The Proliferation of Employment Discrimination Statutory Protections: An Overview

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The Proliferation of Employment Discrimination
Statutory Protections: An Overview

An attorney who is bringing an employment discrimination suit for the first time faces a jumble of prohibitions, exemptions, and time limitations. The number of statutory remedies available to the person who has been discriminated against in employment has expanded greatly in the last twelve years. The Civil Rights Act of 1964,\(^1\) section 1981,\(^2\) the National Labor Relations Act,\(^3\) the Equal Pay Act,\(^4\) and the Age Discrimination in Employment Act,\(^5\) prohibit forms of discrimination for which there were no statutory remedies as recently as the early 1960's. This article will examine the coverage, prohibitions, procedures, and remedies of the major employment discrimination statutes.

**TITLE VII OF THE CIVIL RIGHTS ACT OF 1964**

Title VII of the Civil Rights Act of 1964 (Title VII)\(^6\) is the primary statute in the field of employment discrimination. It was intended to serve as a vehicle to remedy employment discrimination based on race, color, religion, sex, or national origin.\(^7\) The statute also created the Equal Employment Opportunity Commission (EEOC), which processes charges of Title VII violations.\(^8\) Congress amended the Act in 1972,\(^9\) effecting a number of significant changes in the coverage and enforcement of the statute.\(^10\) The amendments ex-

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10. The amendments reduced the number of employees necessary for coverage from 25 to 15, extended coverage to all state and local governments, added a new section extending coverage to federal government employees with enforcement relegated to the Civil Service Commission, eliminated the exemption for educational institutions, broadened the exemption for religious organizations, and, finally, granted the EEOC the power to sue, and lengthened the period for filing a charge from 90 to 180 days. 42 U.S.C. §§ 2000e to e-17 (Supp. IV 1974). The definition of the religious exemption was broadened from "religious activities" to "all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j) (Supp. IV 1974), amending 42 U.S.C. § 2000e (1970). It seems that Congress intended only to preserve the statutory right of sectarian schools to discriminate on religious grounds in hiring, but it is apparent that the new definition goes further. See King's Garden, Inc. v. FCC, 498 F.2d 51, 54 (D.C. Cir. 1974).
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panded the scope of the Act and, by granting the EEOC enforcement powers, added a new potential plaintiff to each Title VII suit.

Coverage and Exemptions

Title VII applies to any "industry affecting commerce," where fifteen or more persons are employed. Employers covered by the Act include individuals, corporations, unions, partnerships, trusts, and governments. The Act also regulates the practices of employment agencies and labor organizations.

Prohibited Acts and Defenses

Title VII prohibits discrimination in hiring, discharge, compensation, terms, conditions, or privileges of employment where such discrimination is based on the individual's race, color, religion, sex, or national origin. An employer may not limit, segregate, or classify employees in ways that deprive them of employment opportunities. Restrictions are placed on employment notices and advertising, and the use of ability tests is illegal where the "test, its administration or action upon the results is . . . designed, intended or used to discriminate."

The defenses Title VII makes available to the employer are business necessity, a bona fide seniority or merit system, ability testing, and bona fide occupational qualifications. The first, the business necessity defense, is derived from a provision stating that an individual shall have no recourse under the Act if a court finds that the alleged discrimination occurred "for any reason other than discrimination on account of race, color, religion, sex, or national origin. . . ." This defense has seldom succeeded. Arguments of economic necessity (administrative costs of wage garnishments) or security (discrimination based on existence of arrest record) have not persuaded the courts.

12. Id. at § 2000e(b).
13. Id. at § 2000e(a).
14. Id. at §§ 2000e(c), (d).
16. 42 U.S.C. § 2000e-2(a)(2) (Supp. IV 1974). Title VII does not prohibit all forms of discrimination. For example, an employee would have no protection under the Act against some types of discrimination, including political association or private morality.
Title VII allows an employer to discriminate pursuant to a "bona fide seniority or merit system . . ." or pursuant to a system that measures earnings by quantity or quality of production.\textsuperscript{21} The courts have had some difficulty interpreting this provision as the Act does not define "bona fide"\textsuperscript{22} and the legislative history is of little assistance.\textsuperscript{23} An employer is also protected if he acts upon the results of a professionally developed ability test that is not designed or used to discriminate.\textsuperscript{24} Since the United States Supreme Court decision in \textit{Griggs v. Duke Power Co.},\textsuperscript{25} holding that such tests must be demonstrably job-related, this defense is rarely successful in purely Title VII attacks.\textsuperscript{26}

Additionally, Title VII excepts discriminatory employment practices based on bona fide occupational qualifications (bfoq).\textsuperscript{27} The bfoq must be "reasonably necessary to the normal operation" of the enterprise, and the exception applies only to discrimination based on religion, sex, or national origin.\textsuperscript{28} There is no exception for race or color. The courts have construed this provision narrowly. For example, customer preference was insufficient to justify an airline requirement that all cabin attendants be female.\textsuperscript{29} Weight lifting requirements used to exclude females are permissible only if it can be demonstrated that "all or substantially all" females would be unable to lift the specified weight.\textsuperscript{30}

\textsuperscript{22} See, e.g., Watkins v. United Steel Workers, Local No. 2369, 516 F.2d 41 (5th Cir. 1975).
\textsuperscript{25} 401 U.S. 424 (1971).
\textsuperscript{28} Id.
\textsuperscript{30} Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).
Procedures and Time Limitations

Title VII procedures are complex and vary depending upon whether the state where the alleged violation occurred has a fair employment practices commission. The individual has 180 days from the time of the allegedly discriminatory act to file a charge with the appropriate state agency (or with the EEOC if there is no state fair employment practices commission). Since some violations are continuing in nature rather than single occurrences, the time limitation does not begin to run until the violations terminate.

The state agency is given exclusive jurisdiction for sixty days to investigate and, if it finds reasonable cause to believe that a violation has occurred, to attempt to conciliate. Following this sixty day period the individual must file a complaint within thirty days of the time the state terminates its proceedings. Regardless of the disposition of the state proceedings, the complainant must file with the EEOC within 300 days of the discriminatory incident.

The EEOC then conducts its own investigation. If it finds that a violation may have occurred, it is required to use the "informal methods of conference, conciliation, and persuasion" to remedy the violation. Realistically, however, the EEOC does not have the time or necessary work force to attempt conciliation or even to conduct

31. When Title VII was enacted in 1964, only 25 states had fair employment practice laws. At the present time, 42 states have such statutes. 8 FAIR EMP. PRAc. MAN. (BNA) § 451:22-23. The state laws vary in coverage, enforcement, and sanctions, some making violation a misdemeanor while others rely on voluntary compliance. Id. at § 451:1. Most prohibit employment discrimination on the basis of race, religion, and national origin, and some include sex and/or age. The state laws generally rely upon education and conciliation, and hence there has been minimal litigation in the state courts. Id. at 451:3.

