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EXTENSION

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2003 Handbook of Employment Regulations Affecting Florida Farm Employers and Workers: Civil Rights and Antidiscrimination¹

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Purpose

Protect employees from workplace discrimination. That is, the various federal programs discussed below require that employers hire all workers who are otherwise qualified without regard to race, color, religion, gender, citizenship, national origin, age, or disability.

Federal Civil Rights / Antidiscrimination Programs

- 1964 Civil Rights Act (Title VII).
- Equal Pay Act of 1963.

- Americans with Disabilities Act (ADA) of 1990.
- Age Discrimination in Employment Act of 1967.
- National Origin Discrimination in IRCA.

1964 Civil Rights Act

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees based on race, color, religion, sex, or national origin.

Employers may never discriminate on the basis of race or color. Employers may discriminate on the basis of religion, sex, or national origin if it is a bona

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vide occupational qualification. Use of this aspect of the law by employers is fraught with risks and should be used carefully. The employer has the burden of proof to show that this kind of job requirement is essential for the normal operation of the business.

For example, a job requiring heavy lifting may be difficult for many women. But, if a woman can do it, it is not essential to make it a job for men only. Rather the job description should describe in detail what must be lifted and all applicants or promotion candidates should be questioned about their ability to do the lifting.

Coverage

The Civil Rights Act of 1964 applies only to employers with fifteen or more employees in at least twenty calendar weeks of the current or preceding year.

Hiring and Interviewing

During the hiring process, care should be taken in the questions asked on an employment application form and in the interview. Questions having a disparate impact on minorities or women may not be asked. For example, certain pre-employment questions are illegal, regardless of whether they are verbal or on a written application form. As a general rule, what is not job related is likely to be illegal.

Sexual Harassment / Discrimination

The consequences of sexual harassment or discrimination should be of increasing concern to employers. Employers should establish and widely circulate rigid company policies against such behavior. Procedures to quickly and effectively deal with sexual harassment should be established as soon as possible and should be the basis for across-the-board employee training.

The Equal Employment Opportunity Commission (EEOC) guidelines define two types of sexual harassment, both of which are illegal:

1. *Quid Pro Quo* (something given or received for something else): Occurs when an employee is subjected to unwelcome sexual advances and submission is made the basis for hiring, firing, or advancement.

2. *Environmental*: Occurs when any type of unwelcomed sexual behavior creates a hostile work environment. Examples of sexual harassment:

- Unsolicited and unwelcome flirtations, advances, or propositions.
- Display of sexually suggestive objects or pictures.
- Graphic or degrading comments about an employee's appearance, dress, or anatomy.
- Ill-received dirty jokes and offensive gestures.
- Sexual or intrusive questions about an employee's personal life.
- Explicit descriptions of the harasser's own sexual experiences.
- Abuse of familiarities or diminutives such as honey, baby, dear, etc.
- Unnecessary, unwanted, physical contact such as touching, hugging, pinching, patting, kissing.
- Whistling, catcalls, leering.
- Exposing genitalia.
- Physical or sexual assault.
- Rape.

Enforcement

Courts may impose broad judicial relief when discrimination is established. Discrimination need not be intentional. Intent to discriminate is often inferred from the existing employment situation where an employer's careless personnel practices and lack of understanding of the law may have resulted in a discriminatory employment environment.

Reminder: Ignorance of civil rights laws is not an acceptable defense against discrimination charges.

Employers in violation of the Civil Rights Act may be ordered to cease the discriminatory practice. They may also be required to reinstate a fired employee, hire an applicant who was turned down, and provide back pay and benefits plus any other relief the court deems appropriate. The act authorizes courts to award attorney's fees and court costs to plaintiffs.

Equal Pay Act of 1963

The Equal Pay Act of 1963, which amended the Fair Labor Standards Act of 1938, prohibits wage discrimination based on an employee's sex. That is, the law requires employers to pay the same wages to male and female employees performing equal work in jobs requiring substantially equal skill, effort, and responsibility and requires equal wages for jobs with similar working conditions.

