AVOIDING DISCRIMINATION CHARGES

The word "discrimination" can be used in many different contexts to describe a variety of situations. Not all discrimination is prohibited by law. Example, a concert promoter may reserve a block of seats in case VIP's show up, yet refuses to sell the public those seats. We may claim "that is unfair" or "that is discrimination". The dictionary definition would indicate that is discrimination. However, in order to determine whether there has been unlawful discrimination within the meaning of S.D.C.L. 20-13, "discrimination" is interpreted more narrowly. The cause of the adverse action or "discrimination" must be related, or at least in part, to the individual's race, color, creed, religion, sex, national origin, ancestry, or disability. This distinguishes that which is simply unfair, unjust, unkind, unusual, etc. from that which is discriminatory within the meaning of S.D.C.L. 20-13.

UNLAWFUL PRACTICES

It is unlawful for an employer to refuse to hire a person, to discharge or lay off an employee, harass or to treat persons differently in the terms and conditions of employment because of race, color, creed, religion, sex, national origin, ancestry, or disability. Age is also prohibited under federal law.

Are many charges of discrimination filed annually?

Although the number of charges filed each year differs, on average the Division will take in approximately 130 charges each year.

What kinds of charges are being filed?

Of all the protected basis (i.e. race, color, sex etc.) the most frequent basis filed is sex discrimination. Sex discrimination can include sexual harassment, pregnancy discrimination, and gender discrimination. The most prevalent issue or alleged harm, however, is sexual harassment followed by discharge. Sex discrimination, disability discrimination and retaliation (being treated adversely because of opposition to discriminatory practices or filing a charge) will compose 90% of our work.

Similarly, approximately 90% of all charges filed will be employment related. Hiring Process

What kinds of questions should be avoided during the application process?

A good rule of thumb is to keep questions job related. Federal and State laws prohibit certain questions that elicit information about age (date of birth), sex, race, color, religion, national origin, disability and ancestry. An employer is prohibited from asking about medical history or workers' compensation on the application or during interviews. Other suspect inquires include asking about marital status, spouses name, number or children, childcare provisions, whether rent or own a home, arrest records, and citizenship. You can offer employment contingent upon passing an employee physical (assuming all employees must submit to the physical). Likewise, you may get Affirmative Action information once an employee is hired. Employers should also keep in mind that if, in the course of a physical exam, medical information revealed must be kept separate from an employees personnel file. The Division has published brochures/booklets and handouts on this matter. Please feel free to contact us for this information.

SEXUAL HARASSMENT

There are essentially two types of sexual harassment. The first is "Quid Pro Quo" harassment (meaning "this for that"). The other type is "Hostile Environment" harassment. Although there are formal definitions for each, essentially Quid Pro Quo harassment occurs when a supervisor (or someone who has control over an employees job destiny) makes employment decisions based on their employees response to his/her requests for sexual favors. Hostile environment harassment occurs when you are subjected to a work environment that is intimidating, hostile, or patently offensive. A supervisor, co-worker, or someone else whom the victim comes in contact on the job creates an abusive work

environment or interferes with the employees work performance through words or deeds because of the victims gender.

Has the South Dakota Supreme court ever ruled on this matter?

Yes. In 1991 the South Dakota Supreme Court handed down Huck v. McCain Foods, 479 N.W. 2d 167 (S.D. 1991) and adopted requirements for sexual harassment and employer liability. In order to prevail on a sexual harassment claim a plaintiff must show that: 1) [He] She belongs to a protected group; 2) [He] She was subject to unwelcome sexual harassment; 3) The harassment was based on sex; 4) The harassment affected a term, condition, or privilege of employment and; 5) The employer knew or should have known of the harassment in question and failed to take proper remedial action. Both males and females alike can be victims of sexual harassment.

Avoiding Sexual Harassment

Prevention is the best tool to eliminate sexual harassment in the workplace. Employers are encouraged to take all steps necessary to prevent sexual harassment from occurring. An effective prevention program should include an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented. The employer should affirmatively raise the subject with all supervisory and non-supervisory personnel, express strong disapproval, and explain the sanctions for harassment.

Handling Sexual Harassment Complaints

At this point, you have no choice but to take action no matter how trivial the situation may appear. You must immediately investigate the allegations to find out what happened and take appropriate action. At a minimum you are required to see that the work atmosphere is free from sexual harassment. Do not attempt resolving the matter by putting the victim and alleged harasser in the same room together. Not only is this intimidating, it could be construed as retaliation. Consider the severity of the alleged conduct and respond appropriately. As a general rule your response should match the severity of the offense (and as stated above, at a minimum your response needs to eliminate the harassing behavior). You are not required to fire an alleged harasser. Finally, conduct follow up interviews with the victim and the alleged harasser to tell them what is happening and why.

PREGNANCY

Pregnancy is considered a temporary disability under the law. Whatever your policy or practice may be regarding temporary disabilities, that is the same practice you must apply to pregnant employees. The Pregnancy Discrimination Act is an amendment to Title VII of the Civil Rights Act of 1964.

Women affected by pregnancy or related conditions must be treated in the same manner as other applicants or employees with similar abilities or limitations. Treatment of pregnant employees is one of the most misunderstood concepts by employers. The Division has handouts regarding the Pregnancy Discrimination Act to provide to employers for guidance on this issue. The employer should also be aware employees have rights under the Family and Medical Leave Act of 1991 as well.

