

TABLE OF CONTENTS

CHAPTER 1

Introduction and General Overview

§ 1.01	Historical Overview	1-1
§ 1.02	Sources and Unusual Characteristics of Sex Discrimination Law	1-4
§ 1.03	Sexual Harassment	1-6
§ 1.04	Limits on Upward Mobility	1-9
§ 1.05	Pregnancy and Related Matters	1-11
§ 1.06	The “Sex Plus” Concept	1-13
§ 1.07	Gender, Height, Weight, Agility, and Appearance	1-15
§ 1.08	Equality of Pay	1-17
§ 1.09	Sex Discrimination in Benefits	1-18
§ 1.10	Unions and Sex Discrimination	1-20
§ 1.11	Seniority Systems	1-23
§ 1.12	Sex Discrimination Arbitrability	1-25
§ 1.13	Federal EEOC Administrative Procedures	1-27
§ 1.14	Damages	1-30
§ 1.15	Attorney’s Fees	1-32
§ 1.16	Human Resources Considerations	1-34
§ 1.17	Ethical and Practice Concerns	1-38
§ 1.18	Sexual Orientation and Gender Under Federal Title VII and State Law	1-40

CHAPTER 2

Overview of Statutes Affecting Sex-Based Discrimination

§ 2.01	Introduction to General Statutory Context	2-5
	[1] Purpose	2-5
	[2] The <i>Chevron</i> Doctrine	2-6.1
§ 2.02	Federal Statutes	2-7
	[1] Civil Rights Act of 1964, Title VII	2-7

SEX DISCRIMINATION

[a]	Scope	2-7
[b]	Applicants for Employment	2-8
[c]	Former Employees.....	2-8
[d]	Indian Tribes	2-8
[e]	Successor Employers.....	2-9
[f]	Religious Organizations and the Ministerial Exemption.....	2-10
[g]	The Public Policymaker Exemption	2-15
[h]	Partners, Professional Corporations, and Directors	2-17
[i]	Independent Contractors	2-20
[j]	In-House Counsel Claims Against Their Own Employers.....	2-22
[k]	Armed Forces, Members and Civilian Employees.....	2-24
[l]	Employee Definition and Count for Title VII Coverage	2-26
[m]	Students as Employees	2-28.4
[n]	Parent, Subsidiary Organizations, and Integration.....	2-28.5
[o]	Joint Employers and Leased Employees	2-28.9
[p]	Unions as Employers Coverage	2-28.15
[q]	Volunteers as Employees	2-28.19
[r]	Supervisors Personal Liability for Sex Discrimination	2-28.20
[s]	Indigent Plaintiffs' Right to Counsel	2-28.30
[t]	Role of the Equal Employment Opportunity Commission	2-28.31
[i]	Conciliation, Mediation, and Negotiation	2-28.31
[ii]	EEOC Mishandling of Complaints	2-28.32
[iii]	Time Limits and the Continuing Violation Theory.....	2-28.33
[iv]	Hostile Environment Claims....	2-28.34
[u]	<i>Ledbetter</i> , Time Limits on Pay Issues	2-28.38
[v]	Initial Complaints	2-28.38
[w]	General Releases and Waivers	2-28.42
[x]	Pregnancy Discrimination	2-28.42

TABLE OF CONTENTS

xv

[y]	Applicability to U.S. Nationals Overseas and to Foreign Employers in the U.S.	2-28.43
[z]	Applicability to Sexual Orientation. . .	2-28.44
[2]	Civil Rights Act of 1871.	2-28.46
[3]	Civil Rights Attorney's Fees Awards Act of 1976.	2-28.47
[4]	Civil Rights Act of 1991.	2-28.48
[5]	National Labor Relations Act.	2-28.49
[6]	Family and Medical Leave Act of 1993. . .	2-28.49
[7]	Equal Pay Act (Amendment to Fair Labor Standards Act).	2-28.50
[7A]	Relation of Title VII and the EPA.	2-28.52
[8]	Bennett Amendment Incorporating EPA Defenses into Title VII.	2-28.53
[9]	Title VII and the Immigration Reform and Control Act (IRCA).	2-28.53
[10]	Treaties.	2-28.54
[11]	Airline Deregulation Act and State F.E.P. Laws.	2-28.56
[12]	Federal Arbitration Act.	2-28.57
[a]	Key Statutory Provisions, Coverage and Exclusion.	2-28.57
[b]	FAA History and Purpose.	2-28.58
[c]	Exclusionary Provision.	2-28.58
[d]	Evolution of the Commerce Clause Impacts FAA.	2-28.58
[e]	Collective Bargaining Agreements and the FAA.	2-28.59
[f]	The Transportation Exclusion.	2-28.61
[i]	Airline Supervisors.	2-28.61
[ii]	Independent Contractor "Gig Workers".	2-28.62
[g]	Airline Workers Under FAA and Railway Labor Act.	2-28.64
[h]	Contracts of Employment and the FAA.	2-28.66
[i]	Conflict Between the Circuits on Collective Bargaining Agreements.	2-28.66
[j]	Preemption of State Law.	2-28.68
[k]	Unconscionability and Class Action.	2-28.70

