CHAPTER 2

FEDERAL EMPLOYMENT LAWS

One of the biggest challenges facing retail managers is keeping track of and complying with the myriad labor laws and regulations that govern various businesses and industries. There are literally hundreds of these laws, and most of them have differing sets of compliance and reporting rules. In this chapter, you learn about the major federal laws that involve employees, including:

- Wage and benefit-related laws
- Health- and safety-related laws

- Antidiscrimination laws
- Sexual harassment and wrongful discharge policies

This chapter includes information about a manager's role in compliance with these laws, as well as some of the controversies about the laws. Of course, it is beyond the scope of this textbook to examine the labor laws of all 50 states, or even comprehensively address the 180+ federal laws that relate to labor—although details about many of the federal laws can be found on the Department of Labor (DOL) Web site (www.dol.gov). Here's a partial list of them, just to illustrate how much time and effort managers must devote to gaining even a basic understanding of their compliance and reporting responsibilities:

Consumer Credit Protection Act
Contract Work Hours and Safety Standards Act
Copeland "Anti-Kickback" Act
Davis-Bacon and Related Acts (DBRA)
Employee Polygraph Protection Act (EPPA)
Employee Retirement Income Security Act (ERISA)
Energy Employees Occupational Illness Compensation Program
Fair Credit Reporting Act (FCRA, mentioned in Chapter 1)
Fair Labor Standards Act (FLSA)
Fair Labor Standards Act (FLSA)/Child Labor
Family and Medical Leave Act (FMLA)
Federal Employees' Compensation Act (FECA)
Federal Mine Safety and Health Act
Immigration and Nationality Act
Labor-Management Reporting and Disclosure Act (LMRDA)
Longshore and Harbor Workers' Compensation Act (LHWCA)
McNamara-O'Hara Service Contract Act (SCA)
Migrant and Seasonal Agricultural Worker Protection Act (MSPA)
Occupational Safety and Health Act (OSH, not to be confused with OSHA, the agency that administers it)
Rehabilitation Act of 1973, Section 503
Uniformed Services Employment and Reemployment Rights Act (USERRA)
Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA)
Walsh-Healey Public Contracts Act
Worker Adjustment and Retraining Notification Act (WARN)

It's obvious from their names that not all of these apply to retail situations. But the point is, there are rules aplenty! What follows is a summary of the major laws and

regulations that address workplace issues and activities for more than 125 million American workers of all kinds. It is intended to give managers an overview of the most commonly used federal labor laws and regulations, not to provide comprehensive descriptions and/or interpretations. It is incumbent upon managers, no matter what their level in the retail industry, to determine which of the laws are relevant to them, and then educate themselves to the point that they can competently comply with them.

FEDERAL WAGE-RELATED LAWS

The **Fair Labor Standards Act** (FLSA) became law in 1938 to set standards and regulate minimum wages, overtime pay, and child labor for most businesses—those with at least two employees that produce goods for interstate commerce. The FLSA requires employers to pay at least the federal minimum hourly wage (which has been $5.15 since September 1997) and overtime pay of one and one-half times the regular rate of pay.

The FLSA limits the hours children under age 16 can work in nonagricultural jobs, and also limits children under age 18 from working in dangerous jobs. The FLSA is administered by the DOL Employment Standards Administration's Wage and Hour Division. This division also enforces labor standards provisions in the Immigration and Nationality Act that apply to nonimmigrant visa programs, most commonly known by their abbreviations: H-1B, H-1C, and H-2A.

The *minimum wage* is a base pay rate set by Congress that can become complicated for employers because it does not apply to administrators, professionals, executives, outside sales representatives, or food service employees who work for tips. There is also a provision to pay a 180-day subminimum "training wage" to employees 19 and younger, although employers seldom use it. The other complicating factor surrounding the federal minimum wage is that it does not supersede state minimum wage laws that set a higher hourly rate than the federal law.

Overtime pay is set by the federal government at one and one-half times an employee's regular pay for hours worked beyond 40 per week, to include certain "portal to portal" before-and-after work tasks if those tasks are standard in a given industry or included in an employment agreement.

