Human Resource Management

An Experiential Approach

Sixth Edition

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Chapter 1 Strategic Human Resource Management in a Changing Environment

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OBJECTIVES

After reading this chapter, you should be able to

1. Describe the field of human resource management (HRM) and its potential for creating and adding value within contemporary organizations.
2. Describe discrepancies between actual HRM practices and recommendations for HRM practice based on scholarly research.
3. Describe the major activities of HRM.
4. Explain important trends relevant to HRM, including the increasing globalization of the economy, changing technology, the role of regulations and lawsuits, the changing demographics of the workforce, and the growing body of research linking particular HRM practices to corporate performance.
5. Emphasize the importance of measurement for effective and strategic HRM.
6. Understand what is meant by competitive advantage, and what the four mechanisms are for offering and maintaining uniqueness.

OVERVIEW

According to graphologist Paul Sassi, the fluidity of President Obama's signature is a sign of high intelligence, while its illegibility shows he is protecting his privacy. "He doesn't want you to know him too well." Another handwriting expert concluded: "The large letters in Obama's signature show that he is ambitious, self-confident, and views himself as a leader. . . . The fluid letter forms reveal that he can form a coalition, be diplomatic, and get along with both sides of the aisle." She added: "He's the type of guy who could tell you to go to hell and you'd enjoy the trip."[1] In her assessment of Mitt Romney, graphologist Sheila Kurtz concluded that he is inclined to think quickly but impulsively, to dream big, but don't even think about telling him what to do. Kurtz describes President Obama as "unclogged with preconceptions and prejudices," with an ability to consider new ideas and probe beneath the surface of issues. She also claims his handwriting also reveals that he is unlikely to act on "raw or coerced impulse."[2]

When one of your authors shared these assessments with undergraduate human resources classes, about 20 percent of students thought the evaluations were "dead on accurate," another 30 percent described the profiles as "mostly accurate," about 25 percent

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thought they were "completely inaccurate," and about 25 percent had no opinion at all on the accuracy of the profiles. Within the last group, however, about half of the students expressed skepticism about assessing someone's personality, intelligence, motivation, or anything else important using the person's handwriting. It is this group of students who are "dead-on accurate." Research clearly shows that handwriting is not a valid means of assessing anything important (except your handwriting!).

The assessment of politicians is not the only application you will find of such invalid assessment methods. *Inc.* magazine, one of the most popular magazines for U.S. small businesses, ran a story extolling the benefits of using graphology to hire managers.[3] The article reported that the use of graphology was on the increase and that the method was very effective for selecting managers and salespersons. Sound research in human resource management (HRM) has determined that companies would do just about as well picking names out of a hat to make personnel decisions.[4]

Major HRM responsibilities

Skilled HRM specialists help organizations with all activities related to staffing and maintaining an effective workforce. Major HRM responsibilities include work design and job analysis, training and development, recruiting, compensation, team building, performance management and appraisal, and worker health and safety issues as well as identifying and developing valid methods for selecting staff.

Research by academics who study and teach HRM is devoted to identifying the most effective and efficient methods for meeting these HRM responsibilities. A key theme of this book is that the **most effective HRM programs, policies, and practices are those that are developed based on HRM research results.** Another theme of this book is that contemporary HRM practice often ignores the sound research about policy, practice, or people that is available to help make good decisions. Instead, organizations are apt to adopt an HRM practice merely because competitors are using it (this was a main theme of the *Inc.* article about graphology).

One of your authors once had a conversation with a business owner who had hired his 145-person sales staff based on graphology reports (at $75 per report) and the answer to a single question posed in an interview. When questioned about the validity of these methods, the business owner described one terrible salesman he had hired out of desperation in a tight labor market despite a graphologist's report that said the "small writing with little slant indicated he may be too introverted for sales work." This one example had stuck in his mind as "proof" of graphology's effectiveness. He lamented, "If only I had listened to the handwriting expert. I wasted a bundle training the guy!" Those of us who teach statistics refer to this type of "research" as a "man who" statistic in which a person enlists a single case to support or refute a theory. For example, when you discuss the overwhelming evidence showing that smoking causes cancer, someone might offer the counterargument that "yea, but my aunt smoked three packs a day and lived to be 90." An article in the *Washington Post* reported that the Pilot Pen Company's CEO Ronald Shaw was a big believer in graphology and would use it for all hiring decisions because the graphologist's profile based on his own handwriting showed that he was "sincere and intelligent and had a lot of integrity."[5] While (apparently) flattery will get you somewhere (or at least a good consulting gig), graphology will not get you accurate or valid assessments of the personal characteristics related to job performance (even the job of president). Needless to say, this is not the way to do research on a procedure.

Sound measurement is critical to effective HR

There are good ways to do research and good ways to assess the effects of programs, procedures, and activities of HRM. **Sound measurement, followed by data-driven decision making, are keys to effective management.** Remember the old adage: if it's not measured, it's not managed. Management needs to collect and validate information. This information can be a major asset and in many cases, "the raw material of new products and services, smarter decisions, competitive advantage for companies, and greater growth and productivity."[6] A 2011 study led by MIT professor Erik Brynjolfsson showed that companies that adopted "data-driven decision making" for major managerial decisions achieved productivity that was 5 to 6 percent higher than what could be explained by other factors, including how much the companies invested in technology. Data-driven decision making was defined not only by collecting sound data on critical variables, but also whether the results of the data collection were then used to make crucial decisions. The major distinction made in the study was determining whether

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managerial decisions were based mainly on “data and analysis” versus the more traditional “experience and intuition.”[7]

Graphology has been the subject of sound, data-based research to determine whether diagnostics that derive from a person’s handwriting actually predicts whether a person is going to be a competent manager and great salesperson (it doesn’t). As we discuss in detail in Chapter 6, there are many methods that do an excellent job predicting performance. Data-driven (and effective) HRM means decision makers (HR specialists and line managers) are aware of these valid methods and then use them to make decisions.

Many HRM systems and activities are not subjected to systematic measurement and analysis. In fact, many organizations do not assess either the short- or long-term consequences of their HRM programs or activities. Another key theme of the book is that **measurement and data-driven decision making are key components to organizational effectiveness and competitive advantage.** Good measurement and data-driven decisions, allied with business strategies, will help organizations identify and improve all of their HRM activities and resultant decisions.

The Balanced Scorecard

Stanford University professor Jeffrey Pfeffer considers measurement to be one of the keys to competitive advantage. His book *Competitive Advantage Through People* cites measurement as one of the 16 HRM practices that contribute the most to competitive advantage.[8] Pfeffer’s views were echoed and expanded in the popular text *The Balanced Scorecard* by Harvard professor Robert Kaplan and consultant David Norton.[9] Kaplan and Norton stress that “if companies are to survive and prosper in information age competition, they must use measurement and management systems derived from their strategies and capabilities” (p. 21). Their “balanced scorecard” emphasizes much more management attention to “leading indicators” of performance that predict the “lagging” financial performance measures. The “balance” reflects the need to measure short- and long-term objectives, financial and nonfinancial measures, lagging and leading indicators, and internal and external performance perspectives.

The Workforce Scorecard

In their book *The Workforce Scorecard,* Professors Mark Huselid, Brian Becker, and Dick Beatty extend research on the “balanced scorecard” to a comprehensive management and measurement system designed to maximize workforce potential.[10] These authors show that the traditional financial performance measures such as return on equity, stock price, and return on investment, the “lagging indicators,” can be predicted by the way companies conduct their HR. HR practices are the “leading indicators” that predict subsequent financial performance measures.[11] Unfortunately, research indicates that only a small percentage of HRM programs or activities are subjected to critical, data-driven analysis. The good news, however, is that the percentage is at least going up. Measurement and data-driven decision making are essential for American organizations in the 21st century!

Lagging and leading indicators

The vision of HRM for the 21st century

One study defined the vision of HRM for the 21st century. HRM activities must be (1) responsive to a highly competitive marketplace and global business structures, (2) closely linked to business strategic plans, (3) jointly conceived and implemented by line and HR managers, and (4) focused on quality, customer service, productivity, employee involvement, teamwork, and workforce flexibility.[12] In general, research shows that the realization of this vision translates into greater organizational effectiveness.

Perhaps because of this body of research, the status of HRM is improving relative to other potential sources of competitive advantage for an organization. Professor Pfeffer notes that “traditional sources of success (e.g., speed to market, financial, technological) can still provide competitive leverage, but to a lesser degree now than in the past, leaving organizational culture and capabilities, derived from how people are managed, as comparatively more vital.”[13] Research clearly indicates that certain HR practices can increase employees’ knowledge, skills, and abilities through more valid staffing and selection decisions, serve to empower employees to leverage these superior characteristics for the benefit of the organization, and to increase the motivation of these employees to do so. The results of these practices are greater job satisfaction and organizational commitment, lower levels of voluntary turnover among key personnel, and higher productivity.[14]

You are likely to manage people at some point in your career. Research shows that the extent to which you as a manager make data-driven, evidence-based HR decisions will be a key to your effectiveness as a manager.[15] We believe that the knowledge and experiences we provide here will prepare you to be an effective manager. We emphasize that the

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most effective HRM programs, policies, and practices are those that derive from strong research and data-driven decisions that are carefully aligned with the organization's strategic mission and objectives. All HRM activities should be evaluated in this context, using "leading indicator" performance measures.

Keep mission in mind

WHAT IS HUMAN RESOURCE MANAGEMENT?

Line managers and HRM

The human resources of an organization consist of all people who perform its activities. In a sense, all decisions that affect the workforce concern the organization's HRM function. Human resource management concerns the personnel policies and managerial practices and systems that influence the workforce. Regardless of the size—or existence—of a formal HRM or personnel department (many small businesses do not have a formal HRM department), the activities involved in HRM are pervasive throughout the organization. Line managers, for example, will spend more than 50 percent of their time involved in human resource activities such as hiring, evaluating, motivating, disciplining, and scheduling employees.

The effectiveness with which line management performs HRM functions with the tools, data, and processes provided by HRM specialists is the key to competitive advantage through HRM. This principle generalizes from very small businesses to the very largest global enterprises. Dr. James Spina, former head of executive development at the Tribune Company, really put things in perspective about the role of HRM. He said, "The HRM focus should always be maintaining and, ideally, expanding the customer base while maintaining and, ideally, maximizing profit. HRM has a whole lot to do with this focus regardless of the size of the business, or the products or services you are trying to sell."

Those individuals classified within an HRM functional unit provide important products and services for the organization. These products and services may include the provision of, or recommendation for, systems or processes that facilitate organizational restructuring, job design, personnel planning, recruitment, hiring, evaluating, training, developing, promoting, compensating, and terminating personnel. **A major goal of this book is to provide information and experiences that will improve the student's future involvement and effectiveness in HRM activities.**

A good way to think of an HR department is to view the department as a business within the company. The HR business has three product lines: (1) administrative services and transactions, which are made up of areas such as staffing and compensation; (2) business partner services, which assist in implementing business plans and meeting objectives; and (3) strategic partner, which contributes to the firm's strategy based on human capital considerations and developing HR practices to foster competitive advantage.[16] The most common and traditional product line for HR is the first one: administrative services. However, the most effective (but less common) HR departments contribute significantly to the other two lines as well.

While HR is capable of creating and sustaining competitive advantage, some would argue that HR, as it is practiced, is often more a weakness than a strength. One survey found that only 40 percent of employees thought their companies were doing a good job retaining high-quality workers, and only 41 percent thought performance evaluations were fair. A mere 58 percent of respondents reported their job training as favorable. A majority said they had few opportunities for advancement and they had little idea about how to advance in the first place. Only about half of those surveyed below the managerial level believed their companies took a genuine interest in their well-being.[17]

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HRM and Corporate Performance

A growing body of research shows that **progressive HRM practices can have a significant effect on corporate performance.** Studies now document the relationship between specific HR practices and critical outcome measures such as corporate financial performance, productivity, product and service quality, and cost control.[18] Many of the methods characterizing

Figure 1-1 Characteristics of High-Performance Work Practices (HPWP)

- Large number of highly qualified applicants for each strategic position.
- The use of validated selection and promotion models/procedures.
- Extensive training and development of new employees.
- The use of formal performance appraisal and management.
- The use of multisource (360 degree) performance appraisal and feedback.
- Linkage of merit increases to formal appraisal processes.
- Above-market compensation for key positions.
- High percentage of entire workforce included in incentive systems.
- High differential in pay between high and low performers.
- High percentage of workforce working in self-managed, project-based work teams.
- Low percentage of employees covered by union contract.
- High percentage of managerial jobs filled from within.

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High-performance work systems

these so-called high-performance work systems or practices (HPWP) have been researched and developed by the HRM academic community. Figure 1-1 presents a summary of this research.

HPWP are particular HR practices or characteristics designed to enhance employees' competencies and productivity so that employees can be a reliable source of competitive advantage. They have been called "coherent practices that enhance the skills of the workforce, participation in decision making, and motivation to put forth discretionary effort." Research shows that "firm competitiveness can be enhanced by high-performance work systems." A summary of this research found that one standard deviation of improved assessment on an HPWP measurement tool increased sales per employee in excess of $15,000, an 8 percent gain in labor productivity.[19] A more recent review concluded that "research in applied psychology and strategic human resource management clearly indicates that investing in human capital can yield positive individual- as well as organization-level performance outcomes."[20]

Validation

Recall the critical remarks earlier about graphology, or handwriting analysis. Validated selection and promotion systems are related to higher productivity and reduced costs (see Figure 1-1). The term ***validated*** **means that the practice has actually been shown to (statistically) predict (or correlate with) something important.** If you're using a method to select managers or sales personnel, a "validated" method is a practice that research has shown to actually predict managerial or sales success. In the field of HRM, there are highly valid methods and procedures for predicting future employee performance based on the assessed personal characteristics of job candidates.

Better training and development programs and team-based work configurations improve performance and job satisfaction and decrease employee turnover. Particular incentive and compensation systems also translate into higher productivity and performance. The fair treatment of employees results in higher job satisfaction, which in turn facilitates higher performance, lower employee turnover, reduced costs, and a lower likelihood of successful union organizing.

Focus on core competencies

Greater demands are now being made on HRM practitioners to respond to contemporary trends in the business environment. Today, the most effective HRM functions are conceptualized in a business capacity, constantly focusing on the strategy of the organization and the core competencies of the organization. HRM specialists must show how they can make a difference for the company's bottom line and, if necessary, serve as "business problem solvers." Costs and efficiencies are necessary criteria for evaluating recommendations from research in HRM.

Many corporate strategy specialists maintain that the key to sustained competitive advantage is building and sustaining core competencies within the organization and maintaining flexibility in order to react quickly to the changing global marketplace and the advances in technology. One primary role of HRM practitioners should be to facilitate these processes.

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DISCREPANCIES BETWEEN ACADEMIC RESEARCH AND HRM PRACTICE

SHRM

knowledge gap

While HRM executives and managers are more educated and professional than in the days when they were simply in charge of personnel, the level of knowledge in practicing HRM is another story. Many companies hire MBAs for HRM jobs even from programs where not even a single HRM course may be required for the MBA. The 190,000-member Society for Human Resource Management (SHRM, see www.SHRM.org), which established the Human Resource Certification Institute, formally recognizes human resource professionals who have demonstrated particular expertise in HR. As of 2011, over 108,000 certified HR professionals in more than 70 countries have received and maintained HR credentials through this respected institution.

HRM practitioners need to pay more attention to academic research. There is a great deal of carefully crafted academic research that is highly relevant to HRM practice. This research should help HR practitioners and line managers doing HR work to make more data-driven decisions. Figure 1-2 presents a few examples of discrepancies between the current state of HR practice and undisputed academic findings and recommendations. One study showed the extent of this "knowledge gap."[21] HR professionals were given a 35-item test that assessed the extent of their HR knowledge (the same test you may have completed as part of Critical Thinking Application 1-A). The test was based on findings from academic research, which would likely be covered in any basic HR course like this one. Items were developed where there was little or no argument on the correct answer within the academic community. The average grade for the nearly 1,000 HR professionals was "D." On numerous items, over 50 percent of the HR professionals got the answer wrong! More recent research indicates that a "C" grade may be more appropriate for HR practitioners today but it's still fair to say that the "knowledge gap" persists.[22]

Throughout the book, we intend to emphasize the most glaring discrepancies between the way HRM is actually being practiced and what academic research has to say about particular practices. The failure on the part of HRM practitioners to be aware of and consider these research findings can ultimately have a profound effect on an organization's "bottom line."

Figure 1-2 **Sample of Discrepancies between Academic Research Findings and HRM Practices**

Academic Research Findings	HRM Practice
RECRUITMENT	
Quantitative analysis of recruitment sources using yield ratios can facilitate efficiencies in recruitment.	Less than 15% calculate yield ratios. Less than 28% know how.
STAFFING	
Realistic job previews can reduce turnover.	Less than 20% of companies use RJPs in high-turnover jobs.
Weighted application blanks reduce turnover.	Less than 35% know what a WAB is; less than 5% use WABs.
Structured and behavioral interviews are more valid.	40% of companies use structured interviews. Less than 50% use behavioral interviews.
Use actuarial model of prediction with multiple valid measures.	Less than 5% use actuarial model.
Graphology is invalid and should not be used.	Use is on the increase in the United States.
PERFORMANCE MANAGEMENT AND APPRAISAL	
Do not use traits on rating forms.	More than 60% still use traits.
Train raters (for accuracy, observation bias).	Less than 30% train raters.
Make appraisal process important element of manager's job.	Less than 35% of managers are evaluated on their performance appraisal practices.
COMPENSATION	
Merit-based systems should not be tied into a base salary.	More than 75% tie merit pay into base pay.
Gain sharing is an effective PFP system.	Less than 5% of companies use it where they could.

Source: H. J. Bernardin (2011), "A Survey of Human Resource Practices: Discrepancies Between Research and HRM Practice." Unpublished Manuscript.

Although line management plays a critical role in the successful implementation and execution of HRM programs, these programs are typically developed, purchased, and adopted because of recommendations by HRM specialists. For the small business with no formal HR department, the person in charge of HR issues needs to be the HR expert.

Many HR activities such as payroll, recruitment, and preemployment screening are now routinely outsourced to organizations that specialize in these areas.[23] The number of consulting organizations specializing in HR activities has increased substantially in the last 10 years. **There are now web-based HR products and services for almost every major functional area of HR.** An organization's HR specialist must have the necessary knowledge and skills to be able to either develop unique HR products or services or to identify the best and most cost-effective of these HR products and services for a particular situation.

HRM professionals should possess up-to-date knowledge about the relative effectiveness of the various programs and activities related to HR planning, training and development, compensation, performance management, selection, information systems, equal employment opportunity/diversity, labor relations, recruitment, and health and safety issues. HRM professionals also should be capable of conducting their own research to evaluate their programs and program alternatives. Unfortunately, evidence suggests that HR professionals adopt many programs based either on effective marketing from the plethora of vendors selling HR materials and programs or simply on what other companies are doing. While some consideration may be given to the leading-indicator research described in Figure 1-1, greater weight is often given to slick marketing programs and simply doing what others are doing. When "bottom-line" questions arise later on—as they inevitably do—HR departments are caught off guard because costly and relatively ineffective programs have been adopted. A careful study of programs with evaluative criteria linked to strategic goals might reveal negligible or no impact. Again, if you don't measure it, you can't manage it.

What is meta-analysis?

Meta-analyses are now available to help HR managers make more informed decisions about methods for such critical HR practices as staffing, recruiting, performance appraisal, and compensation. **A meta-analysis is a statistical technique that statistically combines research findings across studies in order to reveal relationships among variables.** There are now over 500 HR-related meta-analyses published in good, peer-reviewed journals.[24] (Many of the correct answers from the study we cited earlier to illustrate the "knowledge gap" were derived from a meta-analytic study and finding.) These studies are cited throughout the book and often used to make "bottom-line" recommendations for an HR practice or method.

Research should drive HRM practice

Many HR professionals are generally not well trained to ask the right questions, understand scientific research, or conduct the appropriate study of a given HR program, practice, or activity. One of your authors had a conversation with a VP of HR of a Fortune 500 company. He had a Big-Ten MBA (but had taken no classes in HR) and was convinced that one particular test was the best way to hire retail sales personnel. The basis for his position was conversations with other poorly informed HRM MBAs who were using this same test and "it seemed to work." This is no way to evaluate a selection method. Another HR vice president for a retailer adopted an expensive computerized testing program that the publisher claimed would reduce employee turnover by 50 percent. The VP did not request to review the research that supported this claim and later admitted that although he ultimately made the decision to adopt the test, he was unqualified to assess the test's usefulness since he could not even ask fundamental measurement questions that should be the focus of any evaluation of such a product or service. In addition, although the retailer had been using the test for over 2 years, it apparently never occurred to him to evaluate the extent to which the test actually did reduce turnover in his own organization. The New London, Connecticut, police department used an intelligence (also known as a cognitive or general mental ability) test known as the Wonderlic to screen for officers but eliminated candidates if their scores were too high.[25] The department's argument was that more intelligent officers would get bored on the job and thus quit. The department had no evidence to support this theory; only the intuitive appeal of the argument. This is the kind of theory that should be tested first either within an organization or by reviewing relevant scholarly research and by considering the overall implications of such a policy.[26]

One of the great values of academic research is the objective evaluation of activities or programs using well-controlled experimental designs, which allow for unambiguous

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Buros Mental Measurements Yearbook

assessments of effects. For example, *Buros Mental Measurements Yearbook* is a reference source that publishes evaluations of tests written by qualified academics who have no vested interest in the tests themselves. Over 2,000 tests have been reviewed and the reviews can be read and downloaded from the Buros website for $15 per test (http://buros.unl.edu/buros/jsp/search.jsp). Many HRM professionals who adopt tests do not know that this very useful text (and website) even exists.

THE DOMAINS OF HUMAN RESOURCE MANAGEMENT

Figure 1-3 presents a listing of some of the most commonly performed activities by HRM professionals. These HRM activities fall under five major **domains:** (1) Organizational Design, (2) Staffing, (3) Performance Management and Appraisal, (4) Employee Training and Organizational Development, and (5) Reward Systems, Benefits, and Compliance.

Figure 1-3
Major Activities of Human Resource Management

ORGANIZATIONAL DESIGN
Human resource planning based on strategy
Job analysis/work analysis
Job design
Information systems
Downsizing/restructuring

STAFFING
Recruiting/interviewing/hiring
Affirmative action/diversity/EEO compliance
Promotion/transfer/separation
Outplacement services
Employee selection/ promotion methods

PERFORMANCE MANAGEMENT AND APPRAISAL
Management appraisal/management by objectives/strategy execution
Productivity/enhancement programs
Customer-focused performance appraisal
Multirater systems (360°, 180°)
Rater training programs

EMPLOYEE TRAINING AND ORGANIZATIONAL DEVELOPMENT
Induction/orientation/ new employee socialization
Management/supervisory development
Global Leadership development
Career planning/development
Employee assistance/counseling programs
Attitude surveys
Training delivery options
Diversity programs

REWARD SYSTEMS, BENEFITS, AND COMPLIANCE
Compensation program design and management
Compliance with Fair Labor Standards Act (and other compensation laws)
Employee benefits management
Health/medical services
Pension/profit-sharing plans
Unemployment compensation management
Complaint/disciplinary procedures
Employer/employee relations
Labor relations/collective bargaining
Safety programs
Compliance with Occupational Safety and Health Act

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Organizational design activities usually first

Although most of the particular activities subsumed under these five domains are conceptually independent, in practice they are not (and should not be). While we list EEO compliance as part of the Staffing domain, the legal compliance issues could obviously be listed in the "Compliance" domain. Many organizations pursue the various activities within a particular domain as if these activities would have no implications for any of the other domains. For example, the New London Police Department conceded that their leaders (e.g., their captains, even the chief of police) were all selected from within the organization but hadn't considered the fact that not hiring more intelligent officers at entry level might have a negative effect on the pool of candidates for managerial positions.

Jack Welch is one of the most highly regarded former CEOs and the author of several best sellers on management. He has been a strong advocate of a performance appraisal system known as forced ranking (or forced distribution).[27] With this approach, managers are "forced" to put a fixed percentage of their employees into a small number of categories such as "superior" or "needing improvement." Probably because of Mr. Welch's advocacy, this method of performance appraisal became very popular in the 1990s with, it was estimated, one in five of the largest U.S. companies adopting the method, including Microsoft, Ford, Cisco, Capital One, and even the notorious (and bankrupt) Enron Corporation. One unanticipated effect of the method was a plethora of lawsuits related to the method and a decrease in employee morale and teamwork.[28]

Many organizations have recently reduced or eliminated health care benefits and pension programs without due consideration of the impact of these revisions on staffing and employee retention. In addition to considering the implications, and potential consequences, of any particular HR domain activity on other HR domains, all domain activities must be weighed in the context of the new global environment, current and anticipated tax incentives, and contemporary HR laws, regulations, and legal interpretations. This very tangled web is discussed shortly.

Acquiring human resource capability should begin with organizational design and analysis. **Organizational design** involves the arrangement of work tasks based on the interaction of people, technology, and the tasks to be performed in the context of the mission, goals, objectives, and strategic plan of the organization. HRM activities such as human resource planning, job and work analysis, organizational restructuring, job design, team building, computerization, and technological interfaces also fall under this domain.

Organizational and work design issues are almost always the first ones that should be addressed whenever significant change is necessary because of new strategies and/or objectives, changing economic conditions, new or improved technologies, new opportunities, potential advantages or disadvantages, or serious internal problems. Design issues and activities usually (and should) drive other HR domains such as selection, training, performance management, and compensation. The recent economic downturn has provided an opportunity for a serious evaluation of an organization's strategy, its objectives, and its competitive position. There are clearly effective and ineffective approaches and activities within this organizational design.

Corporate downsizing, outsourcing/offshoring, and reengineering efforts often begin with human resource planning in the context of personnel needs, new technology or equipment, a strategic plan, and an analysis of how the work is performed, how jobs and work units relate to one another, and, of course, cost analysis. These decisions can be critical for the long-term survival of a struggling company. Research shows that layoffs designed to derive a short-term "cost savings" may foster an increase in market value in the short run but that investors often lose all of this value plus considerably more.[29] The major activities that define the organization design domain, such as planning, work analysis, downsizing, and restructuring, are covered in Chapters 4 and 5.

Work analysis is a major component of the organization design domain. The identification of the critical knowledge, skills, and abilities necessary to achieve organizational objectives may be the most important of these activities. Effective staffing programs help recruit and retain the personnel who possess these characteristics.

After the organization is structured and work and jobs are clearly defined in terms of performance objectives and the necessary knowledge, skills, and abilities for achieving

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them, positions must then be staffed. Recruitment, employee orientation, selection, promotion, and termination are among the functions that fit into the HR **staffing** domain. Of the HR activities within this domain, selection and termination are probably the two most likely affected by the legal environment. The laws, regulations, and litigation are discussed in Chapter 3. Chapter 6 covers the critical area of selection. Termination is discussed in Chapters 7 and 12.

The **performance management** domain includes assessments of individual, unit, or other aggregated levels of performance to measure and improve work performance. Chapter 7 deals with these subjects, which, like staffing and selection, are also the focus of numerous lawsuits. A lawsuit can occur if the organization maintains that an employee was terminated, not promoted, or not given a merit raise because of performance, and the employee believes that the negative personnel action was because of his or her gender, race, religion, age, disability, or some other personal characteristic. An employee also can claim an unlawful discharge based on an alleged contract or implied contract violation and even make a claim for preemptive retaliation. Obviously, merit-based or incentive pay systems require accurate measures of employee performance.

Employee training and organizational development programs involve the organizational investments in establishing, fostering, and maintaining employee skills based on organizational and employee needs. Activities include specialized training for jobs or management functions, career development, and self-directed learning. Chapters 8 and 9 cover these vital areas.

Reward systems, benefits, and compliance have to do with any type of reward or benefit that may be available to employees. Cash compensation, fringe benefits, merit pay, profit sharing, health care, parental leave programs, vacation and sick leave, and pension programs are among the critical areas within this domain. These activities are regulated by a myriad of compliance requirements at the federal, state, and municipal levels. Recent years have seen a dramatic increase in the number and size of class action lawsuits brought under the federal Fair Labor Standards Act (FLSA) with charges of unpaid work time and overtime wages. These HR activities and the major laws and regulations are covered in Chapters 10 and 11.

This domain also concerns managing employment relationships, labor relations law and compliance, and procedures designed to maintain good working relationships between employees and employers. This may include the negotiation of collective bargaining agreements, which require employers to negotiate with unionized workers over the conditions of employment. These areas and the major relevant laws and regulations are covered in Chapters 12 and 13.

Finally, employee health and safety issues are also subsumed under this domain and include compliance with laws and regulations, especially the federal **Occupational Safety and Health Act** (**OSHA**), which is concerned with the work environment and the effects of health and safety policy and practice on workers and the "bottom line." Our focus is on health and safety policy as a leading indicator of HR effectiveness. This area is explored in Chapter 14.

TRENDS ENHANCING THE IMPORTANCE OF HRM

As we have said, there is an increasing realization (and evidence!) that the manner in which organizations conduct their HR activities can help create and sustain organizational effectiveness and a competitive advantage. The contemporary trends and challenges in the business environment necessitate that even greater attention be given to the human resources of an organization. Let us examine these trends next and relate each to particular HRM activities. Figure 1-4 presents a summary of major trends.

The most significant trend is the increasing globalization of the economy and a growing competitive work environment with a premium on product and service quality and low overhead. One of the most important factors affecting globalization and the growth of transnational corporations is the goal of reducing the cost of production since labor costs

Figure 1-4
Major Trends Affecting HRM

TREND 1: THE INCREASED GLOBALIZATION OF THE ECONOMY
Opportunity for global workforce and labor cost reduction
Increasing global competition for U.S. products and services
Opportunity for expansion that presents global challenges for HR

TREND 2: TECHNOLOGICAL CHANGES, CHALLENGES, AND OPPORTUNITIES
Great opportunities presented by web-based systems
New threats: privacy, confidentiality, intellectual property

TREND 3: INCREASE IN LITIGATION AND REGULATION RELATED TO HRM
Federal, state, and municipal legislation and lawsuits on the increase
Wrongful discharge; negligent hiring, retention, referral

TREND 4: CHANGING CHARACTERISTICS OF THE WORKFORCE
Growing workforce diversity, which complicates HRM
Labor shortages for key competencies/aging workforce/Millennials rising

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are quite significant for U.S. companies. But as we discuss in Chapter 2, market-seeking behavior is now as important a motivator of globalization as the search for low-cost productivity.

Another major trend is the unpredictable but inevitable power of technology to transform HRM. There is a need to be more flexible today because of the incredible pace of change in markets and technology. HRM can facilitate this flexibility. The growth and proliferation of lawsuits related to HR practice and changes in workforce characteristics also have had a big impact on HRM. So is the fact that many in the workforce are ill-equipped with the necessary knowledge, skills and abilities, and job requirements to do their jobs well.

Trend 1: The Increased Globalization of the Economy

In his bestseller *The World Is Flat: A Brief History of the Twenty-First Century*, Thomas Friedman described the next phase of globalization.[30] An Indian software executive told him how the world's economic playing field is being leveled. So-called barriers to entry are being destroyed. A company (or even an individual) can compete (or collaborate) from almost anywhere in the world. Over 1,000,000 American tax returns were prepared in India in 2011. Says Jerry Rao, Indian entrepreneur, "Any activity where we can digitize and decompose the value chain, and move the work around, will get moved around. Some people will say, 'Yes, but you can't serve me a steak.' True, but I can take the reservation for your table sitting anywhere in the world." Rao's recent projects include a partnership with an Israeli company that can transmit MRI and CAT scans through the Internet so Americans can get a second opinion very quickly (and relatively cheaply). There is no question that the increasing globalization of most of the world's economies will affect HRM. It is predicted that most of the largest U.S. companies will soon employ more workers in countries other than the United States, and that the growth for most major corporations will derive from offshore operations. With technological advances, one of the strongest trends is the development of a worldwide labor market for U.S. companies. In their quest for greater efficiencies and reduced costs, American companies can now look globally to get work done. While this opportunity stands to decrease the cost of labor, the process of HRM can be more complicated. Of course, U.S. workers will resist this trend through union and political activity.

The rise in oil prices and the cost of transportation have recently caused some "reverse globalization" in the form of some jobs returning to the United States, especially in 2011. In 2000 when oil was $20 a barrel, it cost $3,000 to ship one container of furniture from Shanghai to New York. In 2012, the estimated cost of the same container is $8,800. The long-suffering furniture manufacturing business in North Carolina is making a comeback. DESA, a company that makes heaters to keep football players warm, is moving all of its production back to Kentucky from China. Carrier Battery is coming back to Ohio. "Cheap labor in China doesn't help you when you gotta pay so much to bring the goods over," says economist Jeff Rubin.

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Labor cost reductions

Nevertheless, most U.S. companies still see great potential for labor cost reductions by looking overseas and a hesitance to hire U.S. workers unless it is absolutely necessary. Despite high profits in recent years, American companies have been very reluctant to hire additional workers in the United States. In 2012, with unemployment between 8 and 9 percent, the belief was that skilled American workers were getting more expensive while capital equipment was getting less expensive. This combination, along with tax advantages for equipment, has encouraged companies to spend money on machines and technology rather than people. "I want to have as few people touching our products as possible," said Dan Mishek, a managing director of Vista Technologies in Minnesota. "Everything should be as automated as it can be. We just can't afford to compete with countries like China on labor costs, especially when workers are getting even more expensive."[31]

But outsourcing can bring new problems along with the cheap labor. It's been over 15 years since some of the biggest companies in the world, because of political and consumer pressure, began their efforts to eliminate the "sweatshop" labor conditions that were pervasive across Asia. Yet, worker abuse is well documented in many Chinese factories that supply U.S. companies. Chinese companies providing goods and services for Walmart, Disney, and Dell have been accused of routinely shortchanging their employees on wages, withholding health benefits, and exposing their workers to dangerous machinery and harmful chemicals like lead and mercury. Walmart, the world's biggest retailer, has a multibillion sourcing portfolio that supplies the goods it sells in stores mostly from China. According to the Institute for Global Labour & Human Rights, two nongovernmental organizations recently documented incidents of abuse and labor violations, including child labor, at 15 factories that produce or supply goods for Walmart. "At Wal-Mart, Christmas ornaments are cheap, and so are the lives of the young workers in China who make them," the National Labor Committee report said.[32]

More concern over productivity

Globalization creates greater competition and fosters more concern over productivity and cost control. One important reason for the recent increased interest in HRM is the perceived connection between HRM expertise and productivity. Most of corporate America now knows that competing in an increasingly global environment requires constant vigilance over costs and productivity and customer satisfaction. A smaller but growing percentage of managers recognize the importance of human resources in dealing with many of these issues. Indeed, a great deal of the most recent corporate downsizing can be linked to technological improvement and corresponding estimates of productivity improvements with HR interacting with the technological changes. But with the rising costs of labor in the United States, many companies are continuing to look for technology to replace workers whose jobs are relatively routine. Says Harvard economist Claudia Goldin, "If you're doing something that can be written down in a programmatic, algorithmic manner, you're going to be substituted for quickly."[33] Bank of America, American Express, Coca-Cola, and General Electric are among the many large U.S. companies that have successfully followed a formula of cutting personnel costs while investing in automated equipment, more efficient facilities, and other technologies.

