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# WOMEN AND PROTECTIVE LABOR LAWS

## Background

In the late 1960's and the 1970's a controversy has arisen over laws which were originally designed to protect women in the labor force from exploitation by employers. Laws establishing minimum wages, maximum hours and special working conditions for women were passed in the spirit of the progressive movement in the early part of the twentieth century in reaction to turn of the century factories and shops where women were subjected to low wages, long hours and hazardous working conditions. In 1908, the U.S. Supreme Court upheld a state law limiting women's working hours to 10 per day. Hailed as a landmark case for the use of sociological data (known as the Brandeis Brief), Muller v Oregon opened the door for additional state legislation to protect the working woman. Almost 70 years later, the same kinds of laws once upheld as progressive are now being attacked as discriminatory.

## Arguments--Pro and Con

Those people who favor repealing laws which establish certain conditions of work for women argue that employers may use requirements such as overtime pay laws as an excuse not to hire women. It is claimed that these laws require employers to make stereotyped judgments about women as a class instead of appraising each female employee on her own merits. Frequently, jobs which call for weightlifting or call-ups during the night are denied to all women, regardless of individual abilities and preferences. Finally, those persons opposed to "protective" labor laws for women point out that anytime employment of women is made more burdensome to employers, female job opportunities will be limited.

Women who wish to retain protective labor laws argue that the women who need them most cannot fight for better conditions for themselves since they are not represented by labor unions. They state that most women want to work short hours on schedules because these conditions also meet their needs as wives and mothers. In their view, eliminating laws regulating working

hours and other conditions for women would force women to work overtime and consequently endanger their health and disrupt the family relationship.

Federal Civil Rights and State Protective Labor Laws

Title VII of the Civil Rights Act of 1964 as amended in 1969 and 1972 prohibits discrimination in employment on the grounds of race, color, religion, national origin and sex. The Title VII provision makes unlawful such things as firing or refusing to hire on the basis of sex, discrimination by labor unions on the basis of sex, refusal by employment agencies to refer for employment on the basis of sex, publishing advertisements which indicate a preference for employment on the basis of sex, or discriminating in training or apprenticeship programs on the basis of sex. An exception is made for occupations where sex is a bona fide occupational qualification, such as actor or actress. The law covers private employers with 15 or more employees, as well as state and local governments. Excluded from this civil rights act are the federal government (whose employees are protected against sexual discrimination by an executive order), U.S. government-owned corporations, certain District of Columbia employees, Indian tribes and bona fide private membership clubs.

Obviously, there is a basic conflict between Title VII of the Civil Rights Act of 1964 and state protective labor legislation for women. In 1969 the Equal Employment Opportunity Commission, which administers Title VII, revised its guidelines pursuant to the law stating that: "The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect." The commission declared that since state protective labor laws conflict with Title VII, they cannot be used as a defense for refusing full employment rights to women.

Thus the way has been paved for overturning or modifying state protective labor laws primarily on the grounds of conflict with the federal civil rights law. In fact, federal courts or state supreme courts in eight states have ruled that their state laws conflict with Title VII. Twenty-two states have issued administrative rulings or attorney general opinions that state hours laws for women do not apply to employers covered under Title VII. Encouraged in some instances by court action, state legislatures in 15 states (including Arizona, Colorado, Montana and Oregon) repealed their maximum hours law for women. Texas and Utah modified their laws by making extended overtime hours for women

voluntary. North Carolina made the state's limit on working hours equally applicable to men and women not covered under the Fair Labor Standards Act. California and Washington empowered their industrial welfare commissions to set hours and working conditions for all employees, not just women and minors.

Nevada Protective Labor Law

The Women's Bureau of the U.S. Department of Labor cites Nevada as the only state which continues to enforce the law setting maximum hours of work for women and overtime payment after an 8-hour day or a 48-hour week. Four other states (Illinois, Kentucky, Michigan and Ohio) continue to enforce state laws providing for maximum hours for women in those cases where Title VII does not apply (employers with 14 or fewer workers).