32. 42 U.S.C. § 2000e-5(e) (Supp. IV 1974). Even though a state agency exists, a wise precaution for the aggrieved individual or his attorney would be to file with the EEOC at the same time that he files with the state agency. This procedure would provide assurance that the initial filing periods are met. See Vigil v. American Tel. & Tel. Co., 455 F.2d 1222 (10th Cir. 1972). The EEOC then must wait for the state's 60-day exclusive jurisdiction to elapse before beginning its own investigation. Love v. Pullman Co., 404 U.S. 522 (1972).

33. As a general guideline, employees who are alleging discrimination by their present employers are alleging a continuing violation so that the limitation period is not tolled while the violation continues. Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186 (7th Cir.), cert. denied, 404 U.S. 939 (1971). The 180-day limitation period begins for former employees on the date of their departure. Terry v. Bridgeport Brass Co., 519 F.2d 806 (7th Cir. 1975). This limitation has been extended by some courts for equitable reasons where the plaintiff can show he was not aware until after his discharge of the discriminatory nature of the action. Reeb v. Economic Opp. Atlanta, Inc., 516 F.2d 924 (5th Cir. 1975).


35. Id. at § 2000e-5(c), (e).

36. Id. at § 2000e-5(b). The absence of an EEOC finding of "reasonable cause" is not, however, a bar to private suit. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973).
thorough investigations in all cases. If the EEOC does not carry out its statutory mandate to attempt conciliation, the private plaintiff is not barred from filing suit. But conciliation attempts are a condition precedent to the EEOC's bringing suit.

If no conciliation agreement has been reached within thirty days from the time the charge was filed with the EEOC, the Commission may file a complaint in federal district court. The EEOC may lose its right to sue if it does not file suit within 180 days of receiving the charge. Where there has been no conciliation agreement and the EEOC has not gone to court within 180 days of the filing date, the aggrieved individual may request a notice of right to sue. This "right to sue letter" evidencing the lapse of the EEOC's period of exclusive jurisdiction is almost always a prerequisite to private suit. While an individual is entitled to the right to sue letter after the 180-day period has ended, he is also free to wait until the EEOC.


40. Until fairly recently a conflict existed within the courts of appeals as to whether the EEOC's right to bring suit was limited by the 180-day exclusive jurisdiction provision of the Act. The remedial purposes of the Act, together with the EEOC's heavy work load and limited work force would indicate that the Commission should not be held to such a strict limitation. Laches and the employer's legitimate interest in having the controversy settled are contrary considerations. The courts now seem to agree that the EEOC may file suit at any time. See, e.g., EEOC v. Duval Corp., 528 F.2d 945 (10th Cir. 1976); EEOC v. Kimberly Clark Corp., 511 F.2d 1352 (6th Cir.), cert. denied, 423 U.S. 994 (1975); EEOC v. E.I. duPont de Nemours & Co., 516 F.2d 1297 (3d Cir. 1975); EEOC v. Cleveland Mills Co., 502 F.2d 153 (4th Cir. 1974), cert. denied, 420 U.S. 946 (1975) (suit allowed four and a half years after filing of charge); EEOC v. Louisville & Nashville R.R. Co., 506 F.2d 610 (5th Cir. 1974).

However, where an individual has filed suit, the Commission may then be limited to its right of permissive intervention. EEOC v. Missouri Pac. R.R. Co., 493 F.2d 71 (8th Cir. 1974). In some situations the EEOC could still file a separate suit based on distinct allegations. EEOC v. Occidental Life Ins. Co., 535 F.2d 533 (9th Cir.), cert. granted, 97 S. Ct. 638 (1976) (married woman challenges pregnancy-benefit provisions; EEOC allowed to bring suit against same defendant concerning discriminatory policies affecting men and unmarried women); EEOC v. Huttig Sash & Door Co., 511 F.2d 453 (5th Cir. 1975) (private suit challenging segregated facilities dismissed; EEOC allowed to maintain suit concerning discriminatory job classifications).


42. Stebbins v. Continental Ins. Cos., 442 F.2d 843, 845-46 (D.C. Cir. 1971). However, the court indicated that the requirement may be excused if the individual persuasively claims that it is a hardship for him to obtain the letter or that the EEOC refuses to give it to him. Upon receipt of the letter, the individual has 90 days to file a complaint in federal court. 42 U.S.C. § 2000e-5(f)(1) (Supp. IV 1974).
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has completed its investigation and conciliation attempts.\textsuperscript{43}

The relationship between Title VII and grievance procedures was recently clarified by the Supreme Court in \textit{IBEW, Local 790 v. Robbins & Myers, Inc.}\textsuperscript{44} The Court held that resort to grievance procedures does not toll the running of the EEOC limitation period.\textsuperscript{45} Not settled is whether the period may be extended for equitable reasons or whether it is an inflexible jurisdictional prerequisite.\textsuperscript{46}

Class actions under Title VII permit a large group of plaintiffs to obtain relief in a single suit. Most courts have taken a flexible approach to the requirements of rule 23 of the Federal Rules of Civil Procedure.\textsuperscript{47} Some employ the presumption that race or sex discrimination is class discrimination by definition.\textsuperscript{48} Since all class members need not have filed a complaint with the EEOC,\textsuperscript{49} persons otherwise time-barred from bringing individual actions can be afforded relief. The rule's notice requirement—an expensive undertaking where the class is large—may defeat a class action. But this problem arises infrequently because employment discrimination class actions usually fall under a subsection of rule 23 that does not require notice.\textsuperscript{50}

\textbf{Remedies}

The EEOC has limited enforcement powers. It may not issue orders or impose sanctions against employers who have violated Title VII. However, the Commission may act as plaintiff in a Title VII suit and is able to seek temporary injunctions in federal district court.\textsuperscript{51} Generally, to obtain a preliminary injunction the plaintiff

\textsuperscript{43} Cunningham v. Litton Indus., 413 F.2d 887 (9th Cir. 1969). It should be remembered, however, that initiation of a Title VII suit does not toll the statute of limitations in a § 1981 action. Johnson v. Railway Express Agency, 421 U.S. 454 (1974).

\textsuperscript{44} 97 S.Ct. 441 (1976).

\textsuperscript{45} Id. at 446-47.

\textsuperscript{46} See note 33 supra.


\textsuperscript{49} Miller v. International Paper Co., 408 F.2d 283 (5th Cir. 1969).

