INSTITUTIONAL COMPLIANCE WITH FEDERAL NON-DISCRIMINATION STATUTES

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I. Introduction

Institutions need to view compliance with federal non-discrimination statutes as a continuous work in progress as the law in these areas evolves. We believe two major trends in federal non-discrimination law make compliance especially tricky. On the one hand, there has been significant judicial erosion of affirmative action laws. Even though the outcome of the University of Michigan admissions cases is pending, the bulk of cases suggest that courts now allow far less leeway than they did 15 years ago in considering race in affirmative action programs. On the other hand, a steady string of cases establishes that federal courts are requiring far greater efforts to educate employees on non-discrimination and harassment prevention. Many institutions are out of compliance in both directions. They are not doing enough to educate students and employees on harassment and discrimination. At the same time, they are following old affirmative action plans, policies, and practices that have not been updated to reflect the more restrictive legal environment.

Bringing a campus into compliance can seem like an overwhelming task. The first step is to identify your highest priority areas and audit them one piece at a time. Ask the following questions:

- Where is the greatest exposure to liability?
- What practices could be most embarrassing to the institution if they became public?
- What areas have not been reviewed recently?
- Which areas of the institution have historically generated the most compliance problems?

The second step is to establish goals for your audit. These should include identification of areas of non-compliance and evaluation of alternative practices.
The third step requires implementation of action plans. Implementation requires agreement and cooperation from a broad array of institutional constituencies, who may not always choose to follow the safest legal route. Ultimately, it is impossible to ensure compliance in every area. Your role as counsel is to spot the most important issues, provide sound advice on legal compliance, and ensure that your advice is protected under the attorney client privilege or work product doctrine should future problems arise in an area you have flagged.

II. Common Pitfalls in Complying with Federal Equal Opportunity Statutes

This outline assumes a working knowledge of federal non-discrimination statutes. This section of the outline highlights areas of confusion; recent new guidance; or areas often overlooked by universities when it comes to compliance.

An exhaustive list (as well as a summary of the law and ministerial duties required) of all federal equal opportunity statutes relating to employment is online at http://counsel.cua.edu/fedlaw/Employment.cfm. A list of all equal opportunity laws relating to students is found online at http://counsel.cua.edu/fedlaw/Students.cfm.

A. Civil Rights Act of 1964

This is an area where the regulations have not kept up with government practice. 29 C.F.R. § 1602.48, which governs record keeping under both the ADA and Title VII, requires institutions of higher education to keep all records necessary for the completion of Higher Education Staff Information Report EEO-6. In fact, the EEO-6 is no longer collected. What is now collected in place of the EEO-6 is the Integrated Postsecondary Education Data System (IPEDS) Fall Staff Survey. The completion of all of the IPEDS surveys is mandated by 20 U.S.C. §1094(a)(17). The National Association of Independent Colleges and Universities (NAICU) reported in June 2002 that the Education Department's Inspector General will be stepping up enforcement of the requirement that all covered institutions file timely IPEDS forms. Failure to file this form puts the institution at risk for fines, audits and loss of Title IV eligibility. For year 2002-2003 The National Center for Education Statistics (NCES) will report non-respondents for each survey to the Office of Federal Student Aid within 45 days of survey closeout. See http://nces.ed.gov/ipeds/web2000/ThisWeekIPEDS.asp

The latest word from NCES on the revised race/ethnicity collection guidelines for aggregate reporting of race/ethnicity on the IPEDS forms is that the revisions to the collection of data are on hold, and NCES recommends that institutions do nothing at this time to change their current race and ethnicity reporting systems. See http://nces.ed.gov/ipeds/newracereport.asp

Another area of confusion under Title VII is the ban on discrimination on the basis of religion. Title VII actually grants religious educational institutions substantial leeway in utilizing a hiring preference on the basis of religion if the religious educational institution
is, in whole or in substantial part, owned, supported, controlled or managed by a particular religious corporation, association, or society, or if the curriculum is directed toward the propagation of a particular religion. See 42 U.S.C. § 2000e-2 (e)(2), as well as the legislative history, online at http://counsel.cua.edu/fedlaw/congrec2864.cfm. See also below on the amendment to Executive Order (EO) 11246 which parallels this Title VII exemption.

Case law in the area of hiring preference on the basis of religion is slim, goes both ways, and is not as clear as the statutory language might suggest. See Pime v. Loyola Univ. of Chicago, 803 F.2d 351 at 357 (7th Cir. 1986) for Judge Posner’s discussion of the religious educational institution defense available under 42 U.S.C. § 2000e-2(e)(2).\(^1\) Although the Pime case was not decided on this defense under the law, in his concurring opinion, Judge Posner addressed the question of whether the combination of a Jesuit president and nine Jesuit directors out of 22 would be considered substantial control or management by the Jesuit order. He noted “There is no case law pertinent to this question; the statute itself does not answer it; corporate-control and state-action analogies are too remote to be illuminating; and the legislative history, though tantalizing, is inconclusive.” (internal citations eliminated)

Posner noted that if it were clear that the board was controlled by Jesuits, then Loyola would clearly fit within the statutory exemption. He also noted that this exemption would allow the religious employer to confine all hiring to members of one religious faith. In other words, he would not limit the preferential hire to the philosophy department. See also Killinger v. Samford University, 113 F.3d 196 (11th Cir. 1997).

This is likely to be an area to watch as Catholic Colleges and Universities enact and defend preferential hiring in accord with Ex Corde Ecclesiae.\(^2\) With respect to faculty, Ex Corde Ecclesiae, Part II, article 4, paragraph 4 states that "in order not to endanger the Catholic identity of the University & the number of non-Catholic teachers should not be allowed to constitute a majority within the institution, which is and must remain Catholic." It is not clear, even among Catholic schools, how "majority" is to be defined.

**B. Executive Order 11246**

Pursuant to Executive Order 13279, Equal Protection of the Laws for Faith-Based and Community Organizations, which was signed by the President on Dec. 12, 2002, Executive Order 11246 was amended. The religious organization exemption that existed in EO 11246 was expanded to clarify that religious corporations, associations, educational institutions and societies that are federal contractors or subcontractors are allowed to exercise a preference in hiring for co-religionists. See 67 Fed. Reg. 77139 (Dec. 16, 2002).

**C. Civil Rights Act of 1991**

\(^1\)Also referred to as Section 703(e)(2)) of the Civil Rights Act.
\(^2\)Ex Corde Ecclesiae is the Apostolic Constitution of Pope John Paul II on Catholic Universities.
A civil service selection process known as expanded certification is used by some governmental employers in meeting affirmative action goals. (See W.S.A. § 230.25; RI ST § 36-4-26.1; and MN ST § 43A.13)

Expanded certification allows the employer to expand the certification list of eligible candidates to include those from underrepresented groups by dipping below the cut off scores used to certify the eligible candidates. This is an employment based version of affirmative action in admissions.

Section 106 of the Civil Rights Act contains the following language:

(l) Prohibition of discriminatory use of test scores. It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin. (codified at 42 U.S.C. § 2000e-2(l))

To date the Department of Justice has not issued any guidelines on how the language of section 106 of the Civil Rights Act meshes with affirmative action plans.

Attorneys for the state, city and county in one Midwestern state all looked at very similar laws that were on the books at the time the Civil Rights Act of 1991 was enacted, and compared them against the prohibition on using different cut off scores contained in Section 106 of the Civil Rights Act. Two of the three attorneys decided that continued use of the expanded certification provisions would likely violate the law. The third governmental entity (the state) issued an opinion that the statute allowing the practice was not in conflict with the law. This is a good example of how the law on equal opportunity is not always clear when it intersects with affirmative action.


University employers with civil service employees that are hired through an expanded certification process will want to ascertain whether the numbers that make the case for under-representation are current and valid.

D. Family and Medical Leave Act

Universities tend to be fairly generous in their leave policies, and thus may become somewhat lax in complying with the clearly required notices in the FMLA. Under this law employers must advise employees which of four systems will be used to count leave: the calendar year; any fixed 12-month leave year (e.g., a fiscal year or a year starting on employee’s anniversary date); the 12-month period measured forward from the date any

employee’s FMLA leave first begins; or a rolling 12-month period measured backward from the date an employee uses any FMLA leave. Sixty days notice must be given before a new system can be implemented. See 29 C.F.R. § 825.200. In addition, FMLA notice must be given to the employee at the beginning of each FMLA leave. This must be done in writing within two business days of the employer obtaining the knowledge that the leave is being taken for an FMLA required reason.

If you want your employees to sit up and take note during training on the FMLA provisions, you could always mention the cases that hold that individual supervisors may be held personally liable for FMLA violations. Personal liability is invoked in connection with substantive rather than procedural violations of the law. See Darby v. Bratch, 287 F. 3d 673 (8th Cir. 2002)(citing the FMLA regulation at 29 CFR § 2611(4)(A)(ii)(I); Hibbs v. HDM, 273 F. 3d 844 (9th Cir. 2001) cert. granted by Nevada Dept. of Human Resources v. Hibbs; 122 S. Ct. 2618 (on the 11th Amendment Immunity question); Kilivitis v. Luzerne County, 78 EPD ¶ 40,008 (2000). Contra Wascura v. Carver, 169 F. 3d 683 (11th Cir. 1999).