SEX DISCRIMINATION

	[l] Statutory Rights Arbitration Under Mandatory Pre-Dispute Arbitration and Collective Bargaining Agreements Permitted	2-28.73
	[13] The Defense of Marriage Act (DOMA) and Domestic Partners	2-28.77
	[a] DOMA Overview	2-28.77
	[b] Unconstitutionality of DOMA Section 3—Definition of Marriage	2-28.78
	[c] DOMA Section 2—Full Faith and Credit	2-28.81
	[14] Violence Against Women Reauthorization Act of 2013 (VAWA)	2-28.83
	[15] Congressional Accountability Act of 1995 (CAA)	2-28.91
	[16] Executive Branch Accountability Act (EBAA)	2-28.94
	[17] Title IX of the Educational Amendments of 1972	2-28.95
	[18] Statute Setting Limitations Period	2-28.96
	[19] Federal Reserve and National Bank Acts—State Law Preemption	2-28.97
	[20] Lilly Ledbetter Fair Pay Act of 2009	2-28.101
	[21] Military Selective Service Act	2-28.103
	[22] Fixing America’s Surface Transportation Act and Sex Discrimination	2-28.104
	[23] The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act	2-28.106
	[24] Model Contractual and Statutory Rights Mandatory Pre-Dispute Arbitration Agreements	2-28.108
	[a] Section 1—Definition	2-28.109
	[b] Section 2—Processing	2-28.111
	[c] Section 3—Arbitration Agreement	2-28.115
§ 2.03	State and District of Columbia Statutes	2-28.128
	[1] Overview of State Statutes	2-28.128
	[2] Patterns of State Sex Discrimination Statutes	2-28.129
	[a] State and District of Columbia Comprehensive Fair Employment Practices	2-28.129
	[b] Minimum Employees for Coverage	2-28.131

TABLE OF CONTENTS

xvii

[c]	Statutes Relating to Government Contractors.	2-28.134
[d]	Statutes Relating to Marital Status Discrimination	2-28.135
[e]	Statutes Relating to Pregnancy Disability	2-28.135
[f]	Statutes Relating to Reproductive Discrimination	2-28.136
[g]	Statutes Relating to Sexual Preference Discrimination.	2-28.136
[h]	Statutes Relating to Fertility and Assisted Reproduction.	2-28.138
[3]	State and District of Columbia Comprehensive Fair Employment Practices Statutes	2-28.139
[a]	New England Region	2-28.140
	[i] Connecticut	2-28.140
	[ii] Maine.	2-28.144
	[iii] Massachusetts	2-28.147
	[iv] New Hampshire	2-28.150
	[v] Rhode Island.	2-28.154
	[vi] Vermont.	2-32
[b]	Middle Atlantic Region.	2-33
	[i] Delaware	2-33
	[ii] District of Columbia.	2-35
	[iii] Maryland	2-40
	[iv] New Jersey	2-42
	[v] New York	2-47
	[vi] Pennsylvania	2-58.7
[c]	Southeast Region.	2-58.8
	[i] Alabama.	2-58.8
	[ii] Florida	2-58.9
	[iii] Georgia	2-58.10
	[iv] Kentucky	2-58.13
	[v] Mississippi.	2-58.17
	[vi] North Carolina	2-58.18
	[vii] South Carolina	2-58.19
	[viii] Tennessee	2-58.21
	[ix] Virginia	2-58.26
	[x] West Virginia	2-58.29
[d]	Midwest and North Central Region.	2-58.32
	[i] Illinois	2-58.32
	[ii] Indiana.	2-58.34
	[iii] Iowa.	2-58.35
	[iv] Michigan	2-58.39

SEX DISCRIMINATION

	[v] Minnesota	2-61
	[vi] Ohio	2-66.2
	[vii] Wisconsin	2-66.3
[e]	Southwest Region	2-72
	[i] Arkansas	2-72
	[ii] Louisiana	2-75
	[iii] Missouri	2-79
	[iv] New Mexico	2-81
	[v] Oklahoma	2-83
	[vi] Texas	2-86
[f]	Great Plains and Rocky Mountain Region	2-89
	[i] Colorado	2-89
	[ii] Kansas	2-91
	[iii] Montana	2-93
	[iv] Nebraska	2-95
	[v] North Dakota	2-98
	[vi] South Dakota	2-101
	[vii] Utah	2-104
	[viii] Wyoming	2-108
[g]	Pacific Region	2-110
	[i] Alaska	2-110
	[ii] Arizona	2-112
	[iii] California	2-114.1
	[iv] Hawaii	2-118.2
	[v] Idaho	2-118.6
	[vi] Nevada	2-118.8
	[vii] Oregon	2-118.9
	[viii] Washington	2-118.12
§ 2.04	Tips, Tricks, and Traps	2-119
§ 2.05	Summary	2-122

CHAPTER 3**Sexual Harassment and the Law**

§ 3.01	Introduction and Overview of Sexual Harassment	3-4
§ 3.02	Equal Employment Opportunity Commission (EEOC) Guidelines on Sexual Harassment and Related Matters	3-6.3
	[1] Guidelines on Sexual Harassment	3-6.3
	[2] Guidelines on Employer Liability	3-8
	[3] Guidelines on Harassment Directed at Caregivers	3-10

TABLE OF CONTENTS

xix

§ 3.03	<i>Meritor Savings Bank, FSB v. Vinson</i>	3-11
	[1] Issues Presented	3-11
	[2] Is “Hostile Environment” Sexual Harassment Actionable Under Title VII?	3-11
	[3] Voluntary v. Unwelcome Behavior	3-14
	[4] Employer Liability	3-14
	[a] <i>Meritor Savings Bank, FSB v. Vinson</i> —“ <i>Quid Pro Quo</i> ” Harassment and Employer Liability	3-14
	[b] <i>Meritor Savings Bank, FSB v. Vinson</i> —Hostile Work Environment and Employer Liability	3-16
	[c] <i>Faragher, Burlington Industries</i> and Employer Liability	3-16.1
	[5] State Law Erosion of <i>Farragher/ Ellerth</i> Defense	3-24.1
§ 3.04	<i>Meritor Savings Bank, FSB v. Vinson</i> : The Relationship Between “ <i>Quid Pro Quo</i> ” and “Hostile Work Environment” Harassment	3-25
	[1] “ <i>Quid Pro Quo</i> ” Sexual Harassment.	3-25
	[2] “Hostile Work Environment” Sexual Harassment	3-30
	[3] Constructive Discharge and “ <i>Quid Pro Quo</i> ” Harassment	3-36.5
	[4] Violence Against Women Reauthorization Act of 2013	3-41
	[5] Other “Actionable” Conduct	3-43
	[a] Men May Sue for Sexual Harassment	3-44
	[b] Same-Sex Sexual Harassment	3-44
	[c] Same-Sex Discrimination: The “Social Context”	3-56
	[d] What Is Considered “Reverse” Harassment?	3-57
	[6] EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors. . .	3-57
	[a] Introduction	3-58
	[b] The Vicarious Liability Rule Applies to Unlawful Harassment on All Covered Bases	3-61