U.S. exports now generate about one in six American jobs, an increase of over 20 percent in just 10 years. McDonald's opened its first non-U.S. restaurant in Canada in 1967. By 2011 its total sales outside of the United States contributed to over 50 percent of the operating income of the firm. Two-thirds of McDonald's new restaurants are now opened outside the United States each year. While McDonald's has moved more quickly than most U.S. firms, many other U.S. firms are now expanding rapidly in both new countries and new markets. The majority of new restaurants opened by Burger King and KFC are now in international markets. The majority of new stores opened by Walmart are now opened outside the United States.

Another response to increasing global competition is restructuring/downsizing, as mentioned earlier. Coca-Cola, Ford, Sears, AT&T, CBS, DuPont, GM, Kodak, Xerox, and IBM are among the many corporate behemoths that have reduced their workforces by more than 10 percent in the last decade. Many HRM specialists are experts in organizational restructuring and change procedures. They have expertise in downsizing and outsourcing options that can reduce labor costs. They may also conduct outplacement counseling for those who are displaced or assist in developing new staffing plans as a result of the restructuring.

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As described in more detail in later chapters, HRM specialists are also asked to help in legal defenses against allegations of discrimination related to corporate downsizing. Lawsuits related to downsizing are quite common. In an attempt to compete more effectively against Geico and Progressive, Allstate Insurance converted all of its 15,200-member sales force to independent contractors. To continue as contractors, the agents had to sign a waiver that they would not sue Allstate for discrimination. The result was an age discrimination lawsuit brought by terminated employees and the government which was settled for $4.5 million in 2009. Labor law can impose constraints on organizations trying to cut costs through changes in labor policies.

Trend 2: Technological Changes, Challenges, and Opportunities

The second trend is the rate of change in technology. More organizations are now evaluating their human resources and labor costs in the context of available technologies based on the theory that products and services can be delivered more effectively (and efficiently) through an optimal combination of people, software, and equipment, thus increasing productivity. Instead of speaking to a customer service representative at Bank of America (BOA) to discuss your account, you now routinely interact with an automated system via the Internet or an automated teller machine (ATM) or through an 800 number. The program is designed to handle almost any problem about which you might inquire. With the automated system, BOA was able to shed customer service representatives and reduce labor costs. As more people use their automated services and ATMs, there is less need for supervision. Customers, as a result, pay less in service charges. As these automated systems have evolved, some customers are satisfied with the automated service, even though they are not dealing with an actual person. HRM specialists participate in the development and execution of user testing programs to assess the design of the automated interface.

Today, with the assistance of HR, more companies are evaluating the role of organizational structure, technology, and human resources with the goal of providing more and higher-quality products and services to the customer at a lower price. This pricing reduction is at least partially achieved by controlling the cost of labor while not losing the focus on meeting customer definitions of quality. Of course, the ultimate goal of for-profit organizations is to maximize profit margins while sustaining (or improving) perceived customer value. HR has a great deal to offer in this endeavor.

35 percent HR involvement in offshoring

While the potential is there, HR specialists are often ignored. Technological advances and offshoring are, of course, related. One survey found that only 35 percent of respondents reported that HR was involved in the offshoring process from an early stage, although HR does typically play a major role in restructuring the organization's workforce as a result of offshoring. Says Jennifer Schramm, manager of workplace trends and forecasting at the Society of Human Resource Management (SHRM.org), "with human capital increasingly seen as the main factor in competitive advantage at both national and organizational levels, increasing productivity through effective human resource management will be crucial. In this sense, HR's role in boosting productivity through human capital and workplace culture, even as the scope of the workplace extends across the globe and spans very different cultures, will continue to grow."[34]

Technology is revolutionizing many HRM activities as electronic HRM (e-HRM) and automated human resource management systems have allowed HR to focus on the more strategic aspects of HR while making HR services more efficient. Virtually all organizations now use some of the many software packages to aid all HR domains. Most HR activities and outcome data are tracked electronically, such as recruitment, hiring data, turnover, performance appraisals, and training. Managers from different departments, states, or even countries now readily access the HR system and update employment files. Software packages are easily customized to fit a specific organization's HR activities. Employees from around the world now work together in virtual teams. Organizations can post job openings online and get a pool of qualified candidates in minutes. Some of these candidates can be tested and interviewed the same day (or hour) they apply. Of course, employees can now access personal information about their health care benefits or their 401k retirement investments. There is no question that e-HRM has increased HR efficiency for many HR activities.

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Technology is also helping HR do things more effectively. Take the performance management and appraisal domain. Process tracing software is now available and used by many technology-oriented companies in order to track the interactions and contributions of individual workers. For example, Microsoft uses data from this software to identify programming "sparkplugs" (those who originate an idea), the "super-connectors" (those who build on an idea), and the "bottlenecks" (those who hold things up). They then use these results to reward contributions and to plan future assignments. IBM uses similar software to identify employees to be "fast-tracked" into managerial and other leadership roles based on their contributions to group projects.

Technology and privacy

The advent of new technology has created a variety of concerns for management. Employee privacy and intellectual property rights are increasingly cited as major concerns. With computer attacks occurring worldwide, ensuring confidentiality of employee data is a growing concern, and the liability of an organization in the event of security breaches is still unclear.[35]

Protecting intellectual property is vital for all organizations, especially emerging technology and research and development organizations. As a result, organizations are developing electronic communication policies that clearly outline permitted electronic activities, uses of employer systems, and monitoring of employees' files such as e-mail. Many companies have banned cellular cameras and instant messaging because of the increased risk of intellectual property theft.

21st century staffing

Although still rare, the following scenario is already here for some companies: A manager or supervisor gets authorization to hire someone. The manager goes into a "node" on the Internet and completes a job analysis for the new position that establishes critical information regarding the job, including the necessary knowledge, ability, skills, and other critical characteristics. The job description is then used to conduct a "key word" computer search of a potential applicant pool in order to match the requirement of the job with the standardized résumés in the database. Out pops a number of potential candidates for the job. The manager then immediately sends out the job vacancy announcement to all of the potential candidates in the database through electronic mail. Interested candidates respond back via e-mail. The manager then selects the "short list" of candidates to compete for the job based on a quantitative analysis of the résumés.

The same job analysis information could also be used to construct or retrieve job-related tests or questions for an employment interview. The manager might even have a web camera and could conduct the testing and "face-to-face" interviewing of the candidates as soon as the contact is made (assuming the candidate also has access to a camera-based computer). This process of going from describing the job to actually interviewing candidates could take less than a day. HR is playing a key role in getting these systems up and running.

Virtually all of the most successful high-tech companies today rely more and more on the Internet for fast, convenient, and efficient recruiting of their core personnel. The trend line for other sectors of the U.S. economy is strong in this same direction. Even the CIA and the FBI do recruiting on the Internet (try www.odci.gov/cia if you'd like to be a spy).

Trend 3: Increase in Litigation and Regulation Related to HRM

Another important trend affecting the status of HRM is the increase in the number of regulations and lawsuits related to personnel decisions. As predicted by one sarcastic statistician, by the year 2013, there will be more lawyers in this country than people. While this is obviously a joke, there is no question that the proliferation and creativity of lawyers have helped to foster our highly litigious society. There is no sign of this activity letting up in the near term. In fact, federal lawsuits charging violations of labor laws have increased faster (up over 125 percent since 1991) than any other area of civil rights legislation. Jury awards have gotten much bigger in recent years. In 2010, 32 percent of judgments against companies related to HR were $1 million or more. In 1994, the percentage of such awards was only 7 percent.

Civil Rights Act

In general, HRM-related laws and regulations reflect societal responses to economic, social, technical, or political issues. For example, the Civil Rights Act of 1964, which prohibits job discrimination on the basis of race, sex, color, religion, or national origin, was passed primarily in response to the great differences in economic outcomes for blacks

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Genetic Information Nondiscrimination Act

compared to whites. The 2008 Genetic Information Nondiscrimination Act was designed to address concerns that job seekers or workers could be denied employment opportunities due to a predisposition for a genetic disorder. A recent amendment to the Americans with Disabilities Act (ADA) is probably responsible for the increase in ADA lawsuits since 2010.

Other examples that have increased regulatory activity are new state laws regarding corporate acquisitions and mergers, laws protecting Americans with disabilities and gays and lesbians from employment discrimination, regulations regarding family leave benefits, and mandated sick leave.

Organizations are bound by a plethora of federal, state, and local laws, regulations, executive orders, and rules that have an impact on virtually every type of personnel decision. There are health and safety regulations, laws regarding employee pensions and other compensation programs, plant closures, mergers and acquisitions, new immigration laws, and a growing number of equal opportunity laws and guidelines. Today's HRM professionals and line managers must be familiar with the ADEA, OFCCP, OSHA, EEOC, ADA, WARN, FLSA, GINA, NLRA, and ERISA—among many other acronyms. Organizations must also monitor the fate of the **Patient Protection and Affordable Care Act** (**PPACA**), a federal statute signed into law by President Barack Obama on March 23, 2010. The constitutionality of the law has been challenged and may have already been decided by the Supreme Court.

Each of these laws represents a major regulatory effort. There is also some indication that regulation will increase in the years ahead in the form of new EEO legislation related to fair pay, union organizing, and sexual orientation protection.

Illegal immigration

While illegal immigration has been recognized as a serious national problem, Congress has been unable to amend the 1986 **Immigration Reform and Control Act** or to pass new legislation. However, the states have been very busy proposing or enacting hundreds of bills addressing illegal workers. According to the National Conference of State Legislatures, between 2009 and 2011, there were 222 laws enacted and 131 resolutions in 48 states.[36] It appears that, due to some of these laws, businesses in various states can lose their licenses to do business if they are found to have intentionally or knowingly hired an "unauthorized alien" as a worker.

Organizations spend considerable time and expense in order to comply with labor laws and regulations and/or to defend against allegations regarding violations. Line managers who do not understand the implications of their actions in the context of these laws can cost a company dearly. Line managers may also be personally liable. Employers and managers now face huge fines, the possible loss of business licenses, and even criminal prosecution because of violations of new laws related to employing illegal immigrants.

Examples of HR lawsuits

Sometimes companies learn the hard way about the complexities of labor laws. Novartis Pharmaceuticals lost a sex discrimination case in 2010 and a jury awarded the plaintiffs $253 million. Drivers in FedEx's Ground division claimed to have been improperly classified as independent contractors (the case was settled). IBM also settled a lawsuit brought on behalf of 32,000 technical and support workers for $65 million who claimed they were entitled to overtime pay in violation of the **Fair Labor Standards Act.**[37] In fact, class action lawsuits brought under the Fair Labor Standards Act for overtime-related issues have increased significantly in recent years.[38] Citigroup/Salomon Smith Barney settled a similar suit for $98 million. Abercrombie and Fitch recently settled a race discrimination lawsuit for $40 million and now conducts its staffing under strict court-imposed scrutiny. Texaco and Coca-Cola settled similar lawsuits for over $165 million each. Baker and McKenzie, the largest law firm in the United States, was assessed $3.5 million in punitive damages for sexual harassment committed by one partner at the firm. The EEOC settled a similar suit with Honda of America for $6 million. Westinghouse Electric Corporation agreed to a $35 million settlement in an age discrimination suit involving 4,000 employees affected by the company's reorganization. Ford recently agreed to a $10.6 million settlement in an age discrimination case. Morgan Stanley settled a sex discrimination case for $54 million. Wal-Mart Stores, Inc. remained mired in a numerous sex discrimination lawsuits over pay and promotions as this book went to press.

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Trend 4: Changing Characteristics of the Workforce

Several trends regarding the future of the American workforce underscore the challenges to and the importance of the human resource function. Compared to 10 years ago, American workers are more ethnically diverse, more educated, more cynical toward work and organizations, getting older, and, for a growing number, becoming less prepared to handle the challenges of work today. The composition of the workforce is changing drastically, and these changes are affecting HRM policies and practices.

Increasing diversity

Increasing diversity creates the need for more diverse HRM systems and practices and increases the probability of litigation. It is estimated that by 2016 the U.S. workforce will be 80 percent white, 12 percent African American, 5 percent Asian, and 3 percent from other groups (including multiple racial groups).[39] Hispanics, African Americans, and Asians are also projected to increase at a higher proportional rate than white non-Hispanics. A greater proportion of women and minorities have entered the workforce since 2005 and have moved into previously white male–dominated positions, including managers, lawyers, accountants, medical doctors, and professors. Nearly 90 percent of the job growth in the first part of the 21st century came from women, immigrants, African Americans, and people of Hispanic or Asian origin. In addition, there are more dual-career couples in the labor force. The "typical" U.S. worker in the past was a male—often white—who was a member of a single-earner household. Fewer than 20 percent of today's employees fit this description. In May 2008, an estimated 11.6 percent of the U.S. population was foreign born. Asians and Hispanics are the fastest growing groups in the labor force and this is projected to continue to 2016. About half of the youngest 100 million Americans are immigrants.[40]

The Millennials

Two other trends will surely make HR more challenging in the years ahead: the rate of "Baby-Boomer" retirements and a growing rate of Generation Yers (or Millennials) entering the workforce. It is estimated that by 2014 there will be almost 63 million Millennials (people born between 1977 and 1994) in the workforce, while the number of Baby Boomers in the workplace will decline to less than 48 million. Some Baby Boomers believe that the Facebook Generation (yet another name for Millennials) are less industrious, less hard working, and less virtuous than the older generations.[41] Don Tapscott, author of *Grown Up Digital: How the Net Generation Is Changing Your World,* says that younger workers prefer to work in teams.[42] Managers (and even professors) have been known to complain about Millennials frequently checking Facebook and Twitter or working with their ear buds in. Millennials are more likely than Baby Boomers to believe that taking breaks for fun at work makes people more, not less, productive. Such a theory is generally not accepted by older bosses and co-workers.[43]

By 2030, Americans 65 and older will make up about 20 percent of the total population of the country. This will involve very large government entitlement costs in the form of Social Security, Medicare, and Medicaid contributions. However, there is some indication that enough Baby Boomers have remained in the workforce to make up for any shortfall of workers and to a limited extent reduced a portion of the staggering projected government unfunded obligations. Unfortunately, this trend has probably aggravated a generational conflict. Because of the larger numbers of workers who are over the age of 40, age discrimination litigation has increased; moreover, a recent Supreme Court age discrimination ruling (to be discussed in Chapter 3) changed the burden of proof needed to prove age discrimination and may have already increased the amount of litigation. Also, the workforce under the age of 40 is expected to acquire more family responsibilities. The Generation Xers, the "sandwich generation," those workers born between the Boomer generation and Generation Y, are to be expected to juggle both child care and especially elder care demands as the Boomers live longer. Currently, many Boomers are juggling many of these responsibilities. All of these issues will be of concern to HRM practitioners and line managers in the years to come.

As a result of these changes in workforce composition, many organizations are implementing programs on diversity, flexible work arrangements, more responsive training programs, child and elder care arrangements, and career development strategies so that work and nonwork responsibilities can be more easily integrated. Building and sustaining a quality workforce from this diversity is a great challenge for HR.

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Diversity and legal implications

While increasing diversity translates into a greater probability of EEO legal actions, many experts also argue that the diversity of the workforce should approximate the population demographics so that an organization can be more responsive to the needs of the population. As a result, today, most large U.S. companies include increasing the diversity of their workforce as one of their strategic objectives. As we discuss in later chapters, the diversity goals of corporations can have an impact on individuals who do not meet the diversity criteria (e.g., older workers and job applicants).

Millennials are not only more racially and ethnically diverse than Boomers or Xers, they are also more comfortable working in a diverse environment. Although there isn't strong research on this subject to date, it is thus likely that the Millennial generation might help run things a little more smoothly as organizations get more and more diverse. Figure 1-5 presents a descriptive summary of the 75-million-strong Millennials.

Summary of Trend Effects

All of these trends are having a profound effect on the way HR is conducted. The changing demographics and cultural diversity of the workforce, the increased number of lawsuits and regulations, and the growing demands on American workers in the context of a paramount

Figure 1-5
Who Are the Millennials? (aka: GenY, GenWHY, Nexers, Boomlets, Netizens, GenNext)

DEMOGRAPHICS

- Born between 1977 and 1994
- Kids of the Baby Boomers
- Largest generation (75 million) after the Boomers
- 38 percent of Millennials identify themselves as "nonwhite"
- Well educated

CHARACTERISTICS

- Techno savvy
- Connected 24/7
- Independent
- Self-reliant
- Global/civic minded
- Green
- Diverse
- Entrepreneurial
- Life-style centered
- Less religious

DEFINING LIFE EXPERIENCES/ EVENTS

- Most "hovered over" generation
- 9/11
- Wars in Iraq, Afghanistan
- Corporate scandal and greed
- Emerging nations (China, India, South Korea)
- Immigration issues/growing diversity

AT WORK

- Adaptable/comfortable with change
- Impatient/demanding/efficient
- More interested in corporate social performance and responsibility
- Want to produce something that makes a difference
- Thrive on flexibility and space to explore
- Require an explanation
- Like feedback/guidance

Source: Adapted from Zemke, R., Rainess, C., and Filipezak, B. (2000). *Generations at Work.* (New York: AMACOM).

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need to improve U.S. productivity and establish a competitive edge all create a situation that will challenge HRM professionals and line management. Yet through better coordination with organizational planning and strategy, human resources can be used to create and sustain an organization's advantage in an increasingly competitive and challenging economy.

Being innovative and responsive to changing business environments requires great flexibility. The trend toward the "elastic" company is clearly affecting the HR function, too. As more companies focus on their core competencies—essentially, what they do best and what is the essence of their business—they outsource other work, use temporary or leased employees or independent contractors to perform services or work on specific projects even at the professional level, and replace personnel with new technology. These so-called modular companies such as Apple, Nike, and Dell Computers have been very successful because they have reliable vendors and suppliers and, most important, hot products. HR consultants have been instrumental in helping companies discover their core competencies and then developing optimal and efficient work designs and HR strategies. HR departments themselves are clearly not exempt from this trend toward outsourcing. The result has been a proliferation of consulting firms that compete for HR-related projects and programs previously performed within the company. Consulting is now a thriving business for HRM.

HR Outsourcing

Outsourcing trends, along with a myriad of Internet, software, and consulting options, have reduced the size of many HR departments and have the potential for making them more efficient and more effective. How lean can you get in HR? Nucor, a steel company with 6,000 employees, has an HR staff of four at its headquarters. Most of the HR work is farmed out to HR consultants. Some experts argue that the most efficient and perhaps most effective HRM departments select the best and least costly outside contractors for HRM products and services, make certain that these products or services are being used properly, and then evaluate and adapt these products and services to ensure they are working effectively and efficiently.

This trend toward outsourcing some of the personnel function supports the thesis of many experts that the HRM functions must be very lean in structure so that companies can react quickly to the changing world. Many HRM departments now assess the need for any expense, personnel included, in the context of the primary functions of the organization and its competitive strategy. So, if companies can maintain a leaner and more cost-effective structure by outsourcing, where will that leave the HR department in the future? One survey found that 91 percent of companies have taken steps to outsource one or more HR function.[44] Most employers indicated that they plan to expand HR outsourcing to include training and development, payroll, recruiting, health care, and global mobility.

91 percent of companies have outsourced one HR activity

Keith Hammonds, executive editor of *Fast Company,* predicts that companies will "farm out pretty much everything HR does. The happy rhetoric from the HR world says this is all for the best: Outsourcing the administrative minutiae, after all, would allow human resources professionals to focus on more important stuff that's central to the business. You know, being strategic partners."[45] Hammonds argues that most HR people are not equipped to take on this more important, strategic responsibility because they don't know enough about the business.

There is no question that intense and growing competition has placed greater pressure on organizations to be more adaptive and to carefully examine all of their costs. Edward Lawler, a prominent management author and consultant, states, "All staff departments are being asked to justify their cost structures on a competitive basis . . . head-count comparisons are being made by corporations to check the ratio of employees to members of the HR department."[46] In *Human Resources Business Process Outsourcing,* Lawler and colleagues illustrate how outsourcing can be a very effective and efficient approach to HR and give HR managers new opportunities to make a more important contribution to a company's bottom-line and overall strategy. They present a template for analyzing an HR department's value, value added, and cost-to-serve.

Whether an organization is facing increasing international competition or simply more intense pressure to improve the bottom line, HR has a great opportunity to help meet the firm's challenges as a business partner. Lawler sees the most pressing need in the area of corporate strategy. "The HR function must become a partner in developing an organization's strategic plan, for human resources are a key consideration in determining strategies that are both practical and feasible."[47] This HR partnership must evolve out of the major activities of the HR function. A key to this partnership is good, strategic measurement.

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THE IMPORTANCE OF HRM MEASUREMENT IN STRATEGY EXECUTION

The Workforce Scorecard

In their book *The Workforce Scorecard: Managing Human Capital to Execute Strategy,* Professors Mark Huselid, Brian Becker, and Dick Beatty argue that of all the controllable factors that can affect organizational performance, **a workforce that can execute strategy is the most critical and underperforming asset in most organizations.**[48] Measurement is front and center in their prescription for a more effective workforce.

Three challenges

They outline three challenges that organizations must take on to maximize workforce potential in order to meet strategic objectives: (1) view the workforce in terms of contribution rather than cost; (2) use measurement as a tool for differentiating contributions to strategic impact; and (3) hold line and HR management responsible for getting the workforce to execute strategy.

Their measurement strategy calls for the development of a "workforce scorecard" that evolves from six general steps an organization needs to take. Figure 1-6 summarizes this process: (1) identify critical and carefully defined outcome measures that really matter; (2) translate the measures into specific actions and accountabilities; (3) give employees detailed descriptions of what is expected and how improvements can be facilitated; (4) identify high and low performing employees and establish differentiated incentive systems; (5) develop supporting HR management and measurement systems; and (6) specify the roles of leadership, the workforce, and HR in strategy execution.

Perspective challenge

Huselid, Becker, and Beatty propose three challenges for successful workforce measurement and management (see Figure 1-6). The "perspective" challenge asks whether management fully understands how workforce behaviors affect strategy execution. The "metrics" challenge asks whether they have identified and collected the right measures of success. Finally, the "execution" challenge asks whether managers have the access, capability, and motivation to use the measurement data to communicate strategy and monitor progress.

Metrics challenge

Execution challenge

Employee satisfaction and corporate performance

Human resource activities, practices, and research typically focus on a relatively small number of criteria or outcome measures. These measures can be fine-tuned on the quality of their measurement and the extent to which they are related to customer satisfaction and then long-term profitability and growth. Much of the research in HRM and many of the criteria used to assess management practices focus on employee satisfaction. Figure 1-7 presents a simple model that illustrates why there is (and should be) such a focus. Throughout the book, many studies are referenced that establish some relationship between an HR practice or HR policy or employee characteristics (e.g., employee job satisfaction) and one or more "bottom-line" criteria such as corporate profit or customer satisfaction.

Figure 1-6
Steps and Challenges for Developing a Workforce Scorecard

STEPS

1. Identify critical and carefully defined outcome measures related to strategic objectives.
2. Translate the measures into specific actions and accountabilities.
3. Develop and communicate detailed descriptions of what is expected. Determine how (or if) improvements can be facilitated.
4. Identify high and low performing employees. Establish differentiated incentive systems.
5. Develop supporting HR management and measurement systems of selection, formal performance appraisal, promotion, development, and termination practices.
6. Specify the roles of leadership, the workforce, and HR in strategy execution.

CHALLENGES

Perspective challenge—Does management fully understand how workforce behaviors affect strategy execution?

Metrics challenge—Has the organization identified and collected the right measures of success?

Execution challenge—Does management have access to the data and the motivation to use the data in decision making?

Source: Adapted from M. A. Huselid, B. E. Becker, and R. W. Beatty, *The Workforce Scorecard: Managing Human Capital to Execute Strategy* (Boston: Harvard Business School Press, 2005).

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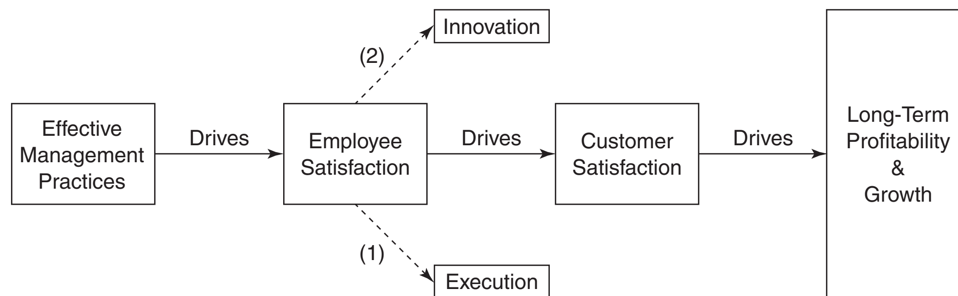
Figure 1-7
The Chain of Relationships Linking Management Practices to Employee Satisfaction, Customer Satisfaction, and Long-Term Profitability and Growth



Source: Cascio W. (2005). "From Business Partner to Driving Business Success: The Next Step in the Evolution of HR Management," *Human Resource Management* 44, p. 162. Reprinted with permission of John Wiley & Sons.

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For example, in an excellent study of the relationship between employee attitudes and corporate performance measures in almost 8,000 business units and 36 companies, strong and reliable correlations were found between unit-level employee job satisfaction and job engagement and critical business-unit outcomes, including profit. "Engagement" in this study had to do with, among other things, the level of employee satisfaction regarding working conditions, recognition and encouragement for good work, opportunities to perform well, and commitment to quality. The authors estimated that those business units in the top quartile on the job engagement scale had, on average, from $80,000 to $120,000 higher monthly revenues or sales.[49]

Can HRM practices facilitate higher engagement? Absolutely! It is clear that changes in HRM practices that serve to increase employee satisfaction and engagement can increase critical business-unit outcomes. Many HR experts now say that the emphasis in corporate America is no longer on "happy" workers who will stay with the company forever. Rather, the new mantra is to retain employees who are "productive" and "engaged." Pay and bonuses are thus more driven by performance measures instead of seniority. "It's an, 'If you give, you'll get' model," says David Ulrich, professor at the University of Michigan business school. "That's kind of the productive contract."[50]

The costs of bad reward systems

Of course, many experts maintain that these simple "this for that" arrangements may have contributed to the most recent U.S. economic woes. Countrywide Financial rewarded its brokers for closing mortgages with questionable borrowers and its CEO Angelo Mozillo got over $10 million in bonuses in one year as a direct result of these bad mortgages. Borrowers began to default on the mortgages in droves in that same year, the stock of the company collapsed, and Countrywide was saved by Bank of America with considerable financial help from the federal government. Over 11,000 employees lost their jobs. Unfortunately, Countrywide is but one of many examples of companies rewarding employees for behaviors and outcomes that may be beneficial to these employees and their bosses in the short term but toxic for the company in the not too distant future. Corporate bankruptcies have been at record levels since 2008. Some of the most costly (e.g., Lehman Brothers, Washington Mutual) can clearly be linked to deeply flawed "pay for performance" systems.

Employees attitudes, performance, and turnover

We should also be interested in how the various measurement criteria relate to one another. **One recent meta-analysis has established a strong relationship between employee job satisfaction and customer satisfaction.**[51] Employees with higher levels of job satisfaction were more likely to deliver superior customer service. Obviously, managers will want to know how more satisfied employees can be found or developed. Your authors know one CEO who was highly critical of HR academic research because it focused so much attention on variables like "job satisfaction" and employee "engagement." He referred to these variables as "softies" and argued that they were not relevant to "bottom-line" financial variables. In fact, an abundant literature now exists that documents such "softies" as indeed being strong predictors of bottom-line accounting and financial measures of organizational performance. One key to effective HR policy and practice is measuring these "softies" and understanding how they do relate to critical bottom-line measures like

performance, costs, profit, and customer satisfaction. Of course, taking action to improve on these metrics is essential.

Organizations should certainly strive to satisfy their employees with good pay, good supervision, and good, stimulating work. But the model presented in Figure 1-7 also helps keep measures of employee job satisfaction and engagement in perspective. Employee satisfaction is related to customer satisfaction. So is cost. Customers are particularly impressed with low cost. Walmart does so well not because its employees are especially happy but because its products are on average 14 percent cheaper than its competitors'. Your authors would be a lot happier if our university salaries were doubled! You'd probably be unhappy if your tuition was raised.

Linking measurement to strategic goals

The key is linking measurement and the resultant data to strategic goals. "Thinking strategically means understanding whether the measurement system you are considering will provide you with the kinds of information that will help you manage the HR function strategically."[52] This linkage creates the connection between leading indicators and lagging indicators. Let us turn to illustrations of recent HRM activities directed at these criteria.

Frito-Lay had a problem with job vacancies in key positions, which it believed had a direct effect on sales. A training and development program was instituted through its HRM division to cross-train workers for several jobs in an effort to reduce downtime from employee vacancies and provide more opportunities for employees to move up. The downtime could be operationally defined in terms of dollars, and the training program saved the company $250,000 in the first year.

AMC Theaters developed a battery of applicant tests to identify individuals most likely to perform more effectively and to stay with the company longer. The reduction in turnover saved the company over a half million dollars in 5 years. Owens-Corning Fiberglas trained all of its managers in statistical quality analysis as a part of its total quality management program. Trainees were made accountable for improving the quality at Owens-Corning and the program worked. Reduction of rejected materials saved over a million dollars. John Hancock Insurance installed a new managerial pay-for-performance system in order to increase regional sales and decrease employee turnover. J. Walter Thompson developed a new incentive system to promote creative advertising ideas from its consumer research and accounting units. RJR Nabisco replaced a fixed-rate commission with a new compensation system for its advertisers, which linked ad agency compensation to the success of the campaign. Concerned about the quality of one managerial level, Office Depot developed a managerial assessment center to select its district managers. It then determined the extent to which the quality of management improved as a function of the new screening method.

Turnover is a serious problem for many service industries and especially fast-food. Many consultants just write it off as part of the business. David Brandon, CEO of Domino's Pizza, did a study inside Domino's, the results of which surprised his top management team.[53] He found that the most important factor related to the success (or failure) of any individual store was not marketing, or packaging, or neighborhood demographics. It was the quality of the store manager. Store managers had a great deal to do with employee turnover, and turnover had a great deal to do with store profit. Domino's calculated that it costs the company $2,500 each time an hourly employee quits and $20,000 each time a store manager quits. Mr. Brandon focused on reducing the 158 percent turnover rate among all employees. Domino's implemented a new and more valid test for selecting managers and hourly personnel, installed new computerized systems for tracking and monitoring employee performance and output, and developed a much more focused pay-for-performance system for all managers. As of 2011, the program was a great success by all counts. Turnover continues to be low compared to its competitors, store profit was up, and the stock price was doing well. Brandon clearly showed how important HRM is to the bottom line. Attracting and keeping good employees, measuring and monitoring performance, and rewarding strategically important outcomes are all keys. Obviously, all of this has to translate into good (and cheap) pizza. Long-term profitability and growth are driven by customer satisfaction, and that's mainly a function of the quality and cost of the products and services. Research clearly shows that HRM practice and employee satisfaction are in the "chain of relationships."

Customer satisfaction and profitability

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In the past, HRM interventions were rarely linked to financial measures or cost figures in order to show a reliable financial benefit. This inability to link such HRM practices to the "big picture" might explain why personnel departments in the past have had so little clout. While marketing departments were reporting the bottom-line impact of a new marketing strategy in terms of market share or sales volume, personnel could only show that absenteeism or turnover was reduced by some percentage, rarely assessing the relationship between these reductions and a specific financial benefit. Stanford professor Jeffrey Pfeffer summed it up: "In a world in which financial results are measured, a failure to measure human resource policy and practice implementation dooms this to second-class status, oversight neglect, and potential failure. The feedback from the measurements is essential to refine and further develop implementation ideas as well as to learn how well the practices are actually achieving their intended results."[54]

Management by measurement

Developing clear criteria linked to strategic goals is critical for managerial success and should be a major driver of HR policy. Some experts argue that HR specialists should "quarterback" the development and administration of a "management by measurement" system, ensuring that all functional business units are subscribing to the guidelines for sound, strategic measurement. Allowing business units to develop and administer "leading-indicator" measures can result in the measurement of criteria more closely linked to making that unit (and particular managers) look good rather than the strategic goals of the unit. By contrast HR can help with sound measurement. A terrific example of this type of measurement system is the "Productivity Measurement and Enhancement System" or (ProMES).[55] The purpose of ProMES is to measure performance at a unit level closely aligned with organizational objectives. The performance measurement system is developed by employees and management, and quantitative feedback measures are used to help personnel improve performance. ProMES is a great example of a measurement system where the data drive HR actions.

Most effective employees

But what is sound measurement? One HR executive laid the groundwork with this definition: "The most effective employees are those who provide the highest possible quantity and quality of a product or service at the lowest cost and in the most timely fashion, with a maximum of positive impact on co-workers, organizational units, and the client/customer population." This statement of effectiveness also applies to particular HR programs, products, and services and all functional business units. In evaluating an outsourced recruiting effort, an HR VP provided the following criterion for evaluation: "Give me a large pool of highly qualified candidates, give me this list as quickly as possible, and don't charge me much when you're doing it." The details of the measurement system (e.g., the quantity and quality of products/services) must be linked to strategic goals. These measurement details are critical. As stated earlier, many problems at companies in the last few years can be attributed to faulty incentive systems that met short-term goals and created long-term disasters. So, the measurement system must be compatible with the long-range strategic objectives of an organization.

Quantify all aspects of HR

The most effective organizations get down to specifics about all important criteria, and these are directly linked to key objectives or desired outcomes for the organization. This prescription applies to HR as for any other business function. Wayne Keegan, VP of HR for toymaker ERTL in Dyersville, Iowa, clearly represented the bottom line for HR: "HR managers should strive to quantify all facets of HR to determine what works and what doesn't."[56]

Develop key workforce measures

What works and doesn't work should focus on the "big picture." The most effective organizations are driven by measurement strategies perhaps conceptualized by HR specialists and applied to HR functions but, more important, applied throughout the workforce. HR can (and should) help senior management develop and focus on key workforce measures that derive from organizational strategy. The most effective organizations develop a set of "top tier" measurement tools that reflect and integrate the company's strategic goals. As Mark Huselid and his colleagues put it, "There should be no gap between what is measured and what is managed." Linking workforce success at the individual and unit level to the most critical business outcomes is a key to competitive advantage. Linking these outcomes to long-term measures of success is the key to long-term advantage and survival.

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COMPETITIVE ADVANTAGE[57]

Competitive advantage refers to the ability of an organization to formulate strategies that place it in a favorable position relative to other companies in the industry. Two major principles describe the extent to which a business has a competitive advantage. These two principles are perceived customer value and uniqueness.

Customer Value

Competitive advantage occurs if customers perceive that they receive more value from their transaction with an organization than from its competitors. Ensuring that customers receive value from transacting with a business requires that all employees be focused on understanding customer needs and expectations. This can occur if customer data are used in the designing of products or service processes and customer value is used as the major criterion of interest. Some companies conduct value chain analysis that is designed to assess the amount of added value produced by each position, program, activity, and unit in the organization. The value chain analysis can be used to refocus the organization on its core competencies and the requirements of the customer base.