Coverage

This law applies to the same agricultural employers covered under the Minimum Wage Law (those who employ at least 500 man-days of labor in any calendar quarter).

Multiple Establishments

Where employers have multiple establishments, coverage is ordinarily determined by circumstances at each establishment.

Exceptions

An employer may use different pay scales in situations where wage payments are made according to the following systems:

- A seniority system.
- A merit system.
- A system that measures earnings by quantity or quality of production.
- A system based on any factor other than sex.

These exceptions may be particularly important in agricultural employment where many pay systems are based on production incentives, such as piece-rate pay methods.

Enforcement

Employers found in violation of the Equal Pay Act may be ordered to halt the discriminatory practice, to hire, reinstate, or promote a worker, and/or to pay lost wages.

Liquidated damages (an amount equal to the lost wages) may be ordered in cases of willful violations. Attorneys' fees and court costs also may be ordered.

Americans with Disabilities Act (ADA) of 1990

The Americans with Disabilities Act prohibits discrimination against persons with disabilities. The law prohibits discrimination in recruitment, pay, hiring, firing, promotions, job assignments, training, leave, layoffs, benefits, and all other employment-related activities.

Coverage

All employers with fifteen or more employees are subject to the ADA's antidiscrimination provisions.

Disability Defined

The ADA defines a disability as a physical or mental impairment that substantially limits a major life activity such as hearing, speaking, breathing, performing manual tasks, walking, caring for oneself, learning, or working. Certain diseases are protected, such as HIV (whether symptomatic or asymptomatic), alcoholism, and past drug addiction. The ADA, in the regulatory text, also clearly informs people who use alcohol that they will be held to the same standards as others while at work and that the use of alcohol in the workplace is prohibited.

Anyone currently using illegal drugs is not protected by the ADA and may be denied employment or fired on the basis of such use. The ADA does not prevent employers from conducting drug testing or making employment decisions based on verifiable results.

Hiring Philosophy of ADA

The ADA does not require that an employer hire any disabled person; an individual must be qualified to perform the essential functions of the job with or without reasonable accommodation.

Thus, an applicant or employee must satisfy the job requirements for educational background, experience, skills, licenses, and any other job-related standards. He or she must also be able to perform those tasks that are essential to the job, with or without reasonable accommodation.

The ADA does not interfere with the employer's right to hire the best-qualified applicant. However, an employer should be able to demonstrate the necessity of those qualities the best applicant is expected to exhibit.

ADA Terminology

To comply with the ADA, it is important to understand the meaning of certain terms. The essential functions of a job are the basic job duties an employee must be able to perform, with or without reasonable accommodation. Each job should be carefully analyzed to determine which functions or tasks are essential for performance.

This analysis should take place before advertising, recruiting, hiring, promoting, or firing. A well-prepared job description is critical to documenting the essential functions of a job.

The ADA requires employers to make reasonable accommodation to permit a disabled person to perform a job. Reasonable accommodation is any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to:

- Participate in the job application process.
- Perform the essential functions of a job.
- Enjoy benefits and privileges of employment equal to nondisabled employees.

It is a violation of the ADA to fail to provide reasonable accommodation to the known physical or mental limitations of a qualified individual with a

disability. The only exception is if doing so would impose an undue hardship on the operation of the business.

An undue hardship means that an accommodation would be unduly costly, extensive, substantial, or disruptive or would fundamentally alter the nature or operation of the business. Among the factors to be considered in determining whether an accommodation is an undue hardship are cost of the accommodation, employer's business size and financial resources, and the nature and structure of the business operation.

In difficult situations, the employer must consider alternatives. For example, if costs cause the undue hardship, the employer must consider possible outside funding and whether the costs could be offset by state and federal tax credits or deductions. The employer also must give the applicant or employee the opportunity to provide the accommodation or pay that portion of the accommodation constituting an undue hardship.

