

Section 6A, Uniform Guidelines on Employee Selection Procedures (1978); 43 FR _____, (August 25, 1978); 29 CFR part 1607, section 6A.

**PART 1608—AFFIRMATIVE ACTION
APPROPRIATE UNDER TITLE VII OF
THE CIVIL RIGHTS ACT OF 1964,
AS AMENDED**

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AUTHORITY: Sec. 713 the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-12, 78 Stat. 265.

SOURCE: 44 FR 4422, Jan. 19, 1979, unless otherwise noted.

§ 1608.1 Statement of purpose.

(a) *Need for Guidelines.* Since the passage of title VII in 1964, many employers, labor organizations, and other persons subject to title VII have changed their employment practices and systems to improve employment opportunities for minorities and women, and this must continue. These changes have been undertaken either on the initiative of the employer, labor organization, or other person subject to title VII, or as a result of conciliation efforts under title VII, action under Executive Order 11246, as amended, or under other Federal, State, or local laws, or litigation. Many decisions taken pursuant to affirmative action plans or programs have been race, sex, or national origin conscious in order to achieve the Congressional purpose of providing equal employment oppor-

tunity. Occasionally, these actions have been challenged as inconsistent with title VII, because they took into account race, sex, or national origin. This is the so-called “reverse discrimination” claim. In such a situation, both the affirmative action undertaken to improve the conditions of minorities and women, and the objection to that action, are based upon the principles of title VII. Any uncertainty as to the meaning and application of title VII in such situations threatens the accomplishment of the clear Congressional intent to encourage voluntary affirmative action. The Commission believes that by the enactment of title VII Congress did not intend to expose those who comply with the Act to charges that they are violating the very statute they are seeking to implement. Such a result would immobilize or reduce the efforts of many who would otherwise take action to improve the opportunities of minorities and women without litigation, thus frustrating the Congressional intent to encourage voluntary action and increasing the prospect of title VII litigation. The Commission believes that it is now necessary to clarify and harmonize the principles of title VII in order to achieve these Congressional objectives and protect those employers, labor organizations, and other persons who comply with the principles of title VII.

(b) *Purposes of title VII.* Congress enacted title VII in order to improve the economic and social conditions of minorities and women by providing equality of opportunity in the work place. These conditions were part of a larger pattern of restriction, exclusion, discrimination, segregation, and inferior treatment of minorities and women in many areas of life.² The Legislative

²Congress has also addressed these conditions in other laws, including the Equal Pay Act of 1963, Pub. L. 88-38, 77 Stat. 56 (1963), as amended; the other titles of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964), as amended; the Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (1965), as amended; the Fair Housing Act of 1968, Pub. L. 90-284, title VII, 82 Stat. 73, 81 (1968), as amended; the Educational Opportunity Act (title IX), Pub. L. 92-318, 86 Stat. 373 (1972), as amended; and the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 (1972), as amended.

Histories of title VII, the Equal Pay Act, and the Equal Employment Opportunity Act of 1972 contain extensive analyses of the higher unemployment rate, the lesser occupational status, and the consequent lower income levels of minorities and women.³ The purpose of Executive Order No. 11246, as amended, is similar to the purpose of title VII. In response to these economic and social conditions, Congress, by passage of title VII, established a national policy against discrimination in employment on grounds of race, color, religion, sex, and national origin. In addition, Congress strongly encouraged employers, labor organizations, and other persons subject to title VII (hereinafter referred to as "persons," see section 701(a) of the Act) to act on a voluntary basis to modify employment practices and systems which constituted barriers to equal employment opportunity, without awaiting litigation or formal government action. Conference, conciliation, and persuasion were the primary processes adopted by Congress in 1964, and reaffirmed in 1972, to achieve these objectives, with enforcement action through the courts or agencies as a supporting procedure where voluntary action did not take place and conciliation failed. See section 706 of title VII.

(c) *Interpretation in furtherance of legislative purpose.* The principle of non-discrimination in employment because of race, color, religion, sex, or national origin, and the principle that each person subject to title VII should take voluntary action to correct the effects of past discrimination and to prevent present and future discrimination without awaiting litigation, are mutually consistent and interdependent

³Equal Pay Act of 1963: S. Rep. No. 176, 88th Cong., 1st Sess., 1-2 (1963). Civil Rights Act of 1964: H.R. Rep. No. 914, pt. 2, 88th Cong., 1st Sess. (1971). Equal Employment Opportunity Act of 1972: H.R. Rep. No. 92-238, 92d Cong., 1st Sess. (1971); S. Rep. No. 92-415, 92d Cong., 1st Sess. (1971). See also, Equal Employment Opportunity Commission, *Equal Employment Opportunity Report—1975, Job Patterns for Women in Private Industry* (1977); Equal Employment Opportunity Commission, *Minorities and Women in State and Local Government—1975* (1977); United States Commission on Civil Rights, *Social Indicators of Equality for Minorities and Women* (1978).