Customers not only perceive but also actually realize value from Walmart in the form of price. The products and services are available in convenient stores, and average prices are about 14 percent lower than its competitors'. While there are many reasons Walmart can price goods lower than competitors (e.g., economies of scale, price control pressures on suppliers, technology on products bought and sold, cheaper imports), low labor cost is certainly one factor. Sales clerks earn less at Walmart compared to most other workers doing essentially the same work for competitors. Walmart also uses proprietary analytical software that is instrumental for controlling labor costs. Walmart compiles and uses its historical store data to make very accurate predictions regarding specific employee needs for its stores by the hour and day. This labor scheduling software facilitates an efficient use of personnel and sharply reduces the need for overtime scheduling. Health care benefits are also estimated to be 15 percent less than coverage for workers within the same industry.

Walmart's strategy to be a price leader and its obsession with cost control have the potential for trouble. The company has been mired in various labor-related lawsuits in recent years, all of which may be related to controlling costs. Walmart paid a huge fine in 2005 for contracting with a company that employed illegal aliens, has been sued numerous times for violating labor laws, including firing people for union organizing efforts, and has been found guilty of violating the **Fair Labor Standards Act** regarding overtime. While it is the largest employer in the United States, the proportional rate of complaints related to its HR practices is high.

Value to Abercrombie and Fitch is related to creating and sustaining an image for its young customers. A&F went for an all-American look and it certainly worked. It is the largest teen retailer in the United States with over 600 stores and over a billion dollars in revenues. Its clothes are certainly not cheaper than competitors.' A&F is clearly promoting image as a part of its definition of value. But just like Walmart's cost control/price strategy, A&F's "image" strategy created big trouble for the company. In a discrimination lawsuit settled for $40 million, A&F was accused of favoring white job applicants and employees. A&F agreed to change some of its marketing strategy as a part of the settlement.

Customer Value and Corporate Social Responsibility (CSR)

The notion of customer value is more complicated than it may seem. Many customers seek out products and services partially due to the reputation of the organization selling the product or service rather than due to the price of the product or service. One of the reasons companies (and politicians) wrap themselves around the Olympics every 4 years is that they believe that the basic sense of American pride and excellence that goes with the Olympics tends to rub off onto the company. Research in marketing shows that perceptions of product quality are positively affected by affiliation with the Olympics and Olympic heroes. Thus, at least the theory is that customer value is affected by this connection.

Likewise, the reputation of a company's environmental policies affects the decision making of a growing number of consumers. Concerns about global warming, the price of gasoline and energy, and air pollution have prompted many companies to offer incentives

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to employees to encourage them to buy fuel-efficient vehicles that emit less carbon dioxide. As the companies go "Green," they report improvements in employee retention and increases in job applications, especially among Millenials. These are two HR metrics that have been linked to subsequent improvements in the bottom line.

Companies go "Green"

Most companies with a connection to manufacturing facilities abroad are very concerned about pitiful labor conditions and child labor issues at these international facilities. When Kathy Lee Gifford was accused of exploiting child labor in Honduran clothing plants, some consumers avoided her line of clothing. Nike was accused by the chairman of the Made in the USA Foundation of using child labor in Indonesia to make its athletic shoes. Nike's business was affected to the extent that consumers consider these allegations when they buy sneakers. Jesse Jackson launched a boycott against Mitsubishi to "encourage" the company to put more women and minorities in executive positions.

American companies spend millions and hire thousands of foreign plant auditors to inspect offshore plants, and there is no doubt that worker conditions have improved since the 1990s. But many bad factories remain and Asian suppliers regularly outsource to other suppliers, who may in turn outsource to yet another operation, creating a supply chain that is difficult to follow.

Some companies obviously believe that their reputation for corporate social and environmental responsibility figures into the complicated calculation of value. There is evidence that companies are under increasing pressure to behave in a socially responsible manner. While there are a variety of definitions of corporate social/environmental performance (CSP), there is debate over the extent to which (or whether) a positive image of CSP is related to corporate financial performance. **Research seems to suggest that "corporate virtue in the form of social responsibility and, to a lesser extent, environmental responsibility is likely to pay off."**[58] Perhaps Walmart already knew this. Have you noticed the many ads on TV informing the public about its many good deeds and how nice it is to its employees and its environment?

CSP and investment

CSP has spawned socially responsible investing, or SRI, which enables investors to buy into companies with favorable CSP reputations. Mutual funds such as Calvert World Values, AXA Enterprise Global, and Henderson GlobalCare Growth invest only in companies that pass CSP muster. It is estimated that one out of every eight dollars invested by professional money managers is invested based on corporate CSP.[59] So, who are these socially responsible companies that dominate SRI? Among the well-known companies most likely to be part of an SRI mutual fund are Canon, Toyota, and Sony (Japan), Nokia (Finland), SAP (Germany), and in the United States, Cisco Systems, Coca-Cola, Johnson & Johnson, Microsoft, and Procter and Gamble.

Corporate "Sustainability"

There is a related and growing "corporate sustainability movement." "Sustainability" has to do with a company's ability to make a profit while not sacrificing the resources of its people, the community, and the planet. Many executives now claim that sustainability can improve the company's financial performance. A survey of executives indicated that the greatest benefits of sustainability programs are improving public opinion, improving customer relations, and attracting and retaining talent. Over 75 percent of the participating executives anticipated more investment in environmental programs.[60]

The Worker's Rights Consortium

Many college students are now involved in tracking the manufacturing process for their school paraphernalia. The United Students Against Sweatshops (http://usas.org/) is an organization of students from over 200 universities affiliated with the Worker's Rights Consortium (WRC). The WRC conducts investigations of manufacturing plants, issues reports, and initiates boycotts against certain university products such as hats or T-shirts if plants do not meet its standards for wages and safety. This movement is growing and has already had some major successes.

Many consumers use "Newman's Own" products (from the late actor Paul Newman) not only because they like the products but because all profits are donated to "educational and charitable purposes." (Go to newmansown.com.) Sure, Newman's Sockarooni spaghetti sauce is tasty. But does the taste account for all of the customer value when the sauce typically costs more than other sauces? Customer value can be complicated. Jesse Jackson and Burger King were well aware of this when Burger King agreed to special financing

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and support for minority-owned franchises. Most people do not live and die for a Whopper. Consumers' knowledge regarding Burger King's policy toward minorities could affect their fast-food decisions.

So, an organization's CSR and CSP reputation regarding its corporate ethics, environmental positions, profamily policies, or affirmative action/diversity practices can go into the "customer value" assessment. For years, Dow Chemical in Midland, Michigan, had a negative reputation on college campuses because of its production of napalm, a chemical agent used in the Vietnam War. Dow had a terrible time recruiting chemists and other vital professionals because of this one product. Dow launched a public relations campaign to enhance its reputation. It focused its advertising on the many agricultural products that it produced and marketed. The result was a profound improvement in Dow's ability to recruit on college campuses. Obviously, Dow's ability to recruit and retain the best chemists was vital to its competitiveness.

Customer value indicated "intangibles"

While consumers undoubtedly place greater weight on the quality of the product or service, there is no question that "customer value" can also include intangible variables such as corporate responsibility, environmental impacts, diversity policies, and being on the right side of political issues. Activist consumer groups, by calling attention to corporate greed, may foster more social responsibility by simply affecting the complicated variable of the customer value equation. There is also evidence that Gen Y Americans are more sensitive to CSR and CSP issues, especially environmental concerns, and that this Millennial generation is more likely to buy from (and invest in) companies with strong CSP reputations and more inclined to work for such companies.

"Most admired" companies

One hot issue related to the complicated equation of "customer value" is the way a company treats its employees. The reputation of a company regarding how it treats its employees can also affect the size of the pool of candidates for any job within the organization. Organizations work hard to make the list of the "most admired" companies for which to work because it does help attract more qualified workers. Apple, the most admired company on *Fortune* magazine's list in 2011, received over 500 applicants for each key position it filled in 2010. Recall that the ratio of the number of qualified applicants to the number of key positions is a "high-performance work practice" and is thus related to corporate financial success (see again Figure 1-1).

At SAS, a North Carolina computer software company with over 10,000 employees, it all started with free M&Ms every Wednesday. The SAS HR strategy is clearly designed to attract the best programmers and to keep the SAS workforce happy. The strategy has worked. SAS sold over a billion dollars of analytical software to retailers like Victoria's Secret and the U.S. military in 1 year. SAS has never had a losing year and has never laid off a single employee! Says Jim Goodnight, the founder of the company, "If employees are happy, they make the customers happy. If they make the customers happy, they make me happy." SAS is always ranked high in *Fortune* magazine's list of best companies to work for (it ranked 1st in 2011 and 3rd in 2012). SAS offers a myriad of benefits you don't find at many companies. It has a Work/Life Center made up of social workers who help SAS employees solve life's problems like elder care and college selection for SAS kids. They'll even have someone pick up and deliver your dry cleaning! Says Jeff Chambers, director of HR, "We do all these things because it makes good business sense," saving staff time.

SAS: 5 percent turnover rate

SAS claims a turnover rate differential of 5 percent at SAS versus 20 percent at competitors (true even in the heat of the 90s' dot-com craze!). That savings in turnover at SAS is estimated at $60–70 million annually. While some companies treat employees as costs or necessities, Jim Goodnight regards his SAS employees as the best investments he ever made. "Ninety-five percent of my assets drive out the front gate every evening. It's my job to bring them back." Google has adopted this HR philosophy with low turnover rates as one consequence.

The "Best Companies" and corporate performance

There is hard and growing evidence that treating employees well will translate into better financial performance. One study found that positive employee relations served as an "intangible and enduring asset and . . . a source of sustained competitive advantage at the firm level."[61] The study found that companies that made the "100 Best Companies to Work for in America" list had much more positive employee attitudes toward work and a significant financial performance advantage over competitors. The advantage is self-sustaining. Once companies make the list, the quality and quantity of their applicants for key positions

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go up and thus the quality of their new hires improves! Among the companies that have been on the list for years are Google, Boston Consulting Group, Whole Foods, Publix Super Markets, Cisco Systems, JM Family Enterprises, J.M. Smucker, Nordstrom, and Ernst and Young. Perceived customer value is the principal source of competitive advantage. While it mainly derives from the actual product or service, it derives indirectly from an organization's reputation.

Maintaining Uniqueness

The second principle of competitive advantage derives from offering a product or service that your competitor cannot easily imitate or copy. For example, if you open a restaurant and serve hamburgers, and a competitor moves in next to you and also serves hamburgers that taste, cost, and are prepared just like yours, unless you quickly offer something unique in your restaurant, you may lose a large part of your business to your competitor. Your restaurant needs to have something that is unique to continue to attract customers. Competitive advantage comes to a business when it adds value to customers through some form of uniqueness. One of your authors works in Boca Raton, Florida, one of the great resort areas of the world (and a golfer's paradise). This location enables his university to attract (and retain) top faculty from around the world—clearly a competitive (and unique) advantage.

Sources of Uniqueness

The key to any business's sustained competitive advantage is to ensure that uniqueness lasts over time. Three traditional mechanisms exist to offer customers uniqueness. A fourth is often a necessary condition to take advantage of one (or more) of the other three. The four mechanisms for offering uniqueness are described next and summarized in Figure 1-8. First, **financial or economic capability** derives from an advantage related to costs; when a business is able to produce or provide a good or service more cheaply than competitors. If in your hamburger restaurant, you have received a financial gift from family or friends to build the restaurant, without repayment of the gift, you may be able to charge less for your product than a competitor who borrowed money from a bank or financial institution. Your cheaper-priced hamburger would then become a source of uniqueness that customers value. Toyota and Honda still do not have anywhere near the retired employees' "legacy" costs that Ford and GM still have (even after GM's bankruptcy). Like BMW and Mercedes, they also have a huge advantage in relative employee health care costs.

Figure 1-8
The Four Mechanisms for Offering and Maintaining Uniqueness

- **FINANCIAL OR ECONOMIC CAPABILITY DERIVES FROM AN ADVANTAGE RELATED TO COSTS**

  WHEN A BUSINESS IS ABLE TO PRODUCE OR PROVIDE A GOOD OR SERVICE MORE CHEAPLY THAN COMPETITORS

  EXAMPLES: WAL-MART, University of Phoenix

- **STRATEGIC OR PRODUCT CAPABILITY**

  A BUSINESS OFFERS A PRODUCT OR SERVICE THAT DIFFERENTIATES IT FROM OTHER PRODUCTS OR SERVICES.

  EXAMPLES: McDONALD'S, APPLE, GOOGLE, ROCKSTAR GAMES

- **TECHNOLOGICAL OR OPERATIONAL CAPABILITY**

  A DISTINCTIVE WAY OF BUILDING OR DELIVERING A PRODUCT OR SERVICE

  EXAMPLES: GOOGLE, E-BAY, AIRFRAME–BOEING, NORTHROP GRUMMAN

- **ORGANIZATIONAL CAPABILITY**

  ABILITY TO MANAGE ORGANIZATIONAL SYSTEMS AND PEOPLE THAT MATCHES CUSTOMER AND STRATEGIC NEEDS

  EXAMPLES: GOOGLE, SAS, WHOLE FOODS, JM FAMILY ENTERPRISES, PUBLIX SUPER MARKETS

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The question of what is unique about a product or service is almost always asked and answered in the context of the usually overriding "cost" question. Walmart's source of uniqueness is rather simple: It has what we want and it's cheaper! For most people and for almost any product or service, the assessment of the product or service is done in the context of price or cost, at both a relative and an absolute level.

The second source of uniqueness comes from having **strategic or product capability.** That is, a business needs to offer a product or service that differentiates it from other products or services. The iPod is a clear example. One early reviewer of the iPod took a look at the $400 initial price tag and suggested that the name might be an acronym for "Idiots Price Our Devices"! But despite its pricey introduction, the iPod overwhelmed the other MP3 players and acquired what pop star Moby referred to as an "insidious revolutionary quality . . . it becomes a part of your life so quickly that you can't remember what it was like beforehand." Apple has had the same success with the iPhone. Now that's uniqueness! In the hamburger wars, fast-food restaurants have attempted to offer unique products and services to attract customers. Salad bars, taco bars, kiddie meals, and $30 breakfasts with giant mice named Mickey and Minnie are all examples of restaurants attempting to make their product unique and appealing to customers. The possession of a patent for a critical drug is an advantage for a pharmaceutical company.

A third source of uniqueness for a business is a **technological or operational capability.** That is, a business can have a distinctive way of building or delivering its product or service. In the hamburger restaurant, the different methods of preparing the hamburgers may distinguish restaurants from each other (broiled versus flame-grilled). Customers may prefer one technological (cooking) process over another, and thus continue to patronize one restaurant. In more complex businesses, technological capability may include research and development, engineering, computer systems and/or software, and manufacturing facilities. Microsoft has thrived in this area by getting consumers to purchase and get comfortable with one of its products so they are more attracted to future products related to their technological capability. Google is a great example of unique technological and operational capability.

A fourth source of uniqueness aiding a company in seeking competitive advantage is **organizational capability.** Organizational capability represents the business's ability to manage organizational systems and people in order to match customer and strategic needs. In a complex, dynamic, uncertain, and turbulent environment (e.g., changing customers, technology, suppliers, relevant laws and regulations), organizational capability derives from the organization's flexibility, adaptiveness, and responsiveness. In a restaurant, organizational capability may be derived from having employees who ensure that when customers enter the restaurant, their customer requirements, their needs, are better met than when the customers go to a competitor's restaurant. That is, employees will want to ensure that customers are served promptly and pleasantly, and that the food is well prepared.

The implications for human resource management should be clear. **HR systems need to be put in place that maximize organizational capability and exploit all other potential sources of uniqueness.** Organizations with serious problems on the organizational capability side of the ledger can fail to exploit other potential sources of competitive advantage. The cultural problems after the merger of Chrysler and Daimler-Benz are a good illustration of this interaction. Despite a solid financial situation and unique technological advantages, the company never gained synergy as DaimlerChrysler and eventually split up.

With increased globalization and the need for strategic alliances, organizational capability is a key to sustained competitive advantage as companies expand their businesses around the world. Take McDonald's as one example of a successful global expansion with a need for strategic alliances. McDonald's has restaurants in over 115 countries, and expansion to some areas of the world poses special challenges. Its marketing determined that it could sell the Big Macs in Saudi Arabia. Here's the line-up for the Saudi Big Mac: two all beef patties from Spain, the special sauce from the United States, lettuce from Holland, cheese from New Zealand, pickles from the United States, onions and sesame seeds from Mexico, the bun from Saudi wheat, sugar and oil from Brazil, and the packaging from Germany. Organizational capability enables McDonald's to pull this integration off, and the result is a highly popular and profitable product. Globalization will necessitate more of these challenging arrangements. HR will have a lot to do with success

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people are recruited, hired, trained, motivated, treated, evaluated, paid, and integrated into the organization.

Organizational capability and corporate performance

Research shows that organizational capability influenced by particular HR activities is a reliable predictor of corporate financial performance.[62] HR activities and processes such as those characterizing "leading-indicator" high-performance work practices illustrate organizational capability as a source of competitive advantage. The ability to attract and retain individuals with the skills to establish and maintain potential sources of uniqueness should be a key metric in any "management by measurement" system.

SUMMARY

Line management is responsible for application of HRM policy

HRM policy and strategic objectives

Human resource management is to some extent concerned with any organizational decision that has an impact on the workforce or the potential workforce. The trends described in Chapter 1 underscore the importance of HR to meet the challenges of the 21st century. While there is typically a human resource or personnel department in medium-sized to large corporations, line management is still primarily responsible for the application of HRM policies and practices. There are critical competencies for general management and HRM professionals. An organization needs both competent personnel trained in HRM and motivated managers who recognize the importance of HRM activities and will apply the best procedures in the recommended manner. HR managers are more likely to convince line managers of the value of HR programs by focusing on "leading-indicator" measurements, which can be linked to the lagging financial indicators that are more clearly understood by management. Sometimes, personnel/HR functions are perceived by line managers to be out of step with the real bottom-line outcome measures for the organization. Therefore, the most effective human resource departments are those in which HRM policy and activities are established and measured in the context of the mission and strategic objectives of the organization. HRM should assist management in the difficult task of integrating and coordinating the interests of the various organizational constituencies, with the ultimate aim being to enhance the organization's competitive position by focusing on meeting or exceeding customer requirements and expanding the customer base.

Competitive advantage is the key to success for most businesses. To attain competitive advantage, businesses need to add (and sustain) value for customers and offer uniqueness. Four capabilities provide a business's uniqueness: financial, strategic or product, technological or operational, and organizational. To sustain competitive advantage, organizational capability should be emphasized, ideally in the context of the other sources of uniqueness. Organizational capability derives from a business's HRM practices.

The view of HRM outlined in this chapter provides a foundation for integrating HRM activities into the organization's mission and goals. HRM professionals should be actively involved in building more competitive organizations through the HRM domains. One necessary competency for both line managers and HRM professionals is an understanding of the growing impact of globalization on HR policy and practice. This critical area is explored in the next chapter.

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Discussion Questions

1. Describe the changing status of HRM. What factors have led to these changes?
2. How do productivity concerns influence organizational policies and procedures regarding HRM activities?
3. Describe the major HRM activities conducted in an organization. Provide an example of each from an organization with which you are familiar.
4. What impact should the composition of the workforce have on HRM practices or activities? What future trends do you see that will influence HRM activities? Why is the growing cultural diversity of the workforce a management challenge?

5. Why is the support of line management critical to the effective functioning of HRM practices in an organization? Provide some suggestions to ensure that this support is maintained.
6. Why does the number of qualified applicants for each strategic position relate to corporate effectiveness? How can HRM enhance this applicant pool?
7. What are the sources of uniqueness that can aid a company seeking competitive advantage?
8. Explain how Ford and GM still have a competitive disadvantage related to financial capability. How does Walmart have an advantage?

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Chapter 2 The Role of Globalization in HR Policy and Practice*

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OBJECTIVES

After reading this chapter, you should be able to

1. Describe the different ways companies may engage in international commerce.
2. Explain the different international business strategies.
3. Explain how international human resource management (IHRM) differs from traditional, domestic HRM.
4. Understand the different IHRM strategies.
5. Describe the trends relating to international job assignments.
6. Understand the issues and trends relating to the development of globally competent business leaders.

OVERVIEW

In Chapter 1, we described the importance of aligning human resource (HR) programs with the business strategy. This means that as organizations change, HR policies and programs must adapt as well. One of the major challenges facing businesses today is the increasing globalization of the world economy and competition.

Thomas Friedman's critically acclaimed book on globalization, *The World Is Flat: A Brief History of the Twenty-First Century*, describes the next phase of globalization.[1] Technological and political forces have facilitated a global, web-based "playing field" that allows for multiple types of collaboration regardless of geography, distance, and even language. Since 1980, worldwide imports and exports, foreign direct investment, and national levels of gross domestic product (GDP) have increased dramatically,[2] particularly following the fall of communism in the late 1980s in all but a few countries (e.g., China, Vietnam, North Korea, Laos, and Cuba). As discussed in Chapter 1, significant growth in global technology, infrastructure, and communication has helped to facilitate such growth. Other factors contributing to increases over the past two decades include the opening of global economies to foreign investment in Russia, China, and India, along with other emerging markets in Asia, the Middle East, and South America and notable changes in the composition and location of the skilled global labor force.

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Foreign Direct Investment

Explosive growth has occurred in foreign direct investment (FDI). FDI involves the control of the productive assets of a company through its ownership by a foreign company or foreign individuals. One expert indicates that about 63,000 companies worldwide have FDIs.[3] The largest flows of FDI occur between the developed nations of Western Europe, North America, and Japan, yet over the past two decades, the growth of FDI flows in developing and transition (formerly communist) economies has been extraordinary.[4] India and China provide good examples of countries that have become increasingly attractive to investment. Each country is home to over 1 billion people and each has opened its doors to FDI. In India, inward FDI increased from $79 million in 1980 to $34 billion in 2009, while in China, inward FDI increased from $57 million in 1980 to $95 billion in 2009.[5]

Rapid growth is sometimes unsustainable growth, however, as evidenced by the stock market collapse of the late 1990s and the real estate collapse and resultant global financial crisis of 2008. The financial crisis, often referred to as the Great Recession, has affected trade and investment in virtually all regions of the world.[6] As a result, FDI inflows declined in both developed and developing countries in 2008 and 2009.[7] Yet the cyclical nature and resiliency of our global economy suggest that a recovery is likely, as evidenced by annual increases in 2010 of numerous financial markets.[8]

Offshore centers

Changes in the composition and location of the skilled global labor force has led to the creation of offshore professional and operations centers, regardless of where the final work product is ultimately marketed. Many U.S. and European software manufacturers now have facilities in India to take advantage of the high concentration of computer skills in that country and the low cost of labor. Traditionally, business facilities were strategically located in order to be close to suppliers or customers and/or within trade alliance borders. Today, however, the use of private satellite links, e-mail, fax machines, and the World Wide Web has made workers from all over the world very accessible. Even customer service facilities are being located overseas, particularly when there is a sufficient supply of productive workers who are willing to work for relatively low pay.

Global recruitment

Changes in technology, infrastructure, and communication have fueled increases in global recruitment and staffing. Technology now even allows a great deal of service work to move offshore where labor costs are less than in the United States. Workers can (and do) telecommute across continents. As a consumer, you may be unaware that your X-rays may be read by someone in India, that your software is repaired by specialists in Ireland, that your airline reservations were booked with a customer service representative in Jamaica, or that your insurance claims were processed in the Philippines.

Why are so many organizations today under pressure to expand their business interests beyond their national boundaries? Major reasons include access to additional resources (including skilled workers), lower costs, economies of scale, favorable regulations and tax systems, direct access to new and growing markets, and the ability to customize products to local tastes and styles. In addition, the rise of regional trade alliances (such as NAFTA and the European Union) is another important reason organizations have increasingly internationalized. Later in this chapter, we will describe some of the problems associated with the rise of regional trade alliances, such as the "banana wars" and Mexico's "screwdriver factories."

Multinational organizations headquartered in the United States have an increasing and substantial global presence. As examples, Starbucks purchases a large share of worldwide coffee production, McDonald's controls a major share of worldwide beef and chicken production, Wal-Mart is the world's largest retailer, and Home Depot is the largest single purchaser of wood and wood products.[9] Of Coca-Cola's 92,000 employees worldwide, over 87 percent are non-U.S. personnel.[10] Coke has six largely autonomous regional groups (North America, Latin America, Europe, Africa, Asia, and the Pacific) and sells its products in over 200 countries.[11] In addition, it has established a global service staff of 500 people who are trained to go anywhere in the world to offer advice and expertise concerning operational and customer service problems. These team members are paid U.S. wages, even though many of them are not from the United States.[12]

Global expansion presents great challenges for HRM, however. When McDonald's entered into a joint venture with the Moscow city council, the company placed a help-wanted ad and received about 27,000 Russian applicants for its 605 positions. It sent six Russian

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managers to its Hamburger University outside Chicago, Illinois, for 6 months of training and another 30 managers for several months of training in Canada and Europe.[13] It also needed to overcome significant problems obtaining high-quality supplies, most of which were perishable. Ultimately, McDonald's opened a $40 million food-processing center about 45 minutes from its first Moscow restaurant.[14]

The majority of Fortune 500 companies are now multinational in that some portion of their business (and profits) is derived from overseas operations.[15] Many of the largest, most prestigious U.S. companies, including IBM, Exxon, GE, and Microsoft, derive more than half of their revenues from overseas business. Furthermore, more firms from an increasing number of developing countries are multinational. The number of developing country multinational firms in the Fortune 500 list rose from 29 in 1998 to 45 in 2005.[16]

With the immense market potential overseas, particularly in Asia, this figure is likely to get even higher for many U.S. corporations. It is estimated that by 2020, the six largest world economies will be the United States plus five Asian economies: China, Japan, India, Indonesia, and a united Korea. Along with this success will come great demand for products and services for the new middle classes in these countries. In 2000, about one-third of the sales of Fortune 500 companies came from outside the United States.[17]

80 percent of Honda and Acuras are built in the U.S.

Of course, global expansion is not reserved for U.S. companies. Many organizations headquartered in Europe and Asia have expanded their global reach over the last decade or so. In fact, chances are better than ever that you may work for a foreign corporation in your own community. Consider that nearly 80 percent of all Honda and Acura vehicles sold in America are built in one of Honda's six manufacturing facilities in the United States. Today, Honda employs over 25,000 people in all 50 U.S. states.[18] Furthermore, more than 100,000 workers are employed in authorized Honda automobile, motorcycle, or power-equipment dealerships in the United States.[19] In the last 10 years, more than 200 German businesses established direct investments in North and South Carolina alone. Most Mercedes and BMW cars driven in the United States are now assembled in the United States. Nokia, the cell phone giant with headquarters in Finland, employs 123,000 workers worldwide, over 80 percent of whom are outside of Finland.[20] The Roche Group, the Swiss pharmaceutical giant, has 88 percent of its workforce outside Switzerland.[21] Today, an estimated 4.9 million U.S. citizens work in U.S. affiliations of foreign-owned corporations.[22]

Business partnership

In addition, your company is now more likely than ever before to have some type of business partnership with a foreign corporation. Earlier we mentioned that McDonald's opened its first restaurant in Russia through a joint venture with the Moscow city council. Businessland, one of the largest U.S. dealers of personal computers, moved into Japan with the help of Japan's four largest electronics firms. There are estimates that over 80 percent of U.S. businesses could successfully market their products or services overseas provided that they have the required knowledge of foreign markets.[23] Since U.S. markets are regarded as mature or "soft" in many product lines, international markets appear to offer potential for substantial growth. Today, over 95 percent of the world's population lives outside of the United States.[24] That's a lot of Coke, Big Macs, and Starbucks' coffees! Furthermore, many Americans choose to live overseas. According to the Association of Americans Resident Overseas (2011), 5.08 million Americans (excluding military) are living in 160+ countries around the world. While many are retired, those who choose to work overseas are subject to double taxation and certain pension-related disadvantages.[25] Companies employing workers abroad often provide benefits to offset these disadvantages. Even if you don't ever work for a foreign-owned firm, or for a U.S. firm with significant foreign investments, experts tell us that all organizations today are affected by the global economy. Even small businesses are using foreign-made materials or equipment, are competing with foreign firms, and are selling their products and services in foreign markets.[26]

As we discussed in Chapter 1, this inevitable globalization of the world's business presents challenges and opportunities for human resources professionals. The purpose of this chapter is to describe and discuss the implications of this increasing globalization for HR activities.

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HOW DO COMPANIES ENGAGE IN INTERNATIONAL COMMERCE?

Organizations conduct international business in a variety of ways. Each of these forms of international commerce has implications for human resource strategies and tactics. An effective HR professional recognizes the range of choices that each of these international business forms (or combinations of these forms) offers. In this section, we will review the different ways firms may internationalize. Then we will describe some of the ways that HR practices may facilitate and advance these business goals.

When a firm simply wants to sell its products and services in foreign marketplaces, it may choose to **export**. Most companies that export do so in order to increase sales and revenues. For some companies, particularly companies with high research and development costs, exporting is necessary to spread these costs over a larger sales volume. Companies may also export to relieve excess capacity. Some companies export as a form of diversification because they are concerned that their domestic markets may be maturing. Finally, some companies export because they believe that they lack the necessary knowledge to directly do business effectively on foreign shores. In this case, exporting may be the first step toward a more aggressive international strategy. Baskin-Robbins followed this approach with its entry into Russia. In 1990, it began shipping ice cream to that country from its company-owned plants in Texas and Canada. Over the next 5 years, the company opened 74 retail outlets with Russian partners, carefully observing the likes and dislikes of local consumers. Finally, in 1995, Baskin-Robbins opened its first, full-service ice cream plant in Moscow.[27] Companies that choose to export may directly sell their products in a foreign market, or they may do business through third parties that specialize in facilitating importing and exporting, called **intermediaries**.

There is little risk in exporting: relatively low investment is involved and a decision to withdraw from a market can be made and executed very quickly. Exporting, however, has several disadvantages, including the high cost of transportation and the difficulty of finding good distributors. Tariffs and quotas are also major problems when goods or services enter a country that is part of a regional pact or a free-trade area. For example, products created within the European Union (EU) move from country to country within the Union tariff-free. The same products and services imported from countries outside the Union typically pay tariffs upon entry. This increases the cost of the product and often places "outside" organizations at a competitive disadvantage. The banana trade provides an interesting example. During the 1990s, when Caribbean bananas were exported to EU countries, they were subject to tariffs and quotas. However, bananas grown in Martinique and Guadeloupe were not subject to these tariffs because those particular islands were still provinces of France and, therefore, enjoyed insider status within the EU.[28] The wars were officially ended by treaty in 2001.[29]

NAFTA

Similarly, extensive rules were required in order to regulate so-called screwdriver plants in Mexico. Capitalizing on Mexico's membership in the North American Free Trade Agreement (NAFTA), companies in other parts of the world were shipping virtually finished goods to plants in Mexico where, typically, a screwdriver was the only tool needed to complete the assembly. Then, the exporting country would assert that the product had been "manufactured" in Mexico and, therefore, would qualify for favorable tariff treatment within NAFTA. Since most of these goods ended up in the United States and Canada, these NAFTA members were particularly worried about the loss of tariff revenues and the loss of jobs to non-NAFTA countries whose goods might qualify for treatment as though they had been created within the NAFTA region. As a result, NAFTA contains complex rules of origin that specify how much and what type of assembly qualifies an item as having actually been produced within the NAFTA area. For example, NAFTA's rules of origin specify that for U.S. imports of Mexican peanuts or peanut products to qualify, 100 percent of the peanuts must be Mexican-grown. The same applies for U.S. exports of peanuts to Mexico (i.e., 100 percent of the U.S. peanuts must be U.S.-grown).[30] Similarly, to protect textile industry jobs, clothing and other textile products must use North American–produced fibers in order to benefit from NAFTA's preferential tariff treatment.

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Another means of entering a foreign market is **licensing**. In this approach, one firm, called the **licensor,** leases the right to use its intellectual property to another firm, called the **licensee,** in exchange for a fee. Intellectual property typically includes patents, formulas, patterns, copyrights, trademarks, brand names, methods, and procedures. Licensors are usually required to provide technical information and assistance, and the licensee is obliged to use the rights responsibly and effectively and to pay the agreed-upon fees. Heineken, for example, is exclusively licensed to manufacture and sell Pepsi-Cola in the Netherlands. To implement this agreement, Pepsi either provides Heineken with its formula or agrees to supply the cola syrup. Heineken then adds carbonated water, packages it in appropriate containers, and sells it in the Netherlands. Under the conditions of the license agreement, Pepsi cannot enter into a similar agreement with another firm to sell Pepsi in the Netherlands, and Heineken cannot alter the product, nor can it begin duplicating other Pepsi products (such as Lays Potato Chips) without a separate agreement.

Franchising is a special form of licensing used frequently by companies as a means of expansion nationally and/or internationally.[31] A franchise agreement allows an independent organization, called the ***franchisee,*** to operate a business under the name of another, called a ***franchisor,*** in return for a fee. Franchising typically allows the franchisor more control over the franchisee and provides for more ongoing support from the franchisor to the franchisee than is the case in the typical licensing agreement. For instance, a franchisor may provide ongoing services such as advertising, training, quality assurance programs, and reservation systems (for airline or hotel operations). Fast-food chains such as McDonald's, Dairy Queen, Domino's Pizza, and KFC have franchised restaurants worldwide.

On the plus side, licensees (and franchisees) receive access to a business that has an established product and operating system plus a good reputation. Licensors (and franchisors) get the opportunity to expand internationally with very limited knowledge about local markets. In addition, over time, each party to the agreement learns valuable information from the other: franchisees learn how to operate a successful business; franchisors learn quickly about the marketplace. On the negative side, both parties typically share the revenues, while neither party has full decision-making authority. Disputes about the terms and conditions of the agreement can become a problem. Of course, in some areas of the world, patents and copyrights are not protected, so a particular company could find its intellectual property duplicated and sold everywhere. This has been particularly problematic in the computer software and the music industries in Asia and Eastern Europe. In addition, licensors (and franchisors) must make certain that the required technical skills are available to support the quality of the product or service. McDonald's, for example, spent considerable resources teaching Russian farmers how to grow potatoes that would meet its standards.

Some firms may choose to use a specialized strategy to participate in international business without making direct, long-term investments. Nike engages in **contract manufacturing** when it outsources the creation of its athletic footwear to numerous factories in southeast Asia. This permits Nike to focus its efforts on product design and marketing, rather than production. Contract manufacturing typically means that the organization gives up a major amount of control over the processes, and this may lead to quality problems or other surprises. Nike has suffered considerable negative publicity about the working conditions employed by its contractors in the factories manufacturing its products. (See Appendix A, Critical Thinking Application 2-A.)