Medical Examinations

During the recruitment / interviewing process, it is unlawful to ask an applicant whether he or she is disabled or about the nature or severity of a disability. It is also unlawful to require an applicant to take a medical examination before making a job offer.

Medical examinations may be required, but only after making an offer of employment, and only if they are required for all applicants in the same job category. However, if the individual is not hired because of the medical examination, the employer must show that the reasons are job-related and that no reasonable accommodation would make it possible for the applicant to perform the essential job functions.

Reminder: An applicant may be asked about his or her ability to perform job functions as long as the questions are not phrased in terms of a disability.

Enforcement

Employers found in violation of the ADA may be prohibited from continuing discriminatory employment practices. They may also be ordered to

hire or reinstate an individual, provide lost pay, or provide any other relief the court chooses to impose.

Attorneys' fees and court costs may also be awarded.

Age Discrimination in Employment Act of 1967

The Age Discrimination in Employment Act of 1967 (ADEA) was passed to encourage the employment of older persons (forty or older) based on ability rather than age and to prohibit arbitrary discrimination based on age.

Coverage

This law applies to employers of twenty or more workers employed during at least twenty calendar weeks of the current or preceding year. It prohibits discrimination against individuals age forty or older in matters of hiring; discharging; wages; and terms, conditions, or privileges of employment.

The law prohibits statements in advertisements that indicate preference, limitations, specifications, or discrimination on the basis of age.

Inappropriate Phrases

It is unlawful to use such phrases as *age twenty-five to thirty-five, young, boy, girl*, or similar phrases. It is also unlawful to use such phrases as *age forty to fifty, age over sixty-five, retired*, or *supplement your pension* since they may discriminate against others in the forty-or-older age group.

The act does not prohibit specification of a minimum age below forty in advertisements (e.g., must be age eighteen or over). However, the Florida Human Rights Act of 1977 prohibits age discrimination without age limits.

There are permitted exceptions to these rules, but they should be used with care. An exception is permitted where age is a bona fide occupational qualification and is reasonably necessary to the normal operation of the particular business. Be aware that this exception is narrowly construed, and that the employer has the burden of proof to show that it applies.

Note: The law prohibits employers from discriminating against older employees based on the claim it is more costly to employ older persons. The only exceptions relate to employee benefit plans.

Enforcement

Employers violating the Age Discrimination in Employment Act may be ordered to discontinue their discriminatory practices. They may also be ordered to hire, reinstate, promote, or pay lost wages. Liquidated damages (an amount equal to lost wages) may be ordered in cases of willful violations. Attorneys' fees and court costs may also be ordered.

National Origin Discrimination in IRCA of 1986

Coverage

The 1986 Immigration Reform and Control Act (IRCA) made it illegal for employers of four or more employees to discriminate against individuals in hiring, firing, recruiting, or referring for a fee based on their citizenship status or national origin. Permanent and temporary residents as well as United States citizens are protected under this law.

Note: The 1996 Immigration Act provides that intent must be shown to make discrimination stick. When an employee has invalid documents, a possible course of action, according to INS, is to require the employee to correct the deficiency, produce other documents or, failing to do so within a reasonable period, be fired.

Employer Responsibilities

IRCA requires employers to fill out and retain an I-9 form for each employee, not merely those who look foreign. Also, IRCA makes it illegal to practice document discrimination by requiring prospective employees to present a particular type of employment documentation.

The key to compliance with IRCA's conflicting missions (prohibiting the hiring of unauthorized persons, while also prohibiting discrimination based on national origin or citizenship status) is to systematize the I-9 process and treat every applicant

and employee exactly the same. Consistent practices are a good defense against discrimination charges.

Employers should base all hiring decisions solely on the applicant's ability to perform the job in question. Each job description should be carefully drafted and should include the specific tasks involved and what skills are needed to adequately perform the job.