methods of addressing social and economic conditions which precipitated the enactment of title VII. Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in title VII.⁴ Affirmative action under these principles means those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity. Such voluntary affirmative action cannot be measured by the standard of whether it would have been required had there been litigation, for this standard would undermine the legislative purpose of first encouraging voluntary action without litigation. Rather, persons subject to title VII must be allowed flexibility in modifying employment systems and practices to comport with the purposes of title VII. Correspondingly, title VII must be construed to permit such voluntary action, and those taking such action should be afforded the protection against title VII liability which the Commission is authorized to provide under section 713(b)(1).

(d) *Guidelines interpret title VII and authorize use of section 713(b)(1).* These Guidelines describe the circumstances in which persons subject to title VII may take or agree upon action to improve employment opportunities of minorities and women, and describe the kinds of actions they may take which are consistent with title VII. These Guidelines constitute the Commission's interpretation of title VII and will be applied in the processing of claims of discrimination which involve voluntary affirmative action plans and programs. In addition, these Guidelines state the circumstances under which the Commission will recognize that a person subject to title VII is entitled to assert that actions were taken "in

⁴Affirmative action often improves opportunities for all members of the workforce, as where affirmative action includes the posting of notices of job vacancies. Similarly, the integration of previously segregated jobs means that all workers will be provided opportunities to enter jobs previously restricted. See, e.g., *EEOC v. AT&T*, 419 F. Supp. 1022 (E.D.Pa. 1976), *aff'd*, 556 F. 2d 167 (3rd Cir. 1977), *cert. denied*, 98 S.Ct. 3145 (1978).

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good faith, in conformity with, and in reliance upon a written interpretation or opinion of the Commission," including reliance upon the interpretation and opinion contained in these Guidelines, and thereby invoke the protection of section 713(b)(1) of title VII.

(e) *Review of existing plans recommended.* Only affirmative action plans or programs adopted in good faith, in conformity with, and in reliance upon these Guidelines can receive the full protection of these Guidelines, including the section 713(b)(1) defense. See § 1608.10. Therefore, persons subject to title VII who have existing affirmative action plans, programs, or agreements are encouraged to review them in light of these Guidelines, to modify them to the extent necessary to comply with these Guidelines, and to readopt or reaffirm them.

§ 1608.2 Written interpretation and opinion.

These Guidelines constitute "a written interpretation and opinion" of the Equal Employment Opportunity Commission as that term is used in section 713(b)(1) of title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-12(b)(1), and § 1601.33 of the Procedural Regulations of the Equal Employment Opportunity Commission (29 CFR 1601.30; 42 FR 55,394 (October 14, 1977)). Section 713(b)(1) provides:

In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission * * *. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that * * * after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect * * *.

The applicability of these Guidelines is subject to the limitations on use set forth in § 1608.11.

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§ 1608.3 Circumstances under which voluntary affirmative action is appropriate.

(a) *Adverse effect.* Title VII prohibits practices, procedures, or policies which have an adverse impact unless they are justified by business necessity. In addition, title VII proscribes practices which "tend to deprive" persons of equal employment opportunities. Employers, labor organizations and other persons subject to title VII may take affirmative action based on an analysis which reveals facts constituting actual or potential adverse impact, if such adverse impact is likely to result from existing or contemplated practices.

(b) *Effects of prior discriminatory practices.* Employers, labor organizations, or other persons subject to title VII may also take affirmative action to correct the effects of prior discriminatory practices. The effects of prior discriminatory practices can be initially identified by a comparison between the employer's work force, or a part thereof, and an appropriate segment of the labor force.

(c) *Limited labor pool.* Because of historic restrictions by employers, labor organizations, and others, there are circumstances in which the available pool, particularly of qualified minorities and women, for employment or promotional opportunities is artificially limited. Employers, labor organizations, and other persons subject to title VII may, and are encouraged to take affirmative action in such circumstances, including, but not limited to, the following:

(1) Training plans and programs, including on-the-job training, which emphasize providing minorities and women with the opportunity, skill, and experience necessary to perform the functions of skilled trades, crafts, or professions;

(2) Extensive and focused recruiting activity;

(3) Elimination of the adverse impact caused by unvalidated selection criteria (see sections 3 and 6, Uniform Guidelines on Employee Selection Procedures (1978), 43 FR 30290; 38297; 38299 (August 25, 1978));

(4) Modification through collective bargaining where a labor organization represents employees, or unilaterally