SEX DISCRIMINATION

	[c] Who Qualifies as a Supervisor?	3-61
	[i] Harasser in Supervisory Chain of Command	3-61
	[ii] Harasser Outside Supervisory Chain of Command	3-62.14
	[iii] Determining Whether a Harasser Is an Employee	3-62.15
	[d] Harassment by Supervisor That Results in a Tangible Employment Action	3-62.16
	[i] Standard of Liability	3-62.16
	[ii] Definition of “Tangible Employment Action”	3-62.19
	[iii] Link Between Harassment and Tangible Employment Action	3-62.21
	[e] Harassment by Supervisor That Does Not Result in Tangible Employment Action	3-62.24
	[i] Standard of Liability	3-62.24
	[ii] Effect of Standard	3-62.24
	[7] Boorish Behavior and Sexual Harassment	3-62.27
	[a] Boorish Behavior That Does Not Support a Sexual Harassment Claim	3-62.27
	[b] Boorish Behavior That Does Support a Sexual Harassment Claim	3-62.28
	[c] Stale Behavioral Claims	3-62.29
§ 3.05	Burden of Proof and Standard of Proof in Sex Discrimination and Sexual Harassment Cases	3-62.30
	[1] The Burden of Proof	3-62.30
	[a] Order and Allocation of Proof	3-62.30
	[i] Order and Allocation of Proof Under Federal Law . . .	3-62.30
	[ii] Order and Allocation of Proof under State Law	3-62.33
	[b] The Shifting Burden Standard	3-62.34
	[c] Mixed-Motive Standard	3-62.34
	[d] Pattern-or-Practice Cases	3-62.40
	[e] Pretext	3-62.48
	[f] Significance of Pretext	3-62.49
	[g] Significance of Pretext Post-Reeves	3-62.50

TABLE OF CONTENTS

xxi

	[h] Summary Judgment Post- <i>Reeves</i> . . .	3-62.52
[2]	Comparative Evidence in Discrimination Cases.	3-62.54
	[a] The Legal Standard.	3-62.54
	[b] Application of Comparative Evidence	3-62.57
[3]	The Reasonable Victim Standard	3-62.61
[4]	Objective/Subjective Standard.	3-62.63
[5]	Standards of Proof and Constructive Discharge	3-62.63
[6]	Sex Discrimination in Hiring.	3-62.69
[7]	Denial of Promotion or Discriminatory Transfer	3-62.69
[8]	Collateral Estoppel and Admissions by Counsel.	3-62.70
§ 3.06	Retaliation	3-62.75
	[1] Defined	3-62.75
	[2] Standard of Proof.	3-62.76
	[3] Co-Worker Retaliation Claims	3-64
	[4] The Elements of a <i>Prima Facie</i> Retaliation Claim.	3-66
	[a] Engaged in a Protected Activity.	3-68.3
	[b] Employer Awareness of Protected Activity	3-68.5
	[c] Material Adversity and the Reasonable Employee Standard.	3-68.6
	[i] Ultimate Employment Action Standard	3-75
	[ii] Adverse Effect Standard.	3-76.1
	[iii] Deterrent Effect Standard.	3-76.3
	[d] Causal Connection.	3-76.7
	[5] Priority Processing and Temporary Protections	3-76.8
§ 3.07	Damages	3-77
§ 3.08	Interim Relief	3-79
§ 3.08A	Sufficiency of the Pleadings.	3-80
§ 3.09	Strategies of Prevention, Avoidance, and Defense	3-82
	[1] First Prong of Affirmative Defense: Employer's Duty to Exercise Reasonable Care.	3-83
	[a] Policy and Complaint Procedure	3-86
	[b] Investigation.	3-93
	[c] Assurance of Immediate and Appropriate Corrective Action	3-98

SEX DISCRIMINATION

	[d] Other Preventive and Corrective Measures	3-102
	[e] Small Businesses	3-102.1
	[2] Second Prong of Affirmative Defense: Employee's Duty to Exercise Reasonable Care.	3-103
	[a] Failure to Complain.	3-104
	[i] Risk of Retaliation	3-106
	[ii] Obstacles to Complaints	3-106
	[iii] Failure to Participate in Alternate Dispute Resolution	3-106
	[iv] Perception That Complaint Process Was Ineffective	3-107
	[b] Avoiding Harm Through Handbook or Applicant Arbitration	3-107
	[c] Other Efforts to Avoid Harm	3-121
	[3] Sexual Harassment Prevention Training	3-122
§ 3.10	Sexual Harassment, Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act.	3-123
§ 3.11	Tips, Tricks, and Traps.	3-126

CHAPTER 4**The Glass Ceiling Problem**

§ 4.01	Introduction	4-1
§ 4.02	Office of Federal Contract Compliance Guidelines	4-4
§ 4.03	Congressional Action Regarding the Glass Ceiling	4-6
§ 4.04	Judicial Decisions Involving Glass Ceiling Issues	4-7
	[1] Partnerships.	4-7
	[2] Academic Tenure and Refusal to Hire in Higher Education.	4-15
	[a] Tenure Decisions	4-15
	[b] Employment Implications of Title IX	4-32
	[3] Student Claims Against Faculty and Academic Retaliation.	4-35
	[4] Pretext and Mixed Motive in Glass Ceiling Cases.	4-37

TABLE OF CONTENTS

xxiii

§ 4.05	“Glass Walls” as a Comparable Worth Analog	4-39
§ 4.06	Term Appointments and Sex Discrimination . . .	4-40
§ 4.07	Mandates to Place Women on Corporate Boards	4-44
§ 4.08	Tips, Tricks, and Traps.	4-45
§ 4.09	Summary	4-47