\textsuperscript{50} Class actions based on charges of employment discrimination are generally brought under rule 23(b)(2). That section, which involves pleas for injunctive relief, does not require notice. Notice is merely discretionary on the part of the court. Rule 23(b)(3), which does require notice, is the section used when the relief sought is primarily damages.

must demonstrate both a high probability of success on the merits and threat of irreparable injury if preliminary relief is not granted.\textsuperscript{52} The existence of irreparable injury may sometimes be presumed from a preliminary determination that Title VII has in fact been violated.\textsuperscript{53}

Title VII gives the courts broad power to fashion relief.\textsuperscript{54} In the typical case, both back pay and attorneys' fees are awarded to the successful plaintiff. In \textit{Albemarle Paper Co. v. Moody},\textsuperscript{55} the Supreme Court held that back pay in Title VII cases should be denied only for reasons that "if applied generally, would not frustrate [Title VII's] central statutory purposes of eradicating discrimination . . . and making persons whole for injuries suffered through past discrimination."\textsuperscript{56} Thus, back pay is consistently awarded in Title VII cases except in the rare instance where the employer is complying in good faith with state "protective laws" or relying on EEOC guidelines or rulings.\textsuperscript{57}

The Act provides that a court may allow the prevailing party reasonable attorneys' fees.\textsuperscript{58} While some courts have allowed the successful \textit{defendant} to receive attorneys' fees,\textsuperscript{59} the usual practice is to allow such fees only to prevailing plaintiffs. The rationale is that these awards are intended to encourage individuals to assert their rights under Title VII as well as to penalize employers for pursuing meritless defenses.\textsuperscript{60} The burden is on the plaintiff to prove

\begin{footnotes}
\item[52] See, e.g., \textit{Berg v. Richmond Unified School Dist.}, 528 F.2d 1208 (9th Cir. 1975), \textit{cert. granted}, 97 S. Ct. 806 (1977).
\item[53] Culpepper v. Reynolds Metals Co., 421 F.2d 888 (5th Cir. 1970).
\item[54] Section 706(g) of the Act, 42 U.S.C. \$ 2000e-5(g) (Supp. IV 1974), provides, in pertinent part:
\begin{quote}
[T]he court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.  
\end{quote}
\textit{422 U.S. 405} (1975).
\item[55] \textit{Id.} at 421. Back pay liability under the 1972 amendments is limited to two years prior to the filing of the charge. 42 U.S.C. \$ 2000e-5(g) (Supp. IV 1974).
\item[56] \textit{See} Wernet v. Amalgamated Meat Cutters & Butchers, Local 17, 484 F.2d 403, 404 (6th Cir. 1973) (union protected where relied on state statute requiring employer to maintain separate seniority lists for men and women); Kober v. Westinghouse Elec. Corp., 480 F.2d 240 (3d Cir. 1973) (no abuse of discretion in denial of back pay where employer relied on state law limiting hours women may work).
\item[58] Van Hoomissen v. Xerox Corp., 503 F.2d 1131 (9th Cir. 1974).
\item[59] Robinson v. Lorillard Corp., 444 F.2d 791, 804 (4th Cir.), \textit{cert. dismissed}, 404 U.S.
that he is entitled to such an award.61

Affirmative relief may also be granted by the courts, and usually takes the form of preferential treatment or quotas. This remedy is considered appropriate when the employer's discriminatory action consists of a practice affecting a large group of persons rather than a single individual. Eradicating the effects of past discrimination through affirmative action presents difficulties for the courts due to the statutory prohibition on the use of preferential treatment.62 Additionally, quotas may result in reverse discrimination charges.63 Many courts have nevertheless used percentage remedies for Title VII violations.64 Examples of other types of affirmative relief include retroactive seniority credit65 and union merger to eliminate segregation.66

Using their powers liberally, some courts have even awarded punitive damages, although the circuits are divided on whether they are ever appropriate in a Title VII action. In EEOC v. Detroit Edi-

1006 (1971). In Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974), the Fifth Circuit listed a number of factors that should be considered by a court in determining the propriety and the size of such awards: (1) the time and labor required, (2) the novelty and difficulty of the questions, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.


62. 42 U.S.C. § 2000e-2(j) (1970). This prohibition has been interpreted to mean that "while quotas merely to attain racial balance are forbidden, quotas to correct past discriminatory practices are not." United States v. Lathers, Local 46, 471 F.2d 408 (2d Cir.), cert. denied, 412 U.S. 939 (1973).


64. See, e.g., Kirkland v. Department of Correction Servs., 520 F.2d 420 (2d Cir. 1975); Associated Gen. Contractors v. Alshuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974); United States v. Ironworkers, Local 86, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971). When quotas are used, the courts usually try to limit the scope as much as possible, avoiding the imposition of an inflexible requirement so that the employer has some leeway to select on a merit basis, making the time limitation a temporary one, or requiring a goal rather than a permanent quota. See, e.g., Rios v. Steamfitters, Local 638, 501 F.2d 622 (2d Cir. 1974); Local 53, Int'l Ass'n of Heat Workers v. Volger, 407 F.2d 1047 (5th Cir. 1969).


son Co., the Sixth Circuit denied such damages, holding that the statute allows only equitable remedies. Money damages in the form of back pay awards are generally considered the sole exception to this limitation since they represent a form of equitable restitution. Nevertheless, a few courts have allowed punitive damages as well as other forms of compensation.

The Federal Employee Under Title VII

The 1972 amendments to Title VII added a new section providing that personnel actions affecting federal employees or applicants "shall be made free from any discrimination based on race, color, religion, sex, or national origin," generally giving these persons the same protections as non-federal workers. Previously, federal employees had no statutory recourse for employment discrimination.

At present, it is unclear which of the Act's defenses are available to the federal government. The federal employee section incorporates the business necessity defense, but a defense based on a bona fide seniority or merit system, ability testing, or a bfoq appears to have no application to federal employment. The courts have not yet addressed this apparent omission.

