

CHAPTER 15
DISCRIMINATION LAW

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CHAPTER 15

DISCRIMINATION LAW

15.1 Scope of This Chapter. This Chapter discusses the principal federal and state statutes enacted to combat discrimination in employment, including Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Arizona Civil Rights Act.

Sections 15.2 - 15.26 address the application of the anti-discrimination laws in the context of employment by state agencies and other entities. Independent of the statutes discussed in this Chapter, other sources of law, including the state and federal constitutions, statutes and regulations, and the common law of contract and torts, may affect state employer-employee relationships, including claims of discrimination in the workplace. Accordingly, in addressing issues related to discrimination, state employers should consult with their legal counsel to ensure that all relevant laws are considered. For a general discussion of personnel issues, see Chapter 3 of this Handbook.

Section 15.27 addresses the issue of preventing discrimination against persons with disabilities in the provision of public services or in public accommodations.

Other useful resources for topics addressed in this Chapter include:

For employment topics, the website for the U.S. Equal Employment Opportunity Commission at www.eeoc.gov, which includes general information and copies of pertinent policies, guidelines, and manuals.

For issues related to the Americans with Disabilities Act (ADA), the website at www.ada.gov or the Department of Justice ADA information line at 800-514-0301 (voice) or 800-514-0383 (TTY).

15.2 Title VII and the Civil Rights Act of 1991. Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits discrimination in employment based on: race, color, religion, sex, national origin, or a person's association with a protected class member. 42 U.S.C. §§ 2000e to 2000e-17. Title VII also prohibits retaliation against an individual who has opposed a discriminatory practice, filed a discrimination charge, or otherwise participated in a judicial or administrative proceeding concerning a discrimination complaint. Title VII protects employees from discrimination in all aspects of the employment relationship, including hire, terms and conditions, benefits, promotion, layoff, and termination.

Title VII covers state and local governmental employers. Title III of the Civil Rights Act of 1991, 2 U.S.C. § 1220 (subsequently transferred to 42 U.S.C. § 2000e-16c), gave

previously exempt state employees serving elected officials many of the same procedural and substantive rights that Title VII provides. Title III covers members of an elected official's personal staff, those serving an elected official on a policy-making level, and those serving an elected official as immediate advisors with respect to the exercise of the office's constitutional or legal powers.¹

15.3 The Arizona Civil Rights Act. The Arizona Civil Rights Act, A.R.S. §§ 41-1401 to -1493.02 ("ACRA"), prohibits discrimination based on race, color, sex, religion, national origin, age, physical or mental disability, and genetic testing results, and prohibits retaliation because a person has opposed discriminatory practices, filed a discrimination charge, or otherwise participated in a judicial or administrative proceeding concerning a discrimination complaint. A.R.S. §§ 41-1463, -1464. The ACRA created the Civil Rights Division within the Arizona Attorney General's Office, A.R.S. § 41-1401(A); provides an administrative procedure for the filing and investigation of discrimination charges, A.R.S. § 41-1481(A) to (C); requires the Civil Right Division ("Division") to seek informal means and conciliation to resolve violations of the ACRA before filing a lawsuit, *id.* § (C); gives the Division authority to go to court to enforce its discrimination findings, *id.* § (D); and gives the charging party the right to intervene in cases brought by the Division as well as pursue a private lawsuit should the Division not find cause to believe that discrimination occurred. *Id.*

To be covered by Title VII or the ACRA, the employer generally must have had fifteen or more employees for twenty or more weeks during the current or preceding year. 42 U.S.C. § 2000e(b); A.R.S. § 41-1461(6)(a). However, if the employee alleges sexual harassment under the ACRA, that number is reduced to a single employee. A.R.S. § 41-1461(6)(a).

Title VII discrimination charges must be filed with the EEOC within 300 days of the most recent discriminatory action. 42 U.S.C. § 2000e- 5(e)(1). Discrimination charges filed under the ACRA must be filed "within [180] days after the alleged unlawful employment practice occurred." A.R.S. § 41-1481(A).

15.4 Race and Color Discrimination. Discrimination based on race or color, which includes discrimination based on physical characteristics and skin color and tone, violates Title VII and the ACRA. 42 U.S.C. § 2000e-2(a)(1)-(2); A.R.S. § 41-1463(B)(1)-(3).

15.5 National Origin Discrimination. National origin discrimination, which may include discrimination based on place of origin or on a physical, cultural, or linguistic

¹ This enactment was not, however, an amendment to Title VII. Under Title VII's definition of "employee," employees who serve elected officials still appear to be entirely exempt. See 42 U.S.C. § 2000e(f). Rules concerning the employment discrimination complaints of previously exempt state and local governmental employees can now be found at 29 C.F.R. §§ 1603.100 to 1603.306.

characteristic of an identifiable group, violates Title VII and the ACRA. 42 U.S.C. § 2000e-2(a)(1)-(2); A.R.S. § 41-1463(B)(1)-(3).

15.5.1 Language. Decision makers should seek legal counsel when implementing policies or taking employment actions based on language or accent. For example, a foreign accent that does not interfere with a worker's ability to perform his or her duties is not a legitimate justification under Title VII for an adverse employment decision. *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1192-93 (9th Cir. 2003). However, an individual who is unable to affectively perform because of language or accent barriers may be considered unqualified for the position. *Fragante v. City of Honolulu*, 888 F.2d 591, 598-99 (9th Cir. 1989). Bilingual individuals may also be required to use their language skills without additional compensation when there is a general requirement that they use whatever skills they possess in performance of the job. *Cota v. Tucson Police Dept.*, 783 F. Supp. 458, 468-69 (1992).

15.5.2 Alienage. Neither Title VII nor the ACRA include "citizenship" or "alienage" as protected classes. See 42 U.S.C. § 2000e-2; A.R.S. § 41-1463. However, if a state agency excludes from employment non-citizens who have valid work authorizations, it must ensure that the decision does not have the purpose or effect of discriminating against applicants based on national origin. 29 C.F.R. § 1606.5(a), see also *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 92 (1973). The agency must also comply with the Equal Protection Clause of the United States Constitution. A state agency may exclude a resident alien from employment based on the employee's need to formulate, execute, or review public policy in the position at issue, but not based on economic costs. *Compare, e.g., Cabell v. Chavez-Salido*, 454 U.S. 432, 445-46 (1982) (upholding exclusion of resident aliens from employment as peace officers); *Sugarman v. Dougall*, 413 U.S. 634, 646 (1973) (invalidating an exclusion of all resident aliens from employment in the competitive civil service for the purpose of reducing costs).

The Privileges and Immunities Clause of the United States Constitution also limits state rules that exclude out-of-state residents from employment. See, e.g., *Hicklin v. Orbeck*, 437 U.S. 518, 534 (1978) (invalidating hiring preference for Alaska residents in the oil and gas development area). In addition, the Immigration Reform and Control Act of 1986, as amended, restricts the employment of unauthorized aliens, but prohibits discrimination based on a person's citizenship status or national origin and provides remedies for such discrimination. See 8 U.S.C. §§ 1324a(a), 1324b(a). Similarly, the Legal Arizona Workers Act prohibits knowing or intentional employment of unauthorized aliens, A.R.S. §§ 23-212(A), -212.01(A), but also prohibits the investigation of unauthorized alien employment if that investigation is pursuant to a complaint "based solely upon race, color or national origin." See A.R.S. §§ 23-212(B), -212.01(B). The United States Supreme Court held that the Immigration Reform and Control Act does not preempt the Legal Arizona Workers Act. *Chamber of Commerce v. Whiting*, 563 U.S. 582, 611 (2011).

15.6 Religious Discrimination. It is unlawful to discriminate against a person because of his or her religion, or the religious beliefs or practices associated with the

religion. 42 U.S.C. § 2000e-2(a)(1)-(2); A.R.S. § 41-1463(B)(1)-(3). Title VII and the ACRA also require an employer to reasonably accommodate the religious beliefs and practices of its employees if it can do so without undue hardship. 42 U.S.C. § 2000e(j); A.R.S. § 41-1461(13). Other defenses to religious discrimination exist where: religion is a bona fide occupational qualification (discussed at 15.17.1 below), A.R.S. § 41-1463(G)(1); the covered entity is a school, college, university, or other educational institution that is in whole or substantially owned, supported, controlled or managed by a religion or the curriculum is directed toward the propagation of a religion. A.R.S. § 41-1463(G)(2).

An employee alleging discrimination based on religion must establish a prima facie case by showing (1) a bona fide religious belief, the practice of which conflicted with an employment duty; (2) the employer was informed of the belief and the conflict; and (3) the employer threatened or subjected the employee to an adverse employment action because of the inability to perform based on the religious conflict. *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993). The employee is never required to show they attempted to compromise their religious belief in order to establish a prima facie case. *Id.*

Once an employee establishes a prima facie case, the employer may avoid liability by offering an accommodation that would eliminate the religious conflict, or showing that granting the request would create an undue hardship. *Opuku-Boateng v. California*, 95 F.3d 1461, 1467 (9th Cir. 1996). The threshold for establishing an “undue hardship” is low. Requiring an employer to bear more than a “de minimis” cost to provide accommodation or an accommodation that would create more than a “de minimis” burden for the charging employee’s coworkers is an undue hardship. *Trans World Airlines v. Hardison*, 432 U.S. 63, 84 (1977). The employer is not required to accept an employee’s suggested accommodation; any reasonable accommodation that removes the conflict satisfies the employer’s duty to accommodate religious practices. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67-69 (1986). Reasonable accommodations may include schedule changes, leaves, or transfers. An employer’s duty to accommodate also includes attire and grooming practices, but safety issues may be considered. *See, e.g., Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1383-84 (9th Cir. 1984) (holding that religious requirement not to shave could not be accommodated because of safety reasons). Speculative future difficulties, such as the possibility of a number of additional requests for similar accommodations, do not constitute undue hardship. *Opuku-Boateng*, 95 F.3d at 1474. Undue hardship requires a showing of an actual hardship and cannot be supported merely by assuming coworkers who do not share the complainant’s religious conflict would be upset or may seek similar exceptions to general employment rules or practices. *Anderson v. General Dynamics Convair Aerospace Division*, 589 F.2d 397, 402 (9th Cir. 1978), quoting *Franks v. Bowman Transp. Co. Inc.*, 424 U.S. 747, 775 (1976).