CHAPTER 5

Pregnancy; Childbirth; Childrearing and Parental Leave

§ 5.01	Introduction	5-2
§ 5.02	Pregnancy Discrimination Act (PDA) of 1978	5-5
	[1] Employment Policies Relating to Pregnancy and Childbirth	5-6
	[2] Equal Treatment vs. Equal Opportunity . . .	5-9
§ 5.03	Employee Pregnancy and Childbirth Leave and Benefits	5-11
	[1] Pregnancy and Related Disability Leave	5-12
	[2] Employee Benefits Related to Pregnancy and Childbirth	5-13
§ 5.04	Childrearing and Parental Leave	5-16
	[1] EEOC Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities	5-16
	[a] Sex-Based Disparate Treatment of Female Caregivers: Analysis of Evidence	5-16
	[b] Unlawful Disparate Treatment of Female Caregivers as Compared with Male Caregivers	5-18
	[2] Parental Leave and Reinstatement.	5-19
	[3] Family and Medical Leave Act.	5-20
	[a] Introduction	5-20
	[b] Purpose.	5-20.10
	[c] Employers Covered	5-20.11
	[d] The Test to Be a Covered Employer	5-21
	[e] “Joint Employment”	5-22
	[f] “Eligibility” to Take Leave.	5-23

SEX DISCRIMINATION

	[g] The “Worksite” Test	5-24
	[h] Circumstances Requiring Grant of Leave.	5-25
	[i] The Definition of a “Spouse,” “Parent,” “Son” or “Daughter” . . .	5-26
	[j] “Serious Health Condition”	5-27
	[k] Notice Under FMLA	5-29
	[l] Rights to Return to Employment . . .	5-30
	[m] Employer’s Obligation to Give Notice of FMLA	5-30.1
§ 5.05	Pregnancy and Hazardous Conditions	5-30.2
§ 5.06	State Law Considerations	5-33
§ 5.07	Breastfeeding Protections	5-34
§ 5.08	Fertility and Assisted Reproductive Technology Protection	5-36
§ 5.09	Tips, Tricks, and Traps.	5-38

CHAPTER 6**Sex Plus**

§ 6.01	Introduction	6-2
§ 6.02	Sex Plus Marriage and Fraternization Policies	6-5
	[1] “No-Marriage Rules”	6-5
	[2] Anti-Fraternization Policies	6-6.1
	[3] Favoritism and Sexual Harassment	6-6.1
	[a] Isolated Instances of Favoritism	6-6.2
	[b] Favoritism Based Upon Coerced Sexual Conduct	6-6.3
	[c] Widespread Favoritism	6-6.3
§ 6.03	Sex Plus Motherhood	6-7
	[1] Motherhood.	6-7
	[2] Unwed Mothers	6-9
	[3] Unlawful Gender Role Stereotyping of Working Women	6-10.1
	[a] Gender-Based Assumptions About Future Caregiving Responsibilities	6-10.2
	[b] Assumptions About the Work Performance of Female Caregivers	6-10.2
	[c] “Benevolent” Stereotyping	6-10.3
	[4] Effects of Stereotyping on Subjective Assessments of Work Performance . . .	6-10.4

TABLE OF CONTENTS

xxv

	[5] Discrimination Against Male Caregivers	6-10.5
§ 6.04	Sex Plus Grooming and Appearance Policies	6-10.6
	[1] Grooming Requirements	6-10.6
	[2] Height and Weight Standards	6-12
	[3] Dress and Clothing Requirements	6-12
	[4] Sexual Preference and Orientation	6-14
	[5] Sexual Stereotyping and Gender Dysphoria	6-16
§ 6.05	Sex Plus Race	6-20
§ 6.06	Preemployment Interviews	6-21
§ 6.07	Tips, Tricks, and Traps.	6-22

CHAPTER 7

Gender, Height, Weight, Strength, Physical Agility, and Appearance

§ 7.01	Introduction	7-1
§ 7.01A	Gender Discrimination	7-2.1
§ 7.02	Height and Weight Requirements	7-3
§ 7.03	Strength and Physical Agility Requirements	7-10
§ 7.04	Appearance	7-13
	[1] Stereotyping, Hair, and Grooming	7-13
	[2] Head Scarves, Head Coverings, and Safety.	7-18
	[3] Non-Immutable Characteristics	7-19
§ 7.05	State Law Considerations	7-21
§ 7.06	OSHA Employee Safety Regulations as Limit on Appearance Statutes	7-23
§ 7.07	Tips, Tricks, and Traps.	7-24
§ 7.08	Summary	7-26

CHAPTER 8

Equal Pay

§ 8.01	Introduction	8-2
	[1] Background.	8-2
	[2] The Equal Pay Act.	8-4
§ 8.02	Coverage Under the Equal Pay Act.	8-9
§ 8.03	Equal Skill, Effort and Responsibility; Similar Working Conditions	8-12

SEX DISCRIMINATION

	[1] Equal Skill, Effort and Responsibility . . .	8-12
	[2] Similar Working Conditions	8-16.6
§ 8.04	Affirmative Defenses to Equal Pay Act	
	Claims	8-17
	[1] Seniority System Defense	8-17
	[2] Merit System Defense	8-19
	[3] Quantity or Quality (Piece Work or Incentive System) Defense	8-20
	[4] Factor Other Than Sex Defense	8-21
§ 8.05	Relationship of Equal Pay Act to Title VII . . .	8-31
	[1] The Bennett Amendment to Title VII . . .	8-31
	[2] Decisions of the Courts Concerning the Equal Pay Act and Title VII	8-32
§ 8.06	Similar Work and Comparable Worth	8-43
§ 8.07	State Law Considerations	8-49
	[1] Arizona	8-49
	[2] California	8-50
	[3] Georgia	8-50
	[4] Illinois	8-51
	[5] Iowa	8-52
	[6] Maine	8-52
	[7] Michigan	8-53
	[8] Minnesota	8-53
	[9] Montana	8-53
	[10] New Jersey	8-54
	[11] New York	8-55
	[12] Ohio	8-57
	[13] Pennsylvania	8-57
	[14] Washington	8-57
§ 8.08	The Equal Pay Act and Issues of Federalism . .	8-58
	[1] Eleventh Amendment	8-58
	[2] Removal of EPA Actions	8-62
§ 8.09	Tips, Tricks, and Traps	8-64

