

How the Courts Define Discrimination

It's a safe bet that you know not to slap your female employees on their backside in this day and age. And racist jokes have no place in the workforce. But **employment law** is ever-evolving, with courts weighing in on social media, weight, flirtation and vegetarianism.

In general, common sense goes a long way, but legal rulings can throw a curve ball in the game of understanding how employees should be treated.

Don't despair. Employers still have reasonable rights. You don't have to perform extraordinary accommodations in many cases. Here are some examples of what employers can expect.

- **Language.** An employer can't require a worker to speak only English on his own time, such as during lunch breaks, for example. However, when speaking English is an issue of customer service, safety or operational issues, you are protected, says attorney [Steve Weisman](#), who is also a professor at [Bentley University](#) in Massachusetts.
- **Moral beliefs.** The Equal Employment Opportunity Commission has said that some strong moral beliefs are protected. For example, in 1996, a vegetarian bus driver was told to pass out coupons for free hamburgers and refused. It was decided that his views were protected as a religious belief.
- **Proselytizing.** While you can't discriminate against an employee for religious beliefs, you don't have to permit them to promote their religion. Hewlett-Packard had a case of a Christian employee who posted anti-gay passages in his cubicle. The courts ruled he was proselytizing, not practicing his beliefs, according to Weisman.
- **Flirting.** It's common knowledge that unwelcomed sexual advances are prohibited. However, some reciprocal flirting is allowed. There was a case of a woman who received inappropriate text messages, says Weisman.

"If she had complained, that would have been the end of it. But she texted him back."

- **Age.** Workers 40 years and older are protected from discrimination. But if your company downsizes and the standards for the layoff decision happens to affect older workers more not because of their age, but because of their role, it can be allowed, says Weisman.
- **Expense.** While people with disabilities are widely known to be protected, extraordinary accommodations are not expected. When accommodation becomes too expensive, for example, the employer has a case.

"It has to be cost effective," says Weisman.

- **Disabilities.** You can't ask about an employee's or applicant's disabilities, says Beth Schroeder of [Silver & Freedman](#) in Los Angeles. However, you can ask if they are able to perform the work. Once a conditional offer is made, you can also require candidates to undergo a physical exam.
- **Perceived disability.** Even a perceived disability can be a violation, says Weisman. Beyond the obvious disabilities, like mental health or physical disabilities, there are less obvious categories.

Recently, weight has been at the forefront of discrimination issues. In San Francisco, a 240-pound fitness instructor filed a lawsuit against Jazzercise that raised the question of whether someone can be overweight and still be physically fit. The case settled out of court, but Jazzercise has adapted its employment policy to focus on physical fitness, rather than appearance.

- **Genetics.** Discrimination because of genetics is a hot topic right now. You cannot refuse to hire because of the potential impact an employee's genetic history could have on your insurance rates, says Weisman.
- **Social media.** Your boundaries may be limited when it comes to social media. In a case that came down in November 2010, an employee made disparaging remarks about managers on a Facebook account, and was fired. The National Labor Relations Board ruled in favor of the employee.
- **Wages.** Many employers have a policy against discussions about raises and wages, but a ban of those discussions can be a violation of the National Labor Relations Act, says Schroeder. Also, some states, like California, specify that employees have the right to discuss their own wages with each other.
- **Job applications.** Be careful about unlawful questions on applications. You shouldn't have boxes for "Miss" and "Mrs.," for example. Marital status is protected in many states. Don't ask for the applicant's maiden name, also. But you can ask for other names the applicant has gone by, says Schroeder.
- **Absenteeism.** Be careful when firing for absenteeism. For example, a person being absent for migraines can fall under the category of a disability.

Bottom line? Stay on top of new rulings, whether through e-mail blasts or consultants and attorneys.

"Lawsuits are extremely expensive and disruptive," says Schroeder. "You have to respond to discovery, you have to document. You're pulling people off work for interviews. Your employees are your witnesses and their witnesses."