Another specialized international business strategy involves **management contracts**. In this form of business, one company sells its management (and sometimes technical) expertise to a company in another area of the world. BAA of Britain, for example, operates the Indianapolis Airport under a 10-year management contract and provides retail services management at the Air Mall in the Pittsburgh Airport.[32] Similarly, major airlines such as Delta, Air France, and KLM often sell their management expertise to small state-owned airlines headquartered in developing countries.[33] Other benefits may become available to organizations that seek managerial partners. For instance, when Sheraton Corporation signs a contract to manage a hotel facility overseas, it usually includes access to and use of its international reservation system.[34]

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All of the preceding approaches enable an organization to internationalize its business interests without actually investing in foreign factories or facilities. Of course, some firms prefer to enter international markets through actual ownership of business. We mentioned earlier that when an organization directly owns part of or an entire business in a foreign market, this form of commerce is called **foreign direct investment (FDI).** FDI is either considered a greenfield investment, in which a firm chooses to be the sole investor, or the result of a merger, alliance, or acquisition of another already existing firm. Often, FDI follows a period in which an organization seeks to learn about and understand a particular market or region using one of the lower-risk entry alternatives, such as exporting, licensing, franchising, or contracting. Although FDI involves much greater risk, it also means increased managerial and operational control, and it ultimately may mean greater profitability if the venture is successful. One common approach to FDI is to identify an appropriate organization with which to "partner." Such an **alliance** allows an organization to make direct investment very gradually while sharing its risk with a knowledgeable, experienced other party. Sometimes, partners enter into **joint ventures,** which involve creating a new, separate company that is owned jointly by the venture partners. Joint venture partners can be privately owned companies, government agencies, or government-owned companies. For instance, Suzuki Motors Corporation of Japan teamed with the government of India to produce an efficient, small-engine car specifically for the Indian marketplace.[35] Sometimes, organizations enter into joint ventures as defensive moves. Caterpillar (U.S.) and Mitsubishi (Japan) created a joint venture to improve each of their competitive positions against joint rival Komatsu (Japan).[36] General Mills (United States) and Nestlé (Switzerland) created Cereal Partners Worldwide (CPW) to combat Kellogg's 50 percent market share of the global cereal industry and, in particular, Kellogg's considerable domination of the European cereal marketplace.[37]

The major disadvantage to joint ventures is the potential for conflict between the partners. This potential is increased considerably when each partner owns 50 percent of the venture. Common areas of conflict include future investments and the sharing of future profits. Joint ventures with local governments also create challenges, particularly when the government's motives and priorities are considerably different from those of its business partner. This situation occurs most often in industries considered to be culturally sensitive or important to national security such as broadcasting, infrastructure projects, and defense.[38]

When companies agree to partner with one another, but do not set up a separate entity, they have formed a **strategic alliance.** Such alliances can be set up between an organization and its suppliers, its customers, and its competitors. Strategic alliances share most of the same advantages as joint ventures and some experts regard joint ventures as a form of strategic alliance. Strategic alliances permit organizations to share risk and expenses, particularly related to research and new product development. They also enable each partner to tap into (and, ultimately, benefit from) the strengths of the other. Disadvantages tend to center on the possibility that each is helping to create a future competitor. Thus, organizations are advised to protect their core competencies from the other, which may mean that trust and communication become problematic.[39]

Of course, some organizations prefer the high risk of **sole ownership** of operations in foreign countries in order to ensure that they have full decision-making authority and operational control. In such cases, organizations would rather not audit the practices of franchisees or manage the compromises that shared alliances tend to create. Such businesses may take the form of start-up operations (that is, built from scratch), or they may be carried out through acquisition. Acquisitions involve the purchase of an already up-and-running business with an existing group of suppliers and customers. As a result, growth in foreign markets through acquisitions tends to allow a firm to enter and compete in a new market more quickly than it would if it created a start-up operation. General Electric's 1990 acquisition of Tungsram, a lighting company in Hungary, is an example of this. The acquisition occurred just as communist rule was being eliminated in Eastern Europe. General Electric

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wanted to learn how to do business in this part of the world. Tungsram was willing to be acquired in order to access Western capitalism and management practices. Some assert that GE's acquisition was a defensive response to the earlier acquisition of Westinghouse's lamp division (GE's traditional rival in its domestic market) by Philips Electronics of the Netherlands. As GE's then–lighting chief, John Opie, indicated, "Suddenly we have bigger, stronger competition. They're invading our market, but we're not in theirs. So, we're immediately put on the defensive."[40]

Within a year of acquiring Tungsram, GE Lighting also acquired Thorn EMI in Great Britain and created a joint venture with Hitachi that would allow entry into the Asian market. As a result of these efforts, GE Lighting's business focus quickly shifted. In 1988, GE Lighting got less than 10 percent of its sales from outside the United States; within 5 years, more than 40 percent of GE Lighting's sales were coming from abroad. In this case, the speed of GE Lighting's internationalization was facilitated by its use of an acquisition strategy.

Exporting Work

Earlier we mentioned the recent trend toward businesses creating **offshore professional and operations centers.** Either as a form of sole ownership or as a strategic alliance, these centers involve the exporting of the work itself to places around the globe that may be unrelated to where the work products are ultimately marketed. These centers leverage such factors as workforce skills, cultural similarities, costs, time, and government policies in order to achieve competitive advantage. A good case in point is India, which has been the recipient of many U.S. technical and customer service jobs in recent years. Among developing countries, the Indian workforce is comparatively well educated and speaks English. Upon achieving independence from Great Britain in 1947, India adopted a democratic political system, although its economic system involved significant government planning and intervention. Since the early 1990s, however, the Indian government's regulation of and involvement in private business matters has been steadily declining in order to specifically encourage foreign direct investment. At the same time, the cost of living in India is much lower than in developed countries, which means that the relative cost of labor is extremely attractive for Western companies.

India's programmers ranked number one

When the World Bank surveyed 150 prominent U.S. and European computer hardware and software manufacturers, India's programmers were ranked first out of eight countries, well ahead of Ireland, Israel, Mexico, and Singapore. In fact, one in four software engineers in the world is of Indian origin. About a decade ago, average annual programmer salaries in India were approximately $3,000 per year, so it's no wonder companies such as Hewlett-Packard, IBM, Texas Instruments, Honeywell, and Motorola have a skilled technical workforce there.[41] These salaries have been growing in recent years, however. Fierce competition among foreign and local firms for a relatively small number of highly qualified Indian employees has led many of these prized employees to switch organizations to increase their pay.[42] As noted by one regional human resource director, "Firms operating in India should expect attrition rates of 15–20% because Indian workers are aspirational and individualistic."[43] Consequently, retention is a key factor for those employing these highly skilled Indian workers. In addition to competent workers at advantageous costs, organizations also are benefiting from time advantages by increasingly using international teams of skilled programmers in the United States, Western Europe, and India who pass the work to the next team as each location's workday ends. This permits around-the-clock product development and/or troubleshooting to be done, a huge benefit in industries in which competitive advantage is influenced by "first-to-market" capability.

Call centers

Customer service facilities are also increasingly moving from developed countries, such as the United States, Great Britain, and Australia, to India. Customer service representatives helping these customers are often taught to speak English with traditional dialects and adopt first and last names more similar to those found in the country which they are serving.[44] They are sometimes provided with additional country-specific information. In

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one Indian call center, employees charged with collecting debts from Americans attended seminars about the recent financial crisis and other events relating to Americans' abilities to repay their debts.[45] The net result of these trends is lower labor costs for American companies and, thus greater profits. Of course, it also means the increased shipment of previously American jobs overseas and the continued stagnation of middle-class wages in this country.

Following a devastating fire that destroyed most of its factory in 1995, the CEO of Malden Mills, one of New England's last textile manufacturers, announced that he would spend about $450 million to rebuild Malden Mills in Lawrence, Massachusetts. Aaron Feuerstein further announced that he would continue to pay the salaries of its idled 4,000 workers, a total additional cost of $15 million. Feuerstein could have relocated the factory to cheaper North Carolina or even China or India, but he chose to keep the company in its home community. Tom Brokaw heralded him as the "saint of the 1990s," while President Clinton recognized him in the State of the Union address. Unfortunately the decisions saddled Malden Mills with $150 million in debt, forcing the company into bankruptcy in 2001. In 2003, Feuerstein was replaced with a new CEO, who proceeded to set up manufacturing plants in China.[46]

SUMMARY

In summary, then, there are a broad variety of approaches that organizations may take to internationalize their business, ranging in risk and degree of involvement from an export strategy to sole ownership of foreign facilities. Each of these approaches has substantially different implications for human resource professionals. When companies engage in exporting, licensing, or contract manufacturing, the major challenges may be primarily related to operations, marketing, and legal issues. HR issues may be affected only on a secondary basis. For instance, in Chapter 1, we mentioned the increasing importance of a company's reputation for social responsibility and the way this relates both to consumers and to potential (or current) employees. When Nike's or another company's reputation suffers because of the labor conditions used by its contract facilities, HR professionals may find that it is increasingly difficult to attract, retain, and motivate qualified and high-performance employees.

On the other hand, when companies engage in management contracts or franchising, the terms and conditions of the agreement will affect the degree of HR involvement and challenge. Certainly, as McDonald's has franchised foreign restaurants, it has maintained an extremely strong role in the training and development of workers at all levels. However, when McDonald's directly owns and operates a restaurant on foreign shores, the HR challenge increases exponentially to include all the HR domains described in Chapter 1. In general, the HR challenge increases as the degree of an organization's international involvement increases. Thus, sole ownership of foreign subsidiaries presents the highest level of HR involvement and challenge.

The HR challenge also is affected by such things as the degree of cultural similarity among a firm's business holdings and the degree of internationalization of a firm, both of which we will discuss later in this chapter. In the next sections, we will describe the managerial strategies that firms may implement and the way they influence HR issues.

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WHAT INFLUENCES THE DECISION TO INVEST IN A PARTICULAR INTERNATIONAL MARKET?

Multinational organizations must also make decisions about the particular markets in which they plan to invest. This decision is typically based on a number of factors. First, issues in a country's **general environment** make a difference. A country's general environment tends to affect all organizations in a similar way. A particular country's

economic, legal, political, and sociocultural systems, plus diversity in language and religious beliefs, are all examples of general environment issues. For example, the increasing cultural diversity of the U.S. workforce and the general aging of the population are sociocultural factors that foreign companies would typically consider before they located operations in the United States. U.S. laws on taxation, regulation, free-trade agreements, currency valuations, inflation, and unemployment levels are other important factors influencing whether Asian, European, and Latin American companies would open subsidiaries here and what particular business and HR strategy they would implement. Political instability in a particular world region is obviously a major influence on all businesses in the region.

A second factor that influences a company's decision to invest in the international market is the company's **task environment,** typically those forces that are directly related to the industry within which a firm operates. Such issues as cost pressures, the intensity of competitive rivalry, the ease with which organizations may enter or leave the industry, and the degree of power over the company maintained by suppliers and customers are all examples of a firm's task environment. Harvard professor Michael Porter argues that such characteristics of an organization's industry are among the most important factors that influence the choice of which international strategy to implement. Porter addresses two types of international industries.[47] In **multilocal industries,** competition in each country, or region, is essentially independent of the competition in other regions. In multilocal industries, business policies and practices can be as centralized or as decentralized as management prefers. In this situation, the organization may choose to manage a portfolio of businesses, each with its own policies and practices. Such multilocal industries include retailing, many consumer food products, wholesaling, life insurance, consumer finance, and caustic chemicals. At the other end of the continuum is the **global industry** in which a firm's competitive position in one country is significantly affected by its position in other countries. Global industries require high integration among units in order to leverage gains and to achieve overall competitive advantage. It is difficult to operate in a decentralized fashion in a global industry because of the high need for coordination. Yet, HR professionals in these organizations must find the appropriate balance between global competitiveness and local responsiveness. Global industries include commercial aircraft, semiconductors, copiers, automobiles, and watches.

Porter's two international industries

A third factor that influences the decision to invest in the international market is the **internal strengths or weaknesses** of the organization. Relevant internal factors include an organization's culture, the expertise of its management staff, the sophistication of its information systems, and the ability to detect and respond to consumer trends. In many cases, these are critical assets that add value within the firm. Organizational capability is an important internal strength and, as we indicated in Chapter 1, may be a source of sustainable competitive advantage for an organization, thus influencing its readiness to pursue a particular international strategy.

DOMESTIC VERSUS INTERNATIONAL HRM

How does HRM in an organization that is actively international differ from HRM in a firm that is essentially rooted within the borders of a single nation? HR activities all relate to the procurement, allocation, and utilization of people. Thus, the particular activities themselves may not be all that different regardless of where they are performed or whom they cover. Experts assert that what differentiates domestic HR from international HR is the complexity involved in operating in different countries with different cultures, politics, and laws and regulations.[48]

Operating in different countries means that individuals must work with different national governments, different legal systems, under widely different economic conditions, with people of diverse cultures and values, and with suppliers and customers over vast geographical distances.[49] Figure 2-1 presents a summary of HRM activities and challenges related to international joint ventures.

HRM activities and challenges

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Figure 2-1 Unique HRM Challenges in International Joint Ventures

HR Activity	HRM Challenge
Staffing	Host country may demand staffing policies contrary to maximizing profits.
Decision making	Conflicts among diverse constituent groups; complexity of decision processes.
Communication	Interpersonal problems due to geographical dispersion and cultural differences.
Compensation	Perceived and real compensation differences.
Career planning	Perceptions regarding value of overseas assignments; difficulties in reentry.
Performance management	Differences in standards; difficulties in measuring performance across countries.
Training	Special training for functioning in international joint venture (IJV) structure.

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In Chapter 3, we will describe the broad array of employment laws that regulate organizations that operate within the United States. But this isn't all there is! Later in the text, you will be introduced to the extensive legal rules governing pay and benefits (Chapter 10), labor relations (Chapter 13), and worker health and safety (Chapter 14). When a foreign firm moves into the United States, it must be expert at understanding and applying legally defensible HR policies and practices. One recent study indicated that the amount of U.S. work-related legislation combined with the litigious orientation of Americans in general places foreign companies at a competitive disadvantage here that they must overcome if they are to be successful.[50] But the reverse is also true. Most developed countries and many emerging economies have a broad framework of work-related legislation. The effective HR professional must understand the implications of such legislation in relevant areas of the world and must have a solid grasp of the costs relating to compliance.

Examples of the nuances in legislation and customs abound in international human resource management as the expectations of employees and their rights vary substantially. While unheard of in the United States, "boss-nappings" are common in France when workers protest layoffs and plant closings. In 2009, when Caterpillar announced the cut of 733 workers, or 25 percent of its French labor force, workers stormed its plants and captured four managers, holding them hostage overnight in their offices. They were released when they agreed to reopen talks about layoffs and to mediation with the state.[51] Sony and 3M experienced similar boss-nappings.[52] Such practices are deemed acceptable in France and other countries of Western Europe where workers' rights are protected through numerous social programs.

In addition to the legal complexity of operating internationally, other factors affect the level of difficulty involved in operating HR on an international basis.[53] First, the degree of cultural difference influences the complexity of HR and managerial challenges. Culture has been defined as "a system of values and norms that are shared among a group of people and that when taken together constitute a design for living."[54] Studies indicate that culture affects the policies and practices of HRM and that a major reason that international assignments fail is culture shock, or the relocated person's inability to adjust to a different cultural environment.[55]

Geert Hofstede's five cultural values

A popular study of culture by Geert Hofstede suggests that societies vary in levels of what he calls individualism/collectivism, power distance, uncertainty avoidance, masculinity/femininity, and long-term versus short-term orientations.[56] These represent examples of cultural values that have important implications for multinational organizations, as differences in such values between cultures affect employee and employer preferences in areas such as compensation, training, and recruitment.

Individualism is the opposite of collectivism. This dichotomy refers to the degree to which individuals look after themselves or operate in groups. People from highly individualistic societies, such as the United States, Australia, and Great Britain, attach more

importance to freedom and challenges in jobs, individual decision making, self-started activities, and individual achievement and initiative than do their counterparts from collectivist societies. Individuals from more collective societies, such as Panama, Ecuador, and Guatemala, may prefer working in groups, team-based pay, and group-based decision making instead of individual-based decision making.

Power distance refers to the extent to which less powerful members of society accept and expect that power is distributed unequally. Individuals from societies high in power distance, such as Mexico, Malaysia, and Panama, may prefer centralized decision structures, tall organization pyramids, a wide salary range between the top and bottom of the organization, and a large proportion of supervisory personnel. Individuals from societies low in power distance, such as Austria, Israel, and Denmark, tend to prefer the opposite. With the exceptions of France and Israel, individualist societies tend to be low in power distance, while collectivist societies tend to be high in power distance.

Uncertainty avoidance refers to whether members of society feel comfortable in unstructured situations. Individuals from societies with high levels of uncertainty avoidance, such as Germany, Greece, Portugal, Finland, and Guatemala, tend to have a strong task orientation, prefer stability and security and well-established rules and procedures, and feel a strong loyalty to their employer. Those from societies with low levels of uncertainty avoidance, such as Singapore, Jamaica, and Denmark, have a strong relationship orientation and feel less loyalty to their employer.

Masculinity/femininity refers to different expectations about gender roles in society. In highly masculine societies, such as Japan, Austria, and Venezuela, there exists a larger wage gap between the genders, fewer women are bosses, and job applicants oversell themselves. In less masculine societies, such as the Netherlands, Norway, and Sweden, more women are in management, a smaller wage gap exists, and job applicants undersell themselves.

Long-term versus short-term orientation refers to the extent to which members of a society accept delayed gratification of their material, social, or emotional needs. Individuals from societies with a long-term orientation, such as China, Vietnam, and Taiwan, emphasize perseverance, personal adaptability, and relationships ordered by status. Those from societies with a short-term orientation, such as Canada, the Philippines, and Nigeria, expect quick results, personal steadiness, stability, and place less emphasis on status.

Furthermore, regional similarities exist. For example, the Nordic countries of Norway, Sweden, and Denmark tend to cluster together in values. Table 2-1 presents an overview of Hofstede's values for 25 countries. While cultural values vary within countries and may change over time with social, religious, political, and economic developments, understanding societal variations in cultural values may be one useful tool for organizations in effectively managing their human resources.

Hofstede collected his data while working for IBM in the late 1960s and early 1970s, yet numerous studies have replicated his findings more recently and in more diverse populations.[57] One recent meta-analysis compiled 598 of these studies representing over 200,000 individuals. The authors found that Hofstede's cultural values are as robust as certain personality traits and demographics in predicting outcomes such as organizational citizenship behaviors and organization commitment.[58] Another study conducted over this past decade is the GLOBE project.[59] The GLOBE project expanded upon Hofstede's original five dimensions to also determine that cultural values vary as a function of the country and region in which one is born and raised. This project was conducted by 170 scholars who surveyed over 17,000 managers in 62 countries. The scholars retained the dimensions of power distance, long-term orientation, and uncertainty avoidance. The masculinity/femininity dimension was expanded into four dimensions: assertiveness, gender egalitarianism, performance orientation, and humane orientation. The individualism/collectivism dimension was split into two dimensions: in-group collectivism and institutional collectivism. In-group collectivism refers to the degree to which individuals express loyalty and cohesiveness in their organizations and families. Institutional collectivism refers to the degree to which organizational and societal practices encourage and reward collective distribution of resources and collective action.

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Table 2-1
Hofstede's Values for 25 Countries

Country	PDI	UAI	IND	MAS	LTO*
Argentina	49	86	46	56	31
Australia	36	51	90	64	31
Brazil	69	76	38	49	65
Canada	39	48	80	52	23
China	80	30	20	66	118
Denmark	18	23	74	16	46
France	68	86	71	43	39
Germany	35	65	67	66	31
Great Britain	35	35	89	66	25
Hungary	46	82	80	88	50
Indonesia	78	48	14	46	
India	77	40	48	56	61
Israel	13	81	54	47	
Japan	54	92	46	95	80
Mexico	81	82	30	69	
Netherlands	38	53	80	14	44
Panama	95	86	11	44	
Poland	68	93	60	64	32
Russia	93	95	39	36	
Spain	57	86	51	42	19
Sweden	31	29	71	5	33
Thailand	64	64	20	34	56
Turkey	66	85	37	45	
United States	40	46	91	62	29
Vietnam	70	30	20	40	80

PDI = Power distance
UAI = Uncertainty avoidance
IND = Individualism
MAS = Masculinity
LTO = Long-term orientation

*Data not available for some countries.
Source: Hofstede, G. (2001). *Culture's consequences: Comparing values, behaviors, institutions, and organizations across nations* (2nd ed.). Thousand Oaks, California: Sage Publications, Inc.

In addition to legal complexity and the degree of cultural differences, experts suggest that a third issue that increases the complexity in managing HR internationally is an organization's degree of foreign investment in relation to its domestic investment. The United States is the largest national economy in the world in terms of gross domestic product, whereas the European Union (EU), when considered collectively, is the largest economy in the world.[60] Thus, EU businesses have had many options concerning growth and expansion (e.g., introducing new products, entering new market segments, finding new uses for existing products, etc.). When U.S. organizations enter foreign markets, they often stumble and fall because they lack experience in effectively operating and managing foreign businesses. Wal-Mart is a great example of a company that has struggled through a number of missteps in its thrust to internationalize. While Wal-Mart has been successful in Canada and Mexico lately, it started out on very shaky ground. Between 1997 and 2006, Wal-Mart struggled to survive in Germany, despite a series of problems. In 2006, it finally gave up and closed its doors.[61]

Organizations headquartered in Switzerland (e.g., Nestlé, ABB Ltd., Roche Pharmaceuticals) have tended to plan for growth by internationalizing, since the Swiss domestic market is so small. Such growth, then, is fundamentally based on the organization's ability to effectively manage foreign operations and foreign workers, and organizations tend to plan for this eventuality. In the United States, we have traditionally measured complexity based on size. *Fortune*'s annual Global 500 list identifies the largest 500 international organizations in the world based on total revenues. Using this measure, the United States is the headquarters to 139 (or 28 percent) of the world's largest international corporations.[62] On the other hand, the United Nations Conference on Trade and Development (UNCTAD), which tracks industrial development around the world, measures the degree of internationality

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among firms, based not on *how much* an organization directly invests in or derives from its foreign business assets, but rather on the *proportionate share* of an organization's overall business that foreign investment and commerce represent. According to UNCTAD, it is considerably more complex to manage a business and its people when the resources are deployed in various ways all over the world than it is to manage just a big organization. The UNCTAD index is based on a composite of three ratios: (1) foreign assets to total assets, (2) foreign sales to total sales, and (3) foreign employment to total employment. Xstrata PLC (United Kingdom), a major global diversified mining and metals group, tops the UNCTAD transnationality list with an overall index of 93.2, which means that 93.2 percent of its sales, assets, and employees are based outside of the United Kingdom. At the end of 2009, Xstrata PLC employed over 36,000 employees and over 21,000 contractors, 95 percent outside of Europe.[63]

Ranking second is ABB Ltd (Switzerland) with a transnationality index of 90.4. ABB Ltd. is a global leader in power and automation technology with operations in more than 100 countries and around 117,000 employees.[64] Figure 2-2 illustrates the top 10 organizations in terms of UNCTAD's transnationality index. One can't help but notice the conspicuous absence of any U.S.-based organization on the top 10 list. In fact, you have to go down to number 13 to find Liberty Global, a U.S.-based telecommunications powerhouse. Figure 2-3 identifies the 10 "most international" U.S. firms. Thus, the UNCTAD approach to organizational complexity would suggest that, as the degree of a company's internationalization increases, the complexity of the HR challenge increases exponentially.

Another issue (perhaps somewhat related to the preceding issue) is the attitude of senior management toward international operations. If senior management lacks an international orientation and considers its foreign subsidiaries as nothing more than "outposts" of the home office, the overall importance of internationalization is diminished. Thinking can become very parochial, as managers focus on domestic issues and assume that international issues are identical to those at home. Regardless of the reason, this failure to recognize differences between domestic and international operations frequently creates problems in foreign business units.[65] This failure often limits the problem-solving capacity of the firm and increases the difficulty of successfully operating offshore.

Recognize differences between domestic and international operations

IHRM is more complex

In summary, then, IHRM is generally more complex than domestic HR because it crosses a number of different systems, including different political systems, economic systems, and legal systems. However, when cultures are very similar, the challenge may not be as difficult as when cultures vary considerably from one another. In addition, when businesses move into the international arena earlier in their history, perhaps because of domestic market size constraints, they build important internal capabilities that may be more difficult to develop later in a firm's experience curve. Finally, when senior managers adopt a multicultural mindset, their international ventures are more likely to be successful.

In the next section, we will turn our attention to the different strategic approaches that may be used when procuring, deploying, and utilizing people on an international basis.

Figure 2-2
Top 10 Transnational Organizations

Rank	Company	Home Economy	Industry	TNI
1	Xstrata PLC	United Kingdom	Mining & quarrying	93.2
2	ABB Ltd.	Switzerland	Engineering services	90.4
3	Nokia	Finland	Electrical & electronic equipment	90.3
4	Pernod Ricard SA	France	Food, beverages and tobacco	89.1
5	WPP Group Plc	United Kingdom	Business services	88.9
6	Vodafone Group Plc	United Kingdom	Telecommunications	88.6
7	Linde AG	Germany	Chemicals	88.3
8	Anheuser-Busch Inbev SA	Netherlands	Food, beverages and tobacco	87.9
9	Anglo American	United Kingdom	Mining & quarrying	87.5
10	ArcelorMittal	Luxembourg	Metal and metal products	87.2

Source: UNCTAD Transnationality Index (2010), www.unctad.org

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Figure 2-3
10 Most "International" U.S. Companies

Rank	Company	Home Economy	Industry	TNI
13	Liberty Global Inc	United States	Telecommunications	86.2
25	Schlumberger Ltd	United States	Other consumer services	76.9
29	Coca-Cola Company	United States	Food, beverages and tobacco	74.3
42	ExxonMobil Corporation	United States	Petroleum expl./ref./distr.	67.9
50	IBM	United States	Electrical & electronic equipment	61.1
55	Procter & Gamble	United States	Diversified	60.2
58	Hewlett-Packard	United States	Electrical & electronic equipment	58.9
59	Chevron Corporation	United States	Petroleum expl./ref./distr.	58.1
69	United Technologies Corporation	United States	Aircraft	54.7
71	Ford Motor Company	United States	Motor vehicles	54.3

Source: UNCTAD Transnationality Index (2010), *www.unctad.org*

INTERNATIONAL HRM STRATEGIES

International firms choose among four general HR management strategies although many use different strategies for different situations. First, in the **ethnocentric** approach, foreign subsidiaries have little autonomy, operations are typically centralized, and major decisions are made at the corporate headquarters. Although rank-and-file workers are probably locals, key positions in foreign subsidiaries are typically held by management who are moved to the assignment by or from the company headquarters. Individuals who are residents of the organization's home country who are sent offshore on assignment are called **parent-country nationals** (PCNs). Toyota, for example, typically sends a team of Japanese executives to oversee the start-up of a new operation in the United States. Many organizations in the United States manage foreign operations using the same basic format. Research suggests that companies follow this approach because they believe that their management and human resource practices are a critical core competence that provides competitive advantage to the firm.[66] Within this type of strategy, pay for the local workers will tend to be based on the local marketplace. Pay for the management team, particularly if they are PCNs, will tend to be related to the home country. One expert described the traditional mindset about managing overseas operations of U.S. companies as being related to two questions: "Who's the best U.S. person to handle this job?" and "What will it take to get him or her there?"[67] In ethnocentric situations, training and development efforts will tend to be focused on ensuring that the local workers possess the necessary knowledge, abilities, skills, and other characteristics (KASOCs) to perform effectively.

When organizations adopt a **polycentric** philosophy, they tend to treat each subsidiary as a distinct entity with some level of decision-making authority. This approach suggests that parent-company HR management systems should not be imposed on overseas affiliates since these operations face considerably different legal, social, and cultural conditions.[68] Thus, subsidiaries will be encouraged to craft policies and procedures that will work most effectively based on the particular situation and locale. Within this strategy, subsidiaries are typically led by talented individuals who have proven themselves in the local marketplace. However, there is very little movement of talent from assignment to assignment, and foreign talent is rarely promoted to key positions at headquarters. Individuals who are residents of countries in which a foreign subsidiary is located are called **host-country nationals** (HCNs). During the early stages of internationalization, HCNs tend to fill middle- and lower-level positions. As time progresses, and the organization builds up management experience, it is increasingly common to see HCNs replace PCNs in key management positions. Many organizations specifically target promising HCNs for training and development initiatives. This is at least partly because HCNs are considerably less expensive than PCNs. As with other HR policies, pay in polycentric organizations will tend to be based on local marketplace trends. In polycentric settings, training and development efforts begin to focus on preparing talented locals (HCNs), particularly in developing countries, for future managerial positions and challenges.

When a company chooses to pursue a **geocentric** managerial approach, it strives to integrate its businesses. In these organizations, relationships between headquarters and foreign subsidiaries tend to be extremely collaborative, with each participant contributing important information, perspective, and decision-making factors. Organizations begin considering themselves to have a **global** workforce that can be deployed in a variety of ways throughout the world. Key positions tend to be filled by the most qualified individual, regardless of national origin. In other words, individual differences in nationality are not as important as individual differences in talent.

Geocentric organizations may still rely heavily on HCNs to fill most of their entry-level and operating jobs, but key jobs will tend to be filled by HCNs, PCNs, or **third-country nationals** (TCNs). TCNs are residents of a different country than the parent country or the host country. Thus, when IBM (a U.S. company) transfers an Australian to a position in its Singapore office, IBM is using a TCN.

More generally, **inpatriates** are individuals from a host country or a third country who are assigned to work in the headquarters office, when it is located in a different country. Thus, if IBM transfers an individual from Australia to work in the United States, it is using an inpatriate. **Expatriates,** who are employees on assignment outside of their home country, are discussed in detail later in this chapter

Like the staffing patterns, compensation plans in geocentric organizations tend to be based on the concept of a "global marketplace." Pay differences will focus less on an individual's country of origin. Instead, pay will begin to consider the value of this particular work to the organization, at this particular time, in this particular setting, by a person with these particular credentials. Training and development will be especially important in geocentric organizations because of the importance of developing a globally competent group of managers. Investments will be made in sending talented individuals from all corners of the globe to all corners of the organization, including to developmental positions in corporate headquarters.

The **regiocentric** managerial approach may be thought of as a scaled-down version of the geocentric model in that it tends to appoint people to positions within general regions of the world. Thus, European subsidiaries tend to be managed by Europeans, while Asian subsidiaries tend to be managed by Asians. When this approach is used, there is limited movement between corporate headquarters and regions. However, there typically is a strong regional headquarters that is vested with considerable power to manage its operations. Such regional headquarters work very collaboratively and independently with the subsidiaries within the region. Some organizations may use the regiocentric approach as an interim step on their way to a geocentric philosophy. As indicated earlier, Coca-Cola is regionally managed, although it maintains a group of global troubleshooters. In the regiocentric management model, the staffing, compensation, and training strategies also generally relate to regional norms.

What Influences the Choice of IHRM Strategy?

The selection and implementation of an IHRM strategy are very similar to the process used when an organization decides on its business strategy. A variety of factors must be carefully assessed, including the general environment, the industry environment, and the firm's internal strengths and weaknesses. However, as we described in Chapter 1, the development of an HR strategy also involves careful consideration of the firm's strategy.

For example, a multilocal firm is one that is primarily targeted at local responsiveness. As such, it tends to be a decentralized collection of relatively independent operating organizations. Many such organizations would find a polycentric IHRM strategy to effectively respond to its need for local focus. However, if the firm was anticipating rapid growth in the near future and was concerned about a sufficient supply of local talent to meet the upcoming managerial challenges, a regiocentric strategy might provide an improved opportunity to identify and develop the necessary local talent. If the availability of qualified talent on a regional basis was uncertain, the organization might find that a geocentric or even an ethnocentric strategy could provide an effective transition that would enable a firm to transfer the necessary managerial and operational know-how from talented parent-country

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or third-country nationals to local-country nationals. The decision concerning which IHRM strategy to implement also may be influenced by the cost pressures within an industry. Firms with high cost pressures may find that the polycentric strategy—with its high level of decentralization—requires so much duplication of functions and services that the strategy is not economically feasible. The key point is that IHRM strategies do not necessarily "match" firm strategies. This is because the particular elements of the firm's environments that indicate what products and services the firm should create do not necessarily consider critical IHRM issues, such as the supply of and demand for labor in a particular area of the world, its relative cost, and its skill level. In Chapter 5, we will describe the HR planning process and the way it relates to both domestic and international businesses.

INTERNATIONAL BUSINESS ASSIGNMENTS

International businesses need international expertise. International job rotation has long been recognized as a key tool for developing such expertise.[69] Yet, foreign job assignments create important HR challenges. In this section, we will describe the use of expatriates and their advantages and disadvantages, and we will note contemporary trends concerning international job assignments.

As indicated earlier, employees who are placed in an assignment outside their home country are called **expatriates** (or "expats"). Traditionally, most expatriates have been parent-country nationals (PCNs) assigned by the home office to lead and manage overseas expansions for two reasons.[70] First, top management doubted whether local talent was up to the challenge of managing a business unit. Second, top management wanted to "mold" offshore affiliates into its own culture and practices. Sending PCNs abroad benefits organizations in building global management skills and knowledge in organizations, yet sometimes negative consequences occur, such as a failure to adjust to the host environment and poor performance. Numerous studies have been conducted to determine the antecedents and outcomes of "expatriate adjustment" and most have primarily focused on the viewpoints of the expatriate and/or spouse.[71] Additional studies focusing on other stakeholders, such as host country nationals, who influence expatriate adjustment are needed.[72]

Today, organizations report a shift away from using PCNs and increasing their reliance on host-country nationals (HCNs) and third-county nationals (TCNs) to fill their managerial ranks. This stems from the desire of multinational organizations to move toward a geocentric managerial philosophy and/or reduce costs. In addition, governments often exert pressure to fill increasing numbers of managerial positions with HCNs.[73]

Goals of International Business Assignments

Today, organizations report using international assignments in order to achieve one or more of the following goals.

First, international assignments are a key element in developing management teams that are globally focused and globally competent. The global leadership challenge is discussed later in this chapter. Second, expatriate assignments encourage high levels of coordination and control among business units. This is especially important when an organization internationalizes by acquiring or creating widely dispersed production and marketing facilities, then integrating them with the rest of the overall business. Expatriates possess knowledge about the way the overall company operates, its long-term goals, and its problem-solving resources that may enable them to identify and capitalize on synergies, while noting duplications of effort.

Third, international business requires high levels of internal communication, both information sharing and information exchange, because of geographical distances, cultural diversity, complex supply and demand conditions, and other similar pressures. Such information sharing is key to effective strategic and tactical decision making. While e-mail and other technological developments facilitate interpersonal contact, global assignments provide the opportunity to work side by side and to develop relationships of collaboration

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and trust over an extended period. Such relationships do not end after the expat "returns home" (or goes on to the next assignment). The continuous exchange of rich information, particularly when people share competitive, marketplace, and technological information, may enable an organization to seize opportunities and respond to challenges more quickly and effectively.

Challenges of International Business Assignments

In spite of their strategic value, managing an effective program of international assignments presents huge challenges.