CHAPTER 9**Sex Discrimination and “Fringe” Benefits**

§ 9.01	Introduction	9-2
§ 9.02	Applicable Federal Statutes and EEOC Guidelines	9-4
	[1] Title VII	9-4
	[2] Equal Pay Act	9-5
	[3] Employee Retirement Income Security Act (ERISA)	9-5

TABLE OF CONTENTS

xxvii

	[4] National Labor Relations Act (NLRA) . . .	9-6
	[5] The Civil Rights Act of 1871 (Section 1983)	9-7
	[6] McCarran-Ferguson Act.	9-7
	[7] The Defense of Marriage Act	9-8
	[8] Lilly Ledbetter Fair Pay Act	9-8
	[9] EEOC Guidelines	9-10
§ 9.03	Retirement Plans and Unisex Tables	9-17
§ 9.04	Health Care and Head of Household Policies	9-20.4
§ 9.05	Preemption and State Law Considerations	9-21
	[1] Issues Arising from Sex Discrimination in Benefits and ERISA	9-21
	[2] Relevant Statutory Provisions	9-22
	[3] Partial Preemption of State Fair Employment Practices Laws	9-23
	[4] Preemption of Disability, Workers' and Unemployment Compensation.	9-25
	[5] No Preemption of Federal Nondiscrimination Statutes	9-26
	[6] ERISA Preemption of Certain Domestic Partner Benefits	9-28
§ 9.06	Tips, Tricks, and Traps	9-31
§ 9.07	Summary	9-33

CHAPTER 10

Unions and Sexual Discrimination

§ 10.01	Introduction	10-2
§ 10.02	Applicable Statutes and Executive Orders. . . .	10-5
§ 10.03	General Content of the Railway Labor and National Labor Relations Acts.	10-12
§ 10.04	National Labor Acts and Sex Discrimination . . .	10-14
	[1] Sex Discrimination Under the RLA and NLRA, 1935 to 1964	10-14
	[2] Sex Discrimination Under the RLA and NLRA After 1964.	10-17
§ 10.05	Sources and Importance of the Duty of Fair Representation.	10-20
	[1] Origins of the Duty of Fair Representation	10-20
	[2] Employer Liability for Breaches of the Duty of Fair Representation	10-20

	[3] Sex Discrimination Cases Involving Breach of the Duty	10-23
§ 10.06	Preemption and Waiver of Sex Discrimination Cases	10-25
	[1] Private Sector	10-26
	[2] Federal Employees	10-30.13
§ 10.07	Relationship of Title VII to NLRA and RLA . . .	10-30.16
§ 10.08	Limitations on Minority Representation	10-31
§ 10.09	Consent Decrees Modifying Labor Agreements	10-32
§ 10.10	Liability of Nonsignatory International Unions	10-33
§ 10.11	Discrimination in Hiring and Hiring Halls	10-35
§ 10.12	Duty to Provide Information to Unions	10-35
§ 10.13	Unions as Employers	10-38
§ 10.14	Labor Contracts Are No Defense to Civil Rights Discrimination Charges	10-39
§ 10.15	Discrimination and Protected Concerted Activities Under NLRA	10-40
§ 10.16	Unions Under the Equal Pay Act	10-41
§ 10.16A	Non-Discrimination Clauses in Collective Bargaining Agreements	10-44
§ 10.16B	Analysis and Follow Up Based on Arbitration Experience	10-45
§ 10.17	Tips, Tricks, and Traps	10-47
§ 10.18	Summary	10-49

CHAPTER 11

Guide for Arbitration Advocates in Discrimination Cases

§ 11.01	Introduction for Arbitration Advocates in Discrimination Cases	11-3
	[1] Chapter Design	11-3
	[2] Requirements for Practicing Arbitration Advocacy	11-5
	[3] Law Applicable to Arbitration	11-6
§ 11.02	Early Involvement	11-7
	[1] Shaping the Case for Minimal Liability	11-7
	[2] Increasing the Chances of Success	11-9
	[3] Consistency Internally and with Policy/Litigations	11-10
	[4] Legal Compliance	11-11

TABLE OF CONTENTS

xxix

	[5] Settlement Discussions	11-12
§ 11.03	Threshold Issues and Concerns	11-13
	[1] Is the Matter Arbitrable?	11-13
	[a] Procedural Arbitrability	11-13
	[b] Substantive Arbitrability	11-15
	[c] Gateway Issues are for the Court	11-16
	[2] Was the Grievance Processed in a Timely Manner?	11-16
	[3] Is the Case Within the Scope of Arbitration?	11-17
	[4] Is the Case by an Individual, Group, or is it a Class Action?	11-18
	[5] Estimating Liability	11-18
	[6] Is the Case Sound – Are the Witnesses?	11-19
§ 11.04	Arbitration Logistics	11-20
	[1] Attorney, Consultant, or Internal Advocate	11-20
	[2] Costs, What to Expect	11-21
	[3] Place and Time of Meeting	11-22
	[4] Court Reporter or Notes	11-23
	[5] Consolidation of Cases	11-25
	[6] Release Time for Grievant and Witnesses to Attend Arbitration	11-26
	[7] Subpoenas and Witnesses Not in Your Control	11-27
	[8] Arbitrator Conflicts of Interest and Ethics	11-27
§ 11.05	Arbitration Rules	11-33
	[1] Contract, Specificity v. Silence on Rules	11-33
	[2] Arbitrator Provider Agency Rules	11-33
	[a] AAA Rules, Employment and Labor Rules	11-33
	[b] FMCS Rules	11-34
	[c] JAMS	11-35
§ 11.06	Selecting the Arbitrator	11-36
	[1] Permanent Umpire v. Ad Hoc Arbitrator	11-36
	[2] The Repeat Arbitrator and Box Scoring	11-37
	[3] Direct Appointment of Arbitrator	11-37
	[4] The Arbitrator Panel and Profiles	11-37
	[5] Reviewing Prior Awards, How and Why	11-39