E. Age Discrimination in Employment Act of 1967

As the population ages your employees may not realize that protection under this law begins at age 40. A good case to use in training is EEOC v. Board of Regents of the University of Wisconsin System, 288 F. 3d 296 (7th Cir. 2002). The EEOC brought an enforcement action against the University of Wisconsin System, alleging violation of the ADEA when the University of Wisconsin Press terminated the four oldest employees working for the press. The jury found U.W. guilty of an intentional violation of the ADEA. The 7th Circuit Court of Appeals upheld the jury finding of liability and damages. Key actors in the case, including a Dean, did not know that ADEA protects beginning at age 40. The Court stated: “We have previously said that "leaving managers with hiring authority in ignorance of the basic features of the discrimination laws is an 'extraordinary mistake' " from which a jury can infer reckless indifference.” Another problem here was firing older employees who lacked current computer skills rather then sending them for updates on computer skills. In the U.W. Press case the justification for termination referred to one of the employees as having skills suited to the pre-electronic era. There was also evidence brought out at trial that the U.W. Press was seeking a new vision. The court stated a reasonable jury could conclude these were code words for age bias.

F. Title VI of the Civil Rights Act of 1964

This law prohibits discrimination based on race, color or national origin at any program or activity receiving federal financial assistance. Records must be maintained on racial and ethnic composition, and filed as part of Integrated Postsecondary Education Data System (IPEDS) reporting. See 28 CFR § 42.106 and 20 U.S.C. § 1094(a)(17) which requires the completion of surveys as part of the (IPEDS) or any other federal postsecondary institution data collection effort.

The question that has arisen under this statute is what the U.S. Dept. Of Education actually requires in terms of collection of racial and ethnic data on admissions form.
While IPEDS requires universities to collect ethnic data, universities are not allowed to use this data in making an admissions decision. No law mandates that the student must report ethnic data. On the other hand, no law mandates that the word “optional” must be placed on admissions forms in connection with the collection of ethnic data. Clarification was sought by a private university on this issue from The Office of General Counsel in the U.S. Dept. of Education. That Office recognizes the inherent tensions in the law. As long as the University does not put “required” in front of the request for ethnic information, there is not a problem and the word optional can be deleted. Removing the word optional simply encourages self-reporting, and helps the university capture the data it needs for IPEDS. The D.O.E. attorney further advised that if a complaint were to be filed saying the university discriminated, and the university had reported a high number of "unknowns", then OCR might in fact task the university to go out and capture that data as part of the investigation.

G. Title IX of the Education Amendments of 1972

A pre-admission Miss/Mrs. inquiry or any inquiry as to marital status is expressly prohibited. See 34 C.F.R. § 106.21(c)(4). Forms should be revised where necessary to ask only for Mr. or Ms., and delete the choice of Mrs. or Miss.

H. Immigration and Nationality Act


III. Case law on training

A. Supreme Court cases

Over the past five years, courts have elevated employee training from a good idea to a legal necessity. In Faragher v. City of Boca Raton, 524 U.S. 775 (1998) and Burlington Industries v. Ellerth, 524 U.S. 742 (1998), the Supreme Court raised the bar by stating that employers could use their efforts to prevent harassment as an affirmative defense. The following year, the Supreme Court ruled in Kolstad v. American Dental Association, 527 U.S. 526 (1999) that employer efforts to educate employees about harassment and discrimination should be considered as a factor in deciding whether to award punitive damages.

B. Trends in the federal courts

Following the Supreme Court’s lead, federal appellate and trial courts are rapidly expanding the legal importance of training programs. Two main principles have emerged:
1. Merely adopting policies against discrimination and harassment is not enough. Courts will look at how well the policies are distributed and how well employees are educated about the contents of the policies.

2. The training standards originally developed in sexual harassment cases now apply to all types of discrimination and harassment cases. Consequently, employers should educate employees about harassment and discrimination based on any legally protected category.

C. Federal appellate court cases

1. Failure to educate managers on basic features of discrimination laws is an “extraordinary mistake” from which a jury can infer reckless indifference. *EEOC v. Board of Regents of the University of Wisconsin System*, 288 F.3d 296, (7th Cir. 2002)


3. Courts are unanimous that merely having a harassment policy is not enough to avoid punitive damages. *Bruso v. United Airlines*, 239 F.3d 848, 858 (7th Cir. 2001).

4. There is consensus among federal appellate courts that the liability standards developed for sexual harassment cases apply to all types of harassment. *Spriggs v. Diamond Auto Glass*, 242 F.3d 179 (4th Cir. 2001).

5. An employer can be held liable for punitive damages for failing to educate its supervisors about the requirements of the Americans with Disabilities Act. *EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241 (10th Cir. 1999).

6. Punitive damages were allowed because the employer did not make good faith efforts to adequately educate its employees about its non-discrimination policy. *Cadena v. The Pacesetter Corporation*, 224 F.3d 1203 (10th Cir. 2000).


8. Punitive damages were upheld because employer did not train supervisors to prevent discrimination from occurring. *Romano v. U-Haul*, 233 F.3d 355 (1st Cir. 2000).

D. Federal district court cases

2. Harassment policies and training were inadequate because they failed to address retaliation.  *Reed v. Cracker Barrel Old Country Store*, 171 F.Supp.2d 741 (M.D. Tenn. 2001)

3. Posting sexual harassment policy on six bulletin boards was not enough to provide summary judgment on request punitive damages charge. Employer needed to show proof of distribution of the policy, instruction of the policy to supervisors, or periodic training programs or redistribution of policy.  *Neal v. Manpower International, Inc. et. al*, 2001 WL 1923127 (N.D.Fla. Sep. 17, 2001).

4. A plaintiff was not entitled to punitive damages where her employer extensively publicized its sexual harassment policy and provided training to all employees.  *Fuller v. Caterpillar, Inc.*, 124 F.Supp.2d 610 (N.D.Ill. 2000).

4. Plaintiff was precluded from recovering punitive damages because she attended a two-day training session on harassment and then failed to report her problem as instructed under company policy.  *Woodward v. Ameritech Mobile Communications*, 2000 WL 680515 (S.D.Ind. March 20, 2000).

IV. Auditing Offices and Departments for Compliance: How to make sure the audit is privileged and confidential.

A. Protection by the attorney-client privilege

1. Communication is usually privileged if the party was or sought to be the client of the attorney; the attorney is acting in his or her capacity as a lawyer at the time of the communication; the communication is made in confidence for the purpose of obtaining legal advice; and the privileged has not been waived.  See, e.g. *United States v. Bay State Ambulance and Hosp. Rental Serv. Inc.*, 874 F.2d 20, 27-28 (1st Cir. 1989);  *In Re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1036 (2d Cir. 1984).

2. A communication or document is privileged if it is “made for the purpose of obtaining or providing legal assistance.” Restatement (Third) of the Law Governing Lawyers Sec. 118.

3. Giving preexisting documents and records to an attorney will not make them privileged. Restatement, Sec. 119.

4. Some courts have held that privilege does not attach if there is not a specific, documented request for legal advice.  See, e.g. *Hardy v. New York News, Inc.*, 114 F.R.D. 633 (S.D.N.Y. 1987).
5. Audits conducted by in-house counsel may be more difficult to protect, particularly since they require attorneys to provide both legal and policy advice. See, e.g. Gulf Oil Corp. v. Schlesinger, 465 F. Supp. 913, 917 (E.D. Pa. 1979) (holding that a lawyer’s work was not privileged because the defendant could not separate the role of the lawyer as attorney from the role as a policy maker); U.S. Postal Service v. Phelps Dodge Refining Corp., 852 F. Supp. 156, 160 n.2 (E.D.N.Y 1994) (where the advice sought involves both business and legal considerations, the attorney must provide predominantly legal advice to maintain the privilege).

6. Courts sometimes extend the privilege to communications between the client and a consultant retained by the attorney. See, e.g. Carter v. Cornell University, 159 F.3d 1345, 1998 WL 537842 (2d Cir. 1998) (unpublished) (finding that interviews of medical college by assistant dean were protected by privilege where dean was acting as an agent of defense counsel); United States v. Kovel, 218 F.2d 918, 922 (2d Cir. 1961) (privilege applied to communications between client and accountant retained by attorney to help him give better legal advice to client because accountant acted like an interpreter); but see United States v. Ackert, 169 F.3d (2d Cir. 1999) (communication between taxpayer’s attorney and taxpayer’s investment banker were not privileged because the investment banker provided additional information the taxpayer did not have rather than acting as an interpreter).