Chapter 609 of the Nevada Revised Statutes deals with working conditions for women and minors and in most instances is typical of protective labor law. It does not apply to state or local government workers, agricultural or domestic workers. The intention of the law is set forth in NRS 609.030, section 1, which states that ". . . it is the sense of the legislature that the health and welfare of female persons required to earn their livings by their own endeavors require certain safeguards as to hours of service and compensation therefor." NRS sections 609.010 to 609.180 protect women in the labor force in the following ways: limiting female workers to an 8-hour day and a 6-day week, and in certain temporary instances where overtime is permitted requiring time and a half overtime pay; requiring a meal period and two 10 minute rest periods during the day; requiring employers to provide suitable seats for female employees; requiring an employer to furnish all special uniforms; and requiring an abstract of the minimum wage/maximum hour law to be posted wherever females are employed. It should be noted that some items of chapter 609 such as minimum wage levels are the same as provisions for men set out in NRS Chapter 608;* most provisions, however, do not afford the same protections for men as for women.

At the end of 1973, the United States Government filed a complaint against the State of Nevada (U.S. v Nevada) alleging that certain Nevada statutes require employers doing business in the state to establish and observe conditions of employment for females which are not required for males and impose an obligation on employers. The U.S. claims that these requirements of law

*Further note that wage discrimination on the basis of sex is prohibited by NRS 609.280.

are in direct conflict with Title VII of the Civil Rights Act of 1964 and, therefore, should be declared legally unenforceable. Filing statements in Nevada's defense, a state deputy attorney general pointed out that both the attorney general's office and the state department of labor enforce certain provisions of the law in question equally, regardless of the actual text of the law. He further stated that legislation would be submitted at the next session of the legislature which would remove those sections of NRS Chapter 609 which refer solely to females and to incorporate into chapter 608 certain sections of chapter 609 in order to extend benefits equally to men and women. In 1974, the federal district judge in Reno ruled that he would withhold judgment in the case until March, 1975. Presumably, his decision will depend on what legislative action is taken by that time.

Some Alternatives to Protective Labor Laws for Women

In response to the belief that concerns still exist about questions of fatigue, health, family responsibilities and personal needs for both working men and women, the Women's Bureau of the U.S. Department of Labor offers the following suggestions:

1) Require premium pay for overtime for women and men as one way of deterring excessive hours of work (19 states have laws to this effect).

2) Set hours limits for men and women (North Carolina does by law and California and Washington empower their industrial welfare commissions to do so).

3) Make overtime voluntary.

SUGGESTED READING
(Available in Research Library)

Women's Bureau of the U.S. Department of Labor. A Working Woman's Guide to Her Job Rights, Washington, 1974.

Women's Bureau of the U.S. Department of Labor. Laws on Sex Discrimination in Employment, Washington, D.C., 1973.

Women's Bureau of the U.S. Department of Labor. "State Hours Laws for Women: Changes in Status Since the Civil Rights Act of 1964," Washington, D.C., 1974.

See attached Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex.

MLL/ 1-15-75

# Title 29—LABOR

## Chapter XIV—Equal Employment Opportunity Commission

## PART 1604—GUIDELINES ON DISCRIMINATION BECAUSE OF SEX

By virtue of the authority vested in it by section 713(b) of title VII of the Civil Rights Act of 1964, 42 U.S.C., section 2000e–12, 78 Stat. 265, the Equal Employment Opportunity Commission hereby revises Title 29, Chapter XIV, Part 1604 of the Code of Federal Regulations.

These Guidelines on Discrimination Because of Sex supersede and enlarge upon the Guidelines on Discrimination Because of Sex, issued by the Equal Employment Opportunity Commission on December 2, 1965, and all amendments thereto. Because the material herein is interpretive in nature, the provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rule making, opportunity for public participation, and delay in effective date are inapplicable. The Guidelines shall be applicable to charges and cases presently pending or hereafter filed with the Commission.