The federal employee's or applicant's procedural course and the time period in which to challenge federal practices differ substantially from that of other Title VII complainants. He has only thirty days to bring alleged discrimination to the attention of a designated counselor. If the employee is not satisfied with the counselor's conciliation attempts, he has fifteen days to file a formal complaint. The complaint is heard by an "examiner," following which the agency head (or his designee) will rule on the merits of the complaint. The complainant then has another fifteen days to appeal to the Civil Service Commission. Following the Civil Service hearing, if the employee remains dissatisfied he may file a civil

67. 515 F.2d 301 (6th Cir. 1975).
70. Id. at § 2000e-16(d). Section 16(d) incorporates § 5(g) which includes the business necessity defense. Not incorporated are §§ 2(e) and (h) which set forth the other defenses.
71. 5 C.F.R. § 713.214(a)(i) (1976).
72. Id. at § 713.214(a)(ii).
73. Id. at § 713.218(a).
74. Id. at § 713.221(a).
75. Id. at § 713.233(a). The time limit may be extended where the employee was not aware of the limitation or where extenuating circumstances exist. Id. at § 713.233(b).
action in federal court within thirty days.76 Once in federal court, however, the action becomes indistinguishable from that of other Title VII plaintiffs, with the same range of remedies available to the federal employee.77

SECTION 1981 OF THE CIVIL RIGHTS ACT OF 1866

Section 1981 was enacted as part of the Civil Rights Act of 1866.78 It provides that all persons shall have the same right to make and enforce contracts as is enjoyed by white citizens. For more than a century the Act was applied only to discrimination occurring under "color of state law."79 In 1968, the Supreme Court, in Jones v. Alfred H. Mayer Co.,80 expanded the scope of the Civil Rights Act of 1866 by holding that state action was not a prerequisite to suit.81

Coverage and Exemptions

Section 1981's protection of the right to contract includes privileges relating to employment. Unlike Title VII, there is no restriction concerning the minimum number of employees an employer must have and no interstate commerce requirement. The section prohibits discrimination based on race, and until recently the courts were in conflict as to whether it affords a remedy to white as well as black litigants.82 The Supreme Court in McDonald v. Santa Fe Trail Transportation Co.83 settled this dispute by holding that the Act was meant to proscribe discrimination against, or in favor of, a member of any race. In contrast to Title VII, section 1981 prohibits discrimination against aliens84 but does not reach discrimination based on sex, religion, or national origin.

76. 42 U.S.C. § 2000e-16(c) (Supp. IV 1974). See Chandler v. Roudebush, 96 S. Ct. 1949 (1976), where the Supreme Court held that a federal employee has the right to a trial de novo following a Civil Service hearing.
81. Id. Although Jones applied to § 1982, in Johnson v. Railway Express Agency, 421 U.S. 454 (1975), the Court held that § 1981 also did not require state action.
84. Graham v. Richardson, 403 U.S. 365, 377 (1971). A number of courts have reached the conclusion that § 1981 provides no remedy for sex discrimination. Waters v. Heublein
Prohibitions and Defenses

All facets of an employment situation or union membership are considered contractual relationships within the meaning of section 1981. Consequently, when discrimination occurs in hiring, promotion, union membership, or some other employment benefit, the affected individual has been denied the right to contract because of his race or national origin and, therefore, has a cause of action under this statute.

The section 1981 plaintiff must initially establish that he or members of his group receive different treatment than similarly situated workers of another race or citizenship. In addition, the section 1981 plaintiff must demonstrate an intent of the employer to discriminate against him or members of his group. Since the Supreme Court decision of Washington v. Davis, plaintiffs may use Title VII standards to demonstrate the disparate impact of a test or practice. However, establishing this Title VII prima facie case is not enough; a section 1981 plaintiff must also demonstrate intent to discriminate. Prior to Washington v. Davis, business necessity was held to be a defense to section 1981 as well as to Title VII. It is unclear whether this and other Title VII defenses are now available in section 1981 actions.

Procedures and Time Limitations

Section 1981 procedures are considerably simpler than those applicable to Title VII. There is no administrative machinery attending a section 1981 action, and there are no time limitations comparable to those of Title VII. The individual must simply file a complaint in the appropriate federal district court. However, there is confusion as to which statute of limitations is applicable in section 1981 actions. Congress failed to enact a statute

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89. See text accompanying notes 32-43 supra.
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of limitations applicable to the Civil Rights Act of 1866 forcing federal courts to turn to the state statutes. In attempting to engraft the appropriate state laws, federal courts use various state statutes of limitations including contract statutes and statutes governing liabilities created by federal law. The time limitations specified by these statutes can differ greatly.

Another procedural difficulty for section 1981 plaintiffs is the relationship between that section and Title VII. The initial question is whether the section 1981 discriminatee must exhaust EEOC administrative procedures before bringing his section 1981 action. The courts of appeals that considered the question agreed that exhaustion was not necessary. And the Supreme Court, in Johnson v. Railway Express Agency, stated that Congress did not expect that a section 1981 action could be used only upon completion of EEOC requirements. Thus, the section 1981 plaintiff need have no contact with the EEOC before initiating suit.

Because of this dual protection, complications arise when the complainant decides to pursue both Title VII and section 1981 remedies. The Johnson Court made clear that the initiation of a Title VII complaint does not toll the statute of limitations on a section 1981 action. Therefore, the running of the statute of limitations may force the plaintiff to file the section 1981 action before the EEOC has completed its conciliation attempts. In turn, the filing of the civil action may discourage any meaningful conciliation efforts. The Court suggests that a plaintiff might ask a district court

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93. Limitations may range from one year under the new Tennessee statute applicable to federal civil rights actions, TENN. CODE ANN. § 28-304 (Supp. 1976), to 10 years under the Louisiana statute applicable to contract actions, LA. CIV. CODE ANN. art. 3544 (1953). See Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir. 1971). In Illinois § 1981 actions, the Seventh Circuit has applied the five-year statute of limitations for civil actions not otherwise provided for, ILL. REV. STAT. ch. 83 § 16 (1975). Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir.), cert. denied, 400 U.S. 911 (1970).
94. See, e.g., Taylor v. Safeway Stores, Inc., 524 F.2d 263 (10th Cir. 1975); Alpha Portland Cement Co. v. Reese, 507 F.2d 607 (5th Cir. 1975); Long v. Ford Motor Co., 496 F.2d 500 (6th Cir. 1974).
96. Id. at 461.
99. This contingency may also occur before the EEOC decides whether to bring its own suit, a possibility which may appeal to the plaintiff for financial reasons.
to stay the 1981 proceedings until the EEOC administrative efforts terminate. However, the effectiveness of this option is untested.

Remedies

Section 1981 remedies generally include those available under Title VII, and the courts usually rely on Title VII for guidance in formulating relief in these cases. The Supreme Court in Johnson established that in section 1981 actions courts have broad discretion to fashion remedies: “An individual who establishes a cause of action under 1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages.” In addition to providing compensation other than back pay, courts may allow more frequent punitive damage awards in section 1981 suits—a remedy considered inappropriate under Title VII.

The National Labor Relations Act

The National Labor Relations Act (NLRA) is an industrial relations statute protecting the right of workers to organize and providing for peaceful resolution of industrial disputes through collective bargaining. Though the statute was not intended to remedy problems in the area of employment discrimination, it has been applied recently to protect the rights of minorities.

Coverage and Exemptions

The NLRA created the National Labor Relations Board (NLRB), an agency charged with administration and enforcement of the Act.