7. Suggestions:

It may be wise for outside counsel to request an audit in writing and for outside counsel to create a paper trail showing that outside counsel (1) participated in key meetings; (2) drafted key documents; (3) retained all outside consultants for the purpose of assisting in providing legal advice; and (4) requested that university personnel provide him or her with key information in response to the audit. If hiring outside counsel is not possible, in-house counsel should carefully document the items mentioned above and should document that in-house counsel is conducting the audit for the purpose of providing legal advice.

8. Cautions:

The mere presence of a lawyer (particularly an in-house attorney) at a meeting is not sufficient to establish privilege. See, e.g., Seal v. Univ. of Pittsburgh, 135 F.R.D. 113 (W.D. Pa. 1990)


Showing audit reports to third parties or using them as weapons in litigation may waive the privilege. See, e.g. Granite Partner, L.P. v. Bear, Stearns & Co., Inc., 184 F.R.D. 49 (S.D.N.Y.) (waiver found when documents were used offensively in deposition and when
portions of the documents were published in a final report); *In Re Leslie Fay Securities Litigation*, 161 F.R.D. 274 (S.D.N.Y. 1995) (attorneys’ production of legal report detailing investigation of accounting irregularities to government offices and outside accounting firm waived the privilege in subsequent litigation between company and accountants).

C. **Protection by the work-product doctrine**

The basic definition of work-product is material “prepared by a lawyer for litigation then in progress or in reasonable anticipation of future litigation.” Restatement Sec. 136(1). “[M]ore than the mere possibility of litigation must be evident” for the work-product doctrine to apply. *Detection Sys., Inc. v. Pittway Corp.*, 96 F.R.D. 152, 155 (W.D.N.Y. 1982). See also *Pacamor Bearings, Inc. v. Minebea Co.*, 918 F. Supp. 491, 512-513 (D.N.H. 1996); *Burlington Industrial v. Exxon Corp.*, 65 F.R.D. 26, 42-43 (D.Md 1974). However, courts have often applied the doctrine broadly. For example, in *UpJohn Co. v. United States*, 449 U.S. 383 (1981), the Supreme Court applied the doctrine to an internal investigation of improper payments when there was no legal action at the time but the company could reasonably expect legal action by shareholders or regulators when evidence of the payments came to light. See also *In Re: Sealed Case*, 146 F.3d 881 (D.C. Cir. 1998) (attorney’s notes about a particular loan transaction protected even though no specific claim had yet been filed); *Rodgers v. United States Steel Corp*; 22 Fed. R. Serv. 2d 324 (W.D. Pa. 1975) (materials prepared after enactment of Title VII regarding validation of companies personnel policies were protected even though they were not prepared for the instant suit). The following steps can help ensure that the work product doctrine applies:

- Address all documents to the attorneys representing the institution rather than the institution itself.
- Mark documents as work product, and treat them as confidential.

D. **Protection Under the Self-Critical Analysis Privilege**

The self critical analysis privilege arises under Rule 501 of the Federal Rules of evidence, which provides that privileges must be granted by the U.S. Constitution, Congress, or the U.S. Supreme Court; however they are determined in accordance with state law in “civil actions and proceedings with respect to an element of a claim or defense as to which State law supplies the rules of decision.” The theory behind the privilege is that disclosure of documents which reflect “candid self-examination will deter or suppress socially useful investigations and evaluations or compliance with the law.” *Sheppard v. Consolidated Edison, Co.*, 893 F. Supp. 6, 7 (E.D.N.Y. 1995). For the seminal article discussing the evolution and rationale behind this privilege see *Note, The Privilege of*
Self-Critical Analysis, Harv. L. Rev. 1083 (1983). In determining whether to invoke the privilege, courts typically use a four factor balancing test: (1) whether the information sought in discovery results from a critical self analysis by the party seeking protection; (2) whether the public has a strong interest in preserving the free flow of the type of information sought; (3) whether the free flow of information would be curtailed if discovery of the reports were allowed; and (4) whether the information sought was intended to be confidential and has been kept confidential. Dowling v. American Haw. Cruises, Inc., 971 F.2d 423, 425-427 (9th Cir. 1992).


The privilege protects subjective opinions and ideas expressed in a self-analysis but not the facts or statistics on which the report is based. Sheppard, 893 F. Supp. at 7.

Courts reject the privilege for reports that defendants are legally required to create under the theory that disclosure would not have a chilling effect. See, Tharp v. Sivyer Steel Corp., 149 F.R.D. 177 (S.D. Iowa 1993) (privilege does not protect affirmative action plans required under E.O. 11246).

V. Auditing for Compliance: Three sample audits

The non-discrimination statues operate at two levels. First, they impose ministerial duties on the institution, e.g. record keeping, reporting, adoption of policies, appointment of grievance officers, and notifications to members of the university community. Second, the non-discrimination statutes impose a duty not to discriminate, requiring a thorough understanding of the laws not just by the legal office, but by all members of the university community. When you are auditing your institution for compliance with EO laws, you are looking at both levels. First, what are the ministerial duties and how well does the institution comply, and second, is there a culture of compliance with and a good grasp of the law throughout the university community? The latter is achieved through training. Periodic audits allow the university to operate in a preventive rather than reactive mode. Areas of non-compliance can then be monitored and training offered to the departments in need of assistance.

A. A sample Department/School audit

1. Defining the Scope of the Audit

Many laws cover non-discrimination. The major categories covered here are disability, race, sex, national origin or age. Theoretically you could design an audit that would cover
all areas of non-discrimination at once. As a practical matter, it may be easier to focus on a particular topic. For purposes of demonstrating how to go about an audit, this outline will focus on institutional compliance with the Americans with Disabilities Act and the Rehabilitation Act of 1974.

Institutions of higher education are notorious for operating in a de-centralized manner. Given this institutional structure, effective compliance audits will tend to be done at the level of schools and departments, in other words, the Department of Psychology in Arts and Sciences will be the subject of one audit, and the Law School the subject of another. Key administrative offices should also be the subjects of separate audits. Admissions, Human Resources, the Dean of Students, and the Disability Services Office are logical places to start.

During the course of the audit, the audit team will be looking at materials as well as practices of a particular School, Department or Office, and if there is non-compliance with respect to the focus area, there is likely to be non-compliance in other areas as well. For example, while auditing the Nursing School for compliance with disability laws, you would request materials on how the Nursing School reviews candidates who have self-identified a disability for special consideration in the admissions process. Reviewing the admissions process will also give you a chance to review the institution’s affirmative action policies. If deficiencies are noted, they should be addressed as part of the audit, even though it may not have been part of the defined scope of the audit.

2. Determining Participants in the Audit

If the institution has noticed problems in a certain Department or School with compliance, or a certain School/Department generates a number of complaints, this may help counsel identify the School or Department that will be the first subject of an audit. The Equal Opportunity Officer will be a helpful participant in the audit. He/she need not be involved at all stages, but will be an invaluable resource and should be kept appraised throughout the course of the audit. The School, Department or Office being audited will need to define a point person who can work with the auditor. The audit team might be an attorney as well as a law clerk or legal intern. There is a good deal of material to sort through, and an audit presents a well defined task that is an ideal project for a law clerk or legal intern. A paralegal, where available, would also be a useful member of the audit team. If the audit is for disability compliance, the Director of Disability Support Services will be involved as well.

3. The Tools used in conducting an audit

In order to audit institutional compliance with the programmatic aspects of the ADA (not including physical access) the CUA Office of General Counsel drafted a Self-Audit Checklist and Answer Guide, online at http://counsel.cua.edu/ada/resources/selfaudit/introduc.cfm.
The first step in the audit, after the School/Department and point person in the School/Department is identified, is to ask the School/Department to complete the self-audit. Answers can made available to the School/Department, but it should be stressed that the School/Department should use the answers as a guide only when they did not fully understand the question.

In addition to having the School/Department complete the written checklist, someone from the School/Department should be asked to gather together any and all materials that are distributed to students, as this was an audit focused on disability compliance with respect to students. This is a key part of the audit, as neglected documents that surface after the audit may be problematical.

What are you looking for? Ask for any health forms used by the School/Department, study abroad or other permission slips; letters generated to students once they have matriculated; requirements for clinical training, all materials sent to applicants and copies of admissions policies, both formal and informal. Also request policies for dealing with a student who asks for an accommodation or files a grievance if these policies differ from general university policies.

The audit checklist is designed to elicit answers about how materials are kept, what training has been provided to staff, and whether or not the school has a policy on how it handles recommendations to licensing authorities, among other issues.

4. Reviewing the Findings and Convening a Meeting

Once the materials have been gathered, someone on the legal staff should review the materials, looking for any materials that might be at odds with anti-discrimination laws, or for ways in which policies or operating procedures veer from general university policy. The answers to the self-audit should also be carefully reviewed. What may seem clear to someone in the legal office may not be so clear to someone out in the field who is simply proceeding in the manner the school has always operated.

