

*Originally printed in . . .*



# Prepare to Avoid Trouble Under The Civil Rights Act of 1991

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The 1991 Civil Rights Act includes provisions meant to reduce illegal discrimination in employment decisions. Enacted November 21, 1991, the new law applies to all employers who have 15 or more employees in each of 20 or more calendar weeks per year.

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The new Civil Rights Act (CRA) provides more fertile ground for the growth of legal charges against unwitting employers. Farmers may be faced with no-win litigation in the future, not only for actually discriminating against members of protected classes, but also for simply neglecting to document the processes by which they hire and promote people.

The compromise that led to passage of the CRA was one in which both sides declared victory. The heart of the compromise was the legislative enactment of vague and ambiguous language, the meaning of which is hotly contested. In essence, Congress agreed to disagree and left the resolution of this critically important social issue to the courts. One thing is clear already, however: The new Civil Rights Act will require more agricultural employers to track and maintain statistics and documentation in a manner that only the largest and most sophisticated employers have done in the past.

## Importance of Statistics

The 1991 CRA breathes new and vigorous life into the "disparate impact" theory and relabels it, significantly, "unintentional discrimination." Under this theory, an employer who selects workers based solely on qualifications, without any information about the race, sex, or national origin of the applicants, can still be found guilty of violating the law. The employer's motive is not an issue.

The legality or illegality of a hiring or promotion process can be judged solely upon a statistical analysis of its employment results, a comparison of the race, national origin, and sex composition of the pool of candidates with that of the workforce selected. The discrimination inferred from such an analysis may have been unintentional, but it is still illegal.

Each qualification is subject to a statistical test of whether it has screened out more minorities or women than whites or males. Where an employer subjectively weighs a set of qualifications, the legality of the entire process will be in doubt if the statistics show that fewer minorities or women made it successfully through the process. The compromise in the new law left several critical definitions to be drafted by the courts but left no doubt whatever that statistical data will be pivotal in the defense of future

discrimination lawsuits.

## Steps Can Be Taken Now to Prepare

Although implications of the new Civil Rights Act will not be fully known until the courts decide a number of issues, a need clearly exists to maintain data to be used in the statistical battles looming in the future. There are several practical and fairly easy steps that employers can implement now that will make a world of difference later if an allegation of unintentional discrimination emerges:

- **Collect and maintain applicant flow data**

Essential to any case of unintentional discrimination is a comparison of the "qualified available pool of applicants" with those actually chosen for the position. Unless the employer has an accurate and reliable way to prove who the actual applicants were, a plaintiff will be able to use more generalized workforce statistics and assume that applicants appeared for each job in the same demographic proportions as their general presence within a geographic area around the work location. It is rare for such an assumption to accurately define the relevant labor market. Uncertainty about where applicants really come from allows plaintiffs to play games with the data and present to the court the statistics most damning of the employer. Therefore, employers should maintain records of who actually applies for each open position, who is chosen, and the reason for the decision on every applicant.

Any form on which information about applicants' sex, race, national origin, and age is recorded must, by law, be kept separate from the written application material used in employee selection. Collection procedures must isolate this protected information from the managers and supervisors who make the hiring decision. If an employment decision is later challenged, the employer would be able to retrieve the demographic information to determine the actual make-up of the applicant pool for a particular position. For example, if, despite a farmer's open recruiting efforts, only males apply for field jobs on a ranch - and that fact can be proved - the all-male composition of that workforce segment would not support a finding that discrimination had occurred. But without such specific data on the real applicant pool, the employer would lose to a charge of discriminatory hiring, hands down.

- **Limit the pool of applicants**

Farm employers who do not take any steps to limit who is deemed an "applicant" run serious risks. Without limitations, the law assumes that everyone who completed a basic application was considered for every job filled during a given time period. The result is a statistically inaccurate picture of the real applicant pool. No law or regulation prohibits an employer from defining the term "applicant," and there are various basic steps that can limit the pool of applicants to dramatically reduce risks of "statistics litigation."

1. Do use a written form - even a very short and simple one - to record identity and some job-related information on every applicant. If applicants are unable to complete the form, a company clerk or supervisor can do it. The important thing is to create documents from which the applicant pool can be clearly determined.
2. Accept applications only when a job is open and ready to be filled.
3. Advise applicants that an application will only be considered active for a fixed amount of time, for instance 30 days, after which it will be disregarded. The use of a "Received" stamp on the application is helpful in sorting out old applications to be moved to an inactive file.
4. If unsolicited applications are received in the mail, return them. This both limits total numbers of

applicants and avoids the problem of not being able to identify race or national origin for computing applicant flow statistics.

5. Discard all applications that are incomplete or illegible. An incomplete application is not an application.

- **Use written job descriptions**

Written job descriptions will be useful in refuting unintentional discrimination charges. With the likely new emphasis on statistics, courts will be trying to identify qualifications that have adversely affected minority applicants and to assess whether those qualifications are valid predictors of performance in a particular job. Thus, there should be a description of every job on the farm outlining all duties and qualifications needed to perform them. Employers who explicitly state their job-related hiring criteria are in a far better position to defend against discrimination litigation.

- **Post promotional opportunities**

Claims of unintentional discrimination arise frequently with regard to promotions and transfers within an organization. Employers are particularly vulnerable to these claims when promotional decisions appear to be made out of the blue, with no notice to those who may be interested, and seem to be based on purely subjective criteria. One simple way to reduce the number of candidates for a promotion (and the number of potential plaintiffs in litigation) is to use job postings with specific qualifying criteria and application deadlines. Those employees who do not apply or who do not meet the objective qualifications for the job cannot later complain that they were discriminated against when they did not receive the promotion. In addition, when the promotional criteria are specified, the employer can precisely identify the pool of candidates from which a choice is made.

- **Use objective screening criteria at an early stage**

Most employment decisions involve narrowing a field of applicants before choosing the final candidate. At the early stages of this process, objective screening criteria can be used to eliminate unqualified candidates. For example, if a payroll manager position opens up, it may require someone who can use specialized computer software and who knows basic law affecting wages and deductions. Such reasonable and necessary job requirements will objectively eliminate many applicants and should also preclude any possible inference that discrimination was involved in narrowing the field of applicants. Note that these qualifying criteria must be related to the particular job and consistent with business necessity.

- **Maintain records of employment decisions**

The retention of records is essential. The most dangerous aspect of the unintentional discrimination theory is its tendency to rely on assumptions and inferences drawn from the statistics and the fact that it can shift the burden to the employer to disprove a presumed earlier occurrence of employment discrimination. Farmers who retain records showing that statistical disparities in the results of hiring decisions have derived from legitimate assessment of job-related qualifications should be able to sustain this burden. Those who do not could be crushed under its weight.

## **Conclusion**

The steps discussed above can produce an accurate and thorough historical record of selection and

promotion processes. By using these measures employers will not only be more likely to select capable people for open jobs, but also be able to make employment statistics work for them rather than against them when faced with claims of unintentional discrimination under the new Civil Rights Act.

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