Sec.


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AUTHORITY: The provisions of this Part 1604 issued under sec. 713(b), 78 Stat. 265, 42 U.S.C. sec. 2000e–12.

### § 1604.1 General principles.

(a) References to "employer" or "employers" in this Part 1604 state principles that are applicable not only to employers but also to labor organizations and to employment agencies insofar as their action or inaction may adversely affect employment opportunities.

(b) To the extent that the views expressed in prior Commission pronouncements are inconsistent with the views expressed herein, such prior views are hereby overruled.

(c) The Commission will continue to consider particular problems relating to sex discrimination on a case-by-case basis.

### § 1604.2 Sex as a bona fide occupational qualification.

(a) The Commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Labels—"Men's jobs" and "Women's Jobs"—tend to deny employment opportunities unnecessarily to one sex or the other.

(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:

(i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.

(ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

(iii) The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers except as covered specifically in subparagraph (2) of this paragraph.

(2) Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.

(b) Effect of sex-oriented State employment legislation.

(1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, e.g., the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain prescribed limits, during certain hours of the night, for more than a specified number of hours per day or per week, and for certain periods of time before and after childbirth. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and, therefore, discriminate on the basis of sex. The Commission has concluded that such laws and regulations conflict with and are superseded by title VII of the Civil Rights Act of 1964. Accordingly, such laws will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

(2) The Commission has concluded that State laws and regulations which discriminate on the basis of sex with regard to the employment of minors are in conflict with and are superseded by title VII to the extent that such laws are more restrictive for one sex. Accordingly, restrictions on the employment of minors of one sex over and above those imposed on minors of the other sex will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

(3) A number of States require that minimum wage and premium pay for overtime be provided for female employees. An employer will be deemed to have engaged in an unlawful employment practice if:

(i) It refuses to hire or otherwise adversely affects the employment opportunities of female applicants or employees in order to avoid the payment of minimum wages or overtime pay required by State law; or

(ii) It does not provide the same benefits for male employees.

(4) As to other kinds of sex-oriented State employment laws, such as those requiring special rest and meal periods or physical facilities for women, provision of these benefits to one sex only will be a violation of title VII. An employer will be deemed to have engaged in an unlawful employment practice if:

(i) It refuses to hire or otherwise adversely affects the employment opportunities of female applicants or employees in order to avoid the provision of such benefits; or

(ii) It does not provide the same benefits for male employees. If the employer can prove that business necessity precludes providing these benefits to both men and women, then the State law is in conflict with and superseded by title VII as to this employer. In this situation, the employer shall not provide such benefits to members of either sex.

(5) Some States require that separate restrooms be provided for employees of each sex. An employer will be deemed to have engaged in an unlawful employment practice if it refuses to hire or otherwise adversely affects the employment opportunities of applicants or employees in order to avoid the provision of such restrooms for persons of that sex.

### § 1604.3 Separate lines of progression and seniority systems.

(a) It is an unlawful employment practice to classify a job as "male" or "female" or to maintain separate lines of progression or separate seniority lists based on sex where this would adversely affect any employee unless sex is a bona fide occupational qualification for that job. Accordingly, employment practices are unlawful which arbitrarily classify jobs so that:

(1) A female is prohibited from applying for a job labeled "male," or for a job in a "male" line of progression; and vice versa.

(2) A male scheduled for layoff is prohibited from displacing a less senior female on a "female" seniority list; and vice versa.

(b) A Seniority system or line of progression which distinguishes between "light" and "heavy" jobs constitutes an unlawful employment practice if it operates as a disguised form of classification by sex, or creates unreasonable obstacles to the advancement by members of either sex into jobs which members of that sex would reasonably be expected to perform.