After the information has been gathered and analyzed, the Office of General Counsel sends a confidential memo to the School/Department identifying areas of non-compliance, and spelling out suggestions for how the School/Department can bring itself into compliance. Areas where the School/Department is doing well should also be noted and commented upon. This is combined with a meeting of key parties, including at this point the EO officer and the Disability Coordinator. A game plan is set up for how to deal with deficiencies.

For example, if a clinical program in the health sciences file utilizes a questionnaire that focuses on disabilities, the OGC can discuss what the program’s objectives are and help the School/Department come up with a document that will address the program’s goals but not open the door to complaints of discrimination. An example of such an approach is contained in Appendix A. If the School/Department does not have a written process for
dealing with students whose disabilities (even after accommodation) make completion of the clinical portion of the program difficult, this should be addressed.

Similarly, if a study abroad form asks what medical conditions a student is being treated for and what medications the student takes, suggest a more neutral approach, such as asking the student to sign a statement as follows:
"To the best of my knowledge, I have no physical condition that would interfere with my ability to participate in this activity or endanger my health."

Ideally, once the new procedures have been put in place, a follow up meeting should be scheduled with the same participants to address any outstanding issues. If training is in order, it is suggested that the entire department be convened for training on non-discrimination laws. If there are issues about particular cases, training may, for confidentiality reasons, need to be held in small groups.

**B. Auditing an Office: A Sample Human Resources Audit**

Needless to say, much of the institution’s compliance or non-compliance with equal opportunity laws rests on the state of the Human Resources Office. This is an office that is actively involved with all the various non-discrimination laws, on a day to day level. Starting with recruitment and hiring, compliance in the HR Office, and a thorough understanding of the law, is key.

1. Position Descriptions

Is a process defined whereby HR works with the hiring department to identify *essential job functions*? A job function is essential if removal of that function would fundamentally change the job. In order to avoid the improper exclusion of disabled applicants who are otherwise qualified for the position, the essential functions should be described in terms of the results or outcomes of a function, as opposed to the manner in which a function is to be performed. Disability law states that an applicant for a job position is considered qualified if they can perform the essential job functions, with reasonable accommodations if necessary. The essential functions must be known before the issue of reasonable accommodations can be addressed.

See 29 C.F.R. § 1630.2(n) The regulations list several factors for consideration in distinguishing the fundamental job functions from the marginal job functions, including:

- whether the performance of the function is "the reason the position exists;"
- whether there are a "limited number of employees available among whom the performance of that job function can be distributed;" and
- whether the function is "highly specialized so that the incumbent in the position is hired for his or her expertise." 29 C.F.R. § 1630.2(n)(2).
The regulations also set forth the following list of factors (not exhaustive) a court may use in identifying the "essential functions" of a job. They include:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the jobs; and/or

(vii) The current work experience of incumbents in similar jobs.

Does the position description state the minimum qualifications for the job? Minimum qualifications are the requisite skills, experience and education needed for the position. Any qualification standard that tends to screen out applicants who are members of a protected class should be closely scrutinized. In certain circumstances, minimum qualifications that are discriminatory will be allowed if they are job related and consistent with business necessity. An example would be hiring a female residence hall assistant for an all-female dorm.

Members of protected classes generally cannot be excluded when writing the position description, even when a benign purpose in involved. In 1991, the Supreme Court held that a lead battery manufacturer had discriminated against women by barring all women, except those with documented infertility, from jobs involving exposure to lead. *Automobile Workers v. Johnson Controls*, 499 U.S. 187 (1991) A policy that barred both males and females, except those with documented infertility, from working in jobs involving exposure to lead would have been permissible. However, *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002) may have changed the equation to some extent, at least with respect to disabilities. In that case Chevron, which operated an oil refinery, used the Americans with Disabilities Act health or safety defense codified in 29 CFR § 1630.15 (b)(2) to justify the company's refusal to hire an employee whose performance on the job would pose a danger to his own health, owing to a disability. The doctors who examined Echazabal stated that the respondent's liver damage (due to Hepatitis C) would be aggravated by continued exposure to toxins at the refinery. The Court upheld Chevron's use of the regulation and found no discrimination.

Copies of position descriptions as they exist at the time of hire should be placed in employees’ files in case they are necessary to defend the university against charges of discrimination. Historically, faculty positions have not been described in terms of
essential job functions. However, since the passage of the ADA, a number of colleges and universities are beginning to identify those functions that must be performed by an academic employee.

2. Advertising the Job Opening and Required Affirmative Action Outreach

What are the required notices of non-discrimination that must be posted along with job openings? You can cover most of them with one notice, which expressly states that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin. For further non-discrimination notifications that must be given to applicants, see the section below on notifications in connection with employment.

A question that arises is "Is it discriminatory to include the following phrase with all job openings: Women and minorities are encouraged to apply; and if not, what regulation supports the proposition that using this language is not discriminatory? An attorney for the Department of Education has stated that use of this language is not discriminatory as no one is being granted a preference. See also Shuford v. Alabama State Board of Education, 897 F. Supp. 1535 (M.D. Ala 1995), distinguishing and supporting inclusive rather than exclusive affirmative action. For regulations related to affirmative action outreach, see 34 CFR Part 106.3. See also 29 CFR §1607.17(1) and 41 CFR § 60-210 and 60-210-11.

See http://www.dol.gov/esa/regs/compliance/posters/pdf/7975epos.pdf for a copy of the standard EEO poster that must be posted. This poster does not include the FMLA. See http://www.dol.gov/esa/regs/compliance/posters/fmla.htm for the required FMLA poster.

See also http://www.dol.gov/elaws/posters.htm for a copy of the Department of Labor’s Poster Advisor. A series of questions about the employer is posed and the web page advises the users what posters must be posted.

Affirmative action outreach: Employers with Federal contracts or subcontracts of $25,000 or more must provide equal opportunity and affirmative action for veterans. A written affirmative program is required for government contracts of $50,000 or more and 50 or more employees. 41 CFR § 60-250.40. As part of affirmative action, Federal contractors and subcontractors are required to list with the local State employment service all employment openings except for executive and top management jobs; jobs which the contractor expects to fill from within; and jobs lasting 3 days or less. 41 CFR § 60-250-5. The equal opportunity clause set forth in 41 CFR § 60-250-5 must also be included in covered government contracts or subcontracts. See the Vets 100 form (online at http://vets100.cudenver.edu/vetsform2002.pdf) for categories of vets covered.

Section 503 of the Rehabilitation Act requires federal contractors and subcontractors with Government contracts in excess of $10,000, to take affirmative action to employ and
advance in employment qualified individuals with disabilities. 41 CFR § 60-741.1. The equal opportunity clause that must be included in all contracts is set forth in 41 CFR § 60-741.5. A written affirmative action program is required for government contractors with 50 or more employees and a contact of $50,000 or more. 41 CFR § 60-741.40.

Affirmative action outreach for women and minorities is also required by EO 11246. There are limits on how affirmative action can be accomplished. See Lutheran Church-Missouri Synod v. FCC, 141 F. 3d 344, (D.C. Cir. 1998), reh’g denied, 154 F. 3d 487 (D.C. Cir. 1998), reh’g en banc denied, 154 F. 3d 494 (D.C. Cir. 1998). This case involved a religiously operated radio stations up for renewal on two licenses. The Federal Communication Commission's internal guidelines for processing license renewal applications involved consideration of the ratio of minority and women employees to the available workforce as one of several factors.

The Church appealed the finding by the FCC that it had transgressed EEO regulations through the use of religious hiring preferences and inadequate minority recruiting. Although the Church had hired minorities and engaged in minority recruiting, for many job openings at its radio stations seminarians and their wives were hired. The question at issue was whether the imposition of numerical norms based on proportional representation should be reviewed on the rational basis standard or strict scrutiny. The U.S. Court of Appeals for the D.C. Circuit held that the Commission's EEO regulations were subject to review under strict scrutiny standard for equal protection purposes.

Racial classifications require a strict scrutiny analysis to see if equal protection has been violated. This requires asking whether the racial classification serves a compelling governmental interest, and whether it is narrowly tailored to achievement of that goal. For gender classifications, the standard is "exceedingly persuasive", e.g. important governmental objectives and the means employed must be substantially related to the achievement of those objectives. Berkley v. United States, 287 F. 3d 1076 (Fed. Cir. 2002).

3. Interview Guidelines and Job Applications

See Appendix B for a handy chart that contains do's and don’t for interview guidelines, also online at http://counsel.cua.edu/employment/questions/. Training all of those who will conduct interviews is a wise investment of time. For specific do's and don’ts on ADA prohibited inquiries see ADA Enforcement Guidance on Preemployment Disability Related Questions and Medical Examinations online at http://www.eeoc.gov/docs/preemp.html. See also http://counsel.cua.edu/ADA/resources/interview.

Job applications should be reviewed to ensure that questions asked are in conformity with EEO laws, e.g. that the EEO statement is on the application, and no forbidden questions are asked. See the chart above for a list of allowable and non-allowable inquiries.
As professors typically do not fill out an employment application, a separate review of the faculty hiring process should be conducted.