Fair pay for time worked has become a big employment issue. In the past decade, there have been record settlements in wage-and-hour lawsuits and judgments. The disagreements that have arisen to become class action lawsuits have included

- Inaccurately calculating employees' "regular" rate of pay.
- Misclassifying employees as independent contractors or otherwise "exempt."
- Not providing lunch breaks. (Federal law requires a one-half hour meal break during a full-time workday, or the employee must be paid for the time.)
- Annual bonuses paid to salaried workers and their impact on how calculation of overtime pay.
- Exempting managers from overtime pay and other provisions because they are salaried.[1]

The turn of the current century brought settlements of $20 million paid by RiteAid stores, $90 million for Farmer's Insurance, and $3 million for Rent-A-Center stores, all resulting from various wage and hour lawsuits.

Child Labor Regulations in the FLSA are specifically designed to protect children from working long hours, in hazardous occupations, or during time frames that would prevent them from attending school. There are exceptions and special rules for farm children, actors, entertainers, newspaper carriers, and children working for their parents.

Where retailers are often unclear is in summer or after-school hiring situations with underage employees—for example, the friend's teenager who wants work experience and is a bright kid who deserves consideration. Generally, the following rules apply:

- Minors 14 to 16 years old can work limited hours in nonhazardous, nonmanufacturing, or nonmining jobs.
- Minors 16 to18 years old can work any hours in nonhazardous jobs.

The federal government enforces the FLSA through the DOL, which can impose injunctive relief and restitution of back pay for injured employees. Employees may also sue on their own behalf to recover back wages, overtime, liquidated damages, reinstatement, and legal fees. DOL also imposes fines for violations, particularly in the area of child labor.

Other Wage-related Acts and Regulations

Several statutes have been enacted for employees not covered by the FLSA, although they don't often apply in retail situations. Most federal

contracts, for example, include provisions requiring FLSA minimum wages. The **Walsh-Healy Act** requires manufacturers and sellers (which may include retailers) to use the wage guidelines if they supply the federal government with goods or services valued at $10,000 or more. The **Davis-Bacon Act** also requires a minimum wage, usually based on local union construction worker wages, for companies with federal building contracts larger than $2,000.

FEDERAL HEALTH AND SAFETY LAWS

The **Occupational Safety and Health Act** (OSH) was passed in 1970 to make employers responsible for providing workplaces that are free from recognized, serious hazards. The OSH regulates workplace safety and health conditions for most private industries, and has provisions for OSHA-approved state systems to cover public-sector workers.

The Occupational Safety and Health Administration (OSHA) oversees and enforces compliance with OSH regulations, and safety and health standards. An OSHA inspection is usually triggered by employee complaints or in the event of a workplace death or serious injury. Most visits are unannounced, and warrants can be issued if an employer refuses access to OSHA inspectors. If violations are found, employers can be criminally prosecuted, fined, or given deadlines by which to correct them. Employers can answer a deadline with a written "notice of contest" within 15 days of their citation. The case then goes to a hearing, and depending on the outcome, employers can appeal the findings all the way up to the U.S. Court of Appeals.

Retail businesses have not been a big priority for OSHA. In 2003, John L. Henshaw of OSHA told members of the International Mass Retail Association that OSHA had conducted 660 inspections of retail stores in the previous year, about 2 percent of the total number of inspections. He said the issues of greatest concern were exits, housekeeping problems, and electrical hazards.

Henshaw also discussed the agency's formation of a number of industry partnerships to work specifically on ergonomics, since musculoskeletal injuries account for about one-third of injuries in the U.S. workforce every year. Retail supermarkets were among the first groups targeted for prevention efforts.[2]

Most federal labor laws include protections for whistle-blowers—that is, employees who report violations of law by their employers—and OSHA is usually the agency that enforces whistle-blower protections.

The Family and Medical Leave Act

When an injury or other medical problem occurs, or when a new baby arrives, the **Family and Medical Leave Act** requires companies with more than 50 employees to provide up to 12 weeks of unpaid but job-protected leave for eligible employees. The circumstances can be the adoption or birth of a child, or a serious illness of the employee or a spouse, child, or parent. The FMLA also requires the companies to maintain health care benefits during the leave period, if those benefits were part of the employee's basic compensation package.