	[6] Checking with Others who have Been Before an Arbitrator	11-40
	[7] Attorneys v. Professors or Other Types of Arbitrators	11-40
	[8] Alternate Strike or Strike and Rank Order Selection System	11-41
§ 11.07	Types of Cases and Burden of Proof/Going Forward	11-43
	[1] Discipline or Discharge Cases	11-43
	[2] Contract/Handbook Interpretation	11-43
	[3] Burden of Going Forward/Burden of Proof	11-44
	[4] Standard of Proof	11-44
	[5] Substantive Issue Expertise?	11-44.1
§ 11.08	Theory of the Case - Identifying Relevant Contract/Policy Language	11-44.3
	[1] Clear and Consistent Theory	11-44.3
	[2] Framing the Issue	11-44.4
	[3] Remedy Questions	11-44.4
§ 11.09	Arbitration Practices	11-44.7
	[1] Discovery	11-44.7
	[2] Information Requests	11-44.7
	[3] Contract Interpretation Principles	11-45
	[4] Assembling and Presenting Documents and Exhibits, Hearsay and Video	11-46
	[5] Selecting and Preparing Witnesses	11-48
	[6] Opening Statements or Pre-Arbitration Briefs	11-49
	[7] Keeping Facts and Law Distinct	11-50
	[8] Cross Examination Miscues	11-50
	[9] Rebuttal Case	11-51
	[10] Civility and Courtesy	11-52
§ 11.10	Post-Hearing Briefs	11-53
	[1] Executive Summary – Our Story	11-53
	[2] Issue	11-54
	[3] Relevant Contract/Policy Language	11-54
	[4] Statement of Facts	11-54
	[5] Argument	11-55
	[6] Relief Issues	11-58
	[7] Conclusion of Post-Hearing Brief	11-59
§ 11.11	Retained Jurisdiction	11-60
	[1] <i>Functus Officio</i>	11-60
	[2] Limits on Retained Jurisdiction by Contract or Agreement	11-60
	[3] Conflict of Interest in Retained Jurisdiction	11-60

TABLE OF CONTENTS

xxxi

§ 11.12	How to Read the Award.	11-62
	[1] Damage Control	11-62
	[2] Vague Awards	11-62
	[3] Awards as Precedent	11-63
	[4] Appealing Arbitration Awards.	11-63
§ 11.13	Tips, Tricks and Traps	11-65

CHAPTER 12

Arbitration of Discrimination Cases

§ 12.01	Sex Discrimination Arbitrability	12-1
	[1] Introduction.	12-1
	[2] Arbitrability of Discrimination Claims	12-2
§ 12.02	The Role of Statutes, Courts and Parties in Arbitrability of Discrimination Claims	12-8
	[1] Applicable Statutes.	12-8
	[2] The Courts' and the Parties' Roles in Arbitrability.	12-11
	[3] Arbitrability Venue Issues	12-16
	[4] Arbitrability Objection Timing	12-17
	[5] Arbitrability Threshold Issues— Substantive or Procedural	12-20
	[6] Consolidated Arbitrations.	12-24
	[7] Class Action Arbitrations.	12-25
	[8] Jury Waivers on “Fallback” from Arbitration.	12-44
§ 12.03	Virtual Arbitration.	12-46
§ 12.04	Tips, Tricks, and Traps.	12-55

CHAPTER 13

Federal EEOC Administrative Procedures

§ 13.01	The Purpose and Powers of the Equal Employment Opportunity Commission	13-2
	[1] Purpose of the EEOC.	13-2
	[2] Powers of the EEOC	13-3
	[3] Position Paper Procedures	13-3
	[4] The EEOC's Charge Processing Procedures	13-6
§ 13.02	Charging Parties and Respondents.	13-6.2
	[1] Charging Parties	13-6.2
	[a] Coverage	13-6.2

SEX DISCRIMINATION

	[b] Charges by Persons Aggrieved	13-6.2
	[c] Charges of Third-Party Interference	13-8
	[d] Application of Title VII to Conduct Overseas and to Foreign Employers Discriminating in the United States	13-11
	[e] Charges by Persons of Protected Group	13-12.1
	[f] Charges by Persons Not of Protected Group	13-12.1
	[g] Charges by Organizations Aggrieved	13-12.3
	[h] Testers	13-12.3
	[i] Commissioner Charges	13-12.5
	[j] Charge Filing Pre-Condition to Suit Not Jurisdictional	13-12.5
	[2] Respondents	13-12.7
	[a] Employers	13-12.7
	[b] Unions and Apprenticeship Programs	13-13
	[c] Employment Agencies	13-14
§ 13.03	Procedures for the Preparation and Filing of an EEO Charge	13-16
	[1] The Contents of an EEO Charge	13-16
	[2] Filing an EEO Charge and Time Limitations	13-18
	[a] Generally	13-18
	[b] Date of Occurrence	13-22
	[i] Individual Acts	13-22
	[ii] Discriminatory Policies	13-24.2
	[iii] Continuing Violations	13-24.3
	[c] Waiver of the EEOC Charge Filing Period	13-24.6
	[d] Estoppel or Tolling	13-24.7
	[3] Service of an EEO Charge	13-24.7
	[4] Processing of Systemic Cases	13-24.7
§ 13.04	EEOC Investigation, Authority and Procedures	13-25
	[1] Access to, and Production of, Evidence	13-28
	[a] Evidence to Obtain from Charging Party/Complainant	13-28
	[b] Evidence to Obtain from Respondent	13-29