4. Process Once Hired

Filling Out the I-9: Employees who fill out the I-9 forms need to be trained on how to do this. Section 8 U.S.C. § 1324b of the Immigration and Nationality Act prohibits discrimination because of national origin against U.S. citizens, U.S. nationals, and authorized aliens. The law also prohibits discrimination because of citizenship status against U.S. citizens, U.S. nationals, and the following classes of aliens with work authorization: permanent residents, temporary residents, refugees, and asylees. A U.S.-citizens-only policy is only legal when state, federal or local law, or government contracts require hire of a U.S. citizen.

The new hire may choose which document(s) he or she wishes to present, and the employer may not ask for different documents if the documents presented appear on their face to be genuine and to relate to the person presenting them. The one exception is if the new employee presents a social security card that indicates it is only valid for work authorization with INS authorization. In that instance, other documentation may be requested. Also note that for F and J visa holders, in certain instances, the I-94 is not considered adequate without supplemental documentation. To ask for different documents than those presented may be construed as national origin or citizenship status discrimination.

5. Policies and Procedures

All written policies that deal with equal opportunity laws should be reviewed on a regular basis. Most of these policies can be found in staff and faculty handbooks. Have the policies been updated to comply with changes in the law? Doe the policies in the paper handbooks match the policies that are posted online. If not, confusion may arise as to what the official university policy actually is. Perhaps equally as important is ascertaining what the unwritten practices are at the organization. What are the underground policies that may be flourishing? Employee handbooks should state that it is not a contract of employment, and that the employee relationship is at will (where applicable), and that the employer retains the right to unilaterally modify the policies and procedures set forth. EEO policies should contain a generic reference to incorporation where applicable of state and local equal opportunity laws.

6. Record Keeping

A quick list of records that must be kept in a sample HR office is listed below. This list assumes the EO Office is part of the HR Office. This list excludes payroll records which must be kept, on the assumption they are kept in the payroll office. EO 11246

Personnel and employment records (including applicant flow data and applicant rejection ratios (minority and gender). Must be kept for two years form the date of making of
record, or personnel action, whichever is later. Fewer than 150 employees and no federal contract of at least $150,000: Keep records for one year. Otherwise the retention period is two years. 41 CFR § 60-1.12

If the university has 50 or more employees and a federal contract of $50,000 or more, the university must develop and maintain an affirmative action program, including documentation of any efforts to achieve placement goals for the current and preceding affirmative action program year.

*Civil Rights Act of 1964*

Records to be used in completing the fall staff survey for IPEDS must be kept for three years. 28 CFR § 1602.48.

General personnel records: includes but not limited to requests for reasonable accommodation, application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship. Must be kept for one year from the making of the action or the personnel action involved, whichever is later. 29 CFR § 1602.14.

*Family and Medical Leave Act of 1993*

The FMLA requires the employer to keep the records for three years. The records should be kept in accord with the FLSA record keeping requirements. The following records must be kept:

1. Basic payroll and identifying employee data, including name, address, and occupation; rate or basis of pay and terms of compensation; daily and weekly hours worked per pay period; additions to or deductions from wages; and total compensation paid.

2. Dates FMLA leave is taken by FMLA eligible employees (e.g., available from time records, requests for leave, etc., if so designated). Leave must be designated in records as FMLA leave; leave so designated may not include leave required under State law or an employer plan which is not also covered by FMLA.

3. If FMLA leave is taken by eligible employees in increments of less than one full day, the hours of the leave.

4. Copies of employee notices of leave furnished to the employer under FMLA, if in writing, and copies of all general and specific written notices given to employees as required under FMLA and these regulations (see § 825.310(b)). Copies may be maintained in employee personnel files.

5. Any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid
leaves.

(6) Premium payments of employee benefits.

(7) Records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement. 29 CFR § 825.500.

*Americans with Disabilities Act of 1990*

Any employment record including but not necessarily limited to requests for reasonable accommodation, application forms submitted by applicants and other records having to do with hiring, promotion, tenure, demotion, transfer, layoff, or termination, rates of pay or other terms of compensation, and selection for training. Must be kept for two years from the date of making, or action involved, whichever is later. 29 CFR § 1602.49.

*Rehabilitation Act of 1973 and Veterans Readjustment Benefits Act*

Government contractors must keep personnel and employment records for two years. If the contractor has fewer than 150 employees or does not have a Government contract of at least $150,000, the minimum record retention period shall be one year. 41 CFR § 60-741.80 and 41 CFR § 60-250.80.

*Age Discrimination in Employment Act*

The employer must keep the following for one year:

- Job applications, resumes, or any other form of employment inquiry whenever submitted to the employer in response to his advertisement or other notice of existing or anticipated job openings, including records pertaining to the failure or refusal to hire any individual,

- Promotion, demotion, transfer, selection for training, layoff, recall, or discharge of any employee,

- The results of any physical examination where such examination is considered by the employer in connection with any personnel action,

- Any advertisements or notices to the public or to employees relating to job openings, promotions, training programs, or opportunities for overtime work.


In the employment office, records showing racial composition of all staff per academic year. Keep for three years.
7. Reduction in Force/Terminations

The same equal employment rules that apply to hiring apply to any terminations and reductions in force. When someone is terminated, if litigation is the remedy of choice, the complaint of the former employee (plaintiff) often alleges wrongful discrimination. In some cases, discrimination may indeed have occurred, but in many cases, discrimination may not have been a factor in the employment decision. Employers need to have personnel practices in place that will prevent discrimination from occurring. Furthermore, employers must also have personnel practices in place that will protect them from false allegations of discrimination and demonstrate that a personnel action was taken fairly and for good reason.

In terms of using affirmative action to shape a reduction in force, chances are very good that a court will find this a violation of equal protection. See Berkley v. United States, 287 F. 3d 1076 (Fed. Cir. 2002).

C. Auditing the Financial Aid Office

1. Public Institutions

In Podberesky v. Kirwan, 38 F3d 147 (4th Circuit 1994), cert. denied, Kirwan v. Podberesky, 514 U.S. 1128 (1995) the Fourth Circuit struck down race exclusive scholarships at the University of Maryland under the 14th Amendment and established a presumption that race-based governmental actions are invalid. However, the court did not address whether the scholarships could be justified on diversity grounds and has subsequently stated that it is an open question whether diversity is a compelling state interest that could justify consideration of race at public institutions. Tuttle v. Arlington County School Board, 195 F.3d 698, 704-705 (4th Cir. 1999); Eisenberg ex. rel. Eisenberg v. Montgomery County Public Schools, 197 F.3d 123, 130-131 (4th Cir. 1999). Thus, this area could be impacted by the decision in the University of Michigan admissions cases.

2. Private Institutions

Although the Department of Education allows private colleges to set aside financial aid for students of a particular race, DOE established in 19944 the following questions to determine if the use of race is narrowly tailored:

- Whether race-neutral means would have been or would be ineffective;
- Whether a less extensive or intrusive use of race or national origin in awarding financial aid as a means of achieving that goal has been or would be ineffective;

459 Fed. Reg. 8756 (Feb. 23, 1994) online at http://frwebgate2.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=385857491772+0+0+0&WAISaction=retrieve
• Whether the use of race or national origin is of limited extent and duration and is applied in a flexible manner;

• Whether the institution regularly re-examines its use of race or national origin in awarding financial aid to determine whether it is still necessary to achieve its goal; and

• Whether the effect of the use of race or national origin on students who are not beneficiaries of that use is sufficiently small and diffuse so as not to create an undue burden on their opportunity to receive financial aid.

VI. Faculty Hiring and Recruiting

A. Overview of the legal issues and high stakes

In efforts to diversity their ranks, many academic departments engage in faculty recruiting practices and follow policies that no longer comply with the more restrictive legal environment imposed by the courts over the past 15 years. Reverse discrimination cases are increasingly common and have generated verdicts disproportionate to the potential earnings of plaintiffs. The following jury verdicts are not reported but citations to news accounts are included for those who would like additional information.

• In 2002, a Michigan jury awarded $1.55 million to a part-time community college instructor at Delta College who applied twice for full-time positions but lost out both times to women with less experience. *Chronicle of Higher Education, Today’s News*, July 18, 2002.

• In 1999 a California jury awarded $2.75 million to a lecturer at San Francisco State University who was denied a tenure track position because the college dean refused to consider white males in faculty searches. *Chronicle of Higher Education, Today’s News*, April 1, 1999.

• In 1998, a Pennsylvania jury awarded $2.2 million to two white tenured professors because they were forced to resign in retaliation for opposing the hiring of minority faculty they believed were unqualified. *Chronicle of Higher Education, Today’s News*, September 28, 1998.
As institutional counsel, you need to review the policies and practices in each department, decide on the institutional risk tolerance, and educate faculty on permissible recruiting practices under current case law. The following chart summarizes the relative risk of various practices in recruiting faculty.

