any workplace policy concerning smoking...**

KY's "Lifestyle Discrimination" Law

Ken. Rev. Statutes Title XXVII §344.040

It is an unlawful practice for an employer:

(c) To require as a condition of employment that any employee or applicant for employment abstain from smoking or using tobacco products outside the course of employment, as long as the person complies with any workplace policy concerning smoking.

NY's "Lifestyle Discrimination" Law

NY LAB §201-d

(2) Unless otherwise provided by law, it shall be **unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against** an individual in compensation, promotion or terms, conditions or privileges of employment because of:

(b) **An individual's legal use of consumable products** prior to the beginning or after the conclusion of the employee's working hours, and off of the employer's premises and without use of the employer's equipment or other property...

Ban The Box Laws

Ban The Box Laws

Prohibit an employer from inquiring about a candidate's criminal history prior to a certain point in the hiring process.

HI's "Ban the Box" Law

HRS §378-2.5

(a) Subject to subsection (b), an employer may inquire about and consider an individual's criminal record concerning hiring, termination, or the terms, conditions, or privileges of employment; provided that the conviction record bears a rational relationship to the duties and responsibilities of the position.

(b) Inquiry into and consideration of conviction records for prospective employees shall take place only after the prospective employee has received a conditional offer of employment which may be withdrawn if the prospective employee has a conviction record that bears a rational relationship to the duties and responsibilities of the position.

Americans With Disabilities Act

3 Parts of the ADA:

- 1** Employment Discrimination
- 2** Discrimination by Public Entities
- 3** Discrimination in Commercial Buildings

Liability Under ADA – Unsettled Law

Lonberg v Sanborn Theaters, Inc. (2001)

Theater Owner and Architect sued for building seating and restroom facilities out of compliance with the Americans with Disabilities Act. Architect found not liable under the ADA.

*The issue of a design professional's liability under the ADA is still unsettled law.

Liability Under ADA – Unsettled Law

1 “owns, leases (or leases to), or operates”

Liability may only be imposed against an entity who “owns, leases (or leases to), or operates” a place of public accommodation.

2 “failure to design and construct”

Discrimination is defined as the “failure to design and construct facilities...that are readily accessible to and usable by individuals with disabilities.” Significant control over final design and construction is sufficient to support a finding of liability.

Types of Discrimination

1 Intentional Discrimination

A discriminatory policy or practice. [Example: subjecting a candidate to additional screenings or testing procedures because of their membership in a protected class.] AKA “Disparate Treatment” or “Adverse Treatment.”

2 Unintentional Discrimination

A neutral policy or practice that has a discriminatory impact. [Example: a background check requirement that disproportionately disqualifies members of a particular class.] AKA “Disparate Impact” or “Adverse Impact.”

Intentional Discrimination – News

Perv Architect Taunted, Flashed, Sexually Harassed Gay Employee: Lawsuit

New York Daily News | May 27, 2016 | Barbara Ross

The Architect Richard Meier Steps Down After Harassment Allegations

New York Times | Oct. 9, 2018 | Robin Pogrebin

Evidence of Intentional Discrimination

1 Direct Evidence

Clear evidence. [Example: “You’re so old. We need someone younger for this position.”]

2 Indirect Evidence

Circumstantial evidence. [Example: Inviting all candidates out to dinner, except for the candidate with a disability]

McDonnell Douglas “Shifting Burdens”

Initial burden of proof on Claimant

Claimant must establish a prima facie case of discrimination.

Claimant wins unless...



Burden of proof shifts to Employer

Employer must demonstrate a legitimate, non-discriminatory rationale for their actions.

Employer wins unless...



Burden of proof shifts back to Claimant

Claimant must show that the Employer’s stated reason is a pretext for discrimination.

Claimant wins.

Unintentional Discrimination

Griggs v. Duke Power Company (1971)

Employees filed a discrimination claim against Employer for policies that had the effect of barring African Americans from higher level positions within the company.

Policies At Issue

In order to be placed in higher paying positions within the company and advance the company required the following:

1 High School Degree
High school education required.

2 Aptitude Tests
Satisfactory performance on two aptitude tests were required.

Rule Re: Disparate Impact

Fair in form but discriminatory in operation

“The act proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation...If an employment practice which operates to exclude [protected persons] cannot be shown to be related to job performance, the practice is prohibited.”

- Chief Justice Warren E. Burger

Unintentional Discrimination – News

Whole Foods Market to Pay \$65,000 To Settle EEOC Disability Suit

EEOC | Nov. 5, 2018 | Press Release

Target to Pay \$2.8 Million for Discriminatory Hiring Tests

Fortune | Aug. 24, 2015 | Claire Zillman

Calculating Disparate Impact

2 Frequently Used Methods:



Statistical Analysis

Is the disparity in hiring rates beyond a “chance” occurrence.

Four-Fifths Rule

Is a member of a protected class selected less than 80% of the rate that an applicant in the most-represented group is selected?

Four-Fifths Rule

- 1** Calculate selection rate for each group
Total number of applicants hired in that group/total number of applicants in that group
- 2** Identify the group with the highest selection rate
- 3** Calculate the impact ratio
Selection rate for a particular group/selection rate of group with the highest selection rate

If Impact Ratio \geq 80%

Indicative of no disparate impact

Example #1

Class	Total Applicants	Total Hires	Hire Rate
Under 40	72	7	9.7%
Over 40	63	3	4.8%

$$\frac{4.8}{9.7} = 49.5\% \leq 80\%$$

Indicative of disparate impact

Example #2

Class	Total Applicants	Total Hires	Hire Rate
Under 40	187	63	34%
Over 40	93	27	29%

$$\frac{29}{34} = 85.3\% \geq 80\%$$

Indicative of no disparate impact

Disparate Impact Case

Initial burden of proof on Claimant

Claimant must establish a causal connection between the policy and disparate impact.