100. Johnson v. Railway Express Agency, 421 U.S. 454, 461 (1976). The Court recognized that filing suit may deter conciliation efforts and that the failure of the suit could weaken EEOC efforts.
101. 421 U.S. at 465.
102. See text accompanying notes 54-66 supra. Attorneys' fees were generally awarded in § 1981 suits, by analogy to Title VII, until Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 240 (1975), where, in a different context, the Supreme Court rejected the “private attorney general” basis for attorneys' fees awards. In direct response to Alyeska, Congress amended § 1988 to make attorneys' fees available in § 1981 suits. 42 U.S.C.A. § 1988 (1976 Supp.). This amendment effectively eliminates one of the distinctions between § 1981 and Title VII.
103. See, e.g., Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974). The reason for this reliance is that § 1981 has no statutory description of the types of relief available, and also because Title VII remedial case law was fairly well developed at the time that § 1981 became available in private discrimination suits.
105. See text accompanying notes 67-68 supra.
The statute applies to labor organizations, defined as organizations of any kind in which employees participate that exist for the purpose of dealing with employers concerning grievances and labor disputes. The Supreme Court has held that a labor organization need not be a union and could include a loosely organized employee group that discussed working conditions, wages, and grievances with management. Non-union members also receive some protection under the Act. The major exception to coverage is for political subdivisions, including federal, state, and local governmental bodies.

Prohibitions and Defenses

The NLRA contains no express prohibitions against racially discriminatory employment practices. Nevertheless, the Act has been applied by the courts to prohibit discrimination in three areas: (1) the union's duty of fair representation, (2) "invidious" employer practices, and (3) the certification process.

The NLRA contains no express duty of fair representation. However, in Steele v. Louisville & Nashville R.R. Co., the Supreme Court held that a statutory right of exclusive representation carried a concomitant duty to represent fairly all members of the employment unit, including non-union members. The scope of the union's duty was delineated in Vaca v. Sipes, where the Supreme Court held that a union breaches the duty of fair representation "only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." If the union representative breaches this duty, the right of the employees to "bargain collectively" is impaired and a violation of the NLRA results.

111. See text accompanying note 114 infra.
113. 323 U.S. 192 (1944).
116. Id. at 190. This standard was recently refined in Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976).
117. Section 8(b)(1)(A) of the NLRA provides that an unfair labor practice results if the union "restrain[s] or coerce[s] . . . employees in the exercise of the rights guaranteed in section 157. . . ." 29 U.S.C. § 158(b)(1)(A) (1970). Section 7 of the Act, 29 U.S.C. § 157 (1970), provides, in pertinent part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."
Although the NLRA does not apply to union membership rules, the duty of fair representation appears to prohibit membership policies based on racial or sexual factors. However, an unfair labor practice charge cannot be predicated solely on the fact that the union's action prejudices certain employees. The complainant must also demonstrate that the union acted in bad faith or in an arbitrary manner.

Basically, the Act provides that it is an unfair labor practice for an employer to interfere with employees' organizational rights. Specifically, the employer may not encourage or discourage union membership through his hiring practices or other terms or conditions of employment. To demonstrate that the employer's discrimination is a violation of the NLRA, it must be shown that the discrimination interferes with or restrains the employees from exercising their section 7 right to act concertedly. The District of Columbia Circuit has held that an employer's discrimination always affects section 7 rights. The court maintained this dissimilar treatment creates a clash of interests between groups of employees which causes apathy inhibiting workers from asserting their section 7 rights. The NLRB has refused to accept this approach and examines the facts in each case to determine if the employer is actually interfering with the employees' right to organize.

The certification process is another area in which employment discrimination considerations may be relevant. The NLRB may revoke certification from a discriminating union, an effective sanction since without certification the union cannot act as the employees' representative. The Eighth Circuit, in *NLRB v. Mansion House Center Management Corp.*, held that the NLRB could not become "a willing participant in the union's discriminatory practices" by granting certification. The NLRB in *Bekins Moving & Storage..."
Co.,\textsuperscript{128} adopted the Eighth Circuit’s holding but soon narrowed its position to exclude sex discrimination\textsuperscript{129} and, this spring, overruled \textit{Bekins}.\textsuperscript{130} Union discrimination may still be challenged in a post-certification unfair labor practice proceeding.

\textit{Procedures and Time Limitations}

The NLRA provides that a person aggrieved under the Act may file a charge with the NLRB. The Act establishes a six month statute of limitations for filing unfair labor practice charges.\textsuperscript{131}

Where the collective bargaining contract contains an applicable anti-discrimination clause, the grievant must exhaust internal grievance procedures before resort to the NLRB or the courts.\textsuperscript{132} The union controls access to the grievance machinery\textsuperscript{133} and has discretion to refuse to act on behalf of an aggrieved employee if the decision is made in good faith.\textsuperscript{134} However, if the union’s refusal to act is discriminatory, the duty of fair representation has been breached and the individual is free to file a charge against the union with the NLRB, or to sue the union and employer directly in federal court. Where the charge alleges employer discrimination affecting only the right to organize, the employee must use the grievance procedure and then may file an unfair labor practice charge with the NLRB.

Charges are filed with a regional office of the NLRB General Counsel.\textsuperscript{135} If a charge appears to have merit, a complaint will be issued against the offending party and the case will be tried by the General Counsel staff before an administrative law judge. From that decision there is a right of appeal to the five-member Board, and final decisions are subject to review and enforcement in the courts of appeals.\textsuperscript{136} Final appealable orders do not include the General Counsel’s refusal to issue a complaint\textsuperscript{137} and are thus limited to the

\textsuperscript{128} 211 N.L.R.B. 138 (1974).
\textsuperscript{129} Bell & Howell Co., 213 N.L.R.B. 407 (1974). In this case Member Kennedy joined the \textit{Bekins} dissenters to form a new majority on the ground that sex had been found not to be a “suspect” classification by the Supreme Court.
\textsuperscript{130} Handy Andy, Inc., 94 L.R.R.M. 1354 (1977).
\textsuperscript{132} Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965).
\textsuperscript{133} Black-Clawson Co., Inc. v. International Ass’n of Machinists Lodge 355, 313 F.2d 179 (2d Cir. 1962).
\textsuperscript{136} Appeals may be made to the District of Columbia Circuit or to the circuit where the offense occurred. 29 U.S.C. § 160(e), (f) (1970).
\textsuperscript{137} United Electrical Contractors Ass’n v. Ordman, 366 F.2d 776 (2d Cir. 1966), \textit{cert. denied}, 385 U.S. 1026 (1967).
Board's actual decisions.