<table>
<thead>
<tr>
<th>Low Risk</th>
<th>Moderate Risk</th>
<th>High Risk</th>
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<tbody>
<tr>
<td>Outreach</td>
<td>Financial incentives for departments</td>
<td>Deciding to hire a particular type of candidate</td>
</tr>
<tr>
<td>Diverse selection committee</td>
<td>Creating a position to lure a candidate of a specific race</td>
<td>Using race or gender as a plus factor in selection</td>
</tr>
<tr>
<td>Expanding the pool</td>
<td></td>
<td>Limiting who can apply</td>
</tr>
</tbody>
</table>

There is a growing judicial consensus that outreach to expand the pool of applications meets strict scrutiny. In fact, institutions that do not engage in such efforts may run afoul of the OFCCP’s requirements discussed in section V(B)(2) above. The acceptance of outreach is usually premised on the distinction between exclusive and inclusive affirmative action established in *Shuford v. Alabama State Board of Education*, 897 F. Supp. 1535 (M.D.Ala. 1995). In *Shuford*, the court held that efforts to broaden the pool of qualified applicants for faculty positions meet strict scrutiny so long as the final hiring decision is made using race-neutral criteria. The distinction was accepted by the 11th Circuit in *Allen v. State Board of Education*, 164 F.3d 1347, 1551-52 (11th Cir. 1999) and has been recognized by a number of other courts. See, e.g. *Sussman v. Tanoue*, 39 F.Supp.2d 13, 25 (D.D.C.1999); *Barbera v. Metro-Dade Cty. Fire Dept.*, 117 F.Supp.2d 1331 (S.D.Fla. 2000); *Duffy v. Wolle*, 123 F.3d 1026, 1039 (8th Cir. 1997) but see *MD/DC/DE Broadcasters Ass'n v. F.C.C.*, 236 F.3d 13, 20 (D.C. Cir. 2001) (questioning the validity of the distinction).

Many people unconsciously hire people like themselves. Diverse selection committees are low risk measure to help filter out those biases and ensure that candidates are evaluated based on actual job qualifications.

The legality of departmental incentives to hire minority candidates often depends on how they are structured. In *University and Community College System of Nevada v. Farmer*, 930 P.2d 730 (Nev. S. Ct. 1997) the Nevada Supreme Court upheld a program that gave a department an extra faculty slot if it hired a minority candidate. The Court reasoned that the institution did not infringe on the rights of a similarly qualified white candidate because the department used its additional faculty slot to hire the white candidate as well.
as the minority candidate. In contrast, a federal district court in *Honadle v. University of Vermont*, 56 F.Supp.2d 419 (D. Vt. 1999) struck down a program that provided additional financial resources to departments hiring minority candidates, reasoning that the prospect of additional resources might induce decision-makers to consider factors other than the qualifications of the candidates. The university eventually won the case at trial because the jury found that the institution did not consider race in its hiring decision.

Giving a “plus” or extra points to candidates of a particular race or gender is risky in light of *Taxman v. Board of Education of Township of Piscataway*, 91 F.3d 1457 (3d Cir. 1996), which held that a school facing budget cutbacks could not use racial diversity as the reason for laying off a white teacher rather than an equally qualified black teacher in the same department. Institutions also should not assume that a position could only be filled by an individual of a particular race, gender, or national origin. See, e.g. *Stern v. Trustees of Columbia University*, 131 F.3d 305 (2d Cir. 1997) (holding that a professor who alleged he was denied the directorship of a Spanish program because of his Eastern European origin was entitled to a jury trial). Faculty also need to understand that an institution may specify qualifications for a position but cannot limit who can apply, even at the request of a donor creating the position. For example, an institution cannot require that a women’s studies position endowed by a prominent feminist be filled by a woman, but it can require that the professor be knowledgeable in feminist theory and an activist in women’s rights.

A useful resource for educating faculty on proper search procedures is “Diversifying the Faculty: A Guidebook for Search Committees,” by Caroline Sotello Viernes Turner. It is available from the Association of American Colleges & Universities and gives practical advice on conducting the search process, includes a checklist of best practices, and provides helpful listings of institutions that produce large number of minority and female doctoral candidates.

**VII. Non-Discrimination Notice Requirements**

**A. With Respect to Students**

The regulations implementing Title VI, Title IX, Section 504, and the Age Discrimination Act all contain notice of non-discrimination requirements for private colleges and universities. See the chart in Appendix C for CFR cites.

In addition, the Internal Revenue Service: Rev. Proc. 75-50 (1975 -2 C.B. 587) requires private universities organized as 501 (c )(3) institutions to do the following:

> § 4.02: Every school must include a statement of its racially nondiscriminatory policy as to students in all its brochures and catalogues dealing with student admissions, programs, and scholarships. A statement
substantially similar to the Notice described in subsection (a) of section 4.03, infra, will be acceptable for this purpose. Further, every school must include a reference to its racially nondiscriminatory policy in other written advertising that it uses as a means of informing prospective students of its programs. The following references will be acceptable

The M school admits students of any race, color, and national or ethnic origin.

Section 4.03 provides in relevant part:

NOTICE OF NONDISCRIMINATORY POLICY AS TO STUDENTS

The M school admits students of any race, color, national and ethnic origin to all the rights, privileges, programs, and activities generally accorded or made available to students at the school. It does not discriminate on the basis of race, color, national and ethnic origin in administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs.

In answer to the question as to whether the admissions application itself (as opposed to the catalogues and brochures) must contain non-discrimination language, the regulations to Title IX, which prohibit gender discrimination in any educational program or activity that receives federal funds, provide at 34 CFR § 106.9 (b):

Publications. (1) Each recipient shall prominently include a statement of the policy described in paragraph (a) of this section in each announcement, bulletin, catalog, or application form which it makes available to any person of a type, described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees.

Thus, the only non-discrimination category that has to be included on the application itself is non-discrimination on the basis of sex. As Title IX requires a statement of non-discrimination on the basis of sex to be included on the actual application form, it would make sense to include the a comprehensive EO notice on the application form itself.

The OCR has addressed notice of non-discrimination on its web page\(^5\), which contains a model notice that may be used to satisfy the various requirements.

**Sample OCR notice**

| The (Name of Recipient) does not discriminate on the basis of race, color, national origin, sex, disability, or age in its programs and activities. The following person has been designated to handle inquiries regarding the non-discrimination policies: |

---

OCR recognizes that the inclusion of a person's name in a non-discrimination notice may result in an overly burdensome requirement to republish the notice if a person leaves the coordinator position. It is acceptable for a recipient to identify its coordinator only through a position title.

For a lengthier description of the actual notice requirements by individual statute, see the OCR web page: [http://www.ed.gov/offices/OCR/docs/nondisc.html](http://www.ed.gov/offices/OCR/docs/nondisc.html).

Other information that must be given to students and applicants includes notice of availability of the equity in athletics report, notice of grievance procedures under Title IX (students), notification of policy and responsible employee under the Age Discrimination Act of 1975, and notification of disability policies.

**B. In Connection with Employment**

Check for the following:

*Civil Rights Act of 1964*: Policy Compliance Statement to all Beneficiaries and Participants.

*FMLA*: Notification of Type of Leave 29 CFR § 825.208.

*Title IX*: Publication of grievance procedures, Notice of non-discrimination to applicants for employment. 34 CFR § 106.8 and 106.9.

*ADA*: Notice of ADA Policy to all applicants and employees.

*The Veteran's Readjustment Benefit Act*: Requires listing of all suitable jobs with local employment service

*Equity in Athletics Disclosure Act*: Notification of availability of equity in athletics report.

*Age Discrimination in Employment Act*: Notification of non-discrimination on employment application.

**VII. Elements of a Great Harassment Policy**

**A. Applies to all types of harassment**

Many campuses prohibit sexual harassment. Harassment, though, can target race, religion, disability, national origin, or other areas. A good harassment policy will address
not only sex but also the other categories protected by the campus nondiscrimination policy.

B.   Accessibility

Can a complaint be filed anytime? From anywhere in the world? Complaint mechanisms should be accessible to people who study or work beyond normal business hours, such as evening students or night shift security guards. Also, people at satellite campuses or participating in off-campus programs need a way to report problems. Several serious harassment cases have arisen in study abroad programs. Make sure that your policy and complaint mechanisms reach all your people and programs.

C.   Consistency

Your institution may have various harassment policies that apply to different groups, such as a staff policy and a student policy. They may have been created at different times and for different purposes. Check them for consistency. Note especially how harassment is defined, the groups whose behavior is covered, who may report complaints, and the complaint processes. Be sure you can explain the reason for any differences among the policies. Is the harassment policy coordinated with other campus policies? Review the harassment policy in tandem with your nondiscrimination statement and disciplinary policies. Check that they make sense when read together. If, for example, a harasser can receive discipline under the harassment policy, check the procedures against your normal disciplinary processes. Compare the rights of a student accused of harassment and one accused of cheating. Or compare the rights of a tenured professor accused of harassment and one accused of plagiarism. If the disciplinary processes differ, can you explain why?