Assignment Failure

First, there is a high level of expatriate assignment failure. Traditionally, "failed" assignments were those in which the expatriate left the assignment prematurely. It is estimated that 10–20 percent of assignments are failures based on this definition. The Global Relocation Trends Survey found that 17 percent of expatriates left their companies during the assignment. The most common factors relating to assignment failure are spouse/partner dissatisfaction (cited by 65 percent of respondents), inability to adapt (47 percent), other family concerns (40 percent), and poor candidate selection (39 percent).[74] One reason behind spouse dissatisfaction may relate to a difficulty in securing employment. A recent study co-sponsored by the Industrial Relations Counselors and ORC Worldwide found that while 90 percent of surveyed spouses were employed prior to expatriation, only 35 percent were employed upon expatriation. Seventy-five percent of those not working said that they wanted to work.[75]

Assignment location also plays a role in assignment failure. The Global Relocations Trends Survey (2010) reported that the most difficult locations for foreign assignments were (1) India, (2) China, and (3) Russia. Difficulties securing housing, temporary accommodation, and immigration were cited. When asked for the top three locations for assignment failure, respondents cited China, India, and the United States. Figure 2-4 reports the results of a survey of Japanese, European, and U.S. firms concerning key problems with international job assignments.

International Compensation Approaches

A second challenge relates to the relatively high cost of expatriated executives, as one estimate indicates that the cost of a manager triples as soon as he/she steps into a foreign country. This high cost can be attributed to the traditional method of compensating expatriates based on home-country practices. For example, expatriates from companies based in the United States, Germany, and Japan are typically compensated by a **"balance sheet approach."**[76] The goal of this approach is to ensure that the expatriate maintains the same standard of living in the host country as he/she had in the home country by providing a

Figure 2-4
Comparative Illustration of HR Challenges

Description of Challenge	U.S. Firms Reporting Challenges	European Firms Reporting Challenges	Japanese Firms Reporting Challenges
Difficulty attracting high-performance managers for offshore assignments	21%	26%	44%
Poor relationships between parent-country nationals (PCNs) and host-country nationals (HCNs)	13%	9%	32%
HCNs reporting frustration about advancement opportunities	8%	4%	21%
High turnover among HCNs	4%	9%	32%
Lack of PCNs skilled in international management	29%	39%	68%
Few PCNs interested in accepting offshore assignments	13%	26%	26%
Reported PCN adjustment problems upon completion of offshore assignment	42%	39%	24%

Source: Adapted from R. Kopp, "International Human Resource Policies and Practices in Japanese, European, and United States Multinationals," *Human Resource Management* 33, no. 4 (Winter 1994), pp. 58–99.

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variety of financial, social, and family benefits. Financial benefits include housing, transportation, and goods and services differentials; company-paid children's education allowances; and tax equalization. Social benefits include a company car and/or driver, rest and relaxation leave, club memberships, domestic staff, language and cross-cultural training, and assistance with locating a new home. Family support benefits include language training, child care providers, locating schools for children, and assistance in locating spousal employment. Factors influencing these benefits include the expatriates' level in the organization, hazardous or difficult host country environments, and market surveys.[77] High-level positions and difficult or hazardous locations require greater premiums and allowances to attract expatriates.

To mitigate the high costs of the balance sheet approach, many companies have opted to use an alternative method to compensate their employees: **the going-rate approach.** This approach, also referred to as "localization" or a "market rate approach," refers to converting expatriates to local standards. For example, an expatriate manager acting as a director for a firm would be paid at the same level as local directors in similar positions are paid, with consideration for performance, work experience, and other inputs. One recent study found that 21 percent of companies localized expatriates immediately, 35 percent localized in 1 to 4 years, and 44 percent localized in a period of 5 years or more.[78] The going-rate approach offers another advantage over the balance sheet approach, as local employees may perceive that the pay of their localized counterparts is fair and not based on U.S. pay levels. This approach is not always attractive to expatriates, however, particularly those in developing host countries where pay levels are significantly less than home-country levels.

A second approach used by firms to reduce costs is to offer expatriates a **cafeteria-style benefit package,** under which expatriates can choose from a variety of benefits, at costs that meet a specified total.[79] This package is less expensive than the balance sheet approach, as certain benefits need not be offered to all expatriates. For example, expatriates with children may choose tuition reimbursement, while those without children may prefer a company car. Certain benefits offer greater appeal, given the country of assignment. As an example, tax equalization is less attractive in Dubai, U.A.E, where employment taxes are not paid.[80] Tax equalization is a benefit often provided to U.S. expatriates working for U.S. multinationals abroad to offset double taxation: taxation by the United States and by the country of assignment. While certain treaties and foreign tax credits from the IRS offset some of these taxes, these offsets may not fully reduce the expatriates' tax liability to that of a single country. Tax equalization is provided to make up the difference.

Another approach is to utilize a regional system. In this approach, the wages are set for all expatriates assigned to a particular region. As an example, expatriates assigned to work in the European Union would be paid under a compensation system specific to that region. Costs for this approach vary as some regions are more costly to operate in than others.

Recently, as the number of dual-income families has increased in the United States, international HR deals have expanded to include "trailing spouse" benefits. Deals typically include direct assistance in locating a position for the spouse, paying the search firm fee when a position is located, or actually paying the spouse's salary until suitable employment can be located. If no suitable employment can be found, the company often continues to subsidize the spouse for lost wages, which can be costly for organizations. In one recent survey, 85 percent of employers provided trailing spouses with language training, while 38 percent provided education training and 34 percent sponsored work permits.[81]

When setting compensation, HR managers need to be cognizant of worldwide variations in the cost of living so they can offer competitive wages. The *Economist* publishes an annual index of the cost of living in major cities around the world. The 10 most expensive cities in 2011 in which to live, relative to New York City's base index of 100, are listed in Table 2-2.

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Table 2-2 Top Ten Most Expensive Cities

1	Tokyo	Japan	152
2	Osaka Kobe	Japan	145
3	Paris	France	132
4	Copenhagen	Denmark	124
5	Oslo	Norway	123
6	Zurich	Switzerland	122
7	Frankfurt	Germany	118
8	Helsinki	Finland	118
9	Geneva	Switzerland	115
10	Singapore	Singapore	112
11	Hong Kong	Hong Kong	110
12	Vienna	Austria	109
13	Dublin	Ireland	108

See Chapter 10 for a further discussion on international compensation.

Cross-Cultural Training

Factual information
Cultural orientation
Cultural assimilation
Language training
Sensitivity training
Field experience

A third challenge relates to the necessity of adequate cross-cultural training for expatriates and accompanying families. Organizations invest significant time and resources preparing individuals and their families for international assignments. Such preparation may include cross-cultural training. A classic study by Rosalie Tung suggests that expatriates should be provided with the following forms of cross-cultural training: (1) training on factual information about geography, climate, housing, and schools; (2) cultural orientation training, which provides information related to the cultural institutions and value systems of the host country; (3) cultural assimilation training, which provides brief episodes describing intercultural encounters; (4) language training; (5) sensitivity training, so trainees can develop some attitudinal flexibility; and (6) a field experience, where candidates are sent to the host country or a "microculture" nearby and can undergo some of the stress of living and working with people abroad.[82] Some researchers suggest that predeparture training is not enough, however, and suggest that "real-time" training, where training is conducted throughout the international assignment, is very useful in reducing problems that occur as the assignment progresses. A newer form of training has also emerged, self-training via the Internet, where trainees teach themselves about cultures by surfing the Web.[83] See Chapter 8 for a further discussion on international training.

Repatriation

A fourth challenge occurs when the expatriates return to the home country. Many organizations have reported difficulty in retaining expatriates after completion of an overseas assignment. One study indicates that 38 percent of expatriates left their companies within 1 year of returning, and 22 percent left after 2 years.[84] This rate far exceeds the annual turnover rate for all employees of 13 percent.[85] Consultants add that anecdotal evidence leads them to place an annual expatriate turnover rate closer to 50 percent.[86] Why is there such turnover following an experience that should deliver a clear benefit to both the company and the individual? One reason is **"reverse culture shock,"** a very real problem.[87] Expatriates who live and work in foreign cultures often become immersed in their new cultures and grow to enjoy their new lives. When they return home, they often are surprised to find that everything has changed, from their companies to their communities.[88] If frequent communication between the expatriate and the home office did not exist while on assignment, these changes may seem drastic. In addition, expatriates and repatriates are increasingly reporting frustration with perceived career opportunities when the international assignment is complete. Organizations sometimes fail to take account of the repatriates' international experience and may place them in lateral positions. In several studies of Western repatriates, less than half of the respondents reported using the knowledge, skills, and abilities they acquired overseas upon repatriation.[89] One

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exceptional, more recent study reported that Indian repatriates felt that their expatriate experience in the United States helped them in a positive way.[90] Organizations may also fail to consider the significant degree of discretion and authority the repatriates had while on assignment when placing them in new positions with greater reporting requirements and more hierarchy.[91]

Fortunately companies are increasingly taking steps to mitigate repatriation problems. One recent study found that 92 percent of organizations surveyed held repatriation discussions, 74 percent had written repatriation policies, and 95 percent identified new jobs within the company for repatriated executives.[92]

Recent Trends in Overseas Assignments

Most expatriate assignments are long-term assignments, generally lasting between 1 and 4 years. One study found that 65 percent of assignments were considered long term (generally between 1 and 4 years), while only 22 percent were considered short term.[93] Yet costs and family pressures have led policy makers to consider other options, such as creating commuter policies or offering extended business trips. They may also consider localization of the expatriate workforce, hiring local workers, or short-term assignments.[94]

Today, four types of expatriate assignments are identified. **Short-term assignments,** described as "something longer than a business trip," are increasingly popular. Typically, these are project-oriented assignments with the worker staying in a hotel and the family remaining behind at home. The second type is **developmental assignments** that are increasingly considered to be a necessity for a high-potential fast-tracker in many large international companies. **Strategic assignments** involve persons with special skills who are moved to become a country manager in an unfamiliar area. For example, an individual may be sent to Korea because an organization is planning an expansion and wants a complete immersion in learning the marketplace, in relationship building, and in understanding the way business is conducted. A **long-term assignment** is similar to the traditional expatriate role. Typically, long-term assignments involve start-ups, or an ongoing managerial presence to resolve major problems, and would typically be taken by a "career expatriate."[95]

More international assignments for women

These changing trends in international assignments may mean that such assignments become more available to women. Today, although women occupy an estimated 50 percent of the U.S. middle-management labor pool, they represent only 17 percent of the expatriate pool. One study indicated that when actually offered an international assignment, 80 percent of women accepted the offer, while only 71 percent of men did. Yet, women are rarely offered international assignments. Two surveys have indicated that women were left out because of managerial beliefs that women were not as globally mobile as men and because supervisors were worried about crime overseas as well as cultural biases against women in some areas of the world.[96] Thus far, studies have failed to find a rational foundation for these beliefs. Even though the use of expatriates may be slowing, expatriates continue to occupy a critically important position in organizations' international expansion and management development strategies. One recent survey provided a snapshot of the characteristics of the "typical" expatriate in 2010.[97]

The "typical" expatriate

- 90 percent of current expatriates had no previous expatriate experience.
- 17 percent of expatriates were women.
- 58 percent of expatriates were 40 years or older.
- 70 percent of expatriates were married and 79 percent of spouses accompanied their partners on assignment.
- 47 percent of expatriates had children accompanying them.

In response to the recent economic climate, almost three-quarters (72 percent) of respondents in the same study were reducing expenses. To achieve these reductions, companies are increasingly turning to shorter-term assignments and relying on localization. A recent meta-analysis of the expatriate literature revealed some surprising effects.[98] While expatriate adjustment was found to be sensitive to many stressors, some of the most

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Figure 2-5
Three Steps to Getting Payback from Expat Investments

	Specific Considerations
Step 1: Send people for the right reasons	Specifically what do we want to achieve? • Response to immediate business demands? • Generating new knowledge? • Developing global capability? • Some combination of the above?
Step 2: Send the right people	Technical skills are needed plus • Communication skills • Cultural flexibility • Broad social skills • "Cosmopolitan orientation" • Collaborative negotiation style

Step 3: Finish the assignment the right way	Create straightforward processes to smooth transition
	• Start planning *early*
	• Involve the expat in reentry planning
	• Find suitable job—focus on direct application of new knowledge and skills
	• Prepare expat for social adjustment realities:
	  • Family's readjustment
	  • Mentors may be gone, reassigned
	  • Transition from "in-charge leader" to "fitting back in" or "starting over again" in new international assignment

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obvious predictors such as previous overseas experience and host country language ability had negligible effects. Spouse—family adjustment, role clarity, and relational skills were potent predictors of assignee adjustment and success.

The United States, China, and the United Kingdom are the most active destinations, while China, India, and Russia present the greatest challenges for program managers and expatriates. Chief issues cited—by both expats and program administrators—relate to fluctuating inflation for goods and services, cultural differences, time delays, complex laws, and general inconvenience.[99]

Recommendations for successful international assignments

Figure 2-5 summarizes expert recommendations for successful international assignments. In summary, then, international business assignments provide critical opportunities and resources to organizations as they internationalize. Although the traditional use of expatriates, particularly parent-country nationals, continues to be popular, their costs are increasingly under scrutiny. Firms are investing more resources in third-country nationals and other developmental programs in order to increase the managerial potential of local workers.

GLOBAL LEADERSHIP CHALLENGES

As organizations internationalize, there is an increasing sense that managing global operations involves a particular expertise that is separate and distinct from traditional U.S. domestic managerial techniques. Today, organizations are increasingly committed to developing management teams that are globally focused. According to management guru Rosabeth Moss Kanter, global management skills are becoming a major core competence for future business leaders.[100] Over half of CEOs surveyed in a 2011 study indicated plans to send staff overseas.[101] The same study noted that over the past decade, the number of international assignments has increased by 25 percent and it forecasted a 50 percent growth rate over the coming decade.

Global management skills are a core competence

In some organizations, considerable global experience is recognized as a major strategic imperative. At General Electric, for example, an individual will not advance beyond a

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particular level without significant experience managing overseas operations. Each of the final candidates in the search for GE CEO Jack Welch's replacement had spent considerable time working outside the United States during the past decade or so. Richard Waggoner was promoted to president and CEO of General Motors after he successfully turned around GM's South American operations. Avon appointed Charles Perrin as CEO largely based on the global business expertise he demonstrated at Duracell.

Most important HR goal: Develop solid global teams

A Conference Board study of executives in 33 countries indicates that the most important HR goal for the coming years is to develop solid global leadership teams.[102] Some argue that the lack of global management bench strength in many organizations has limited business's ability to implement global growth strategies.[103] In other words, the stage is ready for major expansion, but the supply of effective, well-trained leadership talent is short of the mark.

A Fortune 200 global consumer products company provides a good illustration of the challenge.[104] In the early 1990s, the organization had approximately 60 "globally competent" managers, that is, knowledgeable, effective, well-rounded individuals who could be sent anywhere on the globe to run an operation. Estimates indicated that this was a shortfall of 30–35 people if the company was going to be able to implement its strategic growth plans during the next 5 years. Why the shortfall? First, the organization had grown faster internationally over the past 5 years than they anticipated. In the early 1990s, they had opened facilities in 25 new locations, primarily in developing markets, including Eastern Europe, Africa, and Asia. Second, a third of their current globally competent team was nearing retirement age. In addition, the firm was having difficulty maintaining its high-potential employees. As investments were being made in developing global capabilities, individuals were being scooped up by other organizations (including many competitors). Most of these high-potential individuals were part of dual-career, high-potential families who were not particularly interested in expatriate duty, especially in the organization's high-growth areas such as the Ukraine, Nigeria, and Vietnam. In addition, many of the developmental attempts seemed to be "hit or miss" propositions, since the firm had never really articulated exactly what a globally competent leader was. Finally, HR development specialists expressed ongoing frustration because the KASOCs for successful global managers seemed to be changing while developmental efforts were taking place. Review of the popular press would suggest that this organization's experience was not unusual.

What is a globally competent leader?

Exactly what is a globally competent leader? A variety of answers have been offered. One expert describes three key skills relating to globally competent managers and leaders. First, they are integrators who see beyond obvious country and cultural differences. Second, they are diplomats who can resolve conflicts and influence locals to accept world standards or commonalities. Finally, they are cross-fertilizers who recognize the best from various places and adapt it for utilization elsewhere.[105] Another expert cites three knowledges as being critical. First, globally competent managers have an in-depth understanding of world markets, their potentials, and their problems. Second, they master all elements of global supply chains and distribution channels. Finally, they skillfully embrace cultural diversity.[106] In general, it appears that the need for global leadership is clear, but exactly what this is and how it is developed are much less clear.[107]

Understand world markets
Master global supply chains
Embrace cultural diversity

One of the difficulties in agreeing about the attributes of effective global skills may be related to the evolution taking place in the way people think about management roles in global settings in general. One expert asserts that management is currently in the fourth stage of an evolving process of international management philosophy and practices.[108] During early internationalization efforts, companies typically relied on a domestic leadership style, at least partly because they didn't see a reason for managing differently. The traditional assumption was that companies achieved competitive advantage by noting and exploiting marketplace discontinuities. For example, if an organization spotted an unfilled need for a particular type of product or service, or noted a rapid improvement in a culture's standard of living, and a dearth of middle-class products, the ability to rush in and produce the desired goods or services could create a windfall for the company. Mostly these were temporary opportunities, however, because other organizations would imitate a successful campaign and drive the price down, and eventually the market would return to a balanced state. This thinking, then, assumed that international success was based on operational capability and marketing savvy, rather than any particular adaptation of managerial style.

During the second stage, international operations began falling short of expectations, and issues of "How should this facility be managed?" arose. Emerging from this thinking was a general consensus that effective management style varied based on the particular situation and setting. Usually referred to as contingency theory, leaders began to examine the applicability of different managerial styles and mindsets, seeking the one that "fit" best, given a specific situation. In the third stage of international managerial development, the spotlight increased its focus on management practices, but thinking shifted away from a pure "it depends on the situation" attitude, and began examining the way managerial roles and styles need to be altered and adjusted to meet the needs of a particular cultural setting. A wealth of cross-cultural managerial literature emerged, including such bestsellers as *Kiss, Bow or Shake Hands* and *Riding the Waves of Culture.*[109] Today, the interest in cross-cultural management and contingency theory continues, but there is an increasing belief that global business leadership needs an overarching managerial philosophy that considers the collection of situations, challenges, and styles as its primary frame of reference.

Competency model of global leadership

A review of the popular literature suggests that the most widespread (and perhaps faddish) approach to global leadership development currently in use is a "competency model." This thinking assumes that effectiveness in global leaders is based on the degree to which individuals possess particular knowledges, abilities, skills, and other characteristics (KASOCs), such as "customer orientation," "building alliances," and "intellectual capacity." However, critics of this approach assert that these competencies are often subjectively derived, poorly defined, and related to an individual's basic traits, rather than learned behavior. In addition, some organizations have too many competencies and they overlap considerably. For example, Chase Manhattan identifies 250 competencies that comprise effective global leadership. Furthermore, little research has been conducted to investigate whether measures of individual competencies can predict actual performance, domestically or internationally. In Chapter 1 we emphasized the need to measure the effects of HR interventions. Competency models are useful. As we said in Chapter 1, sound measurement is absolutely necessary.

Global mindset

The term *global mindset* is frequently seen these days in the popular press. Global mindset is more a general description of the need for all organizational decision makers to think well beyond domestic issues. One European expert indicates:

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Figure 2-6 General Components of a Global Mindset

Component	Description/Illustration
Global data bank	Maintaining relevant, current, "hard" data about countries, regions.
Market knowledge	What are the top 20 markets in our industry? What are a key country's defining historic moments? What are a key country's defining cultural moments? What is the economic system and performance of a key market? What is a key country's political system? What are the relevant business practices in a key country? What are the major geographic features of a key country?
Understanding the global superstructure	Same questions as required for market knowledge, but applied to critical regions.
Global economic system	Appreciation for and knowledge of the "interconnected economy"; that is, the system that connects the world and covers trade and finance, the world capital markets, and the major trade areas.
Cross-cultural skills	Competence in effectively interacting with managers from many countries or cultures. Foreign language skills. Understanding nonverbal communication commonalities. Appreciation for culture-based nuances in communication techniques.
Cultural roots	Global mindsets require grounding in a home culture for personal balance.
Spirit of generosity, magnanimity	Giving others the opportunity to proceed and to define own directions.

Source: Jean-Pierre Jeannet, *Managing with a Global Mindset,* 1st Edition, © 2000. Electronically reproduced by permission of Pearson Education, Inc., Upper Saddle River, NJ.

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> The idea of the global mindset as a roving globetrotter is probably overblown, and clearly, managers possessing, or aspiring to, a global mindset need to come equipped with a globalized database, or some factual knowledge that is different from the domestic mindset. Furthermore, they need to be able to view the world differently. And, finally, their thinking patterns, responses, and cognitive skills differ sharply from a traditional domestic or even multi-domestic mindset.[110]

Figure 2-6 lists the general components of this global mindset according to this expert. In summary, then, developing global leaders and global mindsets will be a continuing challenge faced by HR professionals probably both in the short term as well as over the long term.

SUMMARY

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Business and commerce are increasingly crossing national, regional, and continental borders. Some organizations have expanded their marketplaces; some organizations have extended their operations; some organizations operate globally. Even if you never work for an international organization, the global economy affects the marketplaces and the operational environments of most business, even small domestic organizations. In this chapter, we described and discussed the way that this expansion affects human resource practices.

When organizations decide to focus attention outside their national borders, there are a variety of approaches that may be taken. Such choices range in risk and degree of involvement from simply exporting goods and services to sole ownership of foreign facilities. Each of these approaches may present very different HR challenges, ranging from providing technical advice and expertise all the way up to (and including) providing in-depth, comprehensive management services and job-related training to people who live in developing parts of the world.

International organizations tend to choose among four general HR strategies. In ethnocentric organizations, offshore operations have little autonomy, major decisions are made at corporate headquarters, and managers are often moved to assignments from the home country (parent-country nationals). At the other end of the spectrum is the polycentric strategy in which each subsidiary is empowered to make important decisions concerning its own operations and markets. When this approach is adopted, employees tend to have stable assignments and rarely move from location to location. The geocentric HR strategy tends to balance the two philosophies: relationships between headquarters and foreign subsidiaries tend to be collaborative, with each participant contributing important inputs. The partnership found in the geocentric HR strategy often gives rise to a global workforce that can be deployed as needed in various areas throughout the world. A scaled-down version of this philosophy is the regiocentric approach in which the world is viewed as a collection of areas in which people and resources may move fluidly, but cross-regional movement may be the exception rather than the rule. Some organizations use a regiocentric approach as a stepping stone to a global philosophy. In deciding on which international HR management (IHRM) strategy to consider, a company typically considers a variety of factors, including the general environment, an organization's industry characteristics, the business's strategy, and the firm's internal strengths and weakness. In other words, the process of choosing an IHRM philosophy is very similar to the process of deciding which business strategy an organization will choose to pursue.

Traditionally, U.S. organizations have used key management talent and international job rotation as a means for developing and deploying strategic capability during efforts to internationalize business. Yet, such job rotation creates huge cross-cultural challenges, and the record of expatriate success has been increasingly called into question. These challenges include a relatively high expatriate failure rate, the high costs and challenges associated with international compensation, the need for cross-cultural training of expatriates and families, and repatriation. At this time, two trends are emerging: (1) the widespread reliance of U.S. companies on their own expatriate managers to build effective businesses abroad is decreasing, and (2) expatriate job rotation is increasingly being used to aid in the

development of global capability, rather than primarily as a tool for transplanting specific home-country business, managerial, and HR practices. In other words, international job rotation is increasingly being used as a developmental assignment for an organization's managerial talent, rather than as a way of creating "satellite offices" or "home-country clones."

The development of effective global leadership continues to be a major challenge for organizations. Most international companies view such development as critical to their long-term effectiveness in international marketplaces. There is little question that business leaders everywhere in the world have a great deal to learn about the way to establish, build, and leverage subsidiaries in foreign countries in order to fully deliver strategic capabilities and organizational excellence.

Discussion Questions

1. Why do you think businesses internationalize? Which forces are most influential and which are secondary forces?
2. Think of three or four organizations with which you are familiar. How have they been affected by the globalization of business? Make sure you consider both direct and indirect influences. If they have not been particularly affected, what are some of the reasons for their insulation from the trend?
3. Think about two businesses: (1) a manufacturer of athletic gear and (2) a property and casualty insurance company. How might the internationalization of each of these companies differ from the other? What factors might account for these differences? Choose one company and pretend that you're the HR director. How would you figure out the "right" way to manage this international expansion?
4. How do differences in international HR management (IHRM) strategies affect the relative importance of each of the HR domains?
5. What are the advantages and disadvantages of using parent-country, host-country, and third-country nationals? Under what specific circumstances might an organization choose to utilize third-country nationals?

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Chapter 3

The Legal Environment of HRM: Equal Employment Opportunity

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OBJECTIVES

After reading this chapter, you should be able to

1. Explain the legal issues affecting HRM activity and the various laws related to equal employment opportunity (EEO) and employment discrimination.
2. Identify potential problems in HRM policy and practice as related to equal employment opportunity laws.
3. Know the importance of judicial interpretation in EEO law.
4. Understand the implications of EEO law in the international context.
5. Describe the future trends related to EEO law and their implications for HRM practice.

OVERVIEW

Chapter 1 briefly summarized the regulatory environment in which HRM is practiced today, and Chapter 2 discussed this environment in the context of the globalization of the economy. Many experts in HRM have noted that the legal environment is a critical component of the external environment for HRM and that legal considerations are a primary force shaping staffing policies and the outsourcing and offshoring of manufacturing and service jobs. Indeed, legal and regulatory studies related to labor issues and labor costs often cite the regulatory environment as a major reason that some U.S. jobs (and facilities) are moved offshore (or at least to southern states).

There are a plethora of federal, state, and local laws and regulations that can be the basis of a lawsuit against an employer for actions (or inactions) related to labor relations, workers' compensation, unemployment compensation, wages, health and safety in the workplace, whistleblower's protection, retirement, employee benefits, rights of privacy, and/or alleged unlawful dismissal.[1] The most important of these laws will be considered when the most relevant HRM activities are covered in the chapters to follow.

No other area of the regulatory environment has had such a profound effect on HRM as the laws related to equal employment opportunity (EEO). Surveys of perceived discrimination in the workplace underscore the importance of EEO law for HRM practice. A 2008 *USA Today*/Gallup Poll found that most Americans believe that racism is still widespread against blacks in the United States. A slim majority of whites (51 percent) feel this way, 59 percent of Hispanics, and 78 percent of blacks. Over 4 in 10 whites, blacks, and Hispanics

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believe that anti-white bias is also a problem.[2] Another survey found that over 31 percent of Asians reported incidents of discrimination (the largest ethnic group percentage) and 26 percent of African-Americans reported incidents of discrimination. Other noteworthy statistics: 22 percent of white women perceived discrimination versus 3 percent of white men; 20 percent of Hispanic men reported discrimination versus 15 percent of Hispanic women.[3]

Such findings, in the context of the increasing diversity of the U.S. workforce,[4] translate into a picture of expanding legal activity related to personnel decisions. The focus of discussion in this chapter is on federal EEO law since most work areas of HRM can be affected by the EEO laws and the regulations about to be discussed. The processes by which employers recruit, hire, place, evaluate, transfer, train, promote, compensate, monitor, lay off, and terminate employees can fall under the close scrutiny of the courts and regulatory agencies based on some form of EEO legislation. In addition, there are numerous state and local laws that also affect HRM practice.

The purpose of this chapter is to provide an overview of the legal environment with particular emphasis on equal employment opportunity laws and regulations. Descriptions of the most important laws in EEO and the legal interpretations of those laws are provided. The chapter concludes with a discussion of the implications of these laws in the global environment and likely future trends related to EEO.

Increasing litigation and regulation

The trend of increasing litigation and regulation has had an impact on virtually all aspects of HRM. Let's start out with some recent cases that represent fairly typical legal actions today. Figure 3-1 presents some examples of cases that reflect this trend.

As discussed in Chapter 1, litigation related to workplace activity is on the rise despite the fact that practicing managers should know more about the legal implications of their behavior than managers did 20 years ago.[5] Jury verdicts have grown substantially in recent years with about 25 percent of verdicts resulting in awards of $1 million or more. A 2010 report concluded that the value of major employment discrimination class-action settlements "increased four-fold over the prior year and the top ten settlements of wage & hour, the Employee Retirement Income Security Act of 1974 (ERISA) and governmental enforcement class actions increased to $1.16 billion, the highest amount ever."[6] A 2011 report concluded that the "last several years have seen an exponential increase in class action and collective action litigation involving workplace issues. The present economic climate

Figure 3-1 **Examples of Recent Litigation**

- White firefighters won a Title VII lawsuit against New Haven, Connecticut, after the city threw out test results because none of the black firefighters scored high enough to be considered for promotion.
- The EEOC sued Kaplan Higher Education Corporation for discrimination against black job applicants due to the way Kaplan uses credit histories in its hiring process.
- A federal judge threw out the minimum test score requirement imposed by the NCAA for college athletic eligibility, ruling that the SAT or ACT score requirement had "an unjustified disparate impact against African-Americans."
- Seven Muslim security workers filed a complaint with the EEOC, alleging they were fired because they refused to remove their hijabs while at work.
- The EEOC settled a lawsuit for $8.5 million against Ford and the United Auto Workers (UAW) on behalf of African-Americans denied apprenticeships based on a written application test.
- Lockheed Martin Corporation agreed to pay $13 million to settle claims of age discrimination brought by former employees of Martin Marietta.
- Bus drivers in Indianapolis challenged the mandatory retirement age of 55 under the Age Discrimination in Employment Act.
- Target Stores was sued for using a psychological test to screen applicants for security guard positions that the plaintiffs regarded as an invasion of privacy.
- A former Army Special Forces commander who was denied a job as a terrorist analyst won a sex discrimination lawsuit against the federal government because he was denied employment after the agency discovered that he was in the process of changing genders.
- A California jury awarded a college instructor $2.75 million after San Francisco State University turned him down for tenure because he was white.
- Home Depot agreed to a $65 million settlement in a discrimination lawsuit involving gender bias in promotion decisions.
- A supervisor was sued by a former employee who claimed the supervisor libeled him in a reference check.
- Ford Motor Company settled a reverse discrimination lawsuit related to its downsizing efforts.
- African-Americans working for Coca-Cola claimed racial discrimination in the manner in which the company promoted people. The case settled for $196 million.
- A terminated employee sued his former employer for disability discrimination, citing his clinical depression as a disability.

is likely to fuel even more lawsuits. The stakes in this type of employment litigation can be extremely significant, as the financial risks of such cases are enormous."[7]

One of the reasons for the rise in legal activity is that there are more and more legal options and theories available to someone who feels he or she has been treated unfairly in the workplace. One review summarized the "piecemeal evolution of the U.S. employment law system" as follows:

> [E]mployees are now statutorily protected from workplace discrimination on the basis of race, color, sex, religion, national origin, age, union status, disability, marital status, and in some places, sexual preference, smoking habits, personal appearance, height and weight, political affiliation, arrest and conviction records, and even the method of birth control they choose. Simultaneously, courts have applied long-standing common law to recognize torts of wrongful discharge, negligent and intentional infliction of emotional distress, breach of contract, invasions of privacy, fraud, defamation, and negligent hiring, retention, training and supervision. Employment law further affords employees the right to a minimum wage and to overtime pay, the right to a safe and healthful workplace, and the right to benefits of social security, unemployment insurance, worker's compensation, family and medical leave, and proper administration of their pension. Thus, U.S. employment law is a broad patchwork of federal and state statutory rights, common law rights, and administratively created rights that can be implicated by almost any managerial decision that affects employees.[8]

The cases listed in Figure 3-1 illustrate the situation. Most Americans work under the **employment-at-will** doctrine that stipulates that both employer and employee can terminate a working relationship at any time and for any reason other than those explicitly covered by law, which, as illustrated by the review quoted earlier, have been expanding.

There has been a "gradual erosion of the employment-at-will doctrine through limiting legislation" and many challenges to the doctrine today.[9] Plaintiffs are winning large judgments against employers under creative legal theories related to contract or tort law. For example, most state courts have ruled that an **implied contract** exists as a consequence of actions or statements of an employer.[10] Statements in employment documents and manuals are often used to define this implied contract. If the employer fires an employee in violation of an implied employment contract regarding the steps to follow prior to firing, the employer may be found liable for breach of contract. The use of the implied contract theory or other exceptions to the employment-at-will doctrine depends on the particular state. (Employment-at-will is discussed in detail in Chapter 12.) Of course, while employers may invoke the "at-will" doctrine in the context of a termination, this position clearly doesn't necessarily stop an employee from claiming that the termination was due to his or her race or gender or age or disability and filing a lawsuit pursuant to this claim.

The trends in litigation related to specific HR practices will be covered when the particular HRM activity is discussed. But what you should know at the outset is that the practice of human resources management in the U.S. is a litigious "minefield" with even more "mines" being planted in the form of new laws, regulations, and legal theories in recent years.

A legal "minefield"

This expansion of new legal theories, combined with the changing demographics of the workforce (an aging, more diverse workforce), suggests the likelihood that the legal "minefield" will be more heavily mined in the future. Practicing HRM specialists need to know where the mines are. HRM researchers can shed light on issues related to the legality of certain HRM practices. Let's first enter perhaps the most contentious of the minefields: equal employment opportunity law.

EQUAL EMPLOYMENT OPPORTUNITY LAW

Prior to the civil rights movement of the early 1960s, employment decisions often were made on the basis of an applicant's or worker's race, gender, religion, or other characteristics unrelated to job qualifications or performance. And across racial groups, women routinely earned less than men, even in identical jobs.

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The laws discussed in this chapter were designed to punish employers that used such criteria as race, gender, national origin, disability, or age to exclude certain persons from employment or as a basis for other personnel decisions. These laws were also designed to restore the unfairly treated worker to the position that she or he would have held without the discrimination.

What Is Employment Discrimination?

Employment discrimination occurs in a variety of ways, and there are a number of methods for seeking redress through the courts. While the legal definition of **discrimination** differs depending on the specific law, it can be broadly defined as *employment decision making or working conditions that are unfairly advantageous (or disadvantageous) to a member or members of one protected group compared to members of another protected group.* The decision-making can apply to personnel selection, admission to training programs, promotions, work assignments, transfers, compensation, layoffs, punishments, and dismissals. The conditions also can pertain to the work atmosphere itself. For example, a common lawsuit today concerns allegations of sexually harassing behaviors at work that place an individual in an offensive or intimidating environment.

What Are the Major Sources of EEO Redress?

Figure 3-2 presents a summary of illegal discriminatory practices. Of the many sources of redress that are available, the most frequently used sources are federal laws: **Title VII of the 1964 U.S. Civil Rights Act** (CRA), the **Age Discrimination in Employment Act of 1967** (ADEA), and the **Americans with Disabilities Act of 1990** (ADA). (See Figure 3-4 for some excerpts from Title VII.) Most of the states and many municipalities also have their own fair employment laws. Complainants can also use the **equal protection clause** of the U.S. Constitution in lawsuits against the states. This clause guarantees that no person shall be denied the same protection of the laws that is enjoyed by other persons in their lives, liberty, property, and pursuit of happiness.

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Figure 3-2 **Prohibited Employment Policies/Practices**

Under the laws enforced by EEOC, it is illegal to discriminate against someone (applicant or employee) because of that person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. It is also illegal to retaliate against a person because he or she complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

The law forbids discrimination in every aspect of employment.