Job applicants should only be asked those questions that relate to the job. Examples may include, "Have you harvested onions previously?" or "Have you driven a four-wheel vehicle before?" Do not ask where the applicant was born.

After you determine an applicant meets the job qualifications and you offer the person the job, present the I-9 form. Allow the person to show you any acceptable documents he or she wishes.

Do not specify which employment documents you will accept. This constitutes prima facie evidence of national origin discrimination.

Example: Do not say, "Do you have a green card?" or "I'd like to see your Social Security card and driver's license."

Note: It is permissible to ask for a Social Security card for purposes of completion of tax documents only and only after the hiring and I-9 processes are completed.

Accept any documents (within reason) that appear to be genuine on their face and do not request more or different documents than those the person presents. If an employer turns away a prospective employee because the documents seemed fraudulent and they are later found to be genuine, the employer is exposed to charges of discrimination.

Enforcement

The Office of Special Counsel for Immigration Related Unfair Employment Practices in the Department of Justice handles national origin discrimination complaints against employers of four to fourteen workers. The Equal Employment Opportunity Commission handles national origin

discrimination complaints against employers of fifteen or more workers.

Penalties for discrimination include up to \$1,000 per person for document discrimination. Hiring and other discrimination violations carry fines ranging from up to \$2,000 per person for first offenses, up to \$5,000 per person for second offenses, and up to \$10,000 per person for three or more offenses.

Employers who illegally discriminate may also be ordered to hire or pay lost wages to applicants turned down for jobs and employees who are illegally discharged. (See EDIS document FE402, *Immigration Reform Programs [Federal]*.)

Enforcement Generally for Civil Rights / Antidiscrimination

Enforcement of discrimination complaints under the Civil Rights Act, ADA, Age Discrimination in Employment Act and Equal Pay Act is handled initially by the federal Equal Employment Opportunity Commission (EEOC), which is within the U.S. Department of Justice.

The EEOC has cooperative enforcement agreements with selected state and local agencies, called deferral agencies. The EEOC refers discrimination complaints to these deferral agencies and generally requires that complaints be filed directly with the deferral agency if one is designated.

In Florida, complaints are filed with the Commission on Human Relations as one of the other designated *706 agencies* (<http://fchr.state.fl.us>).

Florida Designated 706 Agencies

[An agency designated by the EEOC to enforce employment discrimination]

Pinellas County Office of Human Rights

400 South Fort Harrison Avenue, Suite 300

Clearwater, FL 34616

(813) 464-4880

Metro-Dade Department of Community Affairs
 111 NW First Street, Suite 620
 Miami, FL 33128
 (305) 375-5730

Tampa, FL 33602
 (813) 223-8241

Additional non-706 agencies that handle and investigate discrimination complaints are located in Fort Myers, Gainesville, Pensacola, Tallahassee, and Tampa.

Responsible Agency

Florida Commission on Human Relations
 325 John Knox Road, Bldg F, Suite 240
 Tallahassee, FL 32303-4149
 (850) 488-7082

U.S. Equal Employment Opportunity Commission
 1801 "L" Street NW
 Washington, DC 20507
 (202) 663-4900 or
 dial toll-free 1(800) 669-4000
<http://www.eeoc.gov>

Jacksonville Community Relations Commission
 421 West Church Street, Suite 705
 Jacksonville, FL 32202
 (904) 630-4911

District Office
 Equal Employment Opportunity Commission
 2 South Biscayne Boulevard, Suite 2700
 Miami, FL 33131
 (305) 536-4491

Orlando Bureau of Human Relations
 400 South Orange Avenue, Room 103
 Orlando, FL 32801
 (407) 246-2308

Area Office
 501 East Polk Street, 10th Floor
 Tampa, FL 33602
 (813) 228-2310

St. Petersburg Human Relations Department
 175 Fifth Street North, PO Box 2842
 St. Petersburg, FL 33731
 (813) 893-7345

Tampa Office of Human Rights
 712 West Ross Avenue