D.   Necessary components

1. A clear description of the people to whom it applies

2. A clear description of the prohibited behavior

3. Examples of improper behavior

4. Information on how to report potential violations

5. An alternate reporting mechanism, in case the accused harasser is the person who would normally receive complaints

6. A promise that complainants and their supporters will not suffer retaliation

7. A description of the complaint resolution process

8. A statement describing potential consequences for violating the policy
E. Distribution

The case law outlined in section III demonstrates that courts look favorably on institutions that distribute harassment and non-discrimination policies widely and often. The easiest place to post the policies is on your campus web site. Many institutions send an annual email with web links to the policies to all faculty, staff, and students. Some institutions stuff a reminder of the policy in employee paychecks once a year. If you have many non-English speaking staff, translate your policy into other dominant languages. If a harassment or discrimination claim arises on your campus, you don’t want the plaintiff to be able to say he or she did not know what to do. By disseminating the policies broadly and making efforts to educate individuals about them, you not only gain a potential affirmative defense but also decrease the chances of a punitive damages award.

F. Sample Harassment Policies

These samples contain all the elements of a good harassment policy and can help in developing one tailored to the needs of your campus:

Canisius College
http://www2.canisius.edu/policies/harassment.html

Earlham College
http://www.earlham.edu/policies/harassment.html

Duke University
http://www.duke.edu/web/equity/txt_har_pol.htm
Appendix A

Essential Qualifications for CUA Undergraduate Nursing Students

To complete an undergraduate degree at the CUA School of Nursing (“SON”) a student must complete a clinical component which involves taking care of actual patients. Persons applying to SON should be aware of the essential eligibility requirements listed below. By accepting admission and enrolling in the SON, the student certifies that he/she has read these materials and understands the essential eligibility requirements of the clinical program.

CUA does not discriminate on the basis of disability. If reasonable accommodations will allow a student with a disability to meet the essential eligibility requirements for participation in the nursing program, then CUA will assist the student in making the reasonable accommodations. Students who would like to receive accommodations on the basis of disability will need to self-identify, provide documentation of the disability, and request an accommodation. Please refer to the CUA Policy on Disabilities as published in the Student Handbook, (and attached) for further information on the admissions and accommodation process at CUA.

Essential eligibility requirements for participation by undergraduate students in the CUA School of Nursing clinical program minimally include:

a. ability to demonstrate safe nursing practices as specified in the American Nursing Association "Standards for Practice" and the CUA SON Safe Practice Policy;
b. ability to visually identify cyanosis and absence of respiratory movement in a patient;
c. ability to understand oral communication from a patient and be able to attend to a patient’s call for help;
d. ability to orally question a patient about needs and health condition and to be able to relay such information to health personnel;
e. ability to accurately document patient information and plans of care in writing;
f. ability to perform cardiopulmonary resuscitation and to lift patients in order to attend to them;
g. ability to perform nursing functions such as taking of blood pressure, blood, temperature, etc., and the giving of injections, checking for vital signs, performing physical examinations, etc.
h. the ability to get along with others and appropriately interact with patients and colleagues in a clinical setting;
i. in order to progress into the upper division of SON, a student must attain official certification in the performance of cardiopulmonary resuscitation.
## Appendix B

### Interview Guidelines

<table>
<thead>
<tr>
<th>ITEM</th>
<th>PROHIBITED INFORMATION</th>
<th>LAWFUL INFORMATION</th>
</tr>
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<tbody>
<tr>
<td><strong>AGE</strong></td>
<td>Age, birth certificate. Federal law prohibits discrimination on the basis of age over 40. DC imposes an additional layer of protection starting at age 18. Inquiries as to date of high school or college graduation.</td>
<td>Whether candidate meets minimum or maximum age requirement that is a bona fide occupational qualification, such as for police officer or firefighter.</td>
</tr>
<tr>
<td><strong>ARREST RECORD</strong></td>
<td>Any inquiry relating to arrest. Any exception would have to be approved by the Director of Human Resources. See also <strong>CONVICTION</strong>.</td>
<td>None.</td>
</tr>
<tr>
<td><strong>CONVICTION RECORD</strong></td>
<td>Inquiries relating to convictions that are irrelevant to the job being applied for. EEOC position is that conviction of crime cannot be automatic bar to employment due to adverse impact on minorities. Thus, non-hire must be justified by business necessity. Must be balanced against possibility of negligent hire liability.</td>
<td>Inquiries about convictions that reasonably relate to performing the job in question. Consider both nature and number of convictions, facts surrounding each offense, the job-relatedness of each conviction and the length of time since conviction, plus applicant's employment history since conviction.</td>
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<table>
<thead>
<tr>
<th>CREDIT RATING</th>
<th>PROHIBITED INFORMATION</th>
<th>LAWFUL INFORMATION</th>
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</thead>
<tbody>
<tr>
<td>Inquiries relating to credit history or credit rating that do not relate to the job in question. Good credit requirements have been challenged as discriminatory because they may have an adverse impact on minorities.</td>
<td>Inquiries about credit history that relate to the job in question.</td>
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<thead>
<tr>
<th>ITEM</th>
<th>PROHIBITED INFORMATION</th>
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<tbody>
<tr>
<td>EDUCATION</td>
<td>Disqualification of a candidate who does not have a particular degree unless employer has proven that the specific degree is the only way to measure a candidate's ability to perform the job in question.</td>
<td>Inquiries regarding degrees or equivalent experience. Information regarding courses relevant to a particular job.</td>
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<tr>
<th>ITEM</th>
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</thead>
<tbody>
<tr>
<td>DISABILITIES</td>
<td>See Interview of Applicants under ADA section. In general, the employer may not ask disability-related questions at the pre-offer stage.</td>
<td>Questions about the applicant's ability to perform specific job functions.</td>
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<tr>
<th>ITEM</th>
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<tbody>
<tr>
<td>MARITAL AND FAMILY STATUS</td>
<td>DC law prohibits discrimination based on marital status or family responsibilities. Do not ask about childcare problems, number of children, pregnancy, support orders, etc.</td>
<td>Questions about whether candidate can meet work schedule. Ask of both sexes.</td>
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<thead>
<tr>
<th>ITEM</th>
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</thead>
<tbody>
<tr>
<td>MILITARY SERVICE</td>
<td>Under federal law, federal contractors may only invite veterans to self-identify if it is in connection with an affirmative action effort. For a list of all veterans covered see <a href="http://vets100.cudenver.edu/vetsform2002.pdf">http://vets100.cudenver.edu/vetsform2002.pdf</a>. Preferring applicants with honorable discharge rather than dishonorable discharge may be race discrimination</td>
<td>Type of experience or education in military as it relates to job.</td>
</tr>
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</table>
under the adverse impact theory. USERRA protects against discrimination on the basis of military service. However, a less than honorable discharge can be the basis for denial of reemployment under USERRA. Cannot ask about military convictions, unless job related.

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<tr>
<th>ITEM</th>
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</thead>
<tbody>
<tr>
<td>NAME</td>
<td>Inquiries to determine national origin, ancestry, or prior marital status.</td>
<td>Whether candidate has ever worked under a different name.</td>
</tr>
<tr>
<td>NATIONAL ORIGIN</td>
<td>Lineage, ancestry, descent, mother tongue, birthplace, citizenship. National origin of spouse or parents. Refusal to hire because of a foreign accent or lack of facility with English could be construed as national origin discrimination. Individuals must be able to communicate well enough to perform the job.</td>
<td>Whether candidate is legally eligible to work in the U.S.</td>
</tr>
<tr>
<td>CITIZENSHIP</td>
<td>It is an unfair employment practice to discriminate on the basis of citizenship. The law does not protect unauthorized aliens. It protects citizens and intending citizens, which includes aliens who are lawful permanent residents, as well as temporary residents under the amnesty program who complete a declaration of intention to become a citizen. It is not an unfair employment practice for an employer to prefer to hire a citizen or national of the U.S. over another individual who is an alien if the two individuals are equally qualified for the job (8 USC 1324B)</td>
<td>Whether candidate is legally eligible to work in the U.S.</td>
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<tr>
<td>ITEM</td>
<td>PROHIBITED INFORMATION</td>
<td>LAWFUL INFORMATION</td>
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<td>ITEM</td>
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ITEM PROHIBITED INFORMATION

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ITEM PROHIBITED INFORMATION
MEMBERSHIP
Inquiries about membership in an organization which reflects religion, national origin, race, sex or age of the candidates. Not hiring someone because they belong to the National Organization for Women might be viewed as sex discrimination.

ITEM | PROHIBITED INFORMATION | LAWFUL INFORMATION
--- | --- | ---
RACE OR COLOR | Complexion or color of skin. | None.

ITEM | PROHIBITED INFORMATION | LAWFUL INFORMATION
--- | --- | ---
HEIGHT OR WEIGHT REQUIREMENTS | Height or weight requirements not related to job. | Height or weight requirements necessary for the job.