The laws enforced by EEOC prohibit an employer or other covered entity from using neutral employment policies and practices that have a disproportionately negative effect on applicants or employees of a particular race, color, religion, sex (including pregnancy), or national origin, or on an individual with a disability or class of individuals with disabilities, if the polices or practices at issue are not job-related and necessary to the operation of the business. The laws enforced by EEOC also prohibit an employer from using neutral employment policies and practices that have a disproportionately negative impact on applicants or employees age 40 or older, if the policies or practices at issue are not based on a reasonable factor other than age.

JOB ADVERTISEMENTS

It is illegal for an employer to publish a job advertisement that shows a preference for or discourages someone from applying for a job because of his or her race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.

For example, a help-wanted ad that seeks "females" or "recent college graduates" may discourage men and people over 40 from applying and may violate the law.

RECRUITMENT

It is also illegal for an employer to recruit new employees in a way that discriminates against them because of their race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.

For example, an employer's reliance on word-of-mouth recruitment by its mostly Hispanic work force may violate the law if the result is that almost all new hires are Hispanic.

APPLICATION & HIRING

It is illegal for an employer to discriminate against a job applicant because of his or her race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. For example, an employer may not refuse to give employment applications to people of a certain race.

(*Continued*)

An employer may not base hiring decisions on stereotypes and assumptions about a person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.

If an employer requires job applicants to take a test, the test must be necessary and related to the job and the employer may not exclude people of a particular race, color, religion, sex (including pregnancy), national origin, or individuals with disabilities. In addition, the employer may not use a test that excludes applicants age 40 or older if the test is not based on a reasonable factor other than age.

If a job applicant with a disability needs an accommodation (such as a sign language interpreter) to apply for a job, the employer is required to provide the accommodation, so long as the accommodation does not cause the employer significant difficulty or expense.

JOB REFERRALS

It is illegal for an employer, employment agency or union to take into account a person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information when making decisions about job referrals.

JOB ASSIGNMENTS & PROMOTIONS

It is illegal for an employer to make decisions about job assignments and promotions based on an employee's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. For example, an employer may not give preference to employees of a certain race when making shift assignments and may not segregate employees of a particular national origin from other employees or from customers.

An employer may not base assignment and promotion decisions on stereotypes and assumptions about a person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.

If an employer requires employees to take a test before making decisions about assignments or promotions, the test may not exclude people of a particular race, color, religion, sex (including pregnancy), or national origin, or individuals with disabilities, unless the employer can show that the test is necessary and related to the job. In addition, the employer may not use a test that excludes employees age 40 or older if the test is not based on a reasonable factor other than age.

PAY AND BENEFITS

It is illegal for an employer to discriminate against an employee in the payment of wages or employee benefits on the bases of race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. Employee benefits include sick and vacation leave, insurance, access to overtime as well as overtime pay, and retirement programs. For example, an employer many not pay Hispanic workers less than African-American workers because of their national origin, and men and women in the same workplace must be given equal pay for equal work.

In some situations, an employer may be allowed to reduce some employee benefits for older workers, but only if the cost of providing the reduced benefits is the same as the cost of providing benefits to younger workers.

DISCIPLINE & DISCHARGE

An employer may not take into account a person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information when making decisions about discipline or discharge. For example, if two employees commit a similar offense, an employer many not discipline them differently because of their race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.

When deciding which employees will be laid off, an employer may not choose the oldest workers because of their age.

Employers also may not discriminate when deciding which workers to recall after a layoff.

EMPLOYMENT REFERENCES

It is illegal for an employer to give a negative or false employment reference (or refuse to give a reference) because of a person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.

REASONABLE ACCOMMODATION & DISABILITY

The law requires that an employer provide reasonable accommodation to an employee or job applicant with a disability, unless doing so would cause significant difficulty or expense for the employer.

A reasonable accommodation is any change in the workplace (or in the ways things are usually done) to help a person with a disability apply for a job, perform the duties of a job, or enjoy the benefits and privileges of employment.

Reasonable accommodation might include, for example, providing a ramp for a wheelchair user or providing a reader or interpreter for a blind or deaf employee or applicant.

REASONABLE ACCOMMODATION & RELIGION

The law requires an employer to reasonably accommodate an employee's religious beliefs or practices, unless doing so would cause difficulty or expense for the employer. This means an employer may have to make reasonable adjustments at work that will allow the employee to practice his or her religion, such as allowing an employee to voluntarily swap shifts with a co- worker so that he or she can attend religious services.

TRAINING & APPRENTICESHIP PROGRAMS

It is illegal for a training or apprenticeship program to discriminate on the bases of race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. For example, an employer may not deny training opportunities to African-American employees because of their race.

In some situations, an employer may be allowed to set age limits for participation in an apprenticeship program.

HARASSMENT

It is illegal to harass an employee because of race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.

It is also illegal to harass someone because they have complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

(*Continued*)

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Figure 3-2 (*Continued*)

Harassment can take the form of slurs, graffiti, offensive or derogatory comments, or other verbal or physical conduct. Sexual harassment (including unwelcome sexual advances, requests for sexual favors, and other conduct of a sexual nature) is also unlawful. Although the law does not prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal if it is so frequent or severe that it creates a hostile or offensive work environment or if it results in an adverse employment decision (such as the victim being fired or demoted).

The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.

Harassment outside of the workplace may also be illegal if there is a link with the workplace. For example, if a supervisor harasses an employee while driving the employee to a meeting.

TERMS & CONDITIONS OF EMPLOYMENT

The law makes it illegal for an employer to make any employment decision because of a person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. That means an employer may not discriminate when it comes to such things as hiring, firing, promotions, and pay. It also means an employer may not discriminate, for example, when granting breaks, approving leave, assigning work stations, or setting any other term or condition of employment - however small.

PRE-EMPLOYMENT INQUIRIES (GENERAL)

As a general rule, the information obtained and requested through the pre-employment process should be limited to those essential for determining if a person is qualified for the job; whereas, information regarding race, sex, national origin, age, and religion are irrelevant in such determinations.

Employers are explicitly prohibited from making pre-employment inquiries about disability.

Although state and federal equal opportunity laws do not clearly forbid employers from making pre-employment inquiries that relate to, or disproportionately screen out members based on race, color, sex, national origin, religion, or age, such inquiries may be used as evidence of an employer's intent to discriminate unless the questions asked can be justified by some business purpose.

Therefore, inquiries about organizations, clubs, societies, and lodges of which an applicant may be a member or any other questions, which may indicate the applicant's race, sex, national origin, disability status, age, religion, color or ancestry if answered, should generally be avoided.

Similarly, employers should not ask for a photograph of an applicant. If needed for identification purposes, a photograph may be obtained after an offer of employment is made and accepted.

PRE-EMPLOYMENT INQUIRIES AND:

- Race
- Height & Weight
- Credit Rating Or Economic Status
- Religious Affiliation Or Beliefs
- Citizenship
- Marital Status, Number Of Children
- Gender
- Arrest & Conviction
- Security/Background Checks For Certain Religious Or Ethnic Groups
- Disability
- Medical Questions & Examinations

DRESS CODE

- In general, an employer may establish a dress code which applies to all employees or employees within certain job categories. However, there are a few possible exceptions.
- While an employer may require all workers to follow a uniform dress code even if the dress code conflicts with some workers' ethnic beliefs or practices, a dress code must not treat some employees less favorably because of their national origin. For example, a dress code that prohibits certain kinds of ethnic dress, such as traditional African or East Indian attire, but otherwise permits casual dress would treat some employees less favorably because of their national origin.
- Moreover, if the dress code conflicts with an employee's religious practices and the employee requests an accommodation, the employer must modify the dress code or permit an exception to the dress code unless doing so would result in undue hardship.
- Similarly, if an employee requests an accommodation to the dress code because of his disability, the employer must modify the dress code or permit an exception to the dress code, unless doing so would result in undue hardship.

CONSTRUCTIVE DISCHARGE/FORCED TO RESIGN

- Discriminatory practices under the laws EEOC enforces also include constructive discharge or forcing an employee to resign by making the work environment so intolerable a reasonable person would not be able to stay.

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Equal Employment Opportunity Commission (EEOC)

All claims of discrimination under CRA, ADEA, and ADA must first be filed with the EEOC, which received over 80,000 in 2010, up from 2009 claims (check out its website at www.eeoc.gov). The highest percentages of claims of discrimination are for race, gender, age, disability, national origin, and religion (in that order).

The EEOC can (and does) sue employers on its own based on its own investigation. In 2010, the EEOC's Annual Report announced that it would shift its emphasis toward more "pattern and practice" class-action lawsuits on behalf of larger groups of workers.[11] A "pattern or practice" case of discrimination must be established by a preponderance of

the evidence that discrimination is the employer's standard operating procedure. For example, the 2010 EEOC lawsuit against Kaplan Higher Education Corporation is based on the theory that Kaplan did not hire persons with a bad credit history and that this policy discriminated against minorities. The EEOC's theory is that this personnel practice is an "unlawful pattern or practice."[12] In 2011, the EEOC sued the nation-wide Texas Roadhouse chain of restaurants for employment discrimination, claiming that Texas Roadhouse did not hire people age 40 and older because of their age. In another recent case, EEOC sued Hamilton Growers, Inc., doing business as Southern Valley Fruit and Vegetable, claiming the company engaged in a pattern or practice of firing virtually all American workers while retaining workers from Mexico.

Claims of Title VII discrimination are up

Unfortunately, claims of discrimination are up for all of areas covered by the EEOC. National-origin lawsuits represented 10 percent of Title VII claims in 2010 and this includes suits from resident aliens. Aliens who are eligible to work in the United States are covered by Title VII.[13] Title VII also covers employees of U.S. companies working abroad. The 1991 Amendment to Title VII of the Civil Rights Act and the 2008 amendment to the Americans with Disabilities Act (ADA), combined with the increasing diversity and aging of the American workforce and the struggling economy have increased the number of EEO lawsuits.

Compensatory and Punitive Damages

Compensatory and **punitive damages** have been added as remediation for violations of the law, thus creating a greater financial incentive for plaintiffs and plaintiffs' attorneys to pursue these cases. Compensatory damages include future financial loss and emotional effects, and punitive damages are intended to punish the employer to discourage discrimination. Depending on the size of the organization, damages can range from $50,000 to $300,000 per violation. Punitive damages are only allowed if the employer intentionally discriminated or acted with malice or reckless indifference to the plaintiff's rights.

Equal employment laws similar to Title VII exist in 41 states as well as Washington, DC, and Puerto Rico. There are also state and local laws that vary on the legality of certain personnel practices. For example, as of 2011, 10 states, the District of Columbia, and over 165 cities and counties had laws prohibiting employment discrimination based on sexual orientation. Bills are pending and already may have passed in other states (see www.aclu.org for up-to-date data). Most laws cover actual and perceived sexual orientation. Several state laws include all orientation, including heterosexuals and bisexuals. Some states also provide additional protection beyond the ADA opposing discrimination against people who are HIV positive or are victims of AIDS.

What Is the Cost of Violating EEO Laws?

The costs of violation can be substantial, not only because of direct expenses related to litigation, but also in terms of a company's reputation and future outside controls on personnel practices that may be imposed because of legal settlements. For example, Novartis Pharmaceuticals lost a $253 million jury verdict and then, in 2010, agreed to a $175 million settlement of a gender discrimination lawsuit involving over 6,000 current and former female sales representatives. A jury had found Novartis guilty of discrimination in pay, promotions, and other working conditions. As part of the settlement, Novartis agreed to retain consultants to "design and carry out an annual adverse impact analysis of ratings," to work with an outside compensation expert to "design a base salary pay-in-range analysis and subsequent adverse impact analysis of annual rates of pay," and to work with consultants (approved by the court) to "improve the overall culture of the company."[14]

Plaintiffs' successes in court have a tendency to encourage similar lawsuits. For example, the same law firm that successfully represented plaintiffs in the Novartis gender discrimination case, set it sites on Bayer HealthCare Pharmaceuticals in 2011 under Title VII of the Civil Rights Act and a New Jersey state law. The charge alleges a "pattern and practice" of discrimination in pay, promotions, and the treatment of pregnant women and mothers by this multinational corporation. The complaint states that Bayer "engages in systemic discrimination against its female employees – particularly those with family responsibilities – by paying them less than their counterparts, denying them promotions into better and higher paying positions, limiting their employment opportunities to lower and less desirable job classifications, and exposing them to different treatment and a hostile work environment."[15]

An interesting case to be monitored is the EEOC's recent lawsuit against the Kaplan Higher Education Corporation charging the company of discrimination against black job

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applicants in the way Kaplan uses credit histories in its hiring process. The EEOC claims that this practice has a "significant disparate impact" on blacks. Many states, including Hawaii, Washington, Oregon, and Illinois, have already banned or limited the use of credit reports in hiring, and other states and Congress are considering similar laws. About half of all employers use credit histories in at least some hiring decisions.[16]

Recent EEO cases

Employers are now well aware of how costly violations of EEO laws can be. In a much-publicized case, Abercrombie and Fitch settled a Title VII race discrimination lawsuit for $40 million. As part of the settlement, A&F agreed to hire 25 "diversity" recruiters and now has "benchmarks" to monitor its hiring and promotion of minorities and women. A&F also agreed to increase diversity in its advertisements and catalogs, which have featured models who were mainly white and, as described in a *New York Times* article, "seemed to have stepped off the football field or out of fraternities or sororities."[17] The Equal Employment Opportunity Commission (EEOC), a federal agency of the U.S. Department of Labor, filed and then settled a race discrimination lawsuit against Walgreens for $24 million. Morgan Stanley agreed to pay $52 million to end a sex discrimination suit. The firm was also accused by the EEOC of a pattern of discrimination that denied women opportunities for promotions and higher salaries. Another $2 million was set aside for a training program directed at gender-based discrimination. Home Depot settled a class-action lawsuit alleging sex discrimination for $65 million. The federal government itself is not immune from charges of discrimination. The Department of Justice settled a lawsuit against the Voice of America for $108 million, and the Social Security Administration settled a race discrimination lawsuit for $7.75 million.

With some 25 percent of jury verdicts at $1 million or more, organizations have become much more careful about their personnel practices with monitoring systems and EEO offices and training programs for personnel decision makers and supervisors. HRM specialists and labor attorneys are active in conducting training and research in areas related to EEO. Many organizations have taken advantage of the EEOC's outreach programs that provide information about discrimination laws enforced by EEOC and the charge/complaint process. EEOC representatives also make presentations and participate in meetings, conferences, and seminars with employee and employer groups.

One major component of training programs is simply making personnel decision makers aware of EEO laws. Let us follow this approach by introducing you to the major laws that account for most of the federal regulation and litigation in EEO. The major federal laws are presented in the same order as the frequency with which they are used as a source of redress in employment discrimination claims. Remember that there are many other laws related to HRM practice and policy. These laws will be introduced when relevant to each HRM activity covered in the text.

How Do You File a Discrimination Lawsuit?

If you believe you were a victim of illegal discrimination and wish to pursue a claim through the legal system, you must first file a charge of discrimination with an office of the **U.S. Equal Employment Opportunity Commission (EEOC),** a U.S. Department of Labor agency in charge of enforcing most EEO laws. This alleged discrimination must be related to race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability, or genetic information. All laws enforced by the EEOC, except for the Equal Pay Act, require this charge of discrimination first before a lawsuit can be filed against an employer (it received almost 100,000 new charges in 2010, over 7,000 more than the previous year).

Although there are some exceptions, this charge must be filed within 180 calendar days from the day the alleged discrimination took place. The EEOC guidelines for filing this charge are presented in Figure 3-3. The EEOC has 60 days to investigate the complaint. If the EEOC finds that there is no probable cause for the claim or does not complete the investigation in a timely manner, the complainant can then file a lawsuit in federal court.

If the EEOC finds probable cause for action, the agency will attempt to reconcile the matter with the employer through its mediation process. Mediation is an informal process in which a neutral third party assists the opposing parties to reach a voluntary, negotiated

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Figure 3-3 **Filing a Charge of Employment Discrimination**

Note: Federal employees or applicants for federal employment should see Federal Sector Equal Employment Opportunity Complaint Processing.

WHO CAN FILE A CHARGE OF DISCRIMINATION?

- Any individual who believes that his or her employment rights have been violated may file a charge of discrimination with EEOC.
- In addition, an individual, organization, or agency may file a charge on behalf of another person in order to protect the aggrieved person's identity.

HOW IS A CHARGE OF DISCRIMINATION FILED?

- A charge may be filed by mail or in person at the nearest EEOC office.
- Individuals who need an accommodation in order to file a charge (e.g., sign language interpreter, print materials in an accessible format) should inform the EEOC field office so appropriate arrangements can be made.
- Federal employees or applicants for employment should see Federal Sector Equal Employment Opportunity Complaint Processing.

WHAT INFORMATION MUST BE PROVIDED TO FILE A CHARGE?

- The complaining party's name, address, and telephone number.
- The name, address, and telephone number of the respondent employer, employment agency, or union that is alleged to have discriminated, and the number of employees (or union members), if known.
- A short description of the alleged violation (the event that caused the complaining party to believe that his or her rights were violated).
- The date(s) of the alleged violation(s).
- Federal employees or applicants for employment should see Federal Sector Equal Employment Opportunity Complaint Processing.

WHAT ARE THE TIME LIMITS FOR FILING A CHARGE OF DISCRIMINATION?

All laws enforced by EEOC, except the Equal Pay Act, require filing a charge with EEOC before a private lawsuit may be filed in court. There are strict time limits within which charges must be filed.

- A charge must be filed with EEOC within 180 days from the date of the alleged violation in order to protect the charging party's rights.
- This 180-day filing deadline is extended to 300 days if the charge also is covered by a state or local antidiscrimination law. For ADEA charges, only state laws extend the filing limit to 300 days.

The Ledbetter Act became law in 2009. The Ledbetter Act states that the 180-day statute of limitations for filing an equal-pay lawsuit regarding pay discrimination resets with each new discriminatory paycheck.

- These time limits do not apply to claims under the Equal Pay Act, because under that Act persons do not have to first file a charge with EEOC in order to have the right to go to court. However, since many EPA claims also raise Title VII sex discrimination issues, it may be advisable to file charges under both laws within the time limits indicated.
- To protect legal rights, it is always best to contact EEOC promptly when discrimination is suspected.
- Federal employees or applicants for employment should see Federal Sector Equal Employment Opportunity Complaint Processing.

WHAT AGENCY HANDLES A CHARGE THAT IS ALSO COVERED BY STATE OR LOCAL LAW?

Many states and localities have antidiscrimination laws and agencies responsible for enforcing those laws. EEOC refers to these agencies as "Fair Employment Practices Agencies (FEPAs)." Through the use of "work sharing agreements," EEOC and the FEPAs avoid duplication of effort while at the same time ensuring that a charging party's rights are protected under both federal and state law.

- If a charge is filed with a FEPA and is also covered by federal law, the FEPA "dual files" the charge with EEOC to protect federal rights. The charge usually will be retained by the FEPA for handling.
- If a charge is filed with EEOC and also is covered by state or local law, EEOC "dual files" the charge with the state or local FEPA but ordinarily retains the charge for handling.

HOW IS A CHARGE FILED FOR DISCRIMINATION OUTSIDE THE UNITED STATES?

U.S.-based companies that employ U.S. citizens outside the United States or its territories are covered under EEO laws, with certain exceptions. An individual alleging an EEO violation outside the United States should file a charge with the district office closest to his or her employer's headquarters. However, if the individual is unsure where to file, he or she may file a charge with any EEOC office.

For answers to common questions about how EEO laws apply to multinational employers, go to: www.EEOC.gov and find these:

- The Equal Employment Opportunity Responsibilities of Multinational Employers
- Employee Rights When Working for Multinational Employers

Consent decrees

resolution of the charge.[18] Through this process, the EEOC often enters into "consent decree" agreements with an employer in which the employer agrees to take certain actions to put the matter to rest. For example, in 2011, Dunkin Donuts agreed to a "consent decree" in response to a sexual harassment complaint. As part of the agreement, Dunkin Donuts agreed to pay a cash settlement, to appoint an equal employment opportunity coordinator, to provide training for all employees on sexual harassment prevention, and to not rehire a manager responsible for the harassment.

Research on the EEOC mediation process is quite positive. A survey of parties who participated in the program found the process to be fair and neutral, with 96 percent of respondents and 91 percent of charging parties indicating that they would use the mediation process again if the opportunity arose, even when the results of the mediation were

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different than they had anticipated.[19] In 2011 Cracker Barrel joined the more than 200 companies, including several Fortune 500 firms, that have signed a National Universal Agreement to Mediate to streamline the handling of employment discrimination claims with the EEOC. This agreement provides the framework for both organizations to informally resolve most EEO workplace issues that may arise through Alternative Dispute Resolution (ADR) procedures rather than through a traditional (often) lengthy, formal EEOC investigation followed by potential litigation.

Consent decrees do not necessarily settle a matter as whether and how an employer is complying can be challenged. One of your authors (Bernardin) recently worked on a case involving the employment practices of Jefferson County, Alabama. The lawsuit stems originally from a consent decree signed in 1974 and the trail of the litigation (challenging responses to the consent decree) goes through the Supreme Court.[20]

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

The Civil Rights Act was signed by President Johnson in 1964 and was amended by the **Equal Employment Opportunity Act** in 1972 and the **Civil Rights Act of 1991.** Title VII deals specifically with discrimination in employment and prohibits discrimination based on race, color, religion, sex, or national origin. Figure 3-4 provides major excerpts from Title VII. The Act covers all employers having 15 or more employees except private clubs, religious organizations, and places of employment connected to an Indian reservation.

EEOC issues guidelines

The EEOC can (and often does) file Title VII suits against organizations for violations of the law. This agency can file lawsuits without named complainants or can join in a lawsuit. The EEOC also issues interpretive regulations and guidelines regarding employment practices (see www.eeoc.gov to review these guidelines). Among the many regulatory interpretations issued by the EEOC are the **"Uniform Guidelines on Employee Selection Procedures"** that provide recommendations for employment staffing, the "Interpretative Guidelines on Sexual Harassment," and the "Policy Guidance on Reasonable Accommodation

Figure 3-4 **Excerpts from Title VII of the Civil Rights Act of 1964**

SECTION 703

(a) It shall be an unlawful practice for an employer:

(1) to fail to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect status as an employee, because of such individual's race, color, religion, sex, or national origin.

(e) Notwithstanding any other provision of this title,

(1) it shall not be an unlawful employment practice for an employer to hire and employ those employees … on the basis of religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise …

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be unlawful employment practice for an employer to give and act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin …

(j) Nothing contained in this title shall be interpreted to require any employer … to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer … in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

SECTION 704

(a) It shall be an unlawful employment practice for an employer to discriminate against any employees or applicants for employment … because the employee or applicant has opposed any practice made an unlawful employment practice by this title, or because he or she has made a charge, testified, assisted, or participated in any matter in an investigation, proceeding, or hearing under this title.

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Under the Americans with Disabilities Act." The EEOC recently issued regulations regarding the **Genetic Information Nondiscrimination Act.**[21]

HRM legal specialists participate in the development of these regulations and guidelines. While these guidelines and regulations are not law, the EEOC uses them to evaluate claims in cases, and courts often defer to them in interpretations and rulings.

The EEOC also requires that most employers with 100 or more employees submit an annual **EEO-1** Form (see Figure 3-5). Data from these forms are often used to identify possible patterns of discrimination in particular organizations or segments of the workforce. The EEOC may then take legal action or join in a legal action against an organization based on these data. Such data can also be made available to private parties as part of a lawsuit.

What Is Not Prohibited by Title VII?

Title VII does not prohibit discrimination based on seniority systems, veterans' preference rights, national security reasons, or job qualifications based on "job-related" test scores, backgrounds, or experience, even when the use of such practices may be correlated with the race, gender, color, religion, or national origin. Title VII also does not prohibit **bona fide occupational qualifications (BFOQs)** or discriminatory practices whenever these practices are "reasonably necessary to the normal operation of the organization." For example, a BFOQ that excludes one group (e.g., males or females) from an employment opportunity is permissible if the employer can argue that the **"essence of the business"** requires the exclusion; that is, when business would be significantly affected by not employing members of one group exclusively.

Diaz v. Pan American Airways

What if a company had data showing that customers clearly prefer employees with certain protected class characteristics? Pan Am Airways tried this argument in *Diaz v. Pan American World Airways*.[22] In attempting to defend the policy that only females could be flight attendants, Pan Am presented data showing that the vast majority of its customers (overwhelmingly male) preferred female flight attendants. The court agreed with the position of the EEOC that customer preference is not a legally defensible reason to discriminate.

In general, the position of the courts and the EEOC regarding BFOQs favors judgments about the performance, abilities, or potential of specific individuals rather than discrimination by class or categories. The courts have said that the BFOQ exception to Title VII is a narrow one, limited to policies that are directly related to a worker's ability to do the job and the essence of the business. The University of Incarnate Word in San Antonio, Texas, invoked an English-only BFOQ that stipulated that only English must be spoken at work. In general, the EEOC and the courts have taken the position that English-only rules constitute national origin discrimination under Title VII when applied at all times or when they cannot be justified by business necessity.[23] The university settled the case and agreed to drop the requirement.

What Legal Steps Are Followed in a Title VII Case?

The Supreme Court has established the legal steps to be followed in a Title VII action through the federal court system. Although the plaintiff retains the "burden of proof," a model is used such that the burden of producing evidence shifts from the plaintiff to the defendant and back to the plaintiff. Initially the complainant or plaintiff has the burden to show that a **prima facie** case of discrimination exists. ***Prima facie*** **means "presumed to be true until proven otherwise"**; the plaintiff must show that there is a high likelihood that a violation of EEO law has occurred. After the plaintiff produces sufficient evidence to establish a prima facie case, the burden of producing evidence shifts to the employer or defendant, who must provide some proof of a legitimate, nondiscriminatory reason for the employment decision. Finally, the burden of producing evidence shifts back to the plaintiff to either show that the reason given was a pretext for discrimination or that an alternative practice, less discriminatory in its effect, would have achieved the employer's purpose equally well. Title VII cases can be brought under either (or both) of two theories of discrimination: **disparate treatment** and **disparate impact.** The steps to follow for each are illustrated in Figure 3-6.

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Figure 3-5 EEO-1 Form

Joint Reporting Committee

- Equal Employment Opportunity Commission
- Office of Federal Contract Compliance Programs (Labor)

EQUAL EMPLOYMENT OPPORTUNITY

EMPLOYER INFORMATION REPORT EEO—1

Standard Form 100 (Rev. 3/97)

O.M.B. No. 3046-0007
EXPIRES 10/31/99
100-214

SAMPLE

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Section A—TYPE OF REPORT
Refer to instructions for number and types of reports to be filed.

1. Indicate by marking in the appropriate box the type of reporting unit for which this copy of the form is submitted (MARK ONLY ONE BOX).

(1) ☐ Single-establishment Employer Report

Multi-establishment Employer:
(2) ☐ Consolidated Report (Required)
(3) ☐ Headquarters Unit Report (Required)
(4) ☐ Individual Establishment Report (submit one for each establishment with 50 or more employees)
(5) ☐ Special Report

2. Total number of reports being filed by this Company (Answer on Consolidated Report only) ______

Section B—COMPANY IDENTIFICATION (*To be answered by all employers*) — OFFICE USE ONLY

1. Parent Company
   a. Name of parent company (owns or controls establishment in item 2) omit if same as label — a.

Address (Number and street) — b.

City or town | State | ZIP code — c.

2. Establishment for which this report is filed. (Omit if same as label)
   a. Name of establishment — d.

Address (Number and street) | City or Town | County | State | ZIP code — e.

   b. Employer Identification No. (IRS 9-DIGIT TAX NUMBER) ☐☐☐☐☐☐☐☐☐ — f.

   c. Was an EEO–1 report filed for this establishment last year? ☐ Yes ☐ No

Section C—EMPLOYERS WHO ARE REQUIRED TO FILE (*To be answered by all employers*)

☐ Yes ☐ No 1. Does the entire company have at least 100 employees in the payroll period for which you are reporting?

☐ Yes ☐ No 2. Is your company affiliated through common ownership and/or centralized management with other entities in an enterprise with a total employment of 100 or more?

☐ Yes ☐ No 3. Does the company or any of its establishments (a) have 50 or more employees AND (b) is not exempt as provided by 41 CFR 60–1.5, AND either (1) is a prime government contractor or first-tier subcontractor, and has a contract, subcontract, or purchase order amounting to $50,000 or more, or (2) serves as a depository of Government funds in any amount or is a financial institution which is an issuing and paying agent for U.S. Savings Bonds and Savings Notes?

If the response to question C–3 is yes, please enter your Dun and Bradstreet identification number (if you have one): ☐☐☐☐☐☐☐☐☐

NOTE: If the answer is yes to questions 1, 2, or 3, complete the entire form, otherwise skip to Section G.

(*Continued*)

Section D – EMPLOYMENT DATA

SF 100 – Page 2

Employment at this establishment – Report all permanent full- and part-time employees including apprentices and on-the-job trainees unless specifically excluded as set forth in the instructions. Enter the appropriate figures on all lines and in all columns. Blank spaces will be considered as zeros.

Job Categories	Number of Employees (Report employees in only one category)														
	Race/Ethnicity														
	Hispanic or Latino		Not-Hispanic or Latino												Total Col A - N
			Male						Female						
	Male	Female	White	Black or African American	Native Hawaiian or Other Pacific Islander	Asian	American Indian or Alaska Native	Two or more races	White	Black or African American	Native Hawaiian or Other Pacific Islander	Asian	American Indian or Alaska Native	Two or more races	
	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
Executive/Senior Level Officials and Managers 1.1															
First/Mid-Level Officials and Managers 1.2															
Professionals 2															
Technicians 3															
Sales Workers 4															
Administrative Support Workers 5															
Craft Workers 6															
Operatives 7															
Laborers and Helpers 8															
Service Workers 9															
TOTAL 10															
PREVIOUS YEAR TOTAL 11															

1. Date(s) of payroll period used: (Omit on the Consolidated Report.)

O.M.B. No. 3046-0007
Revised 01/2006
Approval Expires 1/2009

SAMPLE

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Section E—ESTABLISHMENT INFORMATION *(Omit on the Consolidated Report)*

1. What is the major activity of this establishment? (Be specific, i.e., manufacturing steel castings, retail grocer, wholesale plumbing supplies, title insurance, etc. Include the specific type of product or type of service provided, as well as the principal business or industrial activity.)	OFFICE USE ONLY
	g.

Section F—REMARKS

Use this item to give any identification data appearing on last report which differs from that given above, explain major changes in composition of reporting units and other pertinent information.

Section G—CERTIFICATION *(See Instructions G)*

Check one
1 ☐ All reports are accurate and were prepared in accordance with the instructions (check on consolidated only)
2 ☐ This report is accurate and was prepared in accordance with the instructions.

Name of Certifying Official	Title	Signature	Date

Name of person to contact regarding this report (Type or print)	Address (Number and Street)			
Title	City and State	ZIP Code	Telephone Number (including Area Code)	Extension

All reports and information obtained from individual reports will be kept confidential as required by Section 709(e) of Title VII.
WILLFULLY FALSE STATEMENTS ON THIS REPORT ARE PUNISHABLE BY LAW, U.S. CODE, TITLE 18, SECTION 1001.

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Figure 3-6 **Evidence and Proof in Title VII Cases**

Evidence Burden	Disparate Treatment	Disparate Impact
Plaintiff's initial burden (prima facie case)	He or she belongs to the discriminated-against group. He or she applied and was qualified. He or she was rejected. The position remained open to applicants with equal or fewer qualifications.	Unequal impact of the practice(s) in question on different groups (e.g., 80% rule violation)
Defendant's rebuttal burden	Articulate a "legitimate nondiscriminatory reason for the rejection."	Demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity.
Plaintiff's burden in response	Show that the stated reason is a pretext by demonstrating, e.g.: • The employer doesn't apply that reason equally to all. • The employer has treated the plaintiff unfairly before. • The employer engages in other unfair employment practices. OR Show the plaintiff's group membership was a factor in the rejection decision.	Show that a less discriminatory and equally valid alternative practice or method does exist.
Defendant's burden in response	Show that the decision would have been the same even if it had not taken plaintiff's group membership into account.	

Source: From J. Ledvinka, *Federal Regulation of Personnel in Human Resource Management* 1e. © 1982 South-Western, a part of Cengage Learning, Inc. Reproduced by permission. www.cengage.com/permissions.

What Is Disparate Treatment?

McDonnell Douglas v. Green

Plaintiffs can demonstrate a prima facie case by showing **disparate treatment,** the most frequently used theory of discrimination. According to the procedures established in the 1973 *McDonnell Douglas v. Green* Supreme Court case, plaintiffs must show that an employer treats one or more members of a protected group differently.[24] For example, the use of different criteria for promotion depending on the candidate's sex would constitute disparate treatment. Female applicants who were not hired by a firm might show that the employer asked them questions about their marital status or childcare arrangements that were not asked of male applicants. In disparate treatment cases, the Supreme Court established that the burden is on the plaintiff to prove that the employer *intended* to discriminate because of race, sex, color, religion, or national origin.[25]

EEO law and retaliation

One special form of disparate treatment is retaliation. All of the laws enforced by the EEOC, including Title VII, make it illegal to fire, demote, harass, or otherwise "retaliate" against people (applicants or employees) because they filed a charge of discrimination, because they complained to their employer about discrimination on the job, or because they participated (e.g., gave testimony) in an employment discrimination proceeding (such as an investigation or a lawsuit). Employers are also prohibited from retaliating against a worker who has filed a discrimination complaint by making reprisals against that worker's fiancé, family members, or other close associates. In a 2010 Supreme Court decision in *Thompson v. North American Stainless,* Justice Scalia wrote, "We think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."[26]

What Is Disparate Impact?

Griggs v. Duke Power

According to procedures established in the 1971 Supreme Court ruling in *Griggs v. Duke Power,*[27] plaintiffs can show that an employer's practices had a **disparate impact** on members of a protected group by showing that the employment procedures (e.g., tests, interviews, credentials) had a disproportionately negative effect or "adverse impact" on members of a protected group. Impact cases are often established as **class-action** cases in which a judge can certify a class of people who make similar claims against a company. For example, the plaintiffs in the Abercrombie and Fitch case were certified as a class before the rest of the case was pursued.

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A common class-action discrimination lawsuit involves the use of "subjective employment practices" to arrive at personnel decisions such as promotions. Such practices include allowing managers considerable discretion in how to arrive at decisions. But does such a practice then qualify as a "class-action" lawsuit? The Supreme Court recently took up this issue in *Wal-Mart Stores, Inc. v. Dukes* in which a federal judge (and the 9th Circuit Court) had certified a class of about 1.4 million female workers. Do the circumstances regarding these women have enough in common to allow them to join together in a single class action? The plaintiffs' argument, proffered in numerous other discrimination cases, is that a centralized companywide policy that provides little guidance and allows store managers considerable discretion in personnel decisions made Wal-Mart Stores, Inc., vulnerable to "gender stereotyping." Wal-Mart argued that this "class" of female plaintiffs worked in 3,400 different stores with 170 different job classifications and that there is not enough **"commonality"** to warrant class-action certification. In 2011, the Supreme Court ruled in favor of Wal-Mart Stores, Inc., and set down some guidelines regarding criteria for class certification.[28] Since this decision, employers are now challenging class certification on the basis that the members of the proposed class lack sufficient commonality. Courts will surely be more critical when plaintiffs make the argument that class members shared "common issues of law or fact;" this "commonality" is required for class certification.