Employees must give 30 days' notice of the impending leave if their upcoming absence is foreseeable. Exemptions to these requirements include employees who have worked less than 24 hours a week during the preceding year, or who have worked for the company less than one year; schoolteachers or other instructors during the school year; employees whose salaries or wages fall within the top 10 percent of the company's employees; or employees whose spouses work at the same company. In the latter case, they can take a total of 12 weeks between them.

The act requires that employees returning from leave must be given the same or a similar position, not simply the same pay and benefits. Changing job titles, reducing supervisory responsibilities, or increasing clerical work constitutes a different job and does not meet the provisions of the law.

FEDERAL BENEFITS LAWS

Do you know whether your company's benefit plans are financially secure? The **Employee Retirement Income Security Act** (ERISA) was passed in 1974 to govern private employers who provide pension, health, vacation, and death benefits to workers. Title I of ERISA is administered by DOL's Employee Benefits Security Administration (EBSA) and includes compliance and reporting requirements for the trustees of pension and welfare benefit plans. Unlike the minimum-wage laws, these preempt similar state laws.

ERISA requires certain employers and plan administrators to pay premiums to the federal Pension Benefit Guaranty Corporation (PBGC) to fund insurance systems to protect various types of retirement benefits. EBSA also administers the **Comprehensive Omnibus Budget Reconciliation Act** of 1985. Most people know it as simply "COBRA," the law that allows some former employees, their spouses (and former

spouses), dependent children, and retirees to keep their health insurance at group rates, at least temporarily, after a job ends under certain circumstances.

ERISA violations that make headlines usually involve a company's executives mismanaging its pension funds or other benefit plans. The agency has a toll-free hotline employees can call to request assistance or report problems with these plans. In 2003, EBSA handled more than 173,000 inquiries and recovered nearly $83 million in benefits with informal resolution on a case-by-case basis, but the hotline also serves as a source of leads for more serious investigations. EBSA can take administrative corrective actions, or file civil or criminal cases to recover damages—and it does. In 2003, the most recent year for which statistics are available, EBSA closed 175 criminal investigations and 4,253 civil investigations, which netted 137 criminal indictments and $1.4 billion in corrections and recovered benefits. Another 240 companies participated in the Voluntary Fiduciary Correction Program (VFCP), agreeing to self-correct ERISA violations without an enforcement action. That's more than triple the number of companies in the program the previous year.[3]

The Social Security Act

Perhaps the most hotly debated issue of the 2000s—at least thus far—the **Social Security Act** was passed in 1935 to provide unemployment insurance, and income for retired workers. Social Security retirement benefits initially supplemented pensions and other retirement income, but were not intended to replace all lost income. The Social Security Act has since been amended many times to expand benefits monetarily and to make more people eligible for more reasons.

Eligible persons must apply to the Social Security Administration (SSA) to receive benefits, which can start as early as age 62 for workers (in reduced form), but usually start at 67 to receive the full benefit amount. Children under 18 (or under 19 if the child is still a full-time high school student) can also be awarded benefits based on a deceased parent's contribution to the fund. Benefits may also be paid to severely disabled, unmarried children, spouses over age 62, spouses caring for disabled children or children under 16, and some divorced spouses.

Families are benefit-eligible only if the worker has earned at least six "credits" and worked for at least 10 years. Currently, one credit of coverage is received for each $500 of annual earnings, up to a maximum of four credits earned each year. Having enough credit units to be fully

insured, however, does not guarantee that a person will receive the maximum amount of dollar benefits under the program.

All this may change as Congress wrestles with Social Security projections and revamps the entire program for future retirees, but for the time being, benefits a worker or their family receives are based on actual earnings over the worker's career, adjusted to reflect changes in average wages since 1951. If a person keeps working after benefits begin, some or all benefits may be lost if they exceed the earnings limit set by the SSA.

Social Security benefits are paid through employer and employee payroll taxes based on the 1954 **Federal Insurance Contributions Act** (FICA), which requires employers to match the tax withheld from employee paychecks. In fact, employers are responsible for the full amount if they don't withhold sufficient FICA funds from employee paychecks. Violations can mean financial penalties and criminal charges.