ITEM | PROHIBITED INFORMATION | LAWFUL INFORMATION
--- | --- | ---
RELIGION | Religious preference or affiliation, unless for faculty positions or unless such inquiries have been approved by the Office of Human Resources. See also Religious Discrimination, online at http://counsel.cua.edu/employment/questions/Relig.cfm | Whether applicant can meet work schedule with reasonable accommodation if necessary.

ITEM | PROHIBITED INFORMATION | LAWFUL INFORMATION
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SEX | Sex of applicant, where sex is not a bona fide occupational qualification (BFOQ). | Sex of applicant where BFOQ, such as actor or actress.

ITEM | PROHIBITED INFORMATION | LAWFUL INFORMATION
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<thead>
<tr>
<th>UNION AFFILIATION</th>
<th>The Labor Management Relations Act makes it illegal for employers to discriminate on the basis of union membership.</th>
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<tbody>
<tr>
<td>ITEM PROHIBITED INFORMATION</td>
<td>LAWFUL INFORMATION</td>
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<tr>
<td>ALCOHOL OR DRUG USE</td>
<td>Alcoholism is a covered disability under the ADA. Current users of illegal drugs are not protected under the ADA. See Prohibited Inquires under ADA Interview of Applicants.</td>
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<tr>
<td>ITEM PROHIBITED INFORMATION</td>
<td>LAWFUL INFORMATION</td>
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<tr>
<td>POLITICAL AFFILIATION</td>
<td>Questions regarding the applicant's past or present political affiliation or lack of political affiliation (DC law).</td>
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<tr>
<td>ITEM PROHIBITED INFORMATION</td>
<td>LAWFUL INFORMATION</td>
</tr>
<tr>
<td>PERSONAL APPEARANCE</td>
<td>DC law prohibits discrimination on the basis of personal appearance. Avoid asking questions about the person's appearance or making unnecessary comments on personal appearance.</td>
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<td></td>
<td>OK to state guidelines for on the job dress code that serves a reasonable business purpose, and to advise of CUA rules regarding standards of appearance or dress to prevent a danger to the health, welfare, or safety or employees or others.</td>
</tr>
</tbody>
</table>
## Appendix C: Compliance Obligation Under Federal Non-Discrimination Statutes

<table>
<thead>
<tr>
<th>Law</th>
<th>Record keeping</th>
<th>Posting</th>
<th>Reporting</th>
<th>Policy/ Assurances</th>
<th>Notification</th>
<th>Designate employee</th>
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</thead>
<tbody>
<tr>
<td><strong>Civil Rights Act of 1964</strong></td>
<td></td>
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<td>Title VII: IPEDS Biennially: Fall staff survey</td>
<td>Adoption of anti-harassment policies and complaint procedures/</td>
<td>Policy compliance statement to beneficiaries and participants</td>
<td></td>
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<td></td>
<td>Title VII:</td>
<td>EEO Poster*</td>
<td>Enrollment annually</td>
<td>Internal guidelines and grievance procedures for employees and students</td>
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<td></td>
<td>IPEDS Fall staff survey biennially</td>
<td></td>
<td>29 CFR §1602.7 and 29 CFR §1602.11</td>
<td>Voluntary affirmative action</td>
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<td></td>
<td>IPEDS Enrollment Annually</td>
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<td>Title VI</td>
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<td></td>
<td>Faculty salary survey</td>
<td></td>
<td>34 CFR §100.6</td>
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<tr>
<td></td>
<td>IPEDS</td>
<td></td>
<td>28 CFR §42.106</td>
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<tr>
<td></td>
<td>general personnel records: 1 year</td>
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<td>45 CFR §80.6</td>
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<td></td>
<td>29 CFR §1602.13</td>
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<td>and 29 CFR §1602.14</td>
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<td></td>
<td>Title VI</td>
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<td>28 CFR §42.106</td>
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<tr>
<td>Family and Medical Leave Act of 1993</td>
<td>29 C.F.R. § 825.500: 3 years</td>
<td>29 CFR §825.300</td>
<td>Include policy in employee handbook 29 CFR §825.301</td>
<td>29 CFR §825.208 notification of type of leave</td>
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<td></td>
<td>29 CFR §825.300</td>
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*EEO Poster*
<p>| <strong>Equal Pay Act of 1963</strong> | 29 CFR 1620. §32 (2 years) | 29 C.F.R. § 516.4 (FLSA) |  |  |
| <strong>Age Discrimination in Employment Act of 1967 (ADEA)</strong> | 29 C.F.R. § 1627.3 payroll records-3 years other job records-one year | 29 C.F.R. § 1627.10 Prohibition on age related language on help wanted notices: 29 CFR § 1625.4 | Notice of non-discrimination on employment application 29 CFR § 1625.5 |  |
| <strong>Title IX of Education Amendment of 1972 and</strong> | 41 C.F.R. § 60-1.42. Contains specific language | Adoption of grievance procedures 34 C.F.R. § 106.8. Dissemination of Policy 34 CFR § 106.9 45 CFR § 86.9 | 34 C.F.R. § 106.8. Publication of grievance procedures Notification of non-discrimination To both applicants for admission and employment 34 CFR § 106.9 |  |
| <strong>Executive Orders 11,246 and 11,375</strong> | 41 CFR § 60-1.12 (2 years) EEO Poster | 41 CFR §60-1.7 for federal contractors and subcontractors: annually by September 30 Standard Form 100 (EEO-1)(not enforced); IPEDS fall staff survey biennially IPEDS enrollment survey | Written affirmative action program if fed $50,000 or more and 50 or more employees 41 C.F.R. § 60-1.7 and 41 C.F.R. § 60-20.6 | Text for contract clause at 48 C.F.R. § 52.222-26. |
| <strong>Americans with Disabilities Act of 1990</strong> | 2 year for employment and three years for IPEDS fall staff survey 29 CFR §1602.1 and 1602.48 and 29 CFR§ 1602.49; 46 EEO poster | 29 CFR § 1602.7 29 CFR § 1602.11 | Notification to employees and applicants of the ADA policy is required Notification to employees and applicants of the ADA policy is required See 28 C.F.R. § 35.106 for all governmental entities: Notice to applicants, Officer to coordinate complaints (actually under Rehab Act regs 34 C.F.R. § 104.7) |  |</p>
<table>
<thead>
<tr>
<th>Regulations</th>
<th>Requirements</th>
<th>Action Required</th>
<th>Responsible Person</th>
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<tbody>
<tr>
<td><strong>Rehabilitation Act of 1973</strong></td>
<td>- 41 C.F.R. § 60-741.80 2 years 1 year if fewer than 150 employees, and no Govt. K of at least $150,000 - EEO poster 48 C.F.R. § 52.222-36. Notice of affirmative action requirement</td>
<td>Invitation to self identify Students: 45 CFR § 84.42 Officer to coordinate complaints 34 C.F.R. § 104.7</td>
<td></td>
</tr>
<tr>
<td><strong>The Veterans' Readjustment Benefits Act</strong></td>
<td>Employment records: two-years if 150 or more employees and a government contract of $150,000 or more. One year if not. 41 CFR § 60-250.80</td>
<td>Written affirmative action plan if Gov. K $50,000 or more and 50 or more employees Requires listing of all suitable jobs with local employment service Invitation to self identify: 41 C.F.R. § Part 60-250.42</td>
<td></td>
</tr>
<tr>
<td><strong>Age Discrimination Act of 1975</strong></td>
<td>Records necessary to prove compliance 45 CFR § 90.2 34 CFR § 110.22</td>
<td>Written assurance to FEDS 34 CFR §110.23</td>
<td></td>
</tr>
</tbody>
</table>

**Notes:**
- EEO poster: Annual by Sept. 30th 41 C.F.R. Part 61-250 to OASVET
- Written assurance to FEDS 34 CFR §110.23
- Certificate non-discrimination policy to IRS
- Requires listing of all suitable jobs with local employment service
- Invitation to self identify: 41 C.F.R. § Part 60-250.42
- Written affirmative action plan if Gov. K $50,000 or more and 50 or more employees
- Requires listing of all suitable jobs with local employment service
- Invitation to self identify: 41 C.F.R. § Part 60-250.42
- Requires listing of all suitable jobs with local employment service
- Notification of availability of equity in athletics report

**Relevant Sections:**
- C.F.R. § 60-3
- 41 C.F.R. § 60-741.80
- 48 C.F.R. § 52.222-36
- 29 C.F.R. § 32.45
- 34 C.F.R. § 104.7
- 45 CFR § 84.42
- 34 CFR § 104.7
| §7.8.1.3.4.3 | 3 years | Records on racial composition of students and all staff. | Records on award scholarships. Copies of all brochures, catalogues, and advertising. Materials used to solicit $. |


See also USERRA, Immigration and Nationality Act; Fair Credit Reporting Act for other non-discrimination laws; Age Discrimination Act of 1975, and the Fair Housing Act.