If the employer is a governmental entity or engages in state action, the interplay between the First Amendment to the United States Constitution; article II, section 12 of the Arizona Constitution; and state and federal provisions that require employers to reasonably accommodate religious beliefs and practices must also be considered. Arizona has enacted the Free Exercise of Religion Act which may also apply for government

employees. See A.R.S §§ 41-1493-1493.04. Generally the same reasonable accommodation and undue hardship framework will apply for government employees. However, government employees also have additional constitutional protections as employees of the government that private sector employees do not have. Significantly, government employees have First Amendment protections for their speech, including religious speech, made on issues of public concern. *Connick v. Myers*, 461 U.S. 138, 154 (1983). Protection of government employee speech is limited when the speech is made pursuant to the employee's official duties, *Garcetti v. Ceballos*, 547 U.S. 410, 421-22 (2006), or when the speech though otherwise protected is excessively disruptive, essentially creating an undue hardship for the government as employer. *Connick*, 461 U.S. at 154.

Decision makers facing problems that involve accommodation of religious beliefs or create issues that could be perceived as favoring a religion over other religions or secular practices and institutions should consult their legal counsel.

15.7 Sex Discrimination. Discrimination because of sex violates Title VII and the ACRA. In narrow circumstances, claims of sex discrimination may be defended on the grounds that sex is a bona fide occupational qualification (discussed at 15.17.1 below), such as when an actor must be of one sex to preserve a production's authenticity. 29 C.F.R. § 1604.2. However, an employer cannot establish that sex is a bona fide qualification when the defense is based on assumptions about comparative employment characteristics of women (such as the assumption that women experience a higher turnover rate than men), when based on stereotypes about the sexes (such as the assumption that women lack aggressiveness), or when based on the preferences of the employer, coworkers, clients, or customers. *Id.* § 1604.2(a).

15.7.1 Pregnancy/Maternity Discrimination. Title VII specifically defines the prohibition of discrimination "because of sex" to include decisions based on pregnancy, childbirth, or related medical conditions. 42 U.S.C. § 2000e(k); see also 29 C.F.R. § 1604.10. The ACRA does not contain a specific prohibition against discrimination based on pregnancy or have a provision defining "because of sex" to include pregnancy and childbirth. However, If pregnancy is pretext for discrimination because of sex, that is, a woman is being treated differently because she is a woman, not because she is pregnant, a charge of discrimination under ACRA exists for sex discrimination, not pregnancy discrimination.

Employers must apply policies and practices concerning the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits, and reinstatement and payment under any health or disability insurance or sick leave plan, to disabilities due to pregnancy related conditions on the same terms and conditions as they apply to disabilities generally. 29 C.F.R. § 1604.10(b). Employers making decisions about leave for pregnancy or maternity must also consider the requirements of the Federal Family Medical Leave Act, 29 U.S.C. § 2611.

An employer may be required to provide a reasonable accommodation to a pregnant employee if the employer provides such accommodations to others similar in their ability or inability to work. *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1354 (2015) (pregnant employee requested accommodation due to lifting restriction related to her pregnancy). As a defense, the employer may articulate legitimate, non-discriminatory reasons for denying the employee an accommodation. *Id.* However, such reasons normally cannot be that “it is more expensive or less convenient” to include pregnant women among the categories of employees “similar in their ability or inability to work” whom the employer accommodates. *Id.* If the employer offers an apparently legitimate, nondiscriminatory reason for its actions, the plaintiff may in turn show that the employer’s proffered reasons are in fact pretext for pregnancy discrimination “by providing sufficient evidence that the employer’s policies impose a significant burden on pregnant workers, and that the employer’s ‘legitimate, nondiscriminatory’ reasons are not sufficiently strong to justify the burden.” *Id.*

15.7.2 Sexual Harassment. Sexual harassment is a form of sex discrimination prohibited by Title VII and ACRA. 42 U.S.C. § 2000e–2(a)(1); A.R.S. § 41-1463(B)(1); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). In general, there are two kinds of sexual harassment: “hostile work environment” and “quid pro quo.” The ACRA is jurisdictionally more inclusive to claims of sexual harassment than Title VII, as an employer need only have a single employee under the jurisdiction of the ACRA rather than the fifteen employee minimum under Title VII. A.R.S. § 41-1461(6)(a); 42 U.S.C. § 2000e(b).

15.7.2.1 Hostile Work Environment Sexual Harassment. To establish a claim for hostile work environment, an employee must prove that he or she was subjected to verbal or physical conduct of a sexual nature, the conduct was unwelcome, and the conduct was sufficiently severe or pervasive as to change the terms and conditions of employment and to create a hostile working environment. *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 966 (9th Cir. 2001)(citing *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir.1995)). Harassing conduct need not be motivated by sexual desire to establish a claim for sexual harassment, *EEOC v. Nat’l Educ. Ass’n*, 422 F.3d 840, 845 (9th Cir. 2005), and does not require the harasser and victim of harassment to be of the opposite sex. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998). The critical determination is whether the alleged harasser’s behavior affected employees of one sex more adversely than it affected employees of the other sex so as to discriminate on the basis of sex. *Id.* Anti-discrimination laws are not general civility codes for the workplace but are meant to eliminate actual discrimination. *Id.*

For a sexually hostile environment to be actionable under Title VII, the harassing conduct must be both objectively and subjectively offensive, *i.e.*, one that a reasonable person would find to be hostile or abusive and one that the victim in fact perceived to be so. *Little*, 301 F.3d at 966. This determination is made by considering the totality of the circumstances, including the “frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Harris*, 510 U.S. at 23.

Sexual or gender-based conduct is abusive if it pollutes the workplace by making it more difficult for an employee to do his or her job, take pride in his or her work, or affects the employee's desire to stay on in the position. *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463 (9th Cir.1994). Offensive comments that are not directly made to an employee can contribute to a hostile work environment. *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1095 (9th Cir. 2008). A single incident of physically threatening conduct that is extremely severe, such as an assault, can create a hostile work environment. *Little*, 301 F.3d at 967.

Respondeat superior principles apply to determine an employer's liability for hostile work environment sexual harassment. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998). If harassment is established and the harasser is so highly ranked to be considered an alter-ego for the company, the employer is vicariously liable. *Ellerth*, 524 U.S. at 758. If harassment is established and the harasser is a supervisor, the employer has no defense to liability if the employee suffers a tangible employment action, such as discharge, demotion, or undesirable reassignment, as a result of the harassment. *Faragher*, 524 U.S. at 808; *Ellerth*, 524 U.S. at 765. If the employee has not suffered a tangible employment action but has been sexually harassed by a supervisor, then the employer may avoid liability if it can prove (1) that it exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and (2) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities that the employer provided or otherwise avoid harm. *Ellerth*, 524 U.S. at 765. If harassment is established and the harasser is a non-supervisory coworker, the employer is liable if the employer knew or reasonably should have known that the harassment was occurring and failed to take steps "reasonably calculated to end the harassment." *Dawson v. Entek Int'l*, 630 F.3d 928, 938 (9th Cir. 2011) (citing *Nichols v. Azteca Rest.*, 256 F.3d 864, 875 (9th Cir. 2001)). An employer may also be liable for the sexual harassment of employees by third parties when the employer was aware or should have been aware of the harassment and failed to remedy or prevent such harassment. *Little v. Windermere Relocation, Inc.* 301 F.3d 958, 968 (9th Cir. 2002).

Whether the employer's remedy is reasonable "depends on its ability to: (1) stop harassment by the person who engaged in harassment; and (2) persuade potential harassers to refrain from unlawful conduct." *Nichols*, 256 F.3d at 875 (citing *Ellison v. Brady*, 924 F.2d 872, 882 (9th Cir. 1991)). An employer is liable for past and future harassment when it does not undertake any remedy or when the remedy does not end the current harassment and deter future harassment. *Nichols*, 256 F.3d at 875-76. An employer's remedial plan should not require the victim of sexual harassment to work in a less desirable location or adversely affect his or her terms and conditions of employment. See *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994).

An employee is a "supervisor" for purposes of determining liability under Title VII if that employee "is empowered by the employer to take tangible employment actions" against the employee. *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013). "Tangible

employment actions” are actions that “effect a significant change in employment status,” such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. *Id.* at 2443. An employer who attempts to limit liability by allowing only a small number of employees to take tangible employment action may still be found liable when they have effectively delegated the power of tangible employment action to other employees upon whose recommendations the employer relies to formally make tangible employment actions. *Id.* at 2452.

15.7.2.2 Quid Pro Quo Sexual Harassment. In order to establish a prima facie case of quid pro quo sexual harassment, the evidence must show that the employer “explicitly or implicitly condition[ed] a job, a job benefit, or the absence of a job detriment, upon an employee’s acceptance of sexual conduct.” *Craig v. M & O Agencies, Inc.*, 496 F.3d 1047, 1054 (9th Cir. 2007) (citing *Nichols v. Frank*, 42 F.3d. 503, 511 (9th Cir. 1994)). Some archetypal examples of quid pro quo harassment include situations where a supervisor’s demand for sexual favors is accompanied by a threat of discharge or where an employee’s continued employment is conditioned on continued participation in sexual acts. See *Holly D. v. California Inst. of Tech.*, 339 F.3d 1158, 1169 (9th Cir. 2003).

If the employee establishes a prima facie case of quid pro quo sexual harassment, then the employer must articulate a legitimate, nondiscriminatory reason for its conduct. *Heyne v. Caruso*, 69 F.3d 1475, 1478 (9th Cir. 1995). If the employer meets this burden, the employee can still prevail if the evidence as a whole demonstrates that the employer’s explanation is pretextual and that it is more likely than not that the real reason for the employment decision (e.g., undesirable reassignment, failure to promote, termination) was the employee’s refusal of the employer’s sexual advances. *Heyne*, at 1478-79; *Holly D.*, 339 F.3d at 1170-71.

The coercion of unwanted sexual favors from an employee based on threats to their employment is considered a tangible employment action without any additional action. *Holly D.*, 339 F.3d at 1173. This showing of a tangible employment action limits the *Faragher/ Ellerth* affirmative defense available to the employer. *Id.*; see Section 15.7.2.1. Thus an employer may be liable and have no affirmative defense when a supervisor either succeeds in coercing sexual favors based on threats or fails to coerce but then terminates, demotes, or otherwise tangibly harms the employee. *Id.*

15.8 Harassment. Harassment cases most often involve sexual harassment. However, while the harassment form of discrimination is much less developed in other contexts, harassment may also involve color, national origin, age, religion, or disability. In general, these harassment claims are analyzed under the same legal standard as sexual harassment claims. To constitute discrimination, the harassing conduct must be unwelcome and either severe or pervasive enough to interfere with an individual’s work performance or create an intimidating, hostile, or offensive working environment. See, e.g., *Vasquez v. Cnty. of Los Angeles*, 349 F.3d 634, 642 (9th Cir. 2003) (harassment based on

race), *Kang v. U. Lim America, Inc.*, 296 F.3d 810, 817 (9th Cir. 2002) (harassment based on national origin).