Wal-Mart v. Dukes

Whether or not the employer had good intentions or didn't mean to discriminate is irrelevant to the courts in "disparate impact" cases. If an employment practice or policy has a disparate impact based on race, color, religion, sex, or national origin, the employer must show that the practice **is job related and consistent with business necessity.** An employer can meet this standard by showing that it is necessary to the safe and efficient performance of the job. According to the EEOC, the challenged policy or practice should be associated with the skills needed to perform the job successfully. In contrast to a general measurement of applicants' or employees' skills, the challenged policy or practice must evaluate an individual's skills as related to the particular job in question.[29]

What is job-relatedness?

HRM specialists are very much involved in this important area. The concept of "job relatedness" as defined in *Griggs* is very similar to the concept of validity developed by industrial psychologists.[31] Thus, once evidence is established showing an employment practice has an adverse impact on a protected class, the burden will be on the employer to show the practice is "job related" or a "business necessity." Finally, the burden shifts back to the plaintiff, who must then show that an alternative procedure is available that is equal to or more effective than the employer's practice and has less adverse impact.[30]

How Do You Determine Disparate or Adverse Impact?

Adverse impact One common "yardstick" recommended (and used) by the EEOC in the *Uniform Guidelines* and adopted in numerous court cases for determining adverse impact (AI) is the **four-fifths rule** (also known as the **80 percent rule**).[32] AI is some form of statistical finding that is presented to support the "prima facie" evidence of disparate impact discrimination. The 80 percent rule means that a selection rate (number selected/number considered) for a protected group cannot be less than four-fifths or 80 percent of the selection rate for the group with the highest selection rate. For example, the City of Columbus, Ohio, used a paper-and-pencil, multiple-choice examination to screen applicants for its firefighter positions. While 84 percent of the whites passed the examination, only 27 percent of the blacks did. Using the four-fifths rule, 80 percent of the white selection rate is 67 percent (0.8×0.84). Since the 27 percent selection rate for blacks was less than 67 percent, the Columbus test was determined to have an **adverse impact** on blacks.

80 percent rule

The 80 percent or four-fifths rule derives from the EEOC's **Uniform Guidelines on Employee Selection Procedures.** However, it is not the only statistical measure of adverse impact that can be used to establish prima facie evidence of discrimination. The makeup of a workforce can also be compared to population or industry data (e.g., a geographical area is 15 percent Hispanic while only 3 percent of workers for Company X in that same area are Hispanic). For example, in the sex discrimination lawsuit against Wal-Mart we discussed earlier, the plaintiffs presented data showing that 58 percent of managers in general merchandising were women while only 32 percent of Wal-Mart's managers were women. Plaintiffs (or the EEOC) can also analyze the extent to which a protected class

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possesses a particular credential or a job requirement of a number of years of experience versus a majority group.[33]

The **standard deviation (SD) rule** can also be followed that uses probability distributions to investigate adverse impact. The SD analysis looks at the difference between the expected representation (e.g., hiring or promotion rates) for a protected group and the actual rate in order to determine whether the difference between the two values is greater than what would occur by chance. For example, 30 percent (60 of 200) of the applicants for retail supervisory positions were women. We would thus expect that 15 women would be promoted for the 50 promotions that were actually made. However, only five women were actually promoted. To determine if this statistical difference is greater than what would be expected by chance, you calculate the SD (go to endnote #34 for the detail). If the difference between the actual and expected representation of women is greater than two standard deviations, we would conclude that there was AI against women (in our example, this is AI).[34]

Prima Facie evidence

A superior statistic also used in numerous EEO cases to examine and define "prima facie" evidence of discrimination is the **Fisher's Exact Test** (for a demonstration go to: http://www.langsrud.com/fisher.htm). The Fisher test can be used to test whether there is any relation between two categorical variables (e.g., males and females) and two levels (e.g., promoted/not promoted).[35]

Remember that these statistical findings establish only **prima facie** evidence of discrimination. The employer still has the opportunity to prevail in the case by providing evidence supporting the "job relatedness" and/or "business necessity" of the personnel practice or procedure. Such statistical evidence can also be used in **disparate treatment** cases to buttress a claim of intentional discrimination and a "pattern and practice" of such discrimination.

The disparate impact theory has been used in many cases involving "neutral employment practices" such as tests, entrance requirements, particular credentials, or physical requirements. For example a class of African-Americans who were denied apprenticeships at Ford Motor Company based on low test scores applied the 80 percent rule to show that the proportion of African-Americans meeting the minimum test score requirements was less than 80 percent of the rate for whites. The EEOC is using "impact" theory to challenge Kaplan's practice regarding the use of credit histories. The Civil Rights Act of 1991 is unclear as to precisely what an employer must demonstrate; it simply says that the employer must demonstrate *"that the challenged practice is job related for the position in question and consistent with business necessity."* There is a great deal of litigation (and confusion) over just what both employees and the organizations they sue must demonstrate under the CRA of 1991. HRM specialists and academics often find themselves on both sides of a court case, attacking (and defending) the validity evidence and the statistics presented to support or refute a theory of discrimination and claims of "job relatedness."

Race Norming

Prior to 1991, organizations attempted to avoid statistical adverse impact by interpreting test scores based on the ethnicity of the test taker. Called **race norming** and even practiced by the U.S. Department of Labor, the exact raw scores on the same test were interpreted (and converted) depending on whether the test taker was white, Latino, or African-American. **The practice of race (and gender) norming was outlawed by the Civil Rights Act of 1991.** Title VII now states that "It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin."

How Does an Employer Prove "Job Relatedness"?

Griggs v. Duke Power

There is a large body of case law that provides legal definitions of the term *job related.* The major case in this area is *Griggs v. Duke Power,* in which the Supreme Court struck down the use of an employment test and a high school educational requirement for entry-level personnel selection. Such practices were judged to be discriminatory because they excluded a disproportionate number of blacks from employment and thus had an "adverse impact," and because the employer could not show that the hiring requirements were "job related," or related to performance on the job. As the court noted, if an employment practice cannot be shown to be related to job performance, and that practice causes an "adverse impact" against "protected class" members, then the practice is prohibited.[36]

Albermarle v. Moody

Since the *Griggs* decision was rendered in 1971, there have been many cases that have focused on job-relatedness issues. In *Albemarle Paper Company v. Moody* (1975), the Supreme Court clarified the job-relatedness defense, requiring a careful job analysis to identify the specific knowledge, skills, and abilities necessary to perform the job or a study that shows a clear statistical relationship between applicants' test scores (or a particular job requirement or credential) and their job performance.[37]

Connecticut v. Teal

The Supreme Court declared that the job-relatedness argument must be applied to *all* steps of a multiple-hurdle selection procedure.[38] Winnie Teal had been denied promotion to a supervisory position because of a low score on a written exam that was the first hurdle of the promotion process. When the final promotion decisions were made, the "bottom line" decisions (i.e., who was actually promoted) actually favored African-Americans. But in 1982 the Supreme Court ruled in *Connecticut v. Teal* that the "bottom line" is *not* an acceptable legal defense in such a case. Rather, the "job relatedness" argument must be made for any step where "prima facie" evidence is presented. Thus, in *Connecticut v. Teal,* the burden was on the defendant to prove that the test was "job related" even though the state had actually promoted a larger proportion of African-Americans for the position.

Transportability

Evidence of a significant correlation between test scores and job performance is considered ideal to support an argument of job relatedness. HRM specialists conduct such studies routinely to evaluate the use of a test or selection procedure. Suppose a company is sued based on the disparate impact theory and must establish the "job relatedness" of its test. The company does not have enough data to conduct an internal study. What if a study exists showing that the test being challenged has validity for the same or similar jobs? Could the company "borrow" a validity study based on data collected in several other organizations? Section 15E of the EEOC's *Uniform Guidelines* provides guidance regarding "transporting" validity evidence from existing studies into new situations. A **"transportability" defense** requires the following evidence: (1) the results of the borrowed study (or studies), (2) a test fairness analysis investigating differences in scores as a function of protected class characteristics, (3) job analysis data showing the similarity of the jobs under study, and (4) data showing the similarity of the applicants under study.

Validity Generalization

The argument of "transportability" is related to the concept known as **validity generalization** (VG). As we discuss in Chapter 6, VG concerns whether validity evidence generalizes to a particular situation. VG studies are based on meta-analytic research.[39] There are now over 500 such studies based on the correct assumption that the mean of several correlational studies is probably a strong basis for concluding that there is a valid relationship between test scores and job performance for similar job situations. However, the most recent review on this issue concluded that the "sole reliance on VG evidence to support test use is probably premature"[40] In order to "borrow" validity from a VG study, the organization should follow the four steps presented earlier for establishing "transportability." It is critical that the VG study present sufficient detail on the individual studies that led to the inference that the test was valid.[41]

Alternative procedures

Once the defendant has presented acceptable evidence of job relatedness, the case is not necessarily over. Title VII allows that where two or more selection (or other decision-making) procedures are available that serve the user's "legitimate interest in efficient and trustworthy workmanship" and that are equally valid for a given purpose, the user should use the procedure that has been demonstrated to have the lesser adverse impact. Thus, the plaintiffs could present evidence that an alternative method exists and that its use would result in less (or no) adverse impact. This step in the process could even apply to the use of a particular "cutoff' score for a test (e.g., 70 percent is passing).[42]

Watson v. Fort Worth Bank

Another critical case related to "disparate impact" theory is *Watson v. Ft. Worth Bank & Trust* (1988). Clara Watson was denied a promotion based on an interview. The critical question that the Supreme Court addressed here was whether "impact" theory could be used in "subjective" employment practices such as interviews and performance appraisals (the *Griggs* and *Albemarle* cases concerned "neutral employment practices" such as credentials or test scores). **In a unanimous decision, the Court allowed "disparate impact" theory for subjective employment practices.**[43] This decision is of course critical for many class-action cases, including the Novartis and Bayer cases we described earlier, where, among other issues, women charged that the "subjective"

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method of selecting and promoting managers was responsible for the statistical disparity in promotion rates for women. However, as these cases are class-action lawsuits, the 2011 Supreme Court ruling throwing out the class certification in Wal-Mart v. Dukes will probably place constraints on the ability to establish class-certification for many of these types of cases.

What Is Illegal Harassment?

Harassment is another form of employment discrimination that also violates Title VII and other federal laws (the Age Discrimination in Employment Act and the Americans with Disabilities Act). Harassment is unwelcome conduct that is based on race, color, sex, religion, national origin, disability, and/or age. Sexual harassment is one form of such illegal harassment. There were over 30,000 charges of illegal harassment, including sexual harassment. In a much-publicized case, the EEOC settled a harassment case with *Tavern on the Green,* a landmark restaurant located in Central Park in New York City. The settlement was for over $2 million but also entailed substantial remedial relief and careful court scrutiny in the future. The EEOC alleged that the restaurant's managers and others engaged in severe and pervasive sexual, racial, and national origin harassment of female, black, and Hispanic employees and then retaliated against employees who complained.

Unlawful harassment, two conditions

The harassment becomes unlawful where (1) enduring the offensive conduct becomes a condition of continued employment, or (2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. Antidiscrimination laws also prohibit harassment against individuals in retaliation for filing a discrimination charge; testifying; or participating in any way in an investigation, proceeding, or lawsuit under these laws or opposing employment practices that they reasonably believe discriminate against individuals in violation of these laws.

Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people. The offensive conduct may include: offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance.

Harassment can occur in a variety of circumstances. The harasser can be the victim's supervisor, a supervisor in another area, an agent, a client or customer of the employer, a co-worker, or a nonemployee. The victim does not have to be the person harassed but can be anyone affected by the offensive conduct. The harassment can be illegal even without economic injury to, or discharge of, the victim.

What Constitutes Sexual Harassment under Title VII?

Under Title VII, sexual harassment, like racial and ethnic harassment, is illegal since it constitutes discrimination with respect to a person's conditions of employment. These conditions can refer to psychological and emotional workplace conditions that are coercive or insulting to an individual. The EEOC has published guidelines for employers dealing with sexual harassment issues (go to www.eeoc.gov). According to these guidelines, sexual harassment is defined as follows:

> unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Over 16 percent of the 12, 717 2010 charges were filed by males, a 1 percent increase from 2005. However, harassment of an employee because of sexual orientation does not constitute illegal harassment under Title VII (it probably does under applicable state or local laws prohibiting discrimination based on sexual orientation).

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According to the EEOC, sexual harassment can occur in a variety of circumstances, including but not limited to the following:

- The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex.
- The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a nonemployee.
- The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.
- Unlawful sexual harassment may occur without economic injury to or discharge of the victim.
- The harasser's conduct must be unwelcome.

The EEOC also states that "It is helpful for the victim to inform the harasser directly that the conduct is unwelcome and must stop. The victim should use any employer complaint mechanism or grievance system available."[44]

Meritor Savings v. Vinson

In 1986, the Supreme Court in *Meritor Savings v. Vinson* stated that it was not necessary for the plaintiff to establish a causal relationship or **quid pro quo** between the rejection of sexual advances and a specific personnel action such as a dismissal or a layoff.[45] Rather, it was necessary for the plaintiff only to establish that the harassment created unfavorable or hostile working conditions for him or her. Any workplace conduct that is "sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment" constitutes illegal sexual harassment.[46]

Harris v. Forklift

The Supreme Court has since provided further clarification on this and other harassment issues. In *Harris v. Forklift* (1993), Theresa Harris was asked to remove coins from her boss's front pocket, was asked to go to the Holiday Inn to "negotiate" her raise, and was exposed to hundreds of other disgusting suggestions and behaviors.[47] A lower court determined that Harris had not suffered emotionally from the harassment and thus a hostile working environment was not created. The Supreme Court disagreed, stating that the psychological effect was unnecessary and that only a "reasonable person" needed to find it hostile or abusive. The Court also provided some guidance for the lower courts in determining a hostile working environment. The frequency of the behavior or verbal abuse, its severity, the extent to which it is threatening or humiliating, and whether the abuse interferes with the employee's work performance all may be considered in making the determination of a hostile working environment.

Legal outcomes in harassment suits

Research on the judicial outcomes of sexual harassment claims identified the following correlates of favorable legal outcomes for the claimant: (1) when the harassment involved physical contact of a sexual nature, (2) when sexual propositions were linked to threats or promises of a change in the conditions of employment, (3) when the claimant notified management of the problem before filing charges, (4) when the claims were corroborated, and (5) when the organization had no formal policy toward sexual harassment that had been communicated to its employees.[48]

What Is the Employer's Liability in Harassment Cases?

While The Civil Rights Act of 1991 provides for compensatory and punitive damages (in addition to back pay) of up to $300,000 for companies with over 500 employees, the price tag for sexual harassment can be even much higher under state or municipal laws that may have no ceilings on compensatory or punitive damages. For example, Aaron Rents, the "rent-to-own" company with more than 1,800 stores, made a profit of $118 million in 2010. But they were ordered to pay over $115 million for findings of sexual harassment (and punitive damages) against the company under New York state law.

Burlington Industries v. Ellerth
Faragher v. City of Boca Raton

Two 1998 Supreme Court decisions provided clarification on employer liability for sexual harassment by supervisors. In *Burlington Industries, Inc. v. Ellerth* and in *Faragher v. City of Boca Raton,* the Court said that the employer is always liable when a hostile environment is created by a supervisor that results in a tangible employment action (e.g., termination).[49] This position was sustained in a later Supreme Court ruling

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(i.e., *Pennsylvania State Police v. Suders*) with the court making it clear that an employer has no defense when a supervisor does the harassing and an adverse employment action results.[50] However, the employer may not be liable when there is no tangible employment action if it can be shown that the employer exercised "reasonable care" in preventing and correcting the harassing behavior and the plaintiff failed to take advantage of corrective opportunities that were available. This so-called **affirmative defense** clearly indicates that organizations should have sexual harassment policies in place and communicated to all employees.

Affirmative Defense

Keep in mind here that sexual harassment lawsuits can be filed based on statutes other than Title VII and that the legal basis for a lawsuit can affect outcomes. For example, in 2010, the New York Court of Appeals held in *Zakrzewska v. The New School* that the "affirmative defense," available under Title VII, is not available under the New York City Human Rights Law (NYCHRL). Under the NYCHRL, employers are subject to strict liability for sexual harassment committed by supervisory employees.[51]

Figure 3-7 presents a summary of employer liability for all forms of harassment by supervisors. Regarding co-workers, the employer will be liable if someone in authority knew or should have known of the harassment and did nothing to stop it. The courts are generally clear that this rule applies to any kind of harassment: racial, ethnic, gender, or religious.[52] Employers also may be liable for behaviors committed by nonemployees, clients, temporary employees, or outside contractors in the workplace if they knew or should have known about the acts and didn't take appropriate action. Essentially, the courts have made it clear that an organization is liable for sexual harassment when management is aware of the activity yet does not take immediate and appropriate corrective action.

Employer is not always liable

An employer is not always liable for sexual harassment. For example, a company is less likely to be found liable under the following conditions: (1) there is a specific policy on harassment that an employee violated, (2) there is a company grievance procedure that the complainant did not follow, and (3) the grievance procedure allows the complainant to bypass the alleged harasser in filing the violation.

The policy has to be acceptable. A policy that requires that a complaint be made through an immediate supervisor (with no alternatives) is not an acceptable policy. But a good harassment policy (for any type of harassment) can give an employer legal protection.

Farley v. American Cast Iron Pipe

In *Farley v. American Cast Iron Pipe,* the 11th U.S. Circuit Court of Appeals established that once an employer has promulgated an effective antiharassment policy, it is incumbent upon the employees to utilize the procedural mechanisms established by the company specifically to address problems and grievances.[53]

What Steps Should a Company Follow Regarding Sexual Harassment?

The following "affirmative defense" strategies have been recommended for organizations: (1) Develop a written policy against sexual harassment, including a definition of sexual harassment and a strong statement by the CEO that it will not be tolerated (some courts have concluded that an employer without a harassment policy is sanctioning a hostile environment); (2) Conduct training to make managers aware of the problem (required in Massachusetts, California, Connecticut, and Maine); (3) Inform employees that they should expect a workplace free from harassment, and what actions they can take if their rights are violated; (4) Detail the sanctions for violators and protection for those who make any charges; (5) Establish a grievance procedure for alleged victims of harassment; (6) Investigate claims made by victims; and (7) Discipline violators of the policy.[54] On this last point, companies must be careful. Individuals can claim "unlawful termination" and have prevailed in cases where they show that they were not treated fairly in the investigation or the hearing that led to the dismissal. Judgments have been in the millions. The person being accused of sexual harassment deserves as fair a treatment as that which is afforded the accuser. Miller Brewing executive Jerold MacKenzie was awarded over $26 million after he was fired for "sexually harassing" a female employee by describing an episode of the *Seinfeld* show.

Oncale v. Sundowner offshore services

The sexual harassment policy should stipulate that the policy applies to same-sex harassment as well. In *Oncale v. Sundowner Offshore Services,* the Supreme Court ruled unanimously in 1998 that same-sex harassment was illegal under the CRA.[55]

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Figure 3-7 **Employer Liability for Harassment by Supervisors**

1. When does harassment *violate federal law*?

   Harassment violates federal law if it involves discriminatory treatment based on race, color, sex (with or without sexual conduct), religion, national origin, age, or disability or because the employee opposed job discrimination or participated in an investigation or complaint proceeding under the EEO statutes.

   Federal law does not prohibit simple teasing, offhand comments, or isolated incidents that are not extremely serious. The conduct must be sufficiently frequent or severe to create a hostile work environment or result in a "tangible employment action," such as hiring, firing, promotion, or demotion.

2. Does the guidance apply *only to sexual harassment*?

   No, it applies to all types of unlawful harassment.

3. When is an employer legally responsible for harassment by a supervisor?

   An employer is always responsible for harassment by a supervisor that culminated in a tangible employment action. If the harassment did not lead to a tangible employment action, the employer is liable unless it proves that: (1) it exercised reasonable care to prevent and promptly correct any harassment; and (2) the employee unreasonably failed to complain to management or to avoid harm otherwise.

4. Who qualifies as a "*supervisor*" for purposes of employer liability?

   An individual qualifies as an employee's "supervisor" if the individual has the authority to recommend tangible employment decisions affecting the employee or if the individual has the authority to direct the employee's daily work activities.

5. What is a "*tangible employment action*"?

   A "tangible employment action" means a significant change in employment status. Examples include hiring, firing, promotion, demotion, undesirable reassignment, a decision causing a significant change in benefits, compensation decisions, and work assignment.

6. How might harassment culminate in a tangible employment action?

   This might occur if a supervisor fires or demotes a subordinate because she rejects his sexual demands or promotes her because she submits to his sexual demands.

7. What should employers do to *prevent and correct harassment*?

   Employers should establish, distribute to all employees, and enforce a policy prohibiting harassment and setting out a procedure for making complaints. In most cases, the policy and procedure should be in writing.

   Small businesses may be able to discharge their responsibility to prevent and correct harassment through less formal means. For example, if a business is sufficiently small that the owner maintains regular contact with all employees, the owner can tell the employees at staff meetings that harassment is prohibited, that employees should report such conduct promptly, and that a complaint can be brought "straight to the top." If the business conducts a prompt, thorough, and impartial investigation of any complaint that arises and undertakes swift and appropriate corrective action, it will have fulfilled its responsibility to "effectively prevent and correct harassment."

8. What should an antiharassment *policy* say?

   An employer's antiharassment policy should make clear that the employer will not tolerate harassment based on race, sex, religion, national origin, age, or disability or harassment based on opposition to discrimination or participation in complaint proceedings.

   The policy should also state that the employer will not tolerate retaliation against anyone who complains of harassment or who participates in an investigation. (Retaliation was the second highest charge category, behind race, in 2007.)

9. What are important *elements of a complaint procedure*?

   The employer should encourage employees to report harassment to management before it becomes severe or pervasive.

   The employer should designate more than one individual to take complaints and should ensure that these individuals are in accessible locations. The employer also should instruct all of its supervisors to report complaints of harassment to appropriate officials. The employer should assure employees that it will protect the confidentiality of harassment complaints to the extent possible.

10. Is a complaint procedure adequate if employees are instructed to report harassment to their immediate supervisors?

    No, because the supervisor may be the one committing harassment or may not be impartial. It is advisable for an employer to designate at least one official outside an employee's chain of command to take complaints to ensure that the complaint will be handled impartially. A policy that requires that the complaint go through the supervisor is unacceptable.

11. How should an employer *investigate* a harassment complaint?

    An employer should conduct a prompt, thorough, and impartial investigation. The alleged harasser should not have any direct or indirect control over the investigation.

    The investigator should interview the employee who complained of harassment, the alleged harasser, and others who could reasonably be expected to have relevant information. Before completing the investigation, the employer should take steps to make sure that harassment does not continue. If the parties have to be separated, then the separation should not burden the employee who has complained of harassment. An involuntary transfer of the complainant could constitute unlawful retaliation. Other examples of interim measures are making scheduling changes to avoid contact between the parties or placing the alleged harasser on nondisciplinary leave with pay pending the conclusion of the investigation.

12. How should an employer *correct harassment*?

    If an employer determines that harassment occurred, it should take immediate measures to stop the harassment and ensure that it does not recur. Disciplinary measures should be proportional to the seriousness of the offense.

(*Continued*)

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Figure 3-7 (*Continued*)

13. Does an employee who is harassed by his or her supervisor have any *responsibilities*?

    Yes. The employee must take reasonable steps to avoid harm from the harassment. Usually, the employee will exercise this responsibility by using the employer's complaint procedure.

14. Is an employer legally responsible for its supervisor's harassment if the *employee failed to use* the employer's complaint procedure?

    No, unless the harassment resulted in a tangible employment action or unless it was reasonable for the employee not to complain to management. An employee's failure to complain would be reasonable, for example, if he or she had a legitimate fear of retaliation. The employer must prove that the employee acted unreasonably.

15. If an employee complains to management about harassment, should he or she wait for management to complete the investigation before *filing a charge* with EEOC?

    It may make sense to wait to see if management corrects the harassment before filing a charge. However, if management does not act promptly to investigate the complaint and undertake corrective action, then it may be appropriate to file a charge. The deadline for filing an EEOC charge is either 180 or 300 days after the last date of alleged harassment, depending on the state in which the allegation arises. This deadline is not extended because of an employer's internal investigation of the complaint.

Note: The "affirmative defense" may not be available based on state or municipal statutes.

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Mandated harassment training

The California law mandating sexual harassment training for all supervisors of employers with 50 or more employees took effect in 2006. The law sets specific standards for the training. The training must be conducted via "classroom or other effective interactive training" and include the following topics: (1) information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention of sexual harassment; (2) information about the correction of sexual harassment and the remedies available to victims of sexual harassment in employment; and (3) practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation. Massachusetts Maine and Connecticut also have harassment training requirements.

What Is Affirmative Action?

Although there is no one generally recognized definition, **affirmative action** has to do with the extent to which employers make an effort through their personnel practices to attract, retain, and upgrade members of the protected classes of the 1964 Civil Rights Act. Affirmative action (AA) may refer to several strategies, including actively recruiting underrepresented groups in a firm, changing management and employee attitudes about various protected groups, eliminating irrelevant employment practices that bar protected groups from employment, and granting preferential treatment to protected groups. The term *affirmative action* is related to corporate *diversity programs* and policies, and the actual HRM activities defining the old affirmative action programs and the new diversity programs are similar. The issue of affirmative action and how it is carried out has been identified as a source of difficulty between HRM professionals and line managers. Whether or not preferential treatment can or should be granted based on protected class characteristics is at the heart of the trouble. *Diversity* is a complex term. The 1990 census included five categories of ethnicity. The 2000 census included 63 categories.[56]

Contractors and subcontractors with more than $50,000 in government business and 50 or more employees not only are prohibited from discriminating, but also must take affirmative action to ensure that applicants and employees are not treated differently as a function of their sex, religion, race, color, and national origin.

Rehabilitation Act

Section 503 of the Rehabilitation Act requires federal contractors to take affirmative action to employ and advance qualified people with disabilities. Under **Executive Order 11246,** contractors and subcontractors are required to develop a written affirmative action plan that is designed to ensure equal employment opportunity. These plans are monitored by the Office of Contract Compliance Programs (OFCCP) in the U.S. Department of Labor (www.dol.gov). Its website includes a sample affirmative action plan.[57] The OFCCP conducted over 4,000 compliance reviews in 2010 and, in 2011, launched a more aggressive review process called "Active Case Enforcement" (ACE).[58]

OFCCP

What Is the Legal Status of Affirmative Action?

Federal courts can order involuntary affirmative action programs, or organizations can implement voluntary affirmative action without a court mandate. Given the recent personnel changes (justices) on the Supreme Court, the legality of such programs is now more questionable than ever. As either part of a judicial decision or the negotiated settlement of a lawsuit, a court also can order targeted quota hiring. For example, as a part of a negotiated settlement with the U.S. Forest Service, a California federal judge ordered the Forest Service to hire a set number of females over a prescribed period. The Forest Service had to submit an annual report on compliance with the quota and was subject to punitive action for failure to comply.

U.S. Steelworkers v. Weber

In 1979, the Supreme Court in *U.S. Steelworkers v. Weber* approved Kaiser Aluminum's voluntary affirmative action plan because it did not "unnecessarily trammel" the interests of majority employees and it was a temporary measure that would cease when blacks reached parity with their representation in the labor market. Lower courts reviewing subsequent challenges to voluntary affirmative action programs have used the *Weber* test to ascertain their legality.[59]

Voluntary AA programs

It has been argued that affirmative action is appropriate only as a remedy for past discrimination against specific individuals. The Supreme Court had opposed this narrow application in early decisions. The 1987 Supreme Court ruling in *Johnson v. Santa Clara Transportation Agency* provided some clarity to the remedies that have been pursued under affirmative action and equal employment opportunity.[60] According to the Court, organizations may adopt voluntary programs to hire and promote qualified minorities and women to correct a "manifest imbalance" in their representation in various job categories, even when there is no evidence of past discrimination. This was the first time that the Supreme Court explicitly ruled that women as well as blacks and other minorities can receive preferential treatment. The decision also affects the most common employment situation in the United States today: work situations where it is difficult or impossible to prove past discrimination, but a statistical disparity exists in the number of females and minorities in certain occupations relative to population statistics. Even that decision emphasized that "manifest imbalance" meant substantial, inexplicable differences in workforce representation. The decision also emphasized that preferential treatment may only be granted when job candidates are judged to be "equally qualified." Thus, race or gender may be considered to essentially break a tie under a condition of "manifest imbalance."

Johnson v. Santa Clara Transportation

"Manifest imbalance"

"Equally qualified"

While the majority of the Supreme Court decisions have favored affirmative action and most forms of preferential treatment, there now appear to be some important qualifiers on their appropriateness. These qualifiers include (1) affirmative action plans should be "narrowly tailored" to achieve their ends with a timetable for ending the preferential practice, (2) class-based firing or layoff schemes are too harsh on the innocent and inappropriate in most circumstances, and (3) preferential personnel practices of any kind are appropriate only in employment situations where there is a prior history or indication of past discrimination. Also unclear is the literal meaning of *prior discrimination.* In its earlier decision in *U.S. Steelworkers v. Weber,* the Supreme Court said it was acceptable to use affirmative action programs to remedy "manifest racial imbalance" regardless of whether an employer had been guilty of discriminatory job practices in the past.

In two cases involving the University of Michigan in 2004, the Supreme Court provided some clarity to the issue of affirmative action and college admissions. Both Michigan cases (*Gratz v. Bollinger*; *Grutter v. Bollinger*) addressed the question of whether racial preference programs unconstitutionally discriminate (based on the **Equal Protection Clause** of the U.S. Constitution) against white students.[61]

Gratz v. Bollinger
Grutter v. Bollinger

The Court ruled that race can be a factor in college admissions since a social value may be derived from greater "diversity" in the classroom. However, race cannot be an "overriding" factor in admissions decisions. While these twin decisions only directly applied to public universities, the decisions could have implications for private schools, other governmental decision-making, and perhaps the business world. The impact of both decisions is that schools have dropped fixed or rigid, point-based systems for admission. Justice Sandra Day O'Connor, writing for the majority in the law school admissions case (*Grutter*), stated that the Constitution "does not prohibit the law school's narrowly tailoring use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body."[62] Justice O'Connor retired in 2006. The

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Supreme Court took up a case in 2012 (*Fisher v. Texas*) that may reverse the *Grutter* ruling. In reaction to the Supreme Court's decision in *Grutter* favoring a form of affirmative action where race can be a factor in decision making, the state of Michigan amended its Constitution in 2006 with Proposition 2, banning race and gender preferences in public education, employment, and contracting. Thus, in Michigan, race and gender can no longer be used as a factor in admissions for their public universities. Arizona, Nebraska, and Washington have joined California and Michigan in outlawing preferential treatment by governments and public agencies in their state.

State constitutional amendments

What Is Required before a Company Embarks on a Voluntary Affirmative Action/Diversity Program?

The courts have clarified criteria for *voluntary* affirmative action plans. For voluntary plans, it has been suggested that they (1) be designed to eradicate old patterns of discrimination, (2) not impose an "absolute bar" to white advancement, (3) be temporary, (4) not "trammel the interests of white employees," (5) be designed to eliminate a "manifest racial imbalance," and (6) show preference only from a pool of equally qualified candidates. For involuntary affirmative action programs, it was suggested that preferential treatment is legal when it (1) is necessary to remedy "pervasive and egregious discrimination"; (2) is used as a flexible benchmark for court monitoring, rather than as a quota; (3) is temporary; and (4) does not "unnecessarily trammel the interests of white employees."

Reverse discrimination claims

U.S. Office of Contract Compliance (OFCCP)

Despite the apparent legal protection for voluntary affirmative action plans, employers must tread very carefully to avoid "reverse discrimination" lawsuits. Race- or gender-conscious employment decisions made in the absence of an AA plan may result in a successful claim of reverse discrimination by a rejected majority applicant or employee. Even when OFCCP-approved AA programs exist, managers must ensure that all individuals meet the stated job requirements and that affirmative action plans are carefully drafted and followed. The most difficult and legally troublesome issue related to AA is when (and if) a protected class characteristic may be considered relative to the qualifications of the job candidates.

It is strongly recommended that employers audit their personnel practices, policies, and decisions for possible "adverse impact" (e.g., 80 percent rule violations) against protected classes.[63] However, actions taken as a consequence of this audit should be done cautiously. Nineteen firefighters filed a Title VII lawsuit against New Haven, Connecticut, claiming that the city discriminated against them with regard to promotion decisions. The firefighters, 17 white and two Hispanic, all passed a promotion exam. The city threw out the test results (and the test) because none of the black firefighters scored high enough to be considered for promotion. The city's argument was that they anticipated a Title VII disparate impact lawsuit by the black officers because of the anticipated adverse impact against this protected minority. But complainants argued that they were denied promotions because of their race, a form of intentional, disparate treatment. In *Ricci v. DeStefano,* the Supreme Court ruled that the standard for permissible race-based action under Title VII is that the employer must "demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute." According to the court, the respondents did not meet this high standard. Justice Kennedy, writing for the 5-4 majority, stated that there was no evidence that "the tests were flawed because they were not job-related or because other, equally valid and less discriminatory tests were available to the City. Fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions."[64]

Ricci v. DeStefano

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Is Affirmative Action Still Necessary?

Some now argue that Barack Obama's election in 2008 supports the argument that AA is now unnecessary because equal employment opportunity already exists. Women and minorities strongly disagree with this argument.[65] The glass ceiling refers to the lack of women and minorities in top managerial positions. The various diversity programs are designed to break down some of these barriers (go to www.ilr.cornell.edu for the Glass Ceiling Commission archives; also see Catalyst www.catalyst.org for current research documenting women and diverse women in leadership positions). A 3-year study conducted by a bipartisan federal commission concluded that women and minorities still face barriers to their advancement: that is, the **glass ceiling.**[66]

It seems that people tend to favor affirmative action in terms of recruitment, training opportunities, and attention to applicant qualifications, rather than using race or gender when making staffing or admissions decisions. They tend to oppose preferential treatment and any form of quota-based decision making.[67]

THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, AMENDED IN 1978 AND 1986

ADEA lawsuits are up

The Age Discrimination in Employment Act (ADEA) was designed to prohibit age discrimination in employment decisions (e.g., hiring, job retention, compensation, and other terms and conditions). The law applies to workers over the age of 39. The ADEA applies to employers with 20 or more employees, unions of 25 or more members, employment agencies, and federal, state, and local governments. There were 23,264 claims of age discrimination filed in 2010, up almost 7,000 from 2005. The vast majority of the complaints fall under the "disparate treatment" theory where an individual claimant must prove intentional discrimination based on age. A 2009 Supreme Court decision made such ADEA claims even more difficult for individual claimants to prevail using the "disparate treatment" theory. In *Gross v. FBL Financial Services,* the Supreme Court held that "a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action . . . the burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in the decision."[68]

Gross v. FBL Financial Services

"Disparate impact" theory can now be used in ADEA cases because of the Supreme Court decision in *Smith v. Jackson.* In 2008, the Supreme Court, in *Meacham v. Atomic Power,* also ruled that an "employer defending a disparate-impact claim under the ADEA bears both the burden of production and the burden of persuasion for the 'reasonable factors other than age' (RFOA) affirmative defense."[69] Thus, the burden of proof shifts in "impact" cases but not in "treatment" cases.