### § 1604.4 Discrimination against married women.

(a) The Commission has determined that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by title VII of the Civil Rights Act. It does not seem to us relevant that the rule is not directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex.

(b) It may be that under certain circumstances, such a rule could be justified within the meaning of section 703 (e)(1) of title VII. We express no opinion on this question at this time except to point out that sex as a bona fide occupational qualification must be justified in terms of the peculiar requirements of the particular job and not on the basis of a general principle such as the desirability of spreading work.

### § 1604.5 Job opportunities advertising.

It is a violation of title VII for a help-wanted advertisement to indicate a preference, limitation, specification, or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job involved. The placement of an advertisement in columns classified by publishers on the basis of sex, such as columns headed "Male" or "Female," will be considered an expression of a preference, limitation, specification, or discrimination based on sex.

### § 1604.6 Employment agencies.

(a) Section 703(b) of the Civil Rights Act specifically states that it shall be unlawful for an employment agency to discriminate against any individual because of sex. The Commission has determined that private employment agencies which deal exclusively with one sex are engaged in an unlawful employment practice, except to the extent that such agencies limit their services to furnishing employees for particular jobs for which sex is a bona fide occupational qualification.

(b) An employment agency that receives a job order containing an unlawful sex specification will share responsibility with the employer placing the job order if the agency fills the order knowing that the sex specification is not based upon a bona fide occupational qualification. However, an employment agency will not be deemed to be in violation of the law, regardless of the determination as to the employer, if the agency does not have reason to believe that the employer's claim of bona fide occupations qualification is without substance and the agency makes and maintains a written record available to the Commission of each such job order. Such record shall include the name of the employer, the description of the job and the basis for the employer's claim of bona fide occupational qualification.

(c) It is the responsibility of employment agencies to keep informed of opinions and decisions of the Commission on sex discrimination.

### § 1604.7 Pre-employment inquiries as to sex.

A pre-employment inquiry may ask "Male _____, Female _____"; or "Mr. Mrs. Miss," provided that the inquiry is made in good faith for a nondiscriminatory purpose. Any pre-employment inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification, or discrimination as to sex shall be unlawful unless based upon a bona fide occupational qualification.

### § 1604.8 Relationship of Title VII to the Equal Pay Act.

(a) The employee coverage of the prohibitions against discrimination based on sex contained in title VII is coextensive with that of the other prohibitions contained in title VII and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.

(b) By virtue of section 703(h), a defense based on the Equal Pay Act may be raised in a proceeding under title VII.

(c) Where such a defense is raised the Commission will give appropriate consideration to the interpretations of the Administrator, Wage and Hour Division, Department of Labor, but will not be bound thereby.

### § 1604.9 Fringe benefits.

(a) "Fringe benefits," as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

(c) Where an employer conditions benefits available to employees and their spouses and families on whether the employee is the "head of the household" or "principal wage earner" in the family unit, the benefits tend to be available only to male employees and their families. Due to the fact that such conditioning discriminatorily affects the rights of women employees, and that "head of household" or "principal wage earner" status bears no relationship to job performance, benefits which are so conditioned will be found a prima facie violation of the prohibitions against sex discrimination contained in the Act.

(d) It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; or to make available benefits for the wives of male employees which are not made available for female employees; or to make available benefits to the husbands of female employees which are not made available for male employees. An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits.

(e) It shall not be a defense under title VIII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.

(f) It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, or which differentiates in benefits on the basis of sex. A statement of the General Counsel of September 13, 1968, providing for a phasing out of differentials with regard to optional retirement age for certain incumbent employees is hereby withdrawn.

### § 1604.10 Employment policies relating to pregnancy and childbirth.

(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of title VII.

(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.

*Effective date.* This revision shall become effective on the date of its publication in the FEDERAL REGISTER (4–5–72).

Signed at Washington, D.C., this the 31st day of March 1972.

WILLIAM H. BROWN III,
*Chairman.*

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