15.9 Equal Pay Discrimination. The ACRA and Title VII both prohibit discrimination with respect to compensation because of the individual's sex. The Equal Pay Act also prohibits wage discrimination on the basis of sex. The protections of these three laws are largely the same. *Arizona Civil Rights Div., Dep't of Law v. Olson*, 643 P.2d 723, 728 (Ariz. Ct. App. 1982). However, unlike Title VII and the ACRA, the Equal Pay Act is a strict liability statute under which discriminatory intent is not required, pay discrepancy alone is sufficient. *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986).

The Equal Pay Act of 1963 amended the Fair Labor Standards Act with the goal of abolishing wage disparity between men and women. Its principal provision states,

No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex[.]

29 U.S.C. § 206(d). Arizona also has an equal pay statute which mirrors the protection of the federal act. A.R.S. § 23-341. The Civil Rights Act of 1964 and the ACRA also prohibit employers from discriminating against any person with respect to their compensation because of that person's sex. 42 U.S.C. § 2000e-2(a), A.R.S. § 41-1463(B)(1). The drafters of Title VII were aware that the compensation discrimination provision overlapped with the Equal Pay Act. Therefore, they added the "Bennett Amendment," providing that a difference in compensation acceptable under the Equal Pay Act is not an unlawful employment practice under Title VII. 42 U.S.C. § 2000e-2(h). The ACRA contains substantially similar language. A.R.S. § 41-1463(I)(3).

In cases where an employer sets compensation on the basis of sex, Title VII and ACRA provide the same protections to an employee. *Garner v. Motorola, Inc.*, 95 F. Supp. 2d 1069, 1074-75 (D. Ariz. 2000). Furthermore, by way of the Bennett Amendment, both Title VII and ACRA "incorporate the four affirmative defenses of the Equal Pay Act." *Higdon v. Evergreen Int'l Airlines, Inc.*, 673 P.2d 907, 909 (Ariz. 1983) (citing *Washington Cnty. v. Gunther*, 452 U.S. 161 (1981)). "The employer bears the burden of pleading and proving these affirmative defenses." *Higdon*, 673 P.2d at 909-10.

The protections of the Equal Pay Act are largely the same as Title VII and ACRA. *Olson*, 643 P.2d at 728. But there are differences. First, under the Equal Pay Act, a

plaintiff must show that he or she performed “equal work” as that performed by an opposite-sex employee who was paid more. Title VII (and the ACRA) do not have this requirement. *Gunther*, 452 U.S. at 181. “Thus claims for wage discrimination can be brought under Title VII even when there is no male coworker performing an ‘equal job.’” *Id.* at 178-180. Second, the Equal Pay Act creates strict liability for unequal compensation for equal work thereby eliminating the need to show discriminatory intent. *Maxwell*, 803 F.2d at 446.

15.10 Lilly Ledbetter Fair Pay Act. The Lilly Ledbetter Fair Pay Act of 2009 (“Ledbetter Act”), Pub. L. No. 111-2, § 181, 123 Stat. 5 (2009) provides that discrimination in compensation occurs when either (1) a discriminatory compensation decision or other practice is adopted; (2) an individual becomes subject to a discriminatory compensation decision or other practice; or (3) an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice. 42 U.S.C. § 2000e-5(e)(3)(A). The Ledbetter Act applies not only to direct compensation decisions but also to any other practice that in whole or part impacts wages, benefits, or other compensation. *Id.* The Ledbetter Act deems each paycheck issued pursuant to a discriminatory compensation decision or pay structure an independent, actionable act. *Id.*

The Supreme Court has held that the Ledbetter Act does not apply to employer actions that were lawful at the time they were taken, but were later made unlawfully discriminatory through legislation. *AT&T Corp. v. Hulteen*, 556 U.S. 701, 715-16 (2009). In *Hulteen*, an employer calculated seniority differently for men and women based upon whether medical leave had been taken for pregnancy. *Id.* at 705. When such disparate calculation was made illegal, the employer amended its calculation procedure to account for the new legislation but did not retroactively amend the seniority calculations made prior to the legislation. *Id.* The Supreme Court held that no retroactive amendment is necessary if the calculation was lawful at the time it was made and the calculation was part of a “bona fide seniority system.” *Id.* at 705-08, 715-16.

15.11 Age Discrimination. The federal Age Discrimination in Employment Act (“ADEA”) prohibits age-based discrimination against employees forty years of age or older. 29 U.S.C. §§ 621 to 634; 632 omitted. The ACRA mirrors that provision. A.R.S. § 41-1465. Because the ADEA prohibits discrimination based on age rather than on class membership, the appropriate inquiry is whether a younger person (who may still be over 40) was treated more favorably than a significantly older person, not whether one person is in the protected age category and the other is not. *O’Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 311-12 (1996).

In addition to prohibiting actual age discrimination, the ADEA and ACRA make it unlawful for an employer to print or publish any notice or advertisement relating to employment that reflects a preference, limitation, specification, or discrimination based on age. 29 U.S.C. § 623(e); A.R.S. § 41-1464(C). To prove intentional discrimination under the ADEA or the ACRA, the plaintiff must establish that his or her age was a but-for cause

of the employer's allegedly discriminatory conduct. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175-177 (2009); see also *Matos v. City of Phoenix*, 859 P.2d 748, 754 (Ariz. Ct. App. 1993).

An employer may violate the ADEA through neutral policies that have a disparate impact on older employees or practices that are facially discriminatory. *Smith v. City of Jackson*, Miss., 544 U.S. 228, 243 (2005). However, ADEA disparate impact claims are narrower than those brought under Title VII. Employers may avoid liability on disparate impact claims under the ADEA by showing that the disparate impact was based on "reasonable factors other than age," while in a Title VII disparate impact case the employer must show a "business necessity" to avoid liability. *Id.* at 242-43.

If an employer does set an age limitation for employment, the limitation must be justified as a bona fide occupational qualification. 29 U.S.C. § 623(f)(1); A.R.S. § 41-1463(G)(4). To justify an age cap, the employer must show (1) that having employees younger than that age in that position is reasonably necessary to the essence of the employer's business and (2) that the employer has a factual basis for believing that all or substantially all persons over the set age are unable to safely and efficiently perform that job or that it is impracticable to make determinations of ability on an individual basis. *EEOC v. Santa Barbara Cnty.*, 666 F.2d 373, 376 (9th Cir. 1982) citing *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 235-36 (5th Cir. 1976). The United States Supreme Court in *Western Air Lines, Inc. v. Criswell*, adopted the two part *Tamiami* standard as proper when assessing the bona fide occupational qualification exception. 472 U.S. 400, 416-17 (1985).

With respect to firefighters and law enforcement officers employed by the State or the State's political subdivisions, the ADEA permits state or local entities to enact new legislation (1) establishing a maximum age for hiring law enforcement officers and firefighters, as long as the maximum age for hiring is not lower than the one set on March 3, 1983, and (2) establishing a new age for mandatory retirement or discharge of law enforcement officers and firefighters as long as that age is not less than fifty-five. 29 U.S.C. § 623(j)(1). If the state law sets an age other than fifty-five for discharge or retirement, the legally permissible age will be the older of age fifty-five or the age set out in a state law enacted after September 30, 1996. *Id.* Any such age-based hiring or discharge must be made pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the ADEA's purposes. *Id.* § 623(j)(2). The ACRA covers any person forty years of age or over. A.R.S. § 41-1465. Therefore, in Arizona, age limitations on the hiring, discharge, and forced retirement of firefighters and law enforcement officers must be justified as bona fide occupational qualifications (see discussion at 15.17.1 below). A.R.S. § 41-1463(G)(4)(a)(b).

Both the ACRA and the ADEA prohibit mandatory retirement based on age. 29 U.S.C. § 623(f)(2); A.R.S. § 41-1463(G)(4)(b). Since the passage and subsequent amendment of the Older Workers Benefit Protection Act (OWBPA), 29 U.S.C. §§ 621, 623, 626, 630, however, the ADEA's exemption is phrased in different terms than the state law

exemption. Among other things, the OWBPA prohibits discrimination against older workers in all employee benefits, except when significant cost considerations justify age-based reductions in employee benefit plans. *Id.* § 623(f)(2) *citing* 29 C.F.R. § 1625.10. Employee benefits law, including the portion that governs what age-based distinctions may be permissible, is highly complex and specialized. Only those knowledgeable in that law should make decisions in this area.

15.11.1 Waivers. Older workers can waive the protections that the OWBPA offers them. For such a waiver to be valid, it must be knowing and voluntary. 29 U.S.C. § 626(f)(1). A valid waiver agreement under the ADEA must meet the following minimum requirements:

1. Waiver is part of a written agreement, *id.* § 626(f)(1)(A);
2. Waiver specifically refers to rights and claims under the ADEA, *id.* § 626(f)(1)(B);
3. The waiver may not waive rights or claims that arise after the date of the agreement, *id.* § 626(f)(1)(C);
4. The employee receives valuable consideration for the waiver in addition to that which the employee is already entitled to receive, *id.* § 626(f)(1)(D);
5. The employee "is advised in writing to consult with an attorney," *id.* § 626 (f)(1)(E);
6. The employee is given at least twenty-one days to review the agreement or forty-five days if the agreement is requested as part of a termination program offered to a group of employees, *id.* § 626(f)(1)(F);
7. The employee is given at least seven days after signing the agreement to revoke the agreement, *id.* § 626(f)(1)(G); and
8. If the agreement is made during a layoff, the agreement must meet additional requirements for waivers made during layoffs, *id.* § 626(f)(1)(H).

An agreement that the employee will not sue the State under the ADEA is not enforceable unless these requirements have been met. An agreement that purports to waive an individual's ADEA rights but that does not strictly comply with these requirements is not enforceable and will not bar a subsequent lawsuit—even if the complainant has retained the consideration that the agreement specified. *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427-28 (1998).