DISABILITY

S.D.C.L. 20-13 has the same definition for "disability" as does the Americans With Disabilities Act (ADA) of 1990 and we follow the ADA rules and regulations. As of July 26, 1994 employers with 15 or more employees are covered under the ADA (S.D.C.L. 20-13 covers all employers). Title I of the ADA deals specifically with employment. A person is covered under ADA and S.D.C.L. 20-13 if he or she has a physical or mental impairment that substantially limits a major life activity. The ADA also protects individuals who have a record of a substantially limiting impairment, and people who are regarded as having a substantially limiting impairment. To be protected, an individual must have, have a record of, or be regarded as having a substantial, as opposed to a minor, impairment. A substantial impairment is one that significantly limits or restricts a major life activity such as hearing, seeing, speaking, breathing, performing manual tasks, walking, caring for oneself, learning or working. An individual with a disability must also be qualified to perform the essential

functions of the job either with or without a reasonable accommodation. The ADA does not interfere with your right to hire the best qualified applicant. Nor does it impose any affirmative action requirements. For more information regarding this issue please contact the Division of Human Rights.

Can I require medical examinations or ask questions about an individual's disability?

It is unlawful to ask an applicant whether he or she is disabled or about the nature or severity of a disability or to require the applicant to take a medical examination before making a job offer. You can ask an applicant questions about ability to perform job related functions, as long as the questions are not phrased in terms of a disability. You can also ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will perform job-related functions. After a job offer is made and prior to the commencement of employment duties, you may require that an applicant take a medical examination if everyone who will be working in the job category must also take the examination. You may condition the job offer on the results of the medical examination.

However, if an individual is not hired because a medical examination reveals the existence of a disability, you must be able to show that the reasons for exclusion are job related and necessary for the conduct of your business. You must also be able to show that there was no reasonable accommodation that would have made it possible for the individual to perform the essential job functions.

Do individuals who use drugs illegally have rights under the ADA?

Anyone who is currently using drugs illegally is not protected by the ADA or S.D.C.L. 20-13 and may be denied employment or fired on the basis of such use. Employers are not prohibited by ADA or S.D.C.L. 20-13 from testing applicants or employees for current illegal drug use, or from making employment decisions based on verifiable results. A test for the illegal use of drugs is not considered a medical examination under the Act(s).

PENALTIES

Charges of discrimination are considered civil (not criminal) matters. Under State law if an employer is found to be in violation, the charging party is entitled to "equitable" or "make-whole" relief. This can include lost back wages, cease and desist actions, specific training, policy changes and the like.

Federal law violations such as Title VII of the Civil Rights Act and the Americans with Disabilities Act impose greater liability. It is possible for prevailing parties to receive compensatory and punitive damages.

STATE VS. FEDERAL

S.D.C.L. 20-13 applies to all employers. Title VII applies to employment discrimination charges alleging race, color, religion, sex, and national origin as long as the employer has 15 or more employees. ADA also requires employers to have 15 or more employees for coverage. The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing Title VII of the Civil Rights Act, Title I of the Americans with Disabilities Act, Age Discrimination in Employment Act (ADEA), and the Equal Pay Act (EPA). The Division of Human Rights automatically dual files charges of discrimination jurisdictional under Title VII and ADA with the EEOC to protect charging parties federal rights. The Division, however, operates under the authority delegated in S.D.C.L. 20-13 and A.R.S.D. 20:03.

INVESTIGATING ALLEGATIONS

The Division of Human Rights does not represent the individual filing a charge of discrimination nor do we defend the employer. The Division's job is to act as an independent fact-finder by conducting an investigation to determine whether or not "probable cause" exists to believe discrimination took place. The Division conducts their investigations with the least amount of interference into the daily operations of an employer while still fulfilling our statutory obligation to investigate. The Division typically conducts investigations by voluntary compliance, however, we do have subpoena

authority. Investigations are often conducted through the use of telephone and mail. On site investigations are also conducted.

Upon completion of an investigation each party will receive a written determination containing a summary and analysis of the facts and a decision. If a probable cause decision is issued, the Division will make every attempt to conciliate the matter. If conciliation fails, either party can elect to remove the matter to Circuit Court within 20 days after Notice to Answer has been served. If election is not made to the Circuit Court, the matter is scheduled for a de novo public hearing in front of the South Dakota Commission of Human Rights which consists of five members appointed by the Governor.

Department of Labor and Regulation

The South Dakota Department of Labor and Regulation (DLR) Division of Human Rights will provide any employer with technical assistance so that compliance can be maintained. The Division will also make presentations to supervisors or employees on various issues pertaining to the South Dakota Human Relations Act. The Division's main goal is to promote equal opportunity through the administration and enforcement of the Human Relations Act. Please call us at 605.773.3681.

Discrimination At The Federal Level

You may contact the EEOC at the Denver District Office:

U.S. Equal Employment Opportunity Commission
Chicago District Office
500 W. Madison St.
Suite 2800
Chicago, IL 60661
312.869.8082
Fax: 312.353.4041

Minneapolis Area Office
Towle Building
330 S. Second Ave.
Suite 720
Minneapolis, MN
612.335.4053
800.669.4000
FAX: 612.335.4044