TABLE OF CONTENTS

xxxiii

	[c] Evidence to Obtain from Witnesses	13-29
	[d] Documentary Evidence	13-30
	[e] Evidence from Federal Agencies	13-30
	[2] Witnesses: Subpoena Power	13-31
	[3] After the EEOC Investigation and Suit, Continuing EEOC Investigation	13-32.1
§ 13.05	EEOC Determinations	13-33
	[1] Reasonable Cause Determinations	13-33
	[2] No Cause Determinations	13-33
	[3] Dismissal	13-34
	[4] Negotiated Settlements	13-35
§ 13.06	Confidentiality	13-36
§ 13.07	Conciliation Process	13-36.1
	[1] Statutory Conciliation Requirements	13-36.1
	[2] Judicial Review of EEOC Conciliation	13-36.1
§ 13.08	Withdrawals	13-37
§ 13.09	Notice of “Right-To-Sue”	13-38
§ 13.10	Tips, Tricks, and Traps	13-40

CHAPTER 14

Damages

§ 14.01	Overview	14-2
	[1] General Considerations	14-2
	[2] Federal Statutory Remedies Available	14-5
	[a] The Civil Rights Act of 1964	14-5
	[b] The Civil Rights Act of 1871	14-6
	[c] The Civil Rights Act of 1991	14-9
	[d] Title IX of the Educational Amendments of 1972	14-13
	[i] Sex Discrimination and Retaliation Liability	14-15
	[ii] Deliberate Indifference	14-16
	[iii] Damages	14-18
	[e] Family and Medical Leave Act of 1993	14-19
	[f] Equal Pay Act of 1963	14-22
	[g] National Labor Relations Act	14-22
	[h] Violence Against Women’s Act (VAWA)	14-22.1
	[3] General View of Federal Guidelines on Damages	14-22.2

	[4] General View of Federal Guidelines on Evidence in Light of the Civil Rights Act of 1991	14-22.2
§ 14.02	Compensatory Damages	14-22.8
	[1] Introduction	14-22.8
	[2] Past Pecuniary Loss	14-22.8
	[3] Future Pecuniary Loss	14-23
	[4] Nonpecuniary Damages	14-23
	[5] Forensic Examinations, Discovery and Evidence	14-24
	[a] Federal Rules of Civil Procedure, Rule 35	14-25
	[b] Federal Rules of Civil Procedure, Rule 26	14-29
	[c] Federal Rules of Evidence, Rule 412	14-30
	[6] Jury Trials	14-32
	[7] Personal Liability	14-33
§ 14.03	Punitive Damages	14-34
	[1] The Civil Rights Act of 1991 and Punitive Damages	14-34
	[2] EEOC Standard Required for Determining Punitive Damages	14-36.12
	[3] Financial Wealth of Defendants	14-36.13
§ 14.04	Mitigation of Damages	14-36.15
	[1] Mitigation of Damages and Burden of Proof	14-36.15
	[2] Model Jury Instruction on Mitigation of Damages	14-36.18
§ 14.05	After-Acquired Evidence Doctrine	14-36.20
§ 14.06	Tax Implications	14-36.26
§ 14.07	Prejudgment Interest	14-40
§ 14.08	Settlement Considerations	14-42
	[1] Guideline Suggestions	14-42
	[2] FRCP Rule 68 Offers in Named Plaintiff and Class Actions	14-44
	[3] Tax Considerations	14-45
	[4] Attorney's Fees	14-46
	[5] Settlement Agreement Limitations	14-47
§ 14.09	State Law Remedies	14-48
§ 14.10	Overview	14-49
	[1] Tips, Tricks and Traps	14-49

CHAPTER 15

Attorney's Fees in Sex Discrimination Cases

§ 15.01	Introduction	15-2
§ 15.02	Why Attorney's Fees and Certain Costs May Be Shifted	15-4.1
§ 15.03	Who May Recover Attorney's Fees and Costs.	15-6
	[1] Plaintiff's Rights to Recover Fees.	15-6
	[2] Defendant's Rights to Recover Fees.	15-16.9
	[a] Prevailing Defendant Recovery of Fees in Non-Frivolous Cases	15-16.9
	[b] Prevailing Defendant Recovery of Fees in Frivolous or Mixed Results Cases.	15-18
	[3] Fees and Intervenors	15-18.1
	[4] Plaintiffs in Arbitration	15-18.1
§ 15.04	Expert Witness Fees	15-20
§ 15.05	How Statutory Fees Are Calculated.	15-22
	[1] The Lodestar Concept	15-22
	[2] Relationship of Statutory and Private Fee Arrangements	15-22
	[3] Reasonable Hours, Inclusions, and Exclusions	15-24
	[4] Reasonable Rates	15-24.4
	[5] Adjustments to the Lodestar	15-25
	[6] Post-Judgment Interest on Attorney's Fees.	15-28.1
	[7] Impact of Taxation on Attorney's Fees and Settlements	15-28.4
	[8] Electronic Legal Research Costs.	15-28.7
	[9] Attorney's Fees that are Uncontested	15-28.8
§ 15.06	Timing and Method for Fee Petitions	15-28.10
§ 15.07	Recovery of Fees from Courts, Boards and Agencies.	15-31
§ 15.08	Rule 68 Offers and Settlement Agreements	15-33
	[1] Rule 68 Offers of Judgment	15-33
	[2] Settlement Agreements That Waive Attorney's Fees	15-33
§ 15.09	State Laws on Fee Shifting for Agency Level Work.	15-35
§ 15.10	Loss of Fees	15-37
§ 15.11	Enhancements to Lodestar Attorney's Fees.	15-38

§ 15.12	Proportionality and Attorney's Fees	15-42
§ 15.13	Moot Case and Attorney's Fees	15-43
§ 15.14	Sequential Attorney Fees and Ancillary Jurisdiction	15-45
§ 15.15	Tips, Tricks and Traps	15-47
§ 15.16	Summary	15-49