15.12 Discrimination Based on Disability. Employees are protected from discrimination based on disability under Title I of the Americans with Disabilities Act of

1990 (“ADA”), 42 U.S.C. §§ 12101 to 12213, and the ACRA. A.R.S. § 41-1463(B)(1). The ADA was intended to be consistent with Title V of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 to 796, so that agencies that complied with that law would also be in compliance with the ADA. The ADA sets the minimum level of protection afforded to individuals with disabilities; other state or federal law may offer greater protections. 29 C.F.R. § 1630.1(c). The ADA covers employers with fifteen or more employees. 42 U.S.C. § 12111(5)(A).

Employers may not discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a); A.R.S. § 41-1463(B)(1). Discrimination includes failure to provide reasonable accommodations for known disabilities (see discussion at 15.12.4 below). A “qualified individual with a disability” is a person who has a disability and who, with or without reasonable accommodation, can perform the essential functions of the job. 42 U.S.C. § 12111(8); A.R.S. § 41-1461(11).

15.12.1 Defining Disability.

The ADA and the ACRA define disability as:

- (1) a physical or mental impairment that substantially limits one or more of the major life activities of an individual;
- (2) a record of such an impairment; or
- (3) being regarded as having such an impairment.

42 U.S.C. § 12102(1); A.R.S. § 41-1461(4).

When analyzing whether a person has an “actual disability,” whether a person is disabled under the first part of the definition of disability, an employer must consider the effect of the individual’s impairment upon a major life activity. *Bragdon v. Abbott*, 524 U.S. 624, 637 (1998). Major life activities include, but are not limited to, such things as caring for oneself, seeing, hearing, walking, sleeping, eating, standing, speaking, breathing, working, concentrating, thinking, learning, reading, interacting with others, and the operation of major bodily functions, including the immune system, endocrine system, and reproductive functions. 42 U.S.C. § 12102(2); A.R.S. § 41-1461(9)(a)-(b). Disability does not include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, or pyromania, or psychoactive substance use disorders resulting from the current illegal use of drugs. 29 C.F.R. § 1630.3(d).

An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. 29 C.F.R. § 1630.2(j)(1)(ii). Whether an impairment substantially limits a major activity

does not take into account the effects of mitigating measures such as medication. *Id.* § 1630.2(j)(vi). An impairment does not cease to be a disability that substantially limits a major life activity because the impairment is episodic or in remission. *Id.* § 1630.2(j)(vii). The ACRA states that a person shall interpret “substantially limits” in accordance with the federal statute. A.R.S. § 41-1468(B).

An individual may be considered disabled under the ADA and the ACRA if they have a record of disability. 42 U.S.C. § 12102(1)(B); A.R.S. § 41-1461(4)(b). Under this prong of the statute, the individual had an impairment that substantially limited one or more major life activity at some point in the past, but is no longer substantially limited. See 29 C.F.R. § 1630.2(k)(1). An individual might also meet this prong of the definition if they were once misclassified as having a substantially limiting impairment. *Id.*

An individual may be “regarded as” having a disability when his or her employer takes an action prohibited by the ADA and the ACRA based on an individual’s impairment or an impairment the employer believes the individual has when the individual does not in fact have that impairment. 42 U.S.C. § 12102(1)(C), (3); A.R.S. § 41-1461(4)(c). However, an employer is not liable for failing to provide a reasonable accommodation for an individual who is only “regarded as” having a disability but isn’t disabled since no accommodation is actually required. 42 U.S.C. § 12201(h), A.R.S. § 41-1463(F)(4).

15.12.2 “Qualified Individual” with a Disability. The ADA and the ACRA protect an individual with a disability who, with or without a reasonable accommodation, can perform the essential functions of the job they hold or desire. 42 U.S.C. § 12111(8); A.R.S. § 41-1461(11). A person is “qualified” if they have the requisite education, skills, experience, and other job-related requirements required for the position. 29 C.F.R. § 1630.2(m). Qualified individuals are able to meet all of the performance demands of the job, with or without an accommodation, despite the individual’s disability. *Matos v. City of Phoenix*, 859 P.2d 748, 751 (Ariz. Ct. App. 1993)(citing *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979)).

The ADA prohibits discrimination based on stereotypes about what individuals with disabilities can or cannot do. See *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1248 (9th Cir. 1999). Employers must make employment decisions based on an individual’s qualifications and abilities in light of the specific duties of the job. *Id.* at 1246-47.

Under federal law and the ACRA, a person is not considered a qualified individual with a disability when the impairment upon which the “disability” is based is caused by the current use of illegal drugs. 29 C.F.R. § 1630.3(a); A.R.S. § 41-1461(4). Individuals who have successfully rehabilitated and no longer use illegal drugs may be considered a qualified individual with a disability if they meet the general requirements. 29 C.F.R. § 1630.3(b). Individuals using a drug under supervision by a licensed health care professional, or as authorized by the Controlled Substances Act or other provisions of Federal law are not excluded from protection under the ADA. 42 U.S.C. § 12111(6)(A). But such a case should be analyzed for a “direct threat” as discussed below at 15.12.3.

The ADA and the ACRA also prohibit discrimination against individuals who do not have a disability because of an association with an individual who does have a disability. 42 U.S.C. § 12112(b)(4); A.R.S. § 41-1463(F)(3).

15.12.3 Defenses Available to Employers. An employer who engages in activity that would otherwise violate the ADA and the ACRA may have a defense in certain situations. If the adverse employment decision was made because of a “legitimate, non-discriminatory reason,” the employer will not be liable. 29 C.F.R. § 1630.15(a).

Additionally, an employer may utilize qualifications standards that screen out or tend to screen out individuals with disabilities, but only if those qualification standards are “job-related and consistent with business necessity.” 29 C.F.R. § 1630.15(b)(1); A.R.S. § 41-1463(F)(6). An employer who requires, as a job qualification, that an employee meet a generally applicable federal safety regulation does not have to justify enforcing the regulation if the regulation relates to an essential function of the position. See *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 577-78 (1999).

An employer may make an otherwise discriminatory employment decision if the individual poses a direct threat to the health or safety of himself or herself or others where the direct threat cannot be eliminated by a reasonable accommodation. 42 U.S.C. § 12113(b); A.R.S. § 41-1463(M). Under the ADA, the determination that an individual poses a "direct threat" must be based on an individualized assessment of the employee's or applicant's present ability to safely perform the job's essential functions and on valid medical analyses or other objective evidence. See, e.g., *Nunes*, 164 F.3d at 1248. It must be made on a case-by-case basis and must rely on objective, factual evidence—not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes about the nature or effect of the particular disability. *Id.* In making a risk assessment, employers should consider “(1) the duration of risk, (2) the nature and severity of the potential harm, (3) the likelihood that the potential harm will occur, and (4) the imminence of the potential harm.” *Id.* If it is determined that there is a significant risk of harm, the employer should determine if it can make a reasonable accommodation without undue hardship that would allow the employee to perform the job without such risk. *Nunes*, 164 F.3d at 1248; A.R.S. § 41-1463(M).

15.12.4 Reasonable Accommodation. The ADA and the ACRA define as discrimination a failure to provide "reasonable accommodation" to a qualified individual with a disability. 42 U.S.C. § 12112(b)(5); A.R.S. § 41-1463(F)(4). An employee should be reasonably accommodated if the accommodation is necessary to give the individual the same opportunity to perform the job or enjoy the same benefits of employment as an individual without disabilities, and the accommodation would not impose an undue hardship on the operation of the business. 42 U.S.C. § 12112(b). A "reasonable accommodation" may include but is not limited to:

1. An accommodation that is required to ensure equal opportunity in the application process, such as appropriate adjustment or modification of examinations, training materials, or policies;
2. An accommodation that allows the employee to perform the essential functions of the position held or desired, such as part-time or modified work schedules; acquisition or modification of equipment or devices; or the provision of qualified readers or interpreters;
3. An accommodation that enables the employee to enjoy the same benefits or privileges of employment that are enjoyed by other employees without disabilities, such as modification of break rooms, lunch rooms, training rooms, etc.;
4. Job restructuring by reallocating or redistributing nonessential or marginal job duties; and
5. Reassignment or transfer to another vacant position when accommodation within the individual's current position would pose an undue hardship on the employer (reassignment is not required if it would violate the terms of a collective bargaining agreement).

42 U.S.C. §§ 12111(9), 12112(b)(5); 29 C.F.R. § 1630.2(o)(2); 29 C.F.R. § Pt. 1630, App.; A.R.S. § 41-1461(12); *Willis v. Pac. Mar. Ass'n*, 236 F.3d 1160, 1165 (9th Cir. 1991), *opinion amended on denial of reh'g*, 244 F.3d 675 (9th Cir. 2001), *as amended* (Mar. 27, 2001). For examples and ideas about accommodations that exist for particular jobs and specific disabilities, employers may consult the *U.S. Department of Labor Job Accommodation Network* at <http://askjan.org/>.

An individual's need for an accommodation cannot be considered by an employer during the decision making process regarding hiring, discharge, promotion, or related matters unless the accommodation would impose an undue hardship upon the employer. 29 C.F.R. § 1630.9(b). A reasonable accommodation is an accommodation that “seems reasonable on its face, *i.e.*, ordinarily or in the run of cases.” *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401-02 (2002). The reasonable accommodation requirement does not require an employer to fundamentally alter the position by eliminating any of the essential duties of the specific job sought or maintained. *Matos*, 859 P.2d at 753, (*citing Southeastern Community College*, 442 U.S. at 413).

Under federal law, once an employee or applicant requests an accommodation or an employer recognizes the need for an accommodation and the individual is unable to request it because of a disability, an employer must engage in the “interactive process” with the employee and use good-faith efforts to determine an effective and reasonable accommodation. *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002); 42 U.S.C. § 1981a(a)(3). Arizona courts have found that the initial burden of requesting an

accommodation is the individual's. *Guo v. Maricopa County Medical Center*, 992 P.2d 11, 18 (Ariz. Ct. App. 1999). The interactive process requires: "(1) direct communication between the employer and employee to explore in good faith the possible accommodations; (2) consideration of the employee's request; and (3) offering an accommodation that is reasonable and effective." *Zivkovic*, 302 F.3d at 1089; *Humphrey*, 239 F.3d at 1137-38. If the disability or the need for accommodation is not obvious, an employer may request documentation to confirm a disability and the need for an accommodation. 29 C.F.R. pt. 1630 app. § 1630.9 (2016). Please see section 15.12.5 for discussion of which types of medical records may be requested and rules regarding the handling of medical records. The employer providing the accommodation has the ultimate discretion to choose between reasonable accommodations, and may choose the less expensive accommodation or the accommodation that is easier to provide. *Zivkovic*, 302 F.3d at 1089, see also 29 C.F.R. § 1630, App. The employer's obligation to engage in the interactive process continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is inadequate and further accommodation is needed. *U.S. E.E.O.C. v. UPS Supply Chain Solutions*, 620 F.3d 1103, 1111 (9th Cir. 2010)(citing *Humphrey*, 239 F.3d at 1138).