Because duty of fair representation claims often involve charges that are "not normally within the Board's unfair labor practice jurisdiction,"\(^{138}\) a Title VII suit may be preferable to filing a charge with the Board.\(^{139}\) A Title VII claim provides direct access to the employer, thereby circumventing the union representatives or arbitrators who may be susceptible to the influence of the allegedly discriminating employer. Title VII also offers the advantages of choice of attorney, the possibility of attorneys' fees awards, and the availability of class action suits.

**Remedies**

The remedies available to the complainant in this area fall into three categories: (1) those specified in the collective bargaining agreement, (2) those set out in the NLRA, and (3) those available through the courts.

Resort to the collective bargaining agreement's internal grievance-arbitration procedures may produce a satisfactory result. Although the scope of available remedies is limited to those specified in the collective bargaining agreement, the arbitration process is usually faster and less costly than court action. In addition, it is clear that the aggrieved employee does not forfeit his Title VII rights by resort to the grievance procedure.\(^{140}\)

The NLRA sets out the forms of relief available through the NLRB. The Act provides that the Board may issue cease and desist orders and may "take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act]."\(^{141}\) The Board is authorized to petition the courts of appeals for the enforcement of its orders.\(^{142}\) Its regional directors may petition federal district courts for temporary injunctions,\(^{143}\) available upon a showing that an injunction is necessary to prevent, frustration of the NLRA's purposes.\(^{144}\)

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139. On the other hand, internal grievance procedures and filing a charge with the Board carry other advantages, particularly the absence of cost to the grievant. See Boyce, *Racial Discrimination and the National Labor Relations Act*, 65 Nw. U.L. Rev. 232, 236 (1970).
142. *Id.* at § 160(e).
143. *Id.* at § 160(j).
144. See, e.g., Boire v. Pilot Freight Carriers, Inc., 515 F.2d 1185 (5th Cir. 1975); Boire v. International Bhd. of Teamsters, 479 F.2d 778 (5th Cir. 1973); UAW v. NLRB, 449 F.2d 1046 (D.C. Cir. 1971).
The most common Board remedy is the cease and desist order, although affirmative action may also be required. Remedies for employer discrimination vary considerably. Reinstatement is the usual remedy for discriminatory discharges, with back pay generally available for both employer and union discrimination. In *Albemarle Paper Co. v. Moody*, the Supreme Court emphasized that back pay is available under the NLRA even where the unfair labor practice was perpetuated in good faith. The courts, in enforcement actions, generally employ the same remedies.

**The Equal Pay Act of 1963**

The Equal Pay Act of 1963 (the Act) is an amendment to the Fair Labor Standards Act of 1938. The purpose of the Act is to eliminate wage differentials based on sex by requiring employers to pay equal wages for equal work. Although the Act is primarily intended to apply to women, it is not sex-restricted and male victims of discrimination have been allowed to recover.

**Coverage and Exemptions**

The Equal Pay Act's coverage is complex. The Fair Labor Standards Act (FLSA) sets out the statutory definitions, procedures, and remedies that are also applicable to the Act. Like Title VII, the Act requires an effect on interstate commerce, but it does not require that the employer have a minimum number of employees.

The Act's coverage is delineated according to the type of enterprise. Some businesses need only meet the commerce requirement, while others must meet an additional prerequisite of minimum annual sales. Some businesses, such as small retail or service establishments, may be totally exempted from the Act. While an em-

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156. *Id.* at § 203(s)(1). A full discussion of the Equal Pay Act's coverage and exemptions is beyond the scope of this article. For a comprehensive discussion of this subject see Gitt &
ployer may come within one of the FLSA exemptions, his employee may still have an equal pay remedy under a state equal pay statute or an applicable state fair employment practices statute. In addition, Title VII also precludes wage discrimination.

The 1974 amendments extended the FLSA and the Act's coverage to local, state, and federal agencies. In National League of Cities v. Usery the Court held the amendments unconstitutional insofar as they extended the Act's minimum wage and maximum hour provisions to state and local governments. However, the Court did not address the issue of whether the equal pay provisions were applicable to such entities. It has subsequently been held that the equal pay provisions are applicable to state and local governments.

Prohibited Acts and Defenses

The Act prohibits sex discrimination based on unequal pay for equal work. Equal work means substantially equal rather than identical, and is statutorily defined as "jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." The statute also provides that a discriminating employer must raise the wage rate of the lesser-paid employee. This duty is not circumvented by the transfer or discharge of one employee.

The Act provides the employer with affirmative defenses for unequal wages based on (1) a seniority system, (2) a merit system, (3) a system that measures earnings by quantity or quality of produc-

157. Some states' equal pay statutes are considerably more limited in scope than the Equal Pay Act. Illinois' statute, for example, covers only employers of six or more persons and protects only "persons engaged in the manufacturing of any article." It has a six-month statute of limitations. Ill. Rev. Stat. ch. 48 § 4(b) (1975).
158. For example, the Illinois Fair Employment Practices Act, Ill. Rev. Stat. ch. 48 §§ 851-867 (1975), requires a minimum of 15 employees but applies to a broader range of enterprises than the Illinois Equal Pay Act.
165. Id. at 206(d)(1).
Employment Discrimination Remedies

Additionally, the Portal-to-Portal Act of 1947 provides defenses to the Fair Labor Standards Act. An employer’s good faith reliance on administrative regulations, orders, rulings, approvals, or interpretations is an absolute defense to liability under the FLSA. Moreover, a partial defense is allowed where the employer demonstrates that he acted in good faith and had reasonable grounds for believing that he was not in violation of the FLSA. The employer may not rely upon this defense where his industry generally has been breaking the law without complaints.

Procedures and Time Limitations

The Act adopts the procedural requirements of the Fair Labor Standards Act. The individual may bring suit directly against the employer without resort to an administrative process (unlike Title VII). The FLSA allows class actions, providing each plaintiff consents to suit in writing. While the equal pay class action plaintiff does not need to demonstrate that his class meets all the rule class action prerequisites, the Equal Pay Act is more restrictive than rule 23 in that it requires all parties to “opt in” while some rule 23 actions include all class members except those who have opted out.

The FLSA authorizes the Secretary of Labor to initiate three types of proceedings. The first seeks injunctive relief and occurs when a routine Department investigation produces a suspected violation.

The Secretary may also bring suit at an employee’s request and may recover liquidated damages in addition to back wages.

167. Case law on Equal Pay Act defenses has focused on the “factor other than sex.” The defendant is generally not successful. See, e.g., Corning Glass Works v. Brennan, 417 U.S. 188 (1974); Hodgson v. Behrens Drug Co., 475 F.2d 1041 (5th Cir.), cert. denied, 414 U.S. 822 (1973). However, in Hodgson v. Robert Hall Clothes, Inc., 473 F.2d 589 (3d Cir.), cert. denied, 414 U.S. 866 (1973), the defendant successfully argued that his wage discrimination was justified because the salesmen generated more profits than the saleswomen.