When an employer hears from the Social Security Administration, it is often in the form of a so-called **mismatch letter**. This is a letter advising the employer that they have reported a particular Social Security number that doesn't match what the SSA has on file for that worker. It's usually a clerical error, or an employee's failure to properly report a name change to SSA after marriage or divorce; but it may also indicate an identity theft, or some type of fraud involving an undocumented worker. For this reason, employers should periodically compare their employment records to the W-2 forms submitted to the SSA. If they don't match up, they can be corrected on a form called a W-2c. In the rare instance that an employee would admit to document fraud, if you continue to allow them to work for you, you are participating in the fraud.[4]

Other Social Security–Related Laws

Medicare is the popular name given to the SSA's **Title 18: Health Insurance for the Aged and Disabled**, passed by Congress in 1965. It is funded with a combination of Social Security taxes, monthly premiums paid by eligible individuals, and general revenues of the federal government. The program is administered by the Health Care Financing Administration.

All persons over age 65 are eligible for Medicare, along with qualified retirees and disabled persons. Part A of Title 18 covers hospitalization, and services provided by nursing homes, home health care, and hospices. Part B partially pays for outpatient hospital care, doctors' fees, "durable" medical equipment, and other medical supplies and services.

Medicaid is the popular name given to the SSA's **Title 19: Grants to the States for Medical Assistance**, also passed by Congress in 1965. Medicaid supplies federal funding to the states for providing aid to low-income persons for medical expenses—but only as long as the state programs follow federal guidelines. Medicaid is not as comprehensive as Medicare, but it does at least partially cover hospital, laboratory, doctor, and nursing costs.

Unemployment compensation is the popular name for SSA's **Title 3: Grants to the States for Unemployment Compensation Administration** and **Title 9: Miscellaneous Provisions Relating to Employment Security**. Both were passed by Congress in 1935. States were not required to join the program, but tax credits were given to employers who paid into state unemployment funds—if the states joined the program and followed federal guidelines. Naturally, the states signed up.

Individual states' programs vary, but all are federally approved, and all are similar in that every private-sector employee must be eligible if he or she reaches a certain earnings threshold (not counting exceptions for domestic workers and some farmworkers); and the maximum benefit period cannot exceed 26 weeks.

The **Supplemental Security Income** (SSI) program was passed by Congress in 1974. SSI supplements SSA's primary old-age protection, disability insurance, and survivors insurance, and applies primarily to the blind and disabled, and those who didn't earn enough during their working lives to be eligible for regular Social Security benefits.

FEDERAL ANTIDISCRIMINATION LAWS

There are numerous federal laws designed to prevent workplace discrimination by employers. Some of the most important include the following.

The **Equal Pay Act of 1963** prohibits employers from paying persons of one sex less than persons of another sex for equal work. It does provide for exceptions based on other criteria, such as seniority, merit, individual sales or production, and other factors not based on sex. An example of the latter exceptions was the 1973 court case *Hodgsen v. Robert Hall Clothes, Inc.*, in which the Third Circuit Court of Appeals held that higher salaries could be paid to male salespeople because of the higher profit margin on men's clothing.

In addition to the exceptions, pay equity or the concept of "comparable worth" are not considered to be valid grounds for a wage discrimination complaint under the act. Comparable worth is the suggestion

that jobs traditionally held by one gender are comparable to different jobs traditionally held by the other gender, and thus should be paid at the same rate. This theory may only be used successfully in a class action suit under the current law, not to remedy an individual worker's complaint.

The **Civil Rights Act of 1964** bars employment discrimination based on race, religion, national origin, or gender. It applies to almost all private- and public-sector employees. Only companies or organizations with 15 employees or members are covered by the Civil Rights Act, except for union hiring halls or employment agencies, which can have a single employee and still be covered by the act.

The same legislation established the *Equal Employment Opportunity Commission* (EEOC) to investigate civil rights complaints, attempt to resolve them without legal action, and to enforce the provisions of the act if a settlement cannot be reached. This includes filing discrimination lawsuits in the federal courts. The EEOC also litigates class actions for large groups of employees or established patterns of discrimination, or can issue a "right-to-sue" letter that authorizes a complainant to take private legal action without further EEOC involvement.