Under federal and Arizona law, an employer must accommodate the known disabilities of a qualified applicant or employee, unless it can demonstrate that such accommodation would impose an undue hardship or create a direct threat. 29 C.F.R. § 1630.9; A.R.S. § 41-1463(F)(4). "Undue hardship" means "significant difficulty or expense." 29 C.F.R. § 1630.2; A.R.S. § 41-1461(14). Under the federal code, to determine whether an employer has demonstrated "undue hardship," the following factors must be considered:

- The nature and cost of the accommodation, taking into account any tax credits, deductions, or outside funding that may be available;
- the overall financial resources of the office or facility at which the accommodation would be provided, including the number of employees at that location;
- the overall financial resources of the covered entity (the entity that employs the individual), including the number of employees and the number of office or facility locations;
- the type of operation of the covered entity, including the composition, structure and functions of the workforce and the geographic separateness and administrative or fiscal relationship of the facility in question to the covered entity; and
- the impact of the accommodation on the facility and the ability of other employees to perform their duties.

29 C.F.R. § 1630.2(p); see also A.R.S. § 41-1461(14)(b) (setting forth almost identical factors for analyzing “undue hardship” under Arizona law, with differences including the ACRA considering “cost” rather than “net cost,” and not requiring consideration of tax implications).

15.12.5 Medical Inquiries and the Confidentiality of Medical Information. The ADA and the ACRA prohibit employers from making medical inquiries or requiring physical examinations prior to making an offer of employment. 42 U.S.C. § 12112(d); A.R.S. § 41-1466(A). However, an employer may make pre-employment inquiries into the ability of the applicant to perform the job, so long as the inquiry is limited to the ability to perform and not any underlying disability. 42 U.S.C. § 12112(d)(2)(B); A.R.S. § 41-1466(B)(1).

An employer may require a medical examination after it has made a job offer, but before the employee has begun working, if all employees are required to undergo the examination and the employer keeps the medical information confidential. 42 U.S.C. § 12112(d)(3); A.R.S. § 41-1466(B). Employers cannot make medical inquiries or require medical examinations of current employees unless the examination or inquiry is job-related and is consistent with business necessity. 42 U.S.C. § 12112(d)(4); A.R.S. § 41-1466(C). Any information that the employer obtains as a result of a permitted medical inquiry or examination must be kept apart from its general personnel files as a separate, confidential medical record and only made available under very limited conditions. 42 U.S.C. § 12112(d)(3)(B),(4)(C); A.R.S. § 41-1466(B)(2)(b), (E).

15.12.6 Other Legislation Prohibiting Discrimination Against Persons with Disabilities. The Rehabilitation Act, which has been in effect since 1973, prohibits discrimination based on physical and mental disability. It applies to federal contractors and recipients of federal grants. 29 U.S.C. § 794. The State, as a federal contractor or recipient of federal grants, must comply with the Rehabilitation Act. The definition of disability is the same under the ADA and the Rehabilitation Act. 42 U.S.C. § 12102(1); 29 U.S.C. § 705(9).

15.13 Genetic Information Discrimination. The Genetic Information Nondiscrimination Act of 2008 (“GINA”) prohibits the use of genetic information in making employment decisions, restricts acquisition of genetic information by employers and other entities covered by Title II, and strictly limits the disclosure of genetic information. 42 U.S.C. § 2000ff-1; -5. The ACRA also prohibits making employment decisions based upon the results of a genetic test received by the employer. A.R.S. § 41-1463(B)(3).

“Genetic information” under GINA includes information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about any disease, disorder, or condition of an individual's family members (*i.e.*, an individual's family medical history). 42 U.S.C. § 2000ff(4).

GINA prohibits discrimination on the basis of genetic information in any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits, or any other term or condition of employment. *Id.* § 2000ff-1(a); - 4(a). Under GINA it is also illegal to harass a person because of his or her genetic information, or to retaliate against an applicant or employee for filing a charge of discrimination, participating in a discrimination proceeding (such as a discrimination investigation or lawsuit), or otherwise opposing discrimination. *Id.* § 2000ff-6(f).

It will usually be unlawful under GINA for an employer to get genetic information, unless it qualifies for one or more of six narrow exceptions:

- Inadvertent acquisitions of genetic information (*e.g.*, a manager overhearing someone talking about a family member's illness) do not violate GINA.
- Genetic information (such as family medical history) may be obtained as part of health or genetic services, including wellness programs, offered by the employer on a voluntary basis, if certain specific requirements are met.
- Genetic information may be acquired as part of the certification process for FMLA leave (or leave under similar state or local laws) where an employee is asking for leave to care for a family member with a serious health condition.
- Acquisition through commercially and publicly available documents like newspapers is permitted, as long as the employer is not searching those sources with the intent of finding genetic information.
- Acquisition through a genetic monitoring program that monitors the biological effects of toxic substances in the workplace is permitted where the monitoring is required by law or, under carefully defined conditions, where the program is voluntary.
- Acquisition of genetic information of employees by employers who engage in DNA testing for law enforcement purposes as a forensic lab or for purposes of human remains identification is permitted, but the genetic information may only be used for analysis of DNA markers for quality control to detect sample contamination.

Id. § 2000ff-1(b).

It is also unlawful for an employer to disclose genetic information about applicants or employees, with limited exceptions. *Id.* § 2000ff-5. Employers must keep genetic information confidential and in a separate medical file. *Id.* § 2000ff-5(a). Genetic information may be kept in the same file as other medical information in compliance with the ADA. *Id.* § 2000ff-5(a).

15.14 Intersectional Discrimination. Discrimination may be based on a combination of race and sex. See *Lam v. Univ. of Hawaii*, 40 F.3d 1551, 1562 (9th Cir. 1994). Anti-discrimination laws are meant to combat discrimination even when an employer does not generally discriminate against members of a certain race or sex, but may discriminate against individuals who represent a combination of race and sex. *Connecticut v. Teal*, 457 U.S. 440, 455 (1982). The law protects individuals from discrimination regardless of whether the protected classes to which they belong are treated fairly in general. *Id.* at 455-56. Therefore, a claim of discrimination can still be made when, for example, Asian women are treated less favorably even though Asian men or women in general do not receive unfavorable treatment. *Lam*, 40 F.3d at 1562. Courts may need to determine whether discrimination has occurred based on the combination of race and sex rather than on race and sex as separate qualities. *Id.*

15.15 Retaliation. An employer is prohibited from retaliating against an employee because the employee has engaged in protected conduct under Title VII, the ADEA, the ADA, the EPA, GINA, and the ACRA. See, e.g., 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 623(d); 42 U.S.C. § 12203; 29 U.S.C. § 218c(a); 42 U.S.C. § 2000ff-6(f); A.R.S. § 41-1464(A). These statutes prohibit adverse action against any individual because that person has opposed an unlawful employment practice or has filed a charge or otherwise participated in an investigation, proceeding, or hearing pertaining to a discrimination complaint. See, e.g., 42 U.S.C. § 2000e-3(a); A.R.S. § 41-1464(A). Both current and former employees are protected. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).

Employee complaints about an employer's treatment of others may be protected activity, even if the complaining employee is not in the same protected class as the employees who allegedly suffered discrimination. *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000). Retaliation against an employee because of the protected actions of someone closely related to or associated with the employee is also unlawful. *Thompson v. North Am. Stainless, L.P.*, 562 U.S. 170, 173-74 (2011) (firing employee because his fiancée filed an EEOC discrimination charge violates Title VII's anti-retaliation provisions). Requests for accommodation by an individual with a disability are considered a protected activity that may not be retaliated against. *MacLean v. State Dept. of Educ.*, 986 P.2d 903, 912 (Ariz. Ct. App. 1999).

An employee has legitimately "opposed" an employment practice so long as they reasonably perceived the employer's actions to be unlawful discrimination. *Freitag v. Ayers*, 468 F.3d 528, 542 (9th Cir. 2006). Complaining employees must have a factual basis for reasonably believing that their employers engaged in unlawful discrimination within the meaning of the anti-retaliation provisions. *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1013 (9th Cir. 1983). However, employees need not prove that the conduct that they opposed in fact violated anti-discrimination provisions so long as they reasonably believe that the action was unlawful. *Learned v. City of Bellevue*, 860 F.2d 928, 932 (9th Cir. 1988). An "adverse action" is any employer action that "well might have 'dissuaded a reasonable worker from making or supporting a charge of

discrimination.” *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)). Thus anti-retaliation provisions protect against a wider range of employer initiated adverse employment actions as anti-retaliation provisions are not limited to adverse actions which impact the “terms and conditions” of employment. *Thompson*, 562 U.S. at 174.

Claims alleging, for example, that the employer retaliated because an employee filed a workers' compensation claim, objected to nonpayment of overtime, reported Occupational Safety & Health Administration (OSHA) violations, or opposed other activities that fall outside the scope of the discrimination provisions are not proper retaliation claims under the discrimination provisions, absent other evidence of discrimination. See, e.g., *Learned*, 860 F.2d at 932 (suit for “excess damages” under industrial insurance statute that did not involve discrimination allegations not protected activity under Title VII). Remedies for retaliation not based on discrimination can be found in other statutes. See, e.g., A.R.S. § 38-532.

The statutory language protects participation in “any manner” in an investigation or complaint of discrimination. See e.g. 42 U.S.C. § 2000e-3(a); A.R.S. § 41-1464(A). However, an employee's opposition activity is protected only if “reasonable in view of the employer's interest in maintaining a harmonious and efficient operation.” *Silver v. KCA, Inc.*, 586 F.2d 138, 141 (9th Cir. 1978). Therefore, if the employee's activities opposing discrimination or participating in an investigation regarding possible unlawful discrimination unreasonably disrupts the employer's operation, for example by surreptitiously copying confidential documents, that activity may not be protected. *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 762-64 (9th Cir. 1996).