174. See note 47 supra.


nally, the Secretary, with the employee's consent, may supervise the payment of wages due where the employer agrees to such an arrangement prior to suit.\textsuperscript{178}

The statute of limitations for equal pay actions is generally two years; however, in the case of a willful violation the limitation is extended to three years.\textsuperscript{179} Thus, a wage discrimination suit may remain viable under the Act even though time-barred by Title VII's shorter limitation periods.

\textit{Remedies}

Recovery of back wages is the remedy in all successful Equal Pay Act suits.\textsuperscript{180} Additionally, in suits brought by an individual, or by the Secretary on behalf of an individual, liquidated damages equal to the amount of wages withheld may be recovered.\textsuperscript{181} Attorneys' fees and court costs are granted only where an individual, and not the Secretary, is the named plaintiff.\textsuperscript{182} Liquidated damages are not recoverable by individuals who consent to the Secretary's supervision of back pay awards prior to suit or where the Secretary initiates a suit for injunctive relief.\textsuperscript{183}

The Act contains special provisions concerning willful violations. Plaintiffs have three years rather than two to file suit, and criminal actions based on these violations may be brought by the Justice Department\textsuperscript{184} (though it appears that this authority has not been exercised). The courts have had difficulty defining the term "willful violation" since the Act provides no guidance. One view is that "willful" requires only knowledge of the possible applicability of the Act.\textsuperscript{185} Other courts maintain that "violations of the Act must be deliberate, voluntary and intentional."\textsuperscript{186} An intermediate inter-

\begin{enumerate}
\item \textsuperscript{178} \textit{Id.}
\item \textsuperscript{180} 29 U.S.C. \textsection 216(b) (Supp. IV 1974).
\item \textsuperscript{181} \textit{Id.}
\item \textsuperscript{182} \textit{Id.}
\item \textsuperscript{183} 29 U.S.C. \textsection\textsection 216(c), 217 (1970 & Supp. IV 1974).
\item \textsuperscript{184} 29 U.S.C. \textsection 216(a) (1970). The Act's criminal penalties provide for a maximum fine of \$10,000 and a prison term not to exceed six months, which may not be imposed on a first offender.
\item \textsuperscript{185} Brennan v. Heard, 491 F.2d 1, 3 (5th Cir. 1974); Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139, 1141-42 (5th Cir. 1972).
\item \textsuperscript{186} Brennan v. Westinghouse Credit Corp., 21 Wage and Hour Cas. 871, 876 (E.D. Tenn. 1973).
\end{enumerate}
pretation is that an employer commits a willful violation when he
"is cognizant of an appreciable possibility that he may be subject
to the statutory requirements and fails to take steps reasonably
calculated to resolve the doubt."187

The Equal Pay Act's remedies would probably make this statute
more attractive than Title VII to the wage discrimination plaintiff,
due to the availability of liquidated damages in some equal pay
suits, the longer statute of limitations, and lack of administrative
prerequisites to suit. Plaintiffs would have no success circumventing
the Act's defenses through a Title VII action since Title VII provides
that a pay differential authorized by the Equal Pay Act is not un-
lawful under Title VII.188

THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

The Age Discrimination in Employment Act of 1967 (ADEA)189
represents a recent congressional effort to remedy unemployment
among older workers by prohibiting arbitrary age discrimination in
employment.190

Coverage and Exemptions

The ADEA protects only workers between forty and sixty-five.191
Like Title VII and the Equal Pay Act, the ADEA requires that the
employer be engaged in an industry affecting interstate com-
merce.192 The Act was amended in 1974 to provide coverage for state
and federal employees.193

Prohibitions and Defenses

The ADEA makes it illegal for an employer to refuse to hire, to
fire, or to otherwise discriminate with respect to terms or conditions
of employment because of an individual's age.194 Like the Equal Pay
Act, the ADEA prohibits reduction of any employee's wages in at-
ttempting to comply with this Act.195

The statute provides the defendant with an affirmative defense

discuss "willful" in the context of the statute of limitations, and it is not clear that
these interpretations would be used in deciding if criminal prosecution were appropriate.
192. Id. at § 630(b). The employer must also have a minimum of 20 employees.
193. Id. at §§ 630(b), 633a.
195. Id. at § 623(a)(3).
where (1) age is a bona fide occupational qualification "reasonably necessary" to the business or the differentiation is based on a factor other than age; (2) the discrimination is mandated by a "bona fide employee benefit plan . . . which is not a subterfuge"; or (3) "good cause" for discharging or disciplining an employee exists.\textsuperscript{196}

The bona fide occupational qualification defense (bfoq),\textsuperscript{197} has been used exclusively in cases where the defendant argues that "public safety" justifies the age discrimination. For example, the courts have upheld maximum cut-off ages for bus driver applicants, holding that age was a valid bfoq defense due to safety considerations.\textsuperscript{198} In these cases the defendant only had to demonstrate that elimination of the maximum hiring age would result in a slight increase in risk to the public.\textsuperscript{199} However, it has recently been held that the bfoq defense was not applicable to mandatory retirement at age sixty-two for firemen.\textsuperscript{200}

A conflict exists as to the proper interpretation of the bona fide employee benefit plan defense.\textsuperscript{201} The Fifth Circuit has held that a pre-Act retirement plan, which provided for mandatory retirement at sixty, was protected.\textsuperscript{202} The ADEA provides that a benefit plan cannot be "bona fide" if it is "a subterfuge to evade the purposes" of the ADEA.\textsuperscript{203} The Fifth Circuit held that since the plan went into effect before the enactment of the ADEA, it could not be a subterfuge.\textsuperscript{204} The court also held that since the statutory language was unambiguous it would not consider the argument that Congress' intent was to exempt only those programs that would become too


\textsuperscript{199} Hodgson v. Greyhound Lines, Inc., 499 F.2d 859, 863 (7th Cir. 1974). Courts reject the Title VII standard that would require demonstration that all or substantially all applicants over 40 could not perform safely. See Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969).