The EEOC reported incoming complaints in 2004 as follows:[5]

- Race-based complaints: 27,696
- Gender-based complaints: 24,249
- Religion-based complaints: 2,466
- National origin-based complaints: 8,361

The **Age Discrimination in Employment Act of 1967** bars employers in the public and private sector from age-based discrimination against workers between ages 40 and 70. Exceptions are made when there is a legitimate age-related job qualification, or where a reasonable factor other than age has led to an older worker being passed over for promotion, fired, or not hired. Federal employees older than 70 are covered by this act, too, although private-sector companies and other organizations can still set a mandatory retirement age of 70.

Age discrimination is a growing field in the legal profession because of the growing number of older Americans in the workplace, but they are tough cases to prove. Just because an employer replaces an older worker with a younger one does not automatically mean "age discrimination" has taken place. The older worker must prove that the action was intentional, and specifically because of age.[6] In 2004, the EEOC received 17,837 complaints—but in about 60 percent of the cases, the commission decided there was "no reasonable cause" to pursue the complaint. Others are settled when the older worker agrees to a payment of back

pay and/or benefits without filing a suit. Still, in 2004 the EEOC collected $69 million on behalf of age discrimination complainants.

Another age-related federal law is the **Older Workers Benefit Protection Act**, which makes it illegal for employers to force workers to take early retirement, or to reduce their benefits (like health or life insurance) or stop contributing to their pension plans if they choose to work past retirement age. For a company, the only way to make early retirement legal (as well as attractive) to employees over age 40 nowadays is to give them a choice of either staying on the job or retiring with a plan that offers them an even better financial situation than if they continued to work—and then allow employees to make the choice freely. If either choice could be construed as "worse" for the employee, then the offer is not considered legal under the act.

The **Vocational Rehabilitation Act of 1973** requires companies with federal contracts larger than $2,500 to make "good faith" efforts to hire handicapped individuals, and bars discrimination against workers solely by reason of their handicap in any federally funded activity or program.

The act defines handicapped persons as those who

- Have a physical or mental impairment that substantially limits one or more of their major life activities
- Have a record of such impairment
- Are regarded as having such impairment

The act defines discrimination as applying to impairments that don't interfere with the requirements of a given job. Employers are expected to make "reasonable efforts" to accommodate disabled workers (see the upcoming text on the Americans with Disabilities Act for more information), but employees who allege this type of discrimination have the responsibility to prove they can perform all of their job's duties.

The **Pregnancy Discrimination Act of 1978** makes it a federal law that pregnant women must be afforded the same treatment as persons with disabilities. It prohibits employers from discharging or refusing to hire or promote a woman solely because she is pregnant. Pregnant women may voluntarily take time off under the Family and Medical Leave Act or similar state laws, but mandatory leave is allowed only when the woman cannot keep working.

Pregnancy discrimination claims do not outnumber sex discrimination or sexual harassment charges filed with the EEOC, but they do outpace them in overall growth. A number of factors contribute to this trend, including women having children later in life and choosing to remain on the job during their pregnancies, and their disagreements with employers who see pregnancy as a liability or productivity problem. No

matter how an employer views the condition of pregnancy, federal law says a manager cannot ask job applicants if they are pregnant and pregnant women don't have to inform their employers of their condition.[7]

When the **Americans with Disabilities Act of 1990** (ADA) was passed by Congress, it effectively expanded the Vocational Rehabilitation Act of 1973 to include all private- and public-sector employers with more than 15 workers, regardless of whether they have federal contracts. The ADA forbids companies from discriminating against job applicants with disabilities that substantially limit their physical or mental capacity, as long as they can actually perform the job for which they apply. It also requires employers to make a "reasonable effort" to accommodate the disabilities of handicapped workers.

The term "disability" has been broadly defined to include obesity, asthma, and a variety of injuries and conditions, and the law still generates confusion in the workplace about its scope and the exact definitions of some of its provisions. There are three practical rules about which retailers should be aware primarily for customers of public facilities—but also for employees:

1. All public accommodation new construction that began after 1992 must meet the ADA's rules for accessibility.
2. Owners and lessees of existing buildings are required to remove architectural barriers to the disabled when it is "readily achievable" to do so.
3. Where this is not "readily achievable," the ADA expressly requires a public accommodation to make its goods, services, facilities, privileges, advantages, and accommodations available through alternative methods where such methods are, again, "readily achievable."