To establish a prima facie case of retaliation, the plaintiff must demonstrate that he or she engaged in protected activity; that the employer subsequently took adverse action; and that there was a causal connection between the protected activity and the adverse action. *Freitag v. Ayers*, 468 F.3d 528, 541(9th Cir. 1997); see also *Najar v. State*, 9 P.3d 1084, 1087 (Ariz. Ct. App. 2000) (applying same elements for retaliation to claims brought under the ACRA). To prove retaliation, the plaintiff must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer. *Univ. of Texas Southwestern Med. Ctr. v. Nassar*, 570 U.S. 338, 362 (2013); see also *Najar*, at 1087. The Ninth Circuit Court of Appeals has inferred causation where the adverse action followed shortly after protected activity. See *Passantino v. Johnson & Johnson Consumer Prods.*, 212 F.3d 493, 507 (9th Cir. 2000) (discussing Ninth Circuit cases).

If the plaintiff establishes a prima facie case, the burden shifts to the employer to provide a legitimate reason for the adverse action. *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000); see also *Najar*, at 1087. If the employer articulates a legitimate, nondiscriminatory reason, the plaintiff may still prevail by proving that the employer's proffered reason is pretext and more likely than not the real reason for the retaliatory action was the protected employee's protected activity. *Ray*, 217 F.3d at 1240.

15.16 Affirmative Action as a Component of a Voluntary Plan. In 2010, the Arizona Constitution was amended to prohibit preferential treatment of (as well as discrimination against) any person or individual on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting in Arizona. Ariz. Const. art. II, § 36(A). As a result of this amendment, an Arizona governmental agency's use of hiring or promotional preferences based on protected classifications is not permissible, unless such preferences fall within several narrow exceptions to the constitutional prohibition. See Ariz. Const. art. II, § 36(B) (excepting from the prohibition on use of preferences (1) sex-based bona fide qualifications, (2) preferences necessary to maintaining federal monies, and (3) court orders and consent decrees that preceded the amendment).

15.16.1 Affirmative Action as a Component of Court-Ordered Relief. Affirmative action plans may be created by court orders issued after employers lose employment discrimination cases. Title VII and the ACRA authorize a court to award prospective relief. See 42 U.S.C. § 2000e-5(g); A.R.S. § 41-1481(G). Courts have also ordered affirmative action to resolve labor disputes. See, e.g., *Local 28, Sheet Metal Workers v. E.E.O.C.*, 478 U.S. 421, 444-45 (1986). Some courts have even ordered affirmative action that establishes quotas for minority hires and promotions. See, e.g., *United States v. Paradise*, 480 U.S. 149, 171-172, 185-86 (1987) (upholding quotas for black state troopers in the Alabama Department of Public Safety); *Eldredge v. Carpenters 46*, 94 F.3d 1366, 1372 (9th Cir. 1996) (reserving twenty percent of positions in apprenticeship program for women until women comprised twenty percent of the total number of apprentices). In Arizona, court orders requiring affirmative action are not available to establish quotas when the state is the employer (see 15.16 above). Ariz. Const. art. II, § 36(A).

15.17 Facial Discrimination. There are two distinct theories of intentional discrimination: facial discrimination and disparate treatment.

The first of these two theories, facial discrimination, requires the plaintiff to prove as part of the prima facie case that the employer has a policy or employs a practice that intentionally discriminates against an individual or a class of individuals based on race, color, national origin, religion, age, disability, or sex. See, e.g. *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991) (finding that employer's policy of barring all women, except those whose infertility was medically documented, from jobs involving actual or potential lead exposure was facially discriminatory).

When a plaintiff establishes a prima facie case of facial discrimination, the burden shifts to the employer to justify its discriminatory acts by proving that religion, sex, national origin, or age is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." See 42 U.S.C. § 2000e-2(e); A.R.S. § 41-1463(G)(1), (G)(4)(a)); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (plurality opinion).

15.17.1 Bona Fide Occupational Qualifications. Title VII, the ADEA, and the ACRA permit an employer to take action that would otherwise be discriminatory based upon an individual's sex, national origin, or religion when the employer can demonstrate that the characteristic is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the employer's business or enterprise. 42 U.S.C. § 2000e-2(e); 29 U.S.C. § 623(f)(1); A.R.S. § 41-1463(G)(1). Age may also be a basis where it is a bona fide occupational qualification. A.R.S. § 41-1463(G)(4)(a).

To establish a BFOQ defense, the employer must prove that all or substantially all members of the protected group would be unable to perform the job safely and efficiently, *see Harriss v. Pan Am. World Airways, Inc.*, 649 F.2d 670, 676 (9th Cir. 1980) (adopting the BFOQ standard partially developed in *Diaz*), or that it is impracticable to deal with members of the protected group on an individual basis, *see EEOC v. Los Angeles Cnty.*, 706 F.2d 1039, 1042-1043 (9th Cir. 1983). The term "occupational" in BFOQ means that any employment requirement permitted under this exception must be related to an employee's "job-related skills and aptitudes" and not to personal attributes that satisfy some other, subjective requirement. *Int'l Union v. Johnson*, 499 U.S. 187, 201-204 (1991). The preference of the customers whom the employer serves does not constitute a BFOQ. *See Diaz*, 442 F.2d at 389.

15.18 Disparate Treatment. Disparate treatment occurs when the employer treats some persons less favorably or differently because of their protected class characteristics. Plaintiffs may establish disparate treatment through circumstantial or direct evidence.

To establish a prima facie case of disparate treatment using circumstantial evidence, the plaintiff must make factual allegations from which the court can infer that the defendant was more likely than not motivated by discriminatory animus. *Gay v. Waiters' & Dairy Lunchmen's Union, Local No. 30*, 694 F.2d 531, 538 (9th Cir. 1982). Typically the plaintiff establishes a prima facie case of disparate treatment using circumstantial evidence by demonstrating that he or she belongs to a protected class, was qualified for or performing satisfactorily for the position sought or held, an adverse employment action was made by the employer, and similarly situated employees outside the protected class were treated better or other evidence gives rise to an inference of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The exact elements of this theory will vary depending on the specific "adverse employment action" alleged. *Id.* at 802 n.13. The plaintiff always has the ultimate burden of proving discriminatory intent. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Under some circumstances, however, intent can be inferred where the employer treats a member of a protected group differently than individuals who are not members of that group. *Civil Rights Div. v. Amphitheater Unified Sch. Dist. No. 10*, 680 P.2d 517, 519 (Ariz. Ct. App. 1983).

Once the plaintiff has established the prima facie case, the employer must articulate a legitimate, nondiscriminatory reason for its decision. *Amphitheater*, 680 P.2d at 519;

McDonnell Douglas, 411 U.S. at 802. If the employer articulates such a reason, the plaintiff may show, through specific and substantial evidence, that the reason was a pretext for discrimination. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000).

The plaintiff may also establish a prima facie case of disparate treatment through direct evidence that demonstrates the employer's discriminatory motivation. See *USPS Bd. Of Governors v. Aikens*, 460 U.S. 711, 714 n. 3 (1983). "Direct evidence typically consists of clearly sexist, racist, or similarly discriminatory statements or actions by the employer." *Coghlán*, 413 F.3d at 1095. If direct evidence of discrimination is presented, then the *McDonnell Douglas* burden-shifting scheme does not apply and the employer cannot rebut the evidence of discriminatory motive simply by presenting a legitimate reason for the employment decision. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985). Under Arizona law, however, the employer may have a defense if it can demonstrate that it would have made the same decision absent any discriminatory animus. See, e.g., *Timmons v. City of Tucson*, 830 P.2d 871, 877 (Ariz. Ct. App. 1991).

15.19 Disparate Impact. The disparate impact theory of discrimination is used to analyze employment practices that are facially neutral but result in unnecessary employment barriers based on an impermissible classification. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971); *Civil Rights Div. v. Amphitheater Unified Sch. Dist. No. 10*, 680 P.2d 517, 519 (Ariz. Ct. App. 1983). Under the disparate impact theory, the plaintiff need not show intentional discrimination, but must show that the employment practice itself has the effect of disproportionately excluding a protected group. See *Griggs*, 401 U.S. at 429-30; 42 U.S.C. § 2000e-2(k); *Amphitheater*, 680 P.2d at 519.

A disparate impact discrimination claim is timely if raised within the Title VII or ACRA limitations period following any application of a policy that produces a disparate impact. *Lewis v. City of Chicago*, 560 U.S. 205, 217 (2010). To establish a prima facie case under the disparate impact theory, the plaintiff must show that the employer uses a facially neutral business practice that has a significant discriminatory impact on the protected group to which the plaintiff belongs. See *Griggs*, 401 U.S. at 429-30; *Paige v. California*, 291 F.3d 1141, 1145, n.4 (9th Cir. 2002) (proof of disparate impact must be by a preponderance of the evidence). The business practice can take the form, for example, of a test or a height or weight requirement for job applicants. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 324 (1977).

Once a prima facie case is established, the burden shifts to the employer to show that the challenged practice is job-related and consistent with business necessity. 42 U.S.C. § 2000e-2(k)(1)(A); *Ricci v. DeStefano*, 557 U.S. 557, 578 (2009); *Amphitheater*, 680 P.2d at 519. To be deemed a business necessity, the challenged practice "must have a manifest relationship to the employment in question," *Griggs*, 401 U.S. at 432. In the case of a challenged test, the employer must "validate the examination by showing that it is a realistic measure of job performance." *Bouman v. Block*, 940 F.2d 1211, 1228 (9th Cir. 1991) (citing *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 426-27 (1975)). If the employer meets its burden, the employee must show

that there are alternative employment practices that would have less impact on the protected person or class. See 42 U.S.C. § 2000e-2(k)(1)(A)(ii); *Ricci*, 557 U.S. at 578. Employers may not invalidate qualification tests to achieve a more balanced statistical distribution, thus creating a potential disparate treatment violation, unless there is a “strong basis in evidence” that invalidating the qualification test is necessary to avoid disparate impact liability. *Ricci*, 557 U.S. at 583-84.

15.20 Mixed Motive Cases. A case in which an employer has both a discriminatory and a nondiscriminatory motive for making an employment decision is referred to as a “mixed motive” case. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 93 (2003). Under federal law, if an employer was motivated by a discriminatory motive it has engaged in employment discrimination even if the employer had other non-discriminatory factors that also were considered when making the employment decision and the employee is entitled to injunctive relief, costs, and fees. 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B). However, if the employer proves that it would have made the same decision without considering the discriminatory factor, the employer’s liability is limited and they will not be liable for reinstatement, lost wages, or damages. *Id.* § 2000e-5(g)(2)(B). Causation under the ACRA requires that the unlawful employment practice be made “because of” race, color, religion, sex, age, national origin, or disability status. A.R.S. § 41-1463. Unlike Title VII, which was amended to include “motivating factor” as a standard for intent, the ACRA does not contain a “motivating factor” provision and thus does not have a mixed motive standard for discriminatory intent. See 42 U.S.C. §§ 2000e-2(m); A.R.S. § 41-1463.