\textsuperscript{202} Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1974).


costly were the employer forced to provide full coverage for newly-hired older workers.\textsuperscript{205}

The Fourth Circuit recently treated a pre-Act retirement plan differently.\textsuperscript{206} The court found the legislative history and policy considerations relevant and concluded that the statute forbids not only subterfuge to evade the Act (which obviously could not have occurred before the Act existed), but subterfuge to evade the purposes of the Act.\textsuperscript{207}

\textbf{Procedures and Time Limitations}

The ADEA, like the Equal Pay Act, incorporates with some modifications the civil enforcement provisions of the Fair Labor Standards Act.\textsuperscript{208} There is no administrative procedure attendant to the ADEA. Suits may be initiated by the complainant or by the Secretary of Labor.\textsuperscript{209} However, the ADEA requires that an individual give the Secretary of Labor sixty days notice of intent to file a complaint.\textsuperscript{210} This notice must be filed within 180 days of the alleged unlawful practice.\textsuperscript{211} Where a state has designated an agency to handle age discrimination claims, and that agency possesses adequate enforcement powers, notice must be filed there before filing with the Secretary of Labor.\textsuperscript{212} The Secretary must then be given

\begin{itemize}
\item \textsuperscript{205} Brennan v. Teft Broadcasting Co., 500 F.2d 212, 217 (5th Cir. 1974). See also Zinger v. Blanchette, 14 Fair Empl. Prac. Cas. 497 (3d Cir. 1977).
\item \textsuperscript{206} McMann v. United Air Lines, Inc., 542 F.2d 217 (4th Cir. 1976), cert. granted, 97 S. Ct. 1098 (1977).
\item \textsuperscript{207} Id. at 220.
\item \textsuperscript{209} 29 U.S.C. § 626(b), (c) (1970).
\item \textsuperscript{210} Id. at § 626(d).
\item \textsuperscript{211} Id. The courts interpret the 180-day notice period requirement liberally. No extension of the limit is allowed where the delay is due solely to plaintiff's actions, while the requirement may be waived where the defendant or the Department of Labor is responsible for the delay. See generally Hays v. Republic Steel Corp., 531 F.2d 1307 (5th Cir. 1976); Woodburn v. LTV Aerospace Corp., 531 F.2d 750 (5th Cir. 1976); Ott v. Midland-Ross Corp., 523 F.2d 1367 (6th Cir. 1975).
\item \textsuperscript{212} The Act specifies that a "deferral" agency exists where "a State . . . has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief. . . ." 29 U.S.C. § 633(b) (1970). Some courts have held that states which do not have adequate enforcement mechanisms do not have proper deferral agencies. See, e.g., Lugo Garces v. Sagner Int'l, Inc., 534 F.2d 987 (1st Cir. 1976); Eklund v. Lubrizol Corp., 529 F.2d 247 (6th Cir. 1976); Bertrand v. Orkin Exterminating Co., 13 Fair Empl. Prac. Cas. 1447 (N.D. Ill. 1976). The plaintiff may be faced with a dilemma where it is not clear whether his state will be considered a proper "deferral" state. A few courts have held that resort to a proper state deferral agency is not a prerequisite to suit in federal court. See Vazquez v. Eastern Air Lines, Inc., 405 F. Supp. 1353 (D.P.R. 1975); Skoglund v. Singer Co., 403 F. Supp. 797 (D.N.H. 1975). But see Fitzgerald v. New England Tel. & Tel. Co., 416 F. Supp. 617 (D. Mass. 1976).
\end{itemize}
notice within 300 days of the allegedly discriminatory action.\textsuperscript{213} State law determines how long the individual has to file with the state agency. The individual may wait as long as two years to file suit after the initial state/federal notice requirements are met.\textsuperscript{214}

Once the state agency receives the complaint it has sixty days of exclusive jurisdiction in which to conciliate.\textsuperscript{215} When a complaint is filed with the Secretary of Labor, either initially or upon exhaustion of state procedure, the Secretary also has sixty days to conciliate.

The ADEA adopts the FLSA provision for class action suits.\textsuperscript{216} As with class actions under the Equal Pay Act, no person may be a party plaintiff without filing a written consent. Most courts require all class members, rather than just the class representatives, to file.\textsuperscript{217}

\textbf{Remedies}

The ADEA adopts the FLSA remedy provisions with some modifications. The statute authorizes both legal and equitable relief, including "compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid . . . wages. . . . ."\textsuperscript{218} Attorneys' fees and costs are allowed.\textsuperscript{219} It is unsettled whether punitive or compensatory damages may be awarded.\textsuperscript{220} Unlike Equal Pay Act remedies, the ADEA limits liquidated damages to cases of willful violations.\textsuperscript{221} There is no provision for criminal sanctions.

\textsuperscript{213} 29 U.S.C. § 626(d) (1970). If the state agency terminates its proceedings before the 300 days within which notice must be filed with the Secretary have elapsed, the individual has either 30 days or the balance of the 300 days (whichever is less) in which to file notice of intent with the Secretary.

\textsuperscript{214} \textit{Id.} at § 626(e). The statute of limitations is three years in the case of a willful violation. \textit{See} text accompanying note 179 \textit{supra}.


\textsuperscript{218} 29 U.S.C. § 626(b) (1970).

\textsuperscript{219} 29 U.S.C. § 216(b) (Supp. IV 1974).


\textsuperscript{221} 29 U.S.C. § 626(b) (1970). \textit{See} text accompanying notes 184-187 \textit{supra}, concerning different interpretations of "willful."
CONCLUSION

The proliferation of employment discrimination suits in recent years has been caused by the increase in fair employment related statutes, as well as the availability of attorneys' fees, coupled with an increased awareness by employees of their rights. Attorneys engaged in these suits will be faced with complex decisions concerning the applicability of particular laws and an evaluation of differing remedies. Factors confronting employment discrimination litigants include: the parties to be named as defendants (e.g., employer, union, employment agency); whether the client is a union member or a member of a recognized bargaining unit; whether the applicable collective bargaining contract exists; whether the statute of limitations or EEOC administrative time requirements bar relief under certain statutes; the differences in relief available; and finally, the merit of possible statutory defenses.

In a significant number of suits, there may be no choice of forum. For example, the NLRA is available only to persons employed in a bargaining unit; the Age Discrimination Act is limited to individuals between the ages of forty and sixty-five; section 1981 is available only to those discriminated against because of race or alienage; and the Equal Pay Act applies only to unequal wage treatment based on sex. Title VII's cumbersome time limitations may often foreclose that relief.

The major area of multiple statutory protections will probably occur in instances of racial discrimination. In these cases the attorney must weigh the relative advantages and disadvantages of Title VII, section 1981, and perhaps NLRA actions. The pertinent facts and financial resources of the client also become significant in deciding when to resort to internal grievance machinery, to file a charge with the NLRB, or to use the EEOC's administrative procedure. If significant compensatory or punitive damages are possible, initial resort to the courts under section 1981 may be preferable. Regardless of these individual decisions, successful employment discrimination actions will become more frequent only when attorneys become more familiar with the possible avenues to pursue and relative attractiveness of the alternatives.

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