The trouble, of course, stems from what is "readily achievable" and who pays for it in the cases of retail space that is being leased from a building owner. Retailers have been sued for lack of proper signage for disabled persons and for lack of access to stores, restrooms, parking lots, and garages.[8]

The ADA was first enforced in 1992. It began with just over 15,000 complaints per year, which is about the same as are received today by the EEOC. (The most active year was 1995, with almost 20,000 complaints.) As with age discrimination complaints, about 60 percent of ADA complaints are found to have "no reasonable cause" to pursue in court. However, the ADA cases that are either tried or resolved without court action netted $47.7 million in fiscal year 2004.

Acquired immune deficiency syndrome (AIDS) is the latest ADA-related challenge. AIDS has been a cause of great concern for employers

who provide group health coverage to employees, and over the last 20 years many have tried to reduce their liability by refusing to hire workers with AIDS, or those who test positively for the human immunodeficiency virus (HIV). However, several federal and state laws, including the Americans with Disabilities Act, bar discrimination against workers with AIDS or HIV. Under the ADA, companies cannot test for AIDS/HIV in preemployment screening except in specified circumstances, and as with any other disability, they must reasonably accommodate infected employees so they can keep working.

The **Civil Rights Act of 1991** was passed by Congress in response to a controversial U.S. Supreme Court ruling in 1989. The court decision virtually reversed 20 years' worth of affirmative action rulings that had made it easier for plaintiffs to win employment-related discrimination cases. The principal goal of the act was to reaffirm that racial discrimination and harassment are prohibited in the United States, and that disabled persons and women are eligible for the same compensation and punitive damages that are available to racial minorities, up to a limit of $300,000 for larger companies.

Perhaps ironically, the act does permit companies to discriminate if they can prove reasons that are "job-related" or a "business necessity," so the debate about the scope and definitions of these terms has raged since the act was passed.

This is also the law that bars different thresholds for different groups in test scores and cutoff scores, and forbids test score adjustment on employment-related tests; and it includes the rights of workers to challenge seniority systems they feel are discriminatory.

SEXUAL HARASSMENT AND WRONGFUL DISCHARGE

Sexual harassment is a high-profile workplace issue and falls within the jurisdiction of Title VII of the Civil Rights Act of 1964, mentioned earlier in this chapter. In 2004, 13,136 complaints were filed with the EEOC charging sexual harassment; 15 percent of them were filed by men. Upon investigation, fewer than half of them were found to have "no reasonable cause."

Sexual harassment is a type of sex discrimination, generally defined as unwanted sexually oriented verbal or physical behavior that makes someone feel uncomfortable or intimidated in the workplace by focusing on a worker's gender rather than his or her professional qualifications.

It applies to men and women, adults, and children, and it includes same-gender harassment.

There are several types of sexual harassment recognized by the courts:

- *Quid pro quo* sexual harassment occurs when a worker's rejection of (or submission to) sexual advances or behavior by a higher-ranking worker or manager is used as a condition of employment, or to make job-related decisions affecting the worker—reassignment, being passed over for promotion, and so on. Generally, only managers can be charged with this type of harassment, because only they can directly affect the pay, benefits, and employment of the worker.[9]
- *Hostile environment* sexual harassment occurs when the unwelcome advances or other behavior create an intimidating or hostile work environment, or when they unreasonably interfere with a worker's job performance. (In this case, the conduct doesn't have to be causing adverse economic effects on the person being harassed.) Unlike quid pro quo harassment, hostile environment harassment can be committed by clients, coworkers, and/or customers as well as by supervisory personnel. Examples of hostile environment sexual harassment include sexually based language, jokes, cartoons, photos, posters, or written materials; fondling; or other unwelcome physical contact. However, there must be a pattern of behavior, not an isolated incident.[10]
- *Third-party* sexual harassment means that workers who were not the specific target of the harassment file claims for quid pro quo or hostile environment sexual harassment because of its overall impact on them.