15.21 Remedies Under the Arizona Civil Rights Act. Under the ACRA, remedies for employment discrimination include back and front pay (the only monetary relief), injunctive relief, reinstatement, and attorney’s fees. A.R.S. § 41-1481(G), (J).

15.22 Remedies in Title VII and § 1981 Actions. Under federal employment law, remedies for employment discrimination include an order to hire or reinstate, back pay, front pay, attorney’s fees, and compensatory and punitive damages for intentional discrimination claims against most employers in actions brought pursuant to Title VII and in many actions brought pursuant to the ADA. See 42 U.S.C. § 2000e-5(g), (k); 42 U.S.C. § 1981a; see also Section 15.26. Compensatory and punitive damages combined are capped on a sliding scale depending on the employer’s number of employees. For an employer with 500 or more employees, the cap is \$300,000 for each complaining party. 42 U.S.C. § 1981a(b)(3)(D). The Ninth Circuit has held that Title VII punitive damages awards that fall within statutory caps comport with due process as a matter of law. See *Arizona v. ASARCO, LLC*, 773 F.3d 1050, 1060 (9th Cir. 2014) (*en banc*).

Public employers are exempt from liability for punitive damages, but are still subject to the cap based on number of employees for compensatory damages. 42 U.S.C. § 1981a(b). Section 1981, which prohibits discrimination based on race (including color and national origin differences) in the making and enforcement of contracts, does not have a cap for damages; however, excessive punitive damages awards

may be limited on due process grounds. See *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). When a complainant requests compensatory or punitive damages under § 1981a, the parties are entitled to a jury trial. 42 U.S.C. § 1981a(c).

Section 1981 does not create a private right of action against states. *Pittman v. Oregon, Emp't Dep't*, 509 F.3d 1065, 1073 (9th Cir. 2007). Section 1981's prohibition on discrimination by a state or its officials can be enforced only by means of 42 U.S.C. § 1983. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 735 (1989). However, 42 U.S.C. § 1981 does contain a private right of action against municipalities. *Pittman*, 509 F.3d at 1067.

15.23 Attorney's Fees. Title VII allows the court to award attorney's fees to a prevailing party other than the EEOC or the United States. 42 U.S.C. § 2000e-5(k). Similarly, the ACRA provides for an award of attorney's fees to a prevailing party other than the Civil Rights Division of the Arizona Department of Law. A.R.S. § 41-1481(J). The court should ordinarily award fees to a prevailing plaintiff, but may award fees to a defendant employer only where the employee's claim was unreasonable, frivolous, or groundless, or brought in bad faith. *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978). Arizona courts follow this standard. See *v. KTUC, Inc.*, 714 P.2d 859, 862 (Ariz. Ct. App. 1986).

Under 42 U.S.C. § 1988, an award of attorney's fees to the prevailing party, other than the United States, in a suit premised on 42 U.S.C. § 1981 is permitted. 42 U.S.C. § 1988. Fee awards under 42 U.S.C. § 1988 are governed by the same standard as fee awards under Title VII. See *Patton v. County of Kings*, 857 F.2d 1379, 1381 (9th Cir. 1988).

15.24 Remedies for an Equal Pay Act Violation. Remedies for an EPA violation include lost wages plus an equal amount as liquidated damages, injunctive relief, and attorney's fees. 29 U.S.C. § 216(c). If the employer shows that it acted in good faith and believed that its actions were legal, the court may limit the award to back wages. *Id.* § 260.

15.25 Remedies Under the ADEA. Remedies under the ADEA include lost wages plus an equal amount as liquidated damages, injunctive relief, reinstatement or front pay, and attorney's fees. *Id.* § 216(b),(c). Unlike Title VII, the ADEA does not allow the recovery of compensatory (i.e. emotional distress) or punitive damages. *Id.* Liquidated damages can be awarded only for willful violations. A violation is willful if the employer knew that its conduct was prohibited or showed reckless disregard for whether its conduct was unlawful. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128-29 (1985). A violation is not willful simply based upon the employer's knowledge that the ADEA is potentially applicable. *Id.* at 127. The successful plaintiff may recover attorney's fees, but successful defendants may do so only where the action is frivolous or in bad faith. 29 U.S.C. § 216(b); see *Glass v. Intel Corp.*, 2009 WL 4050875, at *1 (D. Ariz. 2009).

Under *Kimel v. Florida Board of Regents*, state employees suing under the ADEA cannot recover money damages against a state. 528 U.S. 62, 91-92 (2000).

15.26 Remedies Under the ADA. Remedies under the ADA for employment discrimination are the same as those under Title VII and are obtained through the same administrative process before the EEOC that is available for other types of discrimination. 42 U.S.C. § 12117. Remedies include compensatory and punitive damages. See 42 U.S.C. § 1981a(b). In appropriate circumstances, these damages may be as high as \$300,000 for each complaining party (where an employer has more than 500 employees). *Id.* § 1981a(b)(3). Monetary remedies are capped based on the size of the employer in an action brought under Title I of the ADA. *Id.* The ADA does not, however, preempt any law that gives disabled individuals greater protection. 42 U.S.C. § 12201. Attorney's fees are available to the prevailing charging party or plaintiff in both administrative and court proceedings. 42 U.S.C. § 12205.

The ADA prohibits an award of damages for failure to make a reasonable accommodation where the employer made accommodation efforts in good faith. 42 U.S.C. § 1981a(a)(3).

Under *University of Alabama v. Garrett*, 531 U.S. 356, 374 (2001), state employees suing under the ADA's employment provisions cannot recover money damages against a state. Persons with physical disabilities can still recover monetary relief under the ACRA, which is limited to up to two years of back pay. A.R.S. § 41-1481(G).

15.27 Disability-based Discrimination in Public Services and Accommodations. Title II of the ADA, 42 U.S.C. §§ 12131 to 12150, prohibits public entities such as the State of Arizona from discriminating based on disability in the provision of services, programs, or activities—this includes ensuring that public buildings are accessible. 42 U.S.C. §§ 12131, 12132; *Tennessee v. Lane*, 541 U.S. 509, 531-32 (2004).

Title III of the ADA, 42 U.S.C. §§ 12181 to 12189, prohibits public accommodations (which are private entities)—such as hotels, theaters, museums, golf courses, homeless shelters, dry cleaners, or stores—from discriminating with respect to the goods and services they offer. *Id.* § 12181(7). A public accommodation may not discriminate in the provision of goods, services, facilities, privileges, advantages, or accommodations against a person with a disability, a person who has a relationship or association with a person with a disability, or a person who has engaged in protected conduct. 42 U.S.C. § 12182; A.R.S. § 41-1492.02(A), (B), (F).

Arizona enacted the Arizonans with Disabilities Act ("AzDA") to encompass the protections of Title II and Title III of the ADA. A.R.S. § 41-1492.06(B). The AzDA requires a public entity to ensure that buildings and facilities that are leased or constructed in whole or part with state or local monies or the monies of political subdivisions are accessible so as to conform to Title II of the ADA. A.R.S. § 41-1492.01. Although the AzDA does not contain the Title II provisions regarding services, programs, and activities, the State must still comply with Title II as it qualifies as a public entity under the ADA. 42 U.S.C. §§ 12131, 12132. The AzDA's provision governing private entities which operate places of public

accommodation is substantially similar to Title III. A.R.S. §§ 41-1492, 1492.02. The AzDA states that compliance with Title II and Title III of the ADA and its implementing regulations constitutes compliance with the AzDA. A.R.S. § 41-1492.06(B).

For purposes of Title II and III of the ADA and the AzDA, “disability” is defined the same way that it is under the ADA’s employment provisions as “a[ny] physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; a record of such an impairment; or being regarded as having such an impairment.” 42 U.S.C. § 12102; A.R.S. § 41-1492(6). See Section 15.12. Both the ADA and the AzDA define “major life activities” to include common essential everyday tasks as well as the operation of major bodily functions. 42 U.S.C. § 12102(2); A.R.S. § 41-1492(8).

The ADA and the AzDA protect persons with a disability and persons who have a relationship with or who associate with persons with a disability. 42 U.S.C. § 12182(E); A.R.S. § 41-1492.02(F). The ADA and the AzDA also protect persons who engage in protected activity from retaliation. 42 U.S.C. § 12203(a); A.R.S. § 41-1492.10(A).

15.27.1 General Discrimination Prohibitions. Title II’s general discrimination prohibitions prevent public entities, such as the State of Arizona, from excluding or segregating individuals with disabilities in providing governmental services, programs, or activities. 42 U.S.C. § 12132. Governmental entities may establish safety requirements for their services, programs, and activities based on actual concerns. 28 C.F.R § 35.130(h). Safety standards may not be based on “mere speculation, stereotypes, or generalizations about individuals with disabilities.” *Id.* The ADA and its implementing regulations broadly define unlawful discrimination as actions that adversely affect individuals with disabilities. These actions include:

1. Denying individuals with disabilities the right to participate in or benefit from the aid, benefit, or service that a governmental entity provides, 28 C.F.R. § 35.130(b)(1)(i);
2. Providing individuals with disabilities a lower level of services, aids, or benefits than is provided to similarly situated persons without disabilities, *id.* § 35.130(b)(1)(ii);
3. Providing individuals with disabilities with aids, benefits, services, or special programs that are less effective than those provided to individuals without disabilities or providing such individuals different or separate aids, benefits, or services unless necessary for effectiveness, *id.* § 35.130(b)(1)(iii) & (iv);
4. "Providing significant assistance to an agency, organization, or person that discriminates on the basis of disability," *id.* § 35.130(b)(1)(v);
5. Limiting individuals with disabilities "in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others," *id.* § 35.130(b)(1)(vii);

6. "Establish[ing] requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability," *id.* § 35.130(b)(6).
7. Failing to "make reasonable modifications in policies, practices, or procedures when. . . necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that [the only reasonable modification] would fundamentally alter the nature of the service, program, or activity," *id.* § 35.130(b)(7);
8. Using criteria in selecting procurement contractors that subject otherwise qualified contractors to discrimination based on disability, *id.* § 35.130(b)(5);
9. Imposing "eligibility criteria that screen out or tend to screen out an individual with a disability . . . unless such criteria [are] necessary" for the provision of the program, service, or activity, *id.* § 35.130(b)(8); and
10. Failing to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities," *id.* § 35.130(d).