Claimant wins unless...



Burden of proof shifts to Employer

Employer must demonstrate a legitimate, non-discriminatory rationale for their actions.

Employer wins unless...



Burden of proof shifts back to Claimant

Claimant must show that existence of a less burdensome alternative.

Claimant wins.

Canon I, Rule 1.401

AIA 2018 Code of Ethics and Professional Conduct



Members **shall not engage in harassment or discrimination** in their professional activities on the basis of race, religion, national origin, age, disability, caregiver status, gender, gender identity, or sexual orientation.



Canon I, Rule 1.402

AIA 2018 Code of Ethics and Professional Conduct

“

Members shall not engage in conduct involving
wanton disregard of the rights of others.

”

Canon II, Rule 2.101

AIA 2018 Code of Ethics and Professional Conduct



Members **shall not**, in the conduct of their professional practice, **knowingly violate the law**.



Canon IV, Rule 4.202

AIA 2018 Code of Ethics and Professional Conduct

“

Members shall make reasonable efforts to ensure that those over whom they have supervisory authority conform their conduct to this Code.

”

Canon V, Rule 5.101

AIA 2018 Code of Ethics and Professional Conduct

“

Members shall treat their colleagues and employees with mutual respect and provide an equitable working environment.

”

Canon V, Rule 5.301

AIA 2018 Code of Ethics and Professional Conduct

“

Members **shall recognize and respect** the professional contributions of their employees, employers, professional colleagues, and business associates.

”

Canon 8

American Society of Civil Engineers (ASCE)

“

Engineers shall, in all matters related to their profession, treat all persons fairly and encourage equitable participation without regard to gender or gender identity, race, national origin, ethnicity, religion, age, sexual orientation, disability, political affiliation, or family, martial, or economic status.

”

Canon 8

American Society of Civil Engineers (ASCE)



- a. Engineers shall conduct themselves in a manner in which all persons are treated with dignity, respect, and fairness.
- b. Engineers shall not engage in discrimination or harassment in connection with their professional activities.
- c. Engineers shall consider the diversity of the community, and shall endeavor in good faith to include diverse perspectives, in the planning and performance of their professional services.



Risk Mitigation Strategies

Identify, Address, and Mitigate Discrimination

Policy

Develop a clear, written policy prohibiting discrimination and harassment in the workplace.

Protocol

Establish a protocol – from filing complaints to investigating and resolving allegations of misconduct.

Training

Conduct training sessions for those involved in the Complaint process to ensure respond appropriately, and awareness trainings for all employees.

Record

Document all employment decisions and the steps taken to resolve any allegations of misconduct.

Consistency

Be consistent in your employment actions – whether they be hiring decisions or the disciplinary actions.

Sample EEO Statement

This firm is an equal employment opportunity employer with respect to all Employees and applicants for employment. This policy prohibits discrimination based on any legally-protected basis. The following characteristics are protected categories under federal law: race, color, gender, pregnancy, childbirth or related conditions, age, mental or physical disability, religion, citizenship, national origin, veteran status, and genetic information, characteristics or testing. We also prohibit discrimination based on any other category protected by applicable federal, state, or local law based on the jurisdiction in which the Employee works.

We are a firm believer in upholding the principal of equal opportunity employment and applying this principle to the practices of recruitment, hiring, work environment, and Management decisions regarding compensation, benefits, career development and all aspects of employment.

Sample Reporting Policy

Our reporting policy provides for a timely, thorough and objective investigation of any harassment or discrimination claim and appropriate disciplinary action against one found to have engaged in prohibited harassment or discrimination.

If you believe you have been harassed or discriminated against on the job, or if you are aware of the harassment or discrimination of others, you must report this to (name or position) at (contact information) . All incidents of harassment or discrimination that are reported will be investigated. We will endeavor to protect the privacy and confidentiality of all parties involved to the extent possible consistent with a thorough investigation.

If we determine that harassment or discrimination has occurred, appropriate action will be taken to deter any future harassment or discrimination. If a complaint of harassment or discrimination is substantiated, appropriate disciplinary action, up to and including discharge, will be taken.

1 Complaint Procedure

How claims are filed and the appropriate responses by those involved in the process.

2 What Is Discrimination?

- Define types of prohibited behavior
- Remedies available for discrimination and harassment
- Strategies to prevent discrimination and harassment
- Practical examples

Records/Documentation

Who, What, Where, When, Why

Who was the action taken against? What employment action was taken?
Where, When and Why?

Helpful in proving legitimate, non-discriminatory rationale & can be used to assess whether there is unintentional discrimination.

Be Consistent

Be consistent!

*This has practical and legal implications.

Insurance

Employment
Practices
Liability Insurance



Thank you for your time!

QUESTIONS?

This concludes The American Institute of Architects
Continuing Education Systems Program



Jennifer Walton, Operations Representative

Jennifer.Walton@rlicorp.com

Mika Dewitz-Cryan, Client Solutions Manager

Mika.Dewitz-Cryan@rlicorp.com