All companies and organizations with more than 15 employees are required by the Equal Employment Opportunity Commission (EEOC) to create and disseminate a sexual harassment policy and to train employees to understand the issue. Most states also have sexual harassment laws, some of which may be even stricter than federal rules.[11]

The Supreme Court ruled in 1998 that "employers must be proactive in order to avoid a sexual harassment lawsuit." They can no longer use ignorance of a supervisor's or coworker's conduct as a defense against a claim. The Supreme Court also set a two-part standard companies must meet in order to defend themselves from sexual harassment liability:

1. The company made reasonable efforts to prevent and/or correct any sexually harassing behavior in the workplace.
2. The worker being harassed unreasonably failed to exercise any preventive or corrective mechanisms provided by the company.

The best way for managers to avoid sexual harassment claims against them or their companies is to ensure that their personal conduct

SEXUAL HARASSMENT: POLICIES AND PROCEDURES

A good sexual harassment prevention policy should include the following:

- **Definition of harassment**
- **Harassment prohibition statement**
- **Complaint procedure description**
- **Disciplinary process and penalties**
- **Protection against retaliation statement**

A good sexual harassment prevention procedure should include the following:

- **Conducting yearly or biannual sexual harassment policy reviews with executive and supervisory personnel**
- **Investigating worker complaints promptly and thoroughly**
- **Handling same-sex harassment complaints the same different-gender complaints are handled**
- **Documenting all results of every sexual harassment complaint or investigation**
- **Telling employees it is their duty to report all sexual harassment they see or experience**

is above reproach, that their company's sexual harassment policy is clearly stated in writing, and that all prospective, new, and current employees not only sign off on the policy but receive periodic reviews of it.

A Word about Bantering, Flirting, and Teasing

One reason sexual harassment is such a management minefield is that "nature happens" when men and women work together. Bantering, flirting, and teasing are inevitable in almost every workplace, even those that expressly forbid romantic relationships between workers. Another reason is differences in company culture—conduct that may fall comfortably below the threshold of sexual harassment in one workplace can seriously exceed it at another. At the same time, the law allows for a lot of leeway when it comes to bantering, flirting, and teasing—and that leaves a lot of room for potential misunderstandings and misinterpretations.

Title VII of the Civil Rights Act is not a general civility code, and it does not prohibit "genuine but innocuous differences in the ways men

and women routinely interact with members of the same sex and of the opposite sex." The Supreme Court's opinions also stress that "simple teasing," gender-related jokes, periodic bad language, and other generally nonrecurring conduct in response to "the ordinary tribulations of the workplace" do not amount to sexual harassment as defined by statute.

The bottom line for employers: The law focuses on what a reasonable person would find abusive, coercive, or unmistakably hostile. However, since the definition of "reasonable" varies from place to place (and court to court), it's better to err on the side of caution when defining a company's internal conduct standards.[12]

Sexual Preference Discrimination

Openly homosexual or bisexual workers are becoming more commonplace in the United States, and discrimination against workers on the basis of sexual preference can result in lawsuits and other workplace complaints against companies that practice it. Discrimination based on sexual orientation is different from either sex discrimination or sexual harassment. At this writing, there are no federal laws that specifically address workplace discrimination against gays or lesbians for private-sector businesses, so perhaps it is ironic that federal government workers are the only ones legally protected against such discrimination. However, more than 100 cities and counties and more than a dozen states have antidiscrimination laws that include sexual orientation. One clearinghouse for the latest information in this area of law is the Lambda Legal Defense Fund, a group that maintains a list of laws by state.[13] Most deal with the subject somewhat indirectly; the majority of court challenges are based more on the First, Fifth, and Fourteenth Amendments to the U.S. Constitution.

Title VII of the 1964 Civil Rights Act does not cover sexual preference discrimination, nor does the Rehabilitation Act of 1973. The Federal Labor Relations Board, on the other hand, has ruled that because a federal agency "is not required by law to refrain from discrimination based on sexual orientation . . . does not mean the agency cannot agree to refrain from such discrimination."[14]

At the same time, there are still states with laws against homosexuality or same-sex marriage, so sexual preference discrimination claims in those states don't do very well. In 1993, Georgia was one of those states, so the Georgia Department of Law was found not liable when it withdrew a job offer to a woman after learning she planned to marry another woman.[15]

Against this uncertain legal picture, it is important for companies to have written policies regarding sexual preference—both in terms of hiring and offering benefits to same-sex partners of employees—that have been carefully reviewed and approved by attorneys well acquainted with the areas of social and labor law.