15.27.2 Eliminating Segregation and Other Barriers. The purpose of the ADA is to allow individuals with a disability to live societally integrated lives and eliminate the stigma that they are unwanted. *Olmstead v. L.C., ex rel. Zimring*, 527 U.S. 581, 599-600 (1999). Therefore Congress in enacting the ADA identified barriers and practices that segregate individuals with a disability as a form of discrimination. *Olmstead*, 527 U.S. at 600; *citing* 42 U.S.C. § 12101(a)(2). Persons who do not wish to or are unable to use integrated services are not required to do so. *Olmstead*, 527 U.S. at 601-02. The prohibition of segregation by public accommodations, unlike public services, is codified in the statute for both the ADA and the AzDA. 42 U.S.C. § 12182(b)(2)(A)(iii); A.R.S. § 41-1492.02(G)(3).

The ADA also requires public entities to provide their services, programs, and activities in the most integrated setting that is appropriate to the needs of qualified individuals with disabilities, *i.e.*, in a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible. 28 C.F.R. § 35.130(b)(1)(iv), (b)(2).

15.27.3 Physical Accessibility Requirements. Title II requires public entities to maintain features of their facilities and equipment necessary to allow access and use by individuals with disabilities. *Id.* § 35.133(a). Isolated or temporary interruptions in service or access due to maintenance or repairs are permissible. *Id.* § 35.133(b).

The ADA requires all public entities to provide information concerning accessible services, activities, and facilities to individuals with disabilities. *Id.* § 35.163. This requires

that the entity provide signage at all inaccessible entrances to each of its facilities that direct users to accessible entrances or to locations at which they will find information about accessible entrances. *Id.* The AzDA adopts the ADA standards by requiring all public entities to conform to Title II accessibility requirements. A.R.S. § 41-1492.01.

15.27.4 Program Accessibility. Each service, activity, or program that a public entity conducts, when viewed in its entirety, must be readily accessible to and usable by individuals with disabilities. 28 C.F.R. § 35.150. Standards used in this section are the same as the standards for public accommodations established in Title III of the ADA. The only exceptions to the accessibility requirement involve cases in which ensuring accessibility would result in (a) the threatened destruction of historically significant property; (b) a fundamental alteration in the program's nature; or (c) undue financial and administrative burdens. *Id.* § 35.150(a)(2), (3) in determining whether providing accessibility would pose undue financial and administrative burdens, consideration is given to all the public entity's resources available for funding and operation of the service, program, or activity. *Id.* § 35.150(a)(3). Where full accessibility can be assured only by actions that would result in a fundamental alteration in the program's nature or in undue financial and administrative burdens, the public entity is required to take steps to ensure that individuals with disabilities receive the benefits or services that the entity provides. *Id.*

15.27.5 Communications. The ADA requires public entities to take all appropriate steps necessary to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others. *Id.* § 35.160(a). When necessary, a public entity is required to provide auxiliary aids and services to afford an individual with a disability an opportunity to participate in and enjoy the benefits of the public entity's service, program, or activity. *Id.* § 35.160(b)(1). Public entities are also required to provide an opportunity for individuals with disabilities to request the auxiliary aid and service of their choice, to give that choice primary consideration, and to honor the choice unless another effective means of communication exists or the individual's choice is not required by the ADA. *See Id.* § 35.160(b)(1)-(2).

Auxiliary aids and services may include: qualified interpreters on-site or through video remote interpreting (VRI) services; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing; qualified readers; taped texts; audio recordings; brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision.

Id. § 35.104(1)-(2). The type of auxiliary aids and services required will depend somewhat on the setting. For example, while the regulations state that open captioning may be a necessary auxiliary aid, open captioning is not required for movie theatres as a matter of law, though closed captioning may be required. *Arizona ex rel. Goddard v. Harkins Amusement Enterprises, Inc.*, 603 F.3d 666, 675 (9th Cir. 2010). The ADA requires governmental entities to provide any aids or accommodations at no charge to the individual with a disability; requiring individuals to pay for the aids or accommodations would impose a barrier to equal access to services or benefits that the entities do not impose upon individuals without disabilities. *Id.* § 35.130(f).

The auxiliary aid or service required to satisfy the communication requirements of Title II will vary based on the method of communication utilized by the individual with a disability and the nature, length, and complexity of the communication. *Id.* § 35.160(b)(2). In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability. *Id.* Regarding the facilitation of communication, including interpretive services, a public entity may not:

- Require the individual with the disability to bring his/her own interpreter;
- Rely on an adult accompanying the individual unless there is an emergency situation involving imminent threat to the safety or welfare of the individual or the public and there is no interpreter available, or the individual with a disability and the adult accompanying him/her specifically requests that the adult facilitate the communication, but even then, only if it is appropriate in the circumstances; or
- Rely on a minor child unless there is an emergency situation involving an imminent threat to the safety or welfare of the individual or the public where there is no interpreter available.

Id. § 35.160(c).

When a public entity uses an automated-attendant system, including, but not limited to, voice mail and messaging, or an interactive voice response system, for receiving and directing incoming telephone calls, that system must provide effective real-time communication with individuals using auxiliary aids and services, including all forms of FCC-approved telecommunications relay systems, including Internet-based relay systems. *Id.* § 35.161(b). A public entity must respond to telephone calls from a telecommunications relay service in the same manner that it responds to other telephone calls. *Id.* § 35.161(c).

Requirements for website accessibility for public entities and public accommodations have not been set as the United States Department of Justice has withdrawn previously proposed rulemaking for website accessibility. 82 Fed. Reg. 60932 (Dec. 26, 2017). Under the AzDA websites are expressly exempt. A.R.S. § 41-1492.07(2).

15.27.6 Service Animals. Titles II and III of the ADA and Arizona law require public entities and public accommodations to permit the use of service animals by an individual with a disability. 28 C.F.R. §§ 35.136; 36.302(c); A.R.S. § 11-1024 (including service animals in training and their trainers). Allowing use of a service animal may also be required as a “reasonable modification” to rules and policies under the AzDA. A.R.S. § 41-1492.02(G)(2). A service animal may be excluded if out of control or not housebroken. 28 C.F.R. § 35.136(b); A.R.S. § 11-1024(B)(4)-(5). A service animal must be under the control of its handler, in most cases via a harness, leash, or other tether unless the handler has a disability that prevents the use of such a device or the device interferes with the animal’s ability to do its job. 28 C.F.R. § 35.136(d); A.R.S. § 11-1024(E).

A service animal is defined as a dog or miniature horse that is individually trained to do work or perform a task for an individual with a disability. 28 C.F.R. §§ 35.104, 35.136; 36.104, 36.302(c); A.R.S. § 11-1024(L)(5). The task(s) the animal performs must be directly related to the handler’s disability. 28 C.F.R. §§ 35.104; 36.104; A.R.S. § 11-1024(A). Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. 28 C.F.R. §§ 35-104; 36.104; A.R.S. § 11-1024(A). A public entity or place of public accommodation generally may not inquire as to the disability of the individual. 28 C.F.R. § 35.136(f); 28 C.F.R. § 36.302(c)(6); A.R.S. § 11-1024(L)(2)(d). A public entity or place of public accommodation may ask if the animal is required because of a disability and what work or task the animal has been trained to perform. *Id.* A public entity or place of public accommodation shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. 28 C.F.R. § 35.136(f); 28 C.F.R. § 36.302(c)(6); A.R.S. § 11-1024(L)(2)(e). Generally, a public entity or place of public accommodation may not make these inquiries about a service animal when obvious that the animal is trained to do work or perform tasks for an individual with a disability (for example, a dog guiding an individual with a visual impairment). 28 C.F.R. § 35.136(f); 28 C.F.R. § 36.302(c)(6).

A public entity or place of public accommodation may exclude a service animal if the animal is out of the handler’s control and the handler does not re-establish control or the animal is not housebroken. 28 C.F.R. §§ 35.136(b); 36.302(c)(2); A.R.S. § 11-1024(B) (Arizona law lists additional criteria by which a service animal may be excluded which are not expressly provided in federal law). If the service animal is properly excluded, the public entity or place of public accommodation must give the individual with a disability the opportunity to participate in the program or activity without the service animal. 28 C.F.R. §§ 35.136(c); 36.302(c)(3); A.R.S. § 11-1024(C). A public entity or place of

public accommodation may not charge a fee or surcharge for a service animal, even if the entity typically charges for other animals. 28 C.F.R. §§ 35.136(h); 36.302(c)(8); A.R.S. § 11-1024(L)(2)(c). A public entity or place of public accommodation may charge for damage caused by a service animal. 28 C.F.R. § 36.302(c)(8); A.R.S. § 11-1024(F). Arizona Law allows for a fine to be imposed for an animal that is misrepresented as a service animal. A.R.S. § 11-1024(K). However, under the ADA there is no fine for misrepresentation of a non-service animal as a service animal and inquiries into whether the animal is a service animal are limited as discussed above.

15.27.7 New Construction and Alterations. The ADA requires that buildings designed, constructed, or altered by, on behalf of, or for the use of a public entity after January 26, 1992, meet design and construction standards. 28 C.F.R. § 35.151. The AzDA requires all public buildings and facilities used by a public entity or constructed using monies provided in whole or in part by a public entity to comply with the ADA standards. A.R.S. § 41-1492.02. Public entities seeking information on those standards should consult their legal counsel.

15.27.8 Remedies. Under the AzDA, the victim can obtain actual damages, compensatory damages, injunctive relief, attorney's fees, and civil penalties. A.R.S. § 41-1492.09. However the monetary damages available under AzDA do not include punitive damages. *Id.* § 41-1492.09(B)(2).

Remedies available under Title II of the ADA include all remedies available under § 504 of the Federal Rehabilitation Act of 1973, and are linked to Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7. 29 U.S.C. § 794a; 42 U.S.C. § 12133. These include damages, injunctive relief, attorney's fees, and costs. 29 U.S.C. § 794a; 42 U.S.C. § 2000e-5(g).

A federal contracting or granting agency has the power under the Rehabilitation Act to terminate a contract. 42 U.S.C. § 2000d-1. In addition, under Title VI, a person may bring a private cause of action in tort against governmental entities and federal contractors or grantees for intentional discrimination. *Guardians Ass'n v. New York City Civil Serv. Comm'n*, 463 U.S. 582, 584 (1983).