CHAPTER 16

Human Resources Considerations

§ 16.01	Introduction	16-2
§ 16.02	Policy Manuals and Complaint Procedures	16-5
	[1] EEOC Guideline and Complaint Procedures	16-5
	[2] Employee Handbook or Applicant Mandatory Arbitration Agreement	16-8
§ 16.03	Investigations of Discrimination Allegations	16-9
§ 16.04	Potential for Conflict of Interest Between Employer and Accused	16-14.5
§ 16.05	Labor Unions, Collective Bargaining, and Discrimination	16-18
§ 16.06	Employee Selection and Testing	16-21
§ 16.07	Multilocation Human Resources Administration	16-26
§ 16.08	Model Nondiscrimination and Sexual Harassment Policies	16-27
§ 16.09	Human Resources Concerns in Schools, Colleges, and Universities	16-37
§ 16.10	Public Nature of Litigation	16-41
§ 16.11	Non-Fraternization Policies	16-45
§ 16.12	Class Action Litigation or Arbitration	16-47
§ 16.13	Settlement Offers in Class Actions	16-58.1
§ 16.14	Temporary or Term Employees	16-60
§ 16.15	Same Sex Spouses, Domestic Partners, and Benefits	16-64
§ 16.16	Pay Secrecy	16-66
§ 16.17	Benefits Design and Administration	16-69
§ 16.18	Constructive Discharge	16-70
§ 16.19	Public Employers and Employee Free Speech Rights	16-72
§ 16.20	Sexual Harassment Prevention Training	16-74
§ 16.21	Ombuds Programs for Discrimination Cases	16-76
§ 16.22	Statutes Related to Corporate Board Member Sex	16-85

TABLE OF CONTENTS

xxxvii

§ 16.23	New State Statutes and Statutory Amendments Related to Human Resources . . .	16-86
[1]	California	16-86
[2]	Colorado	16-91
[3]	Connecticut	16-91
[4]	District of Columbia	16-91
[5]	Florida	16-92
[6]	Georgia	16-92
[7]	Hawaii	16-92
[8]	Maine	16-92
[9]	Minnesota	16-95
[10]	Nebraska	16-95
[11]	Oregon	16-96
[12]	Texas	16-96

CHAPTER 17

Ethics and Diversity, Cybersecurity, Practical Concerns for Sex Discrimination Law

§ 17.01	Overview	17-2
§ 17.02	Mediation and the Unauthorized Practice of Law	17-4
[1]	Facilitative vs. Evaluative Mediation	17-4
[2]	Early Prohibitions on Non-Attorneys	17-5
[3]	Defining the Practice of Law	17-6
[4]	Determining the Unauthorized Practice of Law	17-6
[a]	The “Commonly Understood” Test. . .	17-7
[b]	The “Client Reliance” Test.	17-7
[c]	The “Application of the Law to the Facts” Test	17-8
[d]	The “Affecting Legal Rights” Test. . .	17-8
[e]	The “Attorney-Client Relationship” Test	17-8
[5]	Avoiding the Unauthorized Practice of Law	17-8
[6]	Formal Rules Guidelines for Mediators	17-9
[7]	The Virginia Guidelines.	17-10
[8]	Written Mediation Agreements	17-13
[9]	Conclusions.	17-14

§ 17.03	Ethics for Attorney-Neutrals in Discrimination Cases	17-15
	[1] Proposed Model Rule.	17-15
	[a] Diligence and Competence	17-16
	[b] Confidentiality	17-17
	[c] Impartiality.	17-19
	[d] Conflicts of Interest.	17-21
	[e] Fees	17-23
	[f] Fairness and Integrity	17-24
	[2] Other Concerns.	17-25
§ 17.04	Ethics and Electronic Discovery	17-27
	[1] Ethics Codes.	17-27
	[2] Judicial Rulings	17-29
	[3] Inadvertently Sent Documents and E-mails	17-33
§ 17.05	Ethics and Conflict of Interest.	17-35
	[1] Attorney-Employee Suing Own Employer	17-35
	[2] Employer Codes of Ethics.	17-36
	[3] Ethical Disclosure Related to Litigation or Arbitration in California.	17-36
	[4] Ethical Codes, Conflict of Interest and Free Speech	17-45
§ 17.06	Codes of Ethics.	17-46.1
§ 17.07	Ethics Hotlines	17-48
§ 17.08	Ethics and Discovery	17-49
§ 17.09	Ethics and Law for Arbitrators, Retained Jurisdiction	17-51
§ 17.10	Diversity	17-57
§ 17.11	State Ethics Board Members Have Absolute Immunity.	17-60.5
§ 17.12	Ethics of Undisclosed Taping of Telephone Conversations by Attorneys.	17-61
§ 17.13	Systemic Ethical Conflict of Interest Issues in Arbitration	17-63
	[1] Arbitrability and Arbitrator Fees as Ethical Conflict of Interest	17-63
	[2] Retained Jurisdiction as Ethical Conflict of Interest.	17-64
	[3] Possible Solutions to the Conflict of Interest Problems	17-64
	[4] Model Language to Limit Arbitrator.	17-65
	[5] Modified FMCS Arbitration Rules (Labor-Management Arbitrations).	17-68

TABLE OF CONTENTS

xxxix

	[6] Modified AAA Labor Arbitration Rules	17-81
§ 17.14	Ethics and the Virtual Office	17-98

CHAPTER 18

Sexual Orientation and Gender Under Federal Title VII

§ 18.01	Introduction	18-1
§ 18.02	Historical Background	18-3
§ 18.03	The Supreme Court Nationalized Sexual Orientation and Gender Law	18-5
§ 18.04	Transgender and Transsexuals, Including Restroom Assignment.	18-17
	[1] Background.	18-17
	[2] Statutes and Court Decisions.	18-19
	[3] Executive Orders	18-24
	[4] Agency Guidance and Fact Sheets	18-25
	[a] EEOC.	18-25
	[b] OSHA.	18-27

TABLE OF ABBREVIATIONS	TA-1
---	------

INDEX	I-1
------------------------	-----