Wrongful Discharge

Wrongful discharge is a workplace issue that collides with the long-followed common-law doctrine of employment-at-will, meaning that employees were free to quit their jobs "at will," or at any time—and employers were equally free to discharge employees "at will."

This area of law has become so touchy that most employers must now be very careful about discharging employees for any reason. To protect themselves for wrongful discharge lawsuits, most companies now have detailed dismissal procedures in writing. It is also the reason most companies have a system of regular, written job reviews and other job performance documentation in an employee's file—all to ensure that there are documented "business-related" reasons for discharging the person. Even greater precautions must be taken when the worker is part of a protected class—women, minorities, disabled persons, workers older than 40, and so on.

CHAPTER SUMMARY

It should be evident by now that there's a lot more to managing a retail business than deciding how to price the merchandise and hiring friendly people to help sell it! This chapter has been an attempt to summarize the major employment-related laws and how they impact company owners and managers, and every employee—from underage part-timers, to new hires, to those who are almost retired.

When seen as a whole, the aim of federal laws appears to be to protect the working public by ensuring that hourly employees are paid a minimum wage, that children don't work in dangerous situations, that workplaces are safe, and that no one is discriminated against in pursuit of jobs they are qualified and willing to perform, to name a few. Critics charge that there are loopholes in many of the laws, and too few federal investigators to uphold their intent or look into any but the most serious or blatant complaints.

From an employer's standpoint, the result of all these laws and enforcement agencies is that every decision that impacts a workforce must be made carefully, administered fairly, and justified legally.

DISCUSSION QUESTIONS

1. Why would a company have a wage and hour audit performed by a third party?
2. What was the purpose of enacting the Social Security Act? In your opinion, how well does it serve that purpose today?
3. Find out more about the SSA's mismatch letters and what to do if, as an employer or store manager, you receive one.
4. What are the differences between the Civil Rights Acts of 1964 and 1991? Why did Congress decide we needed two of them?
5. How would you write a policy that addresses "less serious" forms of sexual harassment, such as banter and teasing, as well as more blatant incidents? Give it a try, with the intent of sending a clear message to a retail workforce about acceptable (and unacceptable) behavior.

ENDNOTES

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2. Speech by John Henshaw, Occupational Safety & Health Administration, U.S. Department of Labor, to the International Mass Retail Association, Washington, D.C., March 12, 2003.
3. Annual enforcement statistics for FY 2003, Employee Benefits Security Administration, U.S. Department of Labor, Washington, D.C., November 2003.
4. All statistics about EEOC cases throughout this chapter are from the U.S. Equal Employment Opportunity Commission, Washington, D.C.
5. Carol Entelisano, "The Woes of Wal-Mart," Tanner & Guin, LLC, Tuscaloosa, Alabama, on Web site FindLaw.com, February 2005.
6. *What You Should Know about Age Discrimination in the Workplace*, Mansfield, Tanick, and Cohen, P.A., Minneapolis, Minnesota, ©2000.
7. Stephanie Armour, "Pregnant Workers Report Growing Discrimination," *USA Today*, February 16, 2005.
8. Peter Leichtfuss, "ADA Issues Affecting Retailers," Davis Wright Tremaine, LLP, Portland, Oregon, on Web site FindLaw.com, February 2005.

9. "Who Can Engage in 'Quid Pro Quo' Sexual Harassment?" Employment Law section on Web site FreeAdvice.com.
10. "What Are Some Examples of 'Hostile Work Environment' Sexual Harassment?" Employment Law section on Web site FreeAdvice.com.
11. Nancy Wyatt, "What If . . . : Information on Sexual Harassment," Penn State University, University Park, Pennsylvania, 2000.
12. "What about Teasing?" Employment Law section of Web site FreeAdvice.com.
13. *Discrimination Based on Sexual Orientation*, Nolo, Berkeley, California, ©2005.
14. Cited in court decision *Norton v. Macy*, 417 F. 2nd 1161, Circuit Court, Washington, D.C., 1969.
15. Cited in court decision *Shahar v. Bowers,* 836 F. Supp. 859, N.D. Georgia, 1993.