Smith v. Jackson
Meacham v. Atomic Power

What Is Required to Establish Prima Facie Evidence of Age Discrimination?

Similar to Title VII cases, there are certain requirements for establishing a prima facie case of "disparate treatment" age discrimination. These include showing that (1) the employee is a member of the protected age group (40 or older); (2) the employee has the ability to perform satisfactorily at some absolute or relative level (e.g., relative to other employees involved in the decision process or at an absolute standard of acceptability); (3) the employee was not hired, promoted, or compensated or was discharged, laid off, or forced to retire; and (4) the position was filled or maintained by a younger person (just younger, not necessarily under age 40). This second condition is the biggest challenge for the plaintiff and is usually the one where the plaintiff falls short in establishing a prima facie case due to the usual subjectivity in comparing individuals.[70] Expert witnesses are often used who present evidence that the plaintiff is more qualified than the person (or persons) hired (or retained). Of course, a defendant can rebut all such claims based on other data or critiques of the plaintiff's evidence and expert testimony. Most "disparate treatment" claims fall short here because the evidence presented to support this condition is often successfully rebutted by the defendant.[71]

Difficult burden for plaintiffs

Once a prima facie case has been established based on the evidence presented by the plaintiff, the defendant must then present evidence that "reasonable factors" other than age were the basis of the personnel decision. At this point, appearing to be untruthful or incomplete in communications could be costly for employers.

One of the most common scenarios for litigation under ADEA concerns the termination of an employee because of alleged poor performance. For example, in *Mastie v. Great Lakes Steel Corp.,* the employer maintained that Mr. Mastie had been discharged in reduction-in-force efforts because of his poorer performance relative to other employees.[72] Mr. Mastie presented personnel records reflecting an exemplary performance record and a history of

Mastie v. Great Lakes Steel

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merit-based salary increases. However, the court found for the employer and said that the controlling issue is whether age was a *determinative* factor in the personnel decision, not the "absolute accuracy" or correctness of the personnel decision. The *Gross v. FBL Financial Services* Supreme Court ruling clearly places the burden of proof on the claimant in "treatment" cases. The plaintiff must prove that age was the determinative factor in any employment decision, even when there is evidence that age played some role in the decision.[73] The High Court made it clear that it is not the role of the Court to "second guess" employers in their personnel decisions—that is, did they really discharge the poorest performer or hire the very best person? *So, the critical question in ADEA disparate treatment cases is whether age was a "determinative factor" in a personnel decision.* In individual ADEA "disparate treatment" cases alleging claims of intentional discrimination based on age, it is the plaintiff's burden to establish that age was the determinative factor in the decision, which makes it difficult for plaintiffs to win such individual cases. Congress has recently considered an amendment to the ADEA to make it easier for plaintiffs to prevail in "treatment" cases.

Is age the determinative factor?

ADEA and disparate impact

The burden of persuasion does shift to the defendant in "disparate impact" ADEA cases. As a *Fortune* magazine writer put it so delicately, "there usually is a 'business necessity' for dumping workers over 50."[74] In fact, the burden on the employer is not as onerous as the "business necessity" defense required in Title VII impact cases. Rather the burden is a "reasonable factor other than age." A provocative issue is whether a "reasonable factor other than age" (RFOA) is compensation; that is, the organization fired the higher paid employees who just happened to be older. Based on the EEOC's guidelines regarding RFOAs, this simple defense would probably be illegal. However, as we already discussed, the EEOC issues guidelines that are not necessarily adopted or used by the courts to render opinions.

Can Employers Claim Age as a Bona Fide Occupational Qualification (BFOQ)?

Greyhound Bus Lines survived a court challenge to its rule that it would accept no applicants over 40 years of age to drive its buses. The company successfully contended that age was a bona fide occupational qualification (BFOQ) since it was related to the safe conduct of the busline.[75] Other cases have supported the use of age as a BFOQ. *In general, if public safety is relevant and the employee must be in good physical condition, the courts have supported the use of age requirements, both in terms of entry-level positions and, more commonly, mandatory retirement for certain jobs.* Congress specifically exempted public safety personnel, allowing mandatory retirement for police officers and firefighters (usually 55 years of age). The courts have generally recognized age ceilings as legal BFOQs, but only when the employer can demonstrate that (l) physical fitness, and especially good aerobic fitness, is important to the job and (2) the employer applies the same physical fitness standards to employees under 40 as well as to older employees. The EEOC provides the following rules for the imposition of BFOQs: (1) the age limit is reasonably necessary for the business, (2) all or almost all individuals over the age are unable to perform adequately, or (3) some people over the age have a disqualifying characteristic (e.g., health) that cannot be determined independent of age.

One managerial implication is to determine if it is in the employer's best interests to impose an age ceiling or mandatory retirement. In 2008, the retirement age for commercial pilots was raised to 65, the mandatory age used by the rest of the world. Capt. Chesley B. Sullenberger "splash-landed" US Airways Flight 1549 in the Hudson River on January 15, 2009 and was considered a hero. Two years later, Sully was retired.

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THE AMERICANS WITH DISABILITIES ACT OF 1990 (ADA) AMENDED IN 2008

In 1990, Congress passed the Americans with Disabilities Act, which extends the rights and privileges disabled employees of federal contractors have under the Rehabilitation Act of 1973 to virtually all employees. Figure 3-8 presents a summary of the ADA, some excerpts from the law, and a list of the EEOC ADA Enforcement Guidelines and Policy Documents. You can retrieve these documents at www.eeoc.gov. Keep in mind, however, that EEOC guidelines are only guidelines and are subject to judicial interpretation. For

Figure 3-8 **A Summary of the ADA and the 2008 Amendments Act; Excerpts from the ADA; Guidelines Available at eeoc.gov**

DISABILITY DISCRIMINATION

Title I of the Americans with Disabilities Act of 1990 prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. The ADA covers employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations. The ADA's nondiscrimination standards also apply to federal sector employees under section 501 of the Rehabilitation Act, as amended, and its implementing rules.

An individual with a disability is a person who:

- Has a physical or mental impairment that substantially limits one or more major life activities (2008 Amendment expands the definition of "major life activities").
- Has a record of such an impairment.
- Is regarded as having such an impairment.

A qualified employee or applicant with a disability is an individual who, with or without reasonable accommodation, can perform the essential functions of the job in question. Reasonable accommodation may include, but is not limited to:

- Making existing facilities used by employees readily accessible to and usable by persons with disabilities.
- Job restructuring, modifying work schedules, reassignment to a vacant position.
- Acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies, and providing qualified readers or interpreters.

An employer is required to make a reasonable accommodation to the known disability of a qualified applicant or employee if it would not impose an "undue hardship" on the operation of the employer's business. Undue hardship is defined as an action requiring significant difficulty or expense when considered in light of factors such as an employer's size, financial resources, and the nature and structure of its operation.

An employer is not required to lower quality or production standards to make an accommodation; nor is an employer obligated to provide personal use items such as glasses or hearing aids.

Title I of the ADA also covers:

- *Medical examinations and inquiries*—Employers may not ask job applicants about the existence, nature, or severity of a disability. Applicants may be asked about their ability to perform specific job functions. A job offer may be conditioned on the results of a medical examination, but only if the examination is required for all entering employees in similar jobs. Medical examinations of employees must be job related and consistent with the employer's business needs.
- *Drug and alcohol abuse*—Employees and applicants currently engaging in the illegal use of drugs are not covered by the ADA when an employer acts on the basis of such use. Tests for illegal drugs are not subject to the ADA's restrictions on medical examinations. Employers may hold illegal drug users and alcoholics to the same performance standards as other employees.
- *Retaliation*—It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on disability or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under the ADA.

Need More Information?

The law:

- Titles I and V of the ADA

The regulations:

- 29 C.F.R Part 1630
- 29 C.F.R Part 1640
- 29 C.F.R Part 1641

EEOC Enforcement Guidances and Policy Documents:

- Veterans with Services-Connected Disabilities in the Workplace and the ADA
- The Family and Medical Leave Act, the ADA, and Title VII of the Civil Rights Act of 1964
- The ADA: A Primer for Small Business
- Your Responsibilities as an Employer
- Your Employment Rights as an Individual with a Disability
- Job Applicants and the ADA
- Small Employers and Reasonable Accommodation
- Work at Home/Telework as a Reasonable Accommodation
- The ADA: Applying Performance and Conduct Standards to Employees with Disabilities
- Obtaining and Using Employee Medical Information as Part of Emergency Evacuation Procedures
- How to Comply with the Americans with Disabilities Act: A Guide for Restaurants and Other Food Service Employers
- Questions and Answers about:
  - Diabetes in the Workplace and the ADA
  - Epilepsy in the Workplace and the ADA
  - Persons with Intellectual Disabilities in the Workplace and the ADA

EXCERPTS FROM ADA

(a) General Rule. No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual.

(b) Construction. As used in subsection (a), the term "discrimination" includes:

(*Continued*)

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Figure 3-8 (*Continued*)

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of … disability …

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a qualified applicant or employee with a disability to the discrimination prohibited by this title …

(3) not making reasonable accommodations to the known physical or mental limitations of a qualified individual who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity, and

(4) using employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

(c) Medical Examinations and Inquiries.

(1) In general. The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

Definitions

(2) Disability. The term "disability" means, with respect to an individual:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual (The 2008 Amendments Act expands the definition of "major life activities")

(B) a record of such an impairment, or

(C) being regarded as having such an impairment.

(D) mitigating measures shall not be considered in assessing whether an individual has a disability.

Definitions

(3) Qualified Individual with a Disability. The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

(4) Reasonable Accommodation. The term "reasonable accommodation" may include:

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities, and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(5) (A) In general. The term "undue hardship" means an action requiring significant difficulty or expense.

(B) Determination. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

(i) the overall size of the business;

(ii) the type of operation; and

(iii) the nature and cost of the accommodation.

Defenses

(a) Qualification Standards. The term "qualification standards" may include a requirement that an individual with a currently contagious disease or infection shall not pose a direct threat to the health or safety of other individuals in the workplace.

Illegal Drugs and Alcohol

(a) Qualified Individual with a Disability. For purposes of this title, the term "qualified individual with a disability" shall not include any employee or applicant who is a current user of illegal drugs …

(b) Authority of Covered Entity. A covered entity:

(1) may prohibit the use of alcohol or illegal drugs at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or illegal drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under "The Drug-Free Workplace Act" (41 U.S.C. 701 et seq.) [See Chapter 14.];

(4) may hold an employee who is a drug user or alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees …

(c) Drug Testing.

(1) In general. For purposes of this title, a test to determine the use of illegal drugs shall not be considered a medical examination.

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example, in 2002, the EEOC had to amend its guidelines on "reasonable accommodation" based on a Supreme Court ruling. The EEOC also issues new regulations, so be sure to monitor the EEOC website for changes. The EEOC received 25,165 charges of disability discrimination in fiscal year 2010 (almost 10,000 more than in 2000). This increase is probably mainly due to the **ADA Amendments Act of 2008 (ADAAA).**

Essential functions

The ADA provides that qualified individuals with disabilities may not be discriminated against by a private-sector organization or a department or agency of a state or local government employing 15 or more employees, *if the individual can perform the essential functions of the job with or without reasonable accommodation.* Reasonable accommodations are determined on a case-by-case basis and may include reassignment, part-time work,

and flexible schedules. They also may include providing readers, interpreters, assistants, or attendants. No accommodation is required if an individual is not otherwise qualified for the position. The EEOC *Policy Guidance on Reasonable Accommodation Under ADA* suggests the following process for assessing "reasonable accommodation."

EEOC guidelines

1. Look at the particular job involved; determine its purpose and its essential functions.
2. Consult with the individual with the disability to identify potential accommodations.
3. If several accommodations are available, preference should be given to the individual's preferences.

Public facilities such as restaurants, doctor's offices, pharmacies, grocery stores, shopping centers, and hotels must be made accessible to people with disabilities unless undue hardship would occur for the business. It is not clear, however, how exactly organizations will show "undue hardship," although the law suggests that a reviewing court compare the cost of the accommodation with the employer's operating budget.

Common area of disability claims

The three areas of disability that are the most common for ADA claims as of 2011 are various mental difficulties (e.g., depression, attention deficit disorder), headaches, and backaches. The most common personnel action has been termination. While many claims of mental duress and headaches are undoubtedly legitimate, there is no question that some people have taken advantage of the ambiguity in the law to make costly and unwarranted claims.

What Is Legal and Illegal under ADA?

The EEOC approved enforcement guidelines on preemployment disability-related inquiries and medical exams under ADA. The guidelines state that "the guiding principle is that while employers may ask applicants about the ability to perform job functions, employers may not ask about disability." For example, a lawful question would be: "Can you perform the functions of this job with or without reasonable accommodation?" But it is unlawful for an employer to ask questions related to a disability, such as "Have you ever filed for worker's compensation?" or "What prescription drugs do you take?" or "Have you ever been treated for mental illness?" After an employer has made an offer and an applicant requests accommodation, the employer may "require documentation of the individual's need for, and entitlement to, reasonable accommodations."

There has been a great deal of litigation under ADA since the law took effect for most employers, and the Supreme Court has been very much involved in attempting to clarify the law and its implications. Perhaps the most important issue is what constitutes a disability under ADA.

Bonnie Cook was a 300-pound Rhode Island woman who was rejected for an attendant's job at a school for the mentally retarded. She sued, claiming her obesity was a disability under ADA.[76] The EEOC now takes the position that basic obesity, without any other underlying condition, sufficiently impacts the life activities of bending, walking, digestion, cell growth, and so on, to qualify as a disability or perceived disability under the **ADA Amendments Act (ADAAA).**[77] The courts have deferred to the EEOC's position on this matter.

ADAAA

Two Supreme Court rulings probably had the most to do with the passage of the 2008 ADAAA. The first case, *Sutton v. United Air Lines,*[78] established that courts can consider remedial aids, such as eyeglasses for poor eyesight or medication for high blood pressure, to mitigate impairments when determining whether an individual has a disability under the ADA. Contrary to the EEOC's interpretive guidance on the issue, the Court ruled that the mitigating measures used by an employee must be taken into account in judging whether an individual has a disability under the ADA. Thus, the Court reasoned, because a person's eyeglasses corrected an impairment, that person was not disabled under the ADA and thus had no standing in an ADA lawsuit.

Sutton v. United Air Lines

The second case, *Toyota v. Williams,* considered the degree that impairments can be considered to "substantially" interfere with a person's daily activities and therefore require coverage under the ADA. In *Toyota,* the Court held that the plaintiff was limited by carpal tunnel syndrome only in certain activities that were not considered major life activities, as the plaintiff was able to perform other nonmanual work duties.[79] *Again, the court ruled that Ms. Williams was thus not disabled under the law.*

Toyota v. Williams

The **ADAAA** makes important changes to the definition of the term *disability* by rejecting the holdings of these Supreme Court decisions. While retaining the basic definition

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of disability as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment, this amendment changes the way that these terms should be interpreted. In addition to directing the EEOC to revise its regulations defining the term *substantially limits,* the ADAAA emphasizes that the definition of disability should be interpreted broadly (go to www.eeoc.gov for information on ADA-related action pursuant to this law).

Major life activities

The ADA Amendments Act expands the definition of "major life activities" by including those activities that the EEOC had recognized (e.g., walking) and adding other activities that EEOC had not specifically recognized (e.g., reading, bending, and communicating). In addition, a second list is stipulated in the amendment that includes major bodily functions (e.g., "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions").

Mitigating measures

The ADA amendment also states that mitigating measures other than "ordinary eyeglasses or contact lenses" shall not be considered in assessing whether an individual has a disability and that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.[80] The ADAAA is probably mainly responsible for the increase in ADA lawsuits since 2010.

GENETIC INFORMATION NONDISCRIMINATION ACT (GINA)

The Genetic Information Nondiscrimination Act (GINA) became law in 2008.[81] The legislation is designed to address concerns that workers could be denied employment or job benefits due to a predisposition for a genetic disorder. There were 201 charges of discrimination filed under GINA in fiscal year (FY) 2010. GINA has the following major provisions.

1. GINA prohibits insurers from denying coverage to patients.
2. GINA prohibits employers from making hiring, firing, or promotional decisions based on genetic test results.

DNA testing

Figure 3-9 presents a summary of GINA protections, exceptions, and remedies. Supporters of the new law, which evolved over 13 years of legislative work, proclaim that GINA will help usher in an age of genetic medicine where DNA tests will help predict if a person is at risk for a particular disease so as to take action in order to prevent it. The EEOC issued a final rule regarding GINA enforcement in 2009.[82]

Figure 3-9 **Genetic Information Nondiscrimination ACT of 2008 (GINA)**

Nondiscrimination in Employment—GINA prohibits an employer from discriminating against an individual in the hiring, firing, compensation, terms, or privileges of employment on the basis of genetic information of the individual or family member of the individual. An employer would also be prohibited from limiting, segregating, or classifying an employee in any fashion that would deprive the employee of any employment opportunities or adversely affect the status of the employee because of the employee's genetic information (or the genetic information of the family member of the individual).

Health Care Coverage Protections—GINA prohibits an insured or self-insured health care plan from denying eligibility to enroll for health care coverage or from adjusting premium or contribution rates under a plan based on an individual or family member's genetic information. Health care plans cannot require an individual or a family of a plan participant to undergo a genetic test to be eligible for coverage under a health care plan or maintain enrollment restrictions based on the need for genetic services.

Exceptions for Genetic Testing for Health Care Treatment—GINA allows a health care professional to request that a patient undergo a genetic test or advise a patient on the provision of genetic tests or services through a wellness program.

Remedies for Violations of the Health Care Coverage Provisions—GINA allows plan participants to receive injunctive relief under the Employee Retirement Income Security Act (ERISA) and to have health care coverage reinstated back to the date of loss of coverage. Plan administrators could be personally liable for discriminating in coverage decisions and be assessed a penalty of $100 per day for the period of noncompliance. Plans could be fined a minimum penalty of $2,500 to $15,000 for violations up to a total of $500,000 for multiple violations.

Confidentiality of Genetic Health Care Information—GINA provides that the disclosure of protected genetic health care information is governed by the medical privacy requirements of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). GINA allows injunctive relief for violations of the confidentiality provisions of the bill. For violations of the privacy provisions of the bill, civil monetary penalties of $100 per day up to $250,000 and 10 years in prison for egregious violations.

State Genetic Law Preemption—GINA allows state laws that are more stringent in the requirements, standards, or implementations then those contained in GINA to supersede the federal act. Most states have genetic testing laws.

Definition of Family Member—GINA defines a family member as the:

(1) spouse of the individual;

(*Continued*)

(2) a dependent child of the individual, including a child who is born to or placed for adoption with the individual; or
(3) parent, grandparent, or great-grandparent.

Restrictions on Collecting Genetic Information—GINA forbids an employer from requesting, requiring, or purchasing genetic information of the individual or family member except

(1) where the employer inadvertently requests or requires the information,
(2) for genetic services offered by the employer (including wellness programs),
(3) for purposes of complying with the Family and Medical Leave Act, and
(4) where the employer purchases documents that are commercially available. GINA also limits or expand the protections, rights, or obligations of employees or employers under workers' compensation laws.

Genetic Monitoring in the Workplace Exception—GINA allows for genetic monitoring of biological effects of toxic substances in the workplace, but only if

(1) the employer provides written notice of the monitoring to the employee;
(2) the employee agrees to the monitoring in writing or the monitoring is required by federal, state, or local law;
(3) the employee is informed of the results of the test;
(4) the monitoring conforms to any federal or state law, including rules promulgated by OSHA; and
(5) the employer receives the results of the tests in aggregate terms. Employers also may offer genetic services to the employee, but only if the services are voluntary and shared only with the employee or family member of the employees.

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PREGNANCY DISCRIMINATION ACT OF 1978

A total of 6,119 charges of Pregnancy Discrimination Act (PDA) violations were filed with the EEOC in 2010, up 5 percent since 2007. The PDA prohibits employment practices that discriminate on the basis of pregnancy, childbirth, or related medical conditions (e.g., abortion). This means that a woman is protected from being fired or refused a job or promotion simply because she is pregnant or has had an abortion. She also cannot be forced to take a leave of absence as long as she is able to work. What about refusing to hire a woman because she may become pregnant soon? Can't do that either. An employer may not use potential pregnancy as a basis for a decision. For example, the retailer Motherhood Maternity recently settled a PDA complaint with the EEOC in which it was alleged that it refused to hire pregnant women. The company agreed to a 3-year consent decree that included training employees on the law and its prohibitions.[83]

Pregnant women must be treated in the same manner as other applicants (or employees) with similar abilities. Like the ADA, the PDA stipulates that an employer cannot refuse to hire a pregnant woman if she can perform the essential functions of the job. What about a pregnant woman who freely admits that she plans to take a leave 3 months after her starting date? Surely this is a "job-related" reason to not hire her? While this may be costly to the employer, in fact the employer cannot consider either her pregnancy or her impending leave in a hiring decision.

Under the law, women are not guaranteed the same job or, indeed, any job when they return from their pregnancy leave. However, most U.S. companies have adopted either a "same job," "comparable job,'' or "some job" policy for women who wish to return to work. The employer must adopt such a policy with consideration to the disparate treatment theory of Title VII, and pregnancy should be treated like any other disability. In other words, if other employees on disability leave are entitled to return to their jobs when they are able to work again, then so should women who have been unable to work due to pregnancy.

Benefit coverage

The PDA also requires that employers must provide benefit coverage for pregnancy as fully as for other medical conditions. In other words, a woman unable to work for pregnancy-related reasons is entitled to disability benefits or sick leave on the same basis as other employees unable to work for medical reasons.

The PDA does not prohibit states from requiring additional benefits for pregnant employees. The Supreme Court, for example, upheld a California law that required employers to provide up to 4 months' unpaid pregnancy disability leave with guaranteed reinstatement, even though disabled males were not entitled to the same benefit. The **Family and Medical Leave Act,** discussed in Chapter 10, provides additional protection related to pregnancy. Figure 3-10 presents a summary of the PDA.

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Figure 3-10 **Pregnancy Discrimination**

The Pregnancy Discrimination Act is an amendment to Title VII of the Civil Rights Act of 1964. Discrimination on the basis of pregnancy, childbirth, or related medical conditions constitutes unlawful sex discrimination under Title VII, which covers employers with 15 or more employees, including state and local governments. Title VII also applies to employment agencies and to labor organizations, as well as to the federal government. Women who are pregnant or affected by related conditions must be treated in the same manner as other applicants or employees with similar abilities or limitations.

Title VII's pregnancy-related protections include:

- *Hiring*—An employer cannot refuse to hire a pregnant woman because of her pregnancy, because of a pregnancy-related condition, or because of the prejudices of co-workers, clients, or customers.
- *Pregnancy and maternity leave*—An employer may not single out pregnancy-related conditions for special procedures to determine an employee's ability to work. However, if an employer requires its employees to submit a doctor's statement concerning their inability to work before granting leave or paying sick benefits, the employer may require employees affected by pregnancy-related conditions to submit such statements.

  If an employee is temporarily unable to perform her job due to pregnancy, the employer must treat her the same as any other temporarily disabled employee. For example, if the employer allows temporarily disabled employees to modify tasks, perform alternative assignments, or take disability leave or leave without pay, the employer also must allow an employee who is temporarily disabled due to pregnancy to do the same.

  Pregnant employees must be permitted to work as long as they are able to perform their jobs. If an employee has been absent from work as a result of a pregnancy-related condition and recovers, her employer may not require her to remain on leave until the baby's birth. An employer also may not have a rule that prohibits an employee from returning to work for a predetermined length of time after childbirth.

  Employers must hold open a job for a pregnancy-related absence the same length of time jobs are held open for employees on sick or disability leave.
- *Health insurance*—Any health insurance provided by an employer must cover expenses for pregnancy-related conditions on the same basis as costs for other medical conditions. Health insurance for expenses arising from abortion is not required, except where the life of the mother is endangered.

  Pregnancy-related expenses should be reimbursed exactly as those incurred for other medical conditions, whether payment is on a fixed basis or a percentage of reasonable-and-customary-charge basis.

  The amounts payable by the insurance provider can be limited only to the same extent as amounts payable for other conditions. No additional, increased, or larger deductible can be imposed.

  Employers must provide the same level of health benefits for spouses of male employees as they do for spouses of female employees.
- *Fringe Benefits*—Pregnancy-related benefits cannot be limited to married employees. In an all-female workforce or job classification, benefits must be provided for pregnancy-related conditions if benefits are provided for other medical conditions.

  If an employer provides any benefits to workers on leave, the employer must provide the same benefits for those on leave for pregnancy-related conditions.

  Employees with pregnancy-related disabilities must be treated the same as other temporarily disabled employees for accrual and crediting of seniority, vacation calculation, pay increases, and temporary disability benefits.

  It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on pregnancy or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under Title VII.

Need More Information?

The law:

- Title VII of the Civil Rights Act

The regulations:

- 29 C.F.R Part 1604

The EEOC has also issued guidance on:

- The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964

ARE EXPATRIATES COVERED BY FEDERAL EEO LAWS WHEN THEY ARE ASSIGNED TO COUNTRIES OTHER THAN THE UNITED STATES?

Figure 3-11 presents guidelines to help multinational employers determine their obligations under EEO laws. In general, the Civil Rights Act, the ADEA, and the ADA all have **extraterritoriality.** This means that an American working for an American corporation on foreign soil is covered by these laws. With some exceptions, the laws also apply to resident aliens working for foreign companies on U.S. soil.

Many U.S. companies have branches, subsidiaries, or joint venture partners throughout the world. Companies doing business within the countries of the European Union are subject to the minimum requirements in working conditions and employee representation and involvement set forth by the European Community (EC). The EC sets policy with respect to working time, labor unions (aka "European Work Councils"), and other social protections and Member States transpose this Community law into their own national laws.

Figure 3-11 **The Equal Employment Opportunity Responsibilities of Multinational Employers**

The globalization of business activity has resulted in employers from around the world assigning increasing numbers of personnel internationally. The following general guidance is intended to help multinational employers determine their obligations under U.S. equal employment opportunity laws (EEO laws).

OPERATIONS IN THE UNITED STATES OR U.S. TERRITORIES

Multinational employers that operate in the United States or its territories—American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands—are subject to EEO laws to the same extent as U.S. employers, unless the employer is covered by a treaty or other binding international agreement that limits the full applicability of U.S. antidiscrimination laws, such as one that permits the company to prefer its own nationals for certain positions.

OPERATIONS OUTSIDE THE UNITED STATES AND U.S. TERRITORIES

Companies Based in the U.S.

Employers that are incorporated or based in the U.S. or are controlled by U.S. companies and that employ U.S. citizens outside the United States or its territories are subject to Title VII, the ADEA, and the ADA with respect to those employees. U.S. EEO laws do not apply to non-U.S. citizens outside the U.S. or its territories.

How to Determine Who Is a U.S. Employer

An employer will be considered to be a U.S. employer if it is incorporated or based in the United States or if it has sufficient connections with the United States. This is an individualized factual determination that will be based on the following relevant factors:

- The employer's principal place of business, i.e., the primary place where factories, offices, and other facilities are located.
- The nationality of dominant shareholders and/or those holding voting control.
- The nationality and location of management (the officers and directors of the company).

How to Determine Whether a Company Is "Controlled" by a U.S. Employer

Employers operating outside the United States are covered by Title VII, the ADEA, and the ADA only if they are controlled by a U.S. employer. Whether a company is controlled by a U.S. employer is also an individualized determination, which will be based on the following relevant factors:

- Whether the operations of the employers are interrelated.
- Whether there is common management.
- Whether there is centralized control of labor relations.
- Whether there is common ownership or financial control.

Foreign Laws Defense

U.S. employers are not required to comply with the requirements of Title VII, the ADEA, or the ADA, if adherence to that requirement would violate a law of the country where the workplace is located. For example, an employer would have a "Foreign Laws Defense" for a mandatory retirement policy if the law of the country in which the company is located requires mandatory retirement.

A U.S. employer may not transfer an employee to another country in order to disadvantage the employee because of his/her race, color, sex, religion, national origin, age, or disability. For example, an employer may not transfer an older worker to a country with a mandatory retirement age for the purpose of forcing the employee's retirement.

WHAT U.S. EEO LAWS COVER

The federal EEO laws enforced by the EEOC are Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and the Equal Pay Act (EPA). These laws prohibit covered employers from discriminating on the bases of race, color, sex, national origin, religion, age, and disability. Examples of conduct prohibited include:

- *Discriminatory employment decisions*—Title VII, the ADEA, and the ADA prohibit discrimination in all aspects of the employment relationship including recruitment, hiring, assignment, transfer, firing, layoffs, and other conditions or privileges of employment.
- *Discrimination in compensation and benefits*—Title VII, the ADEA, and the ADA prohibit discrimination in compensation based on race, color, sex, national origin, religion, age, and disability. In addition, the EPA prohibits pay discrimination between men and women who are performing substantially equal work. Although the EPA does not apply outside the United States, such claims are covered by Title VII, which also prohibits discrimination in compensation on the basis of sex.
- *Harassment*—Title VII, the ADEA, and the ADA also prohibit offensive conduct that creates a hostile work environment based on race, color, sex, national origin, religion, age, and disability. Employers are required to take appropriate steps to prevent and correct unlawful harassment and employees are responsible for reporting harassment at an early stage to prevent its escalation.
- *Retaliation*—Title VII, the ADEA, the ADA, and the EPA prohibit employers from retaliating against employees because they have opposed unlawful discrimination or participated in a discrimination-related proceeding.

Need More Information?

For more detailed information, including a comprehensive discussion of these and other issues, please see:

- EEOC's Web site at www.eeoc.gov for detailed information on EEO laws. Go to "Laws, Regulations and Policy Guidance" for Compliance Manual Sections and Enforcement Guidance.
- EEOC Enforcement Guidance, "Application of Title VII and the Americans with Disabilities Act to Conduct Overseas and to Foreign Employers Discriminating in the United States" (1993).
- EEOC Policy Guidance, "Application of the Age Discrimination in Employment Act of 1967 and the Equal Pay Act of 1963 to American Firms Overseas, Their Overseas Subsidiaries, and Foreign Firms" (1989).
- EEOC Policy Guidance, "Analysis of the sec. 4(f)(1) 'foreign laws' defense of the Age Discrimination in Employment Act of 1967."

To be automatically connected to an EEOC field office, call 1-800-669-4000 or TTY 1-800-669-6820. For more information on EEO law in other countries, see:

- Directorate General for Employment and Social Affairs for the European Union, http://www.europa.eu.int/comm/employment_social/fundamental_rights/index_en.htm
- Canadian Human Rights Commission http://www.chrc-ccdp.ca
- UK Equal Opportunities Commission http://www.eoc.org.uk
- UK Disability Rights Commission, http://www.drc-gb.org
- UK Commission on Racial Equality, http://www.cre.gov.uk
- Hong Kong Equal Opportunity Commission http://www.eoc.org.hk

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What Are Employee Rights When Working for Multinational Employers?

What EEO laws apply to an American working for a foreign company operating in the United States or in another country? Figure 3-12 presents a summary of these rights. In general, all three laws apply to the American company and protect the American worker. However, an American working for a foreign company on foreign soil is not protected. HRM specialists working in these various contexts must be well aware of the various laws and their applications. A great resource is the global forum of the Society of Human Resource Management (www.SHRMglobal.org).

Figure 3-12 **Employee Rights When Working for Multinational Employers**

As the workplace grows more global and mobile, increased numbers of employers have international operations, resulting in more international assignments of their employees. The following provides general guidance concerning employees' rights under the United States' equal employment opportunity laws (U.S. EEO laws) when working for multinational employers.

WORK IN THE UNITED STATES AND U.S. TERRITORIES

All employees who work in the U.S. or its territories—American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands—for covered employers are protected by EEO laws, regardless of their citizenship or work authorization status. Employees who work in the U.S. or its territories are protected whether they work for a U.S. or foreign employer.

Example:

Kim is a Chinese citizen working in the Commonwealth of the Northern Mariana Islands for a Chinese manufacturer of women's attire. Kim's manager threatens Kim with losing her job if she does not comply with his sexual demands. Kim is protected by U.S. EEO laws because she works in a U.S. territory. The employer can be held liable for sexual harassment.

WORKING FOR NON-U.S. EMPLOYERS IN THE U.S.

The only exception to the rule that employees working in the U.S. are covered by federal EEO laws occurs when the employer is not a U.S. employer and is subject to a treaty or other binding international agreement that permits the company to prefer its own nationals for certain positions.

Example:

ABC Communications is an Egyptian company doing business in the U.S. Under a "friendship, commerce and navigation treaty" ("FCN") between the U.S. and Egypt, Egyptian companies operating in the U.S. are authorized to hire Egyptian citizens for executive positions. Thomas, a U.S. citizen, alleges that he was subjected to national origin discrimination when he was denied a position as Vice President of Legislative Affairs in favor of Menkure, who is an Egyptian citizen. ABC Communications admits that it favored Menkure because he is an Egyptian citizen and can successfully assert the FCN treaty as a defense.

However, if Menkure were not an Egyptian citizen but a citizen of the U.S. or a third country, ABC would not have the treaty as a defense because the treaty authorizes a preference only for Egyptian citizens.

WORK OUTSIDE THE UNITED STATES

Individuals who are not U.S. citizens are not protected by U.S. EEO laws when employed outside the U.S. or its territories. Consult your embassy to determine whether EEO laws for other countries exist and whether they apply to your situation.

U.S. citizens who are employed outside the U.S. by a U.S. employer—or a foreign company controlled by an U.S. employer—are protected by Title VII, the ADEA, and the ADA.

Example:

Isaac is an African-American U.S. citizen working in Africa for a U.S. employer as a customer service manager. Isaac alleges race discrimination after he was transferred to a less desirable and less public position. The new position involved a loss of pay and lack of upward career mobility opportunities. The employer admitted that it transferred Isaac because its predominantly white customers did not want to deal directly with nonwhites. Customer preference is never a defense to violations of U.S. EEO law. The transfer violates Title VII.

Whether a Company Is a U.S. Employer or Controlled by a U.S. Employer

An employer will be considered a U.S. employer if it is incorporated or based in the United States or if it has sufficient connections with the United States. Several factors help determine whether a company has sufficient connections with the U.S., including the company's principal place of business and the nationality of its dominant shareholders and management. Whether a foreign company is controlled by a U.S. employer will depend on the interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control of the two entities. For more information, see http://www.eeoc.gov/docs/threshold.html#2-III-B-3-c.

Foreign Laws Defense

U.S. employers are not required to comply with the requirements of Title VII, the ADEA, or the ADA if adherence to that requirement would violate a law of the country where the workplace is located.

Example:

Sarah is a U.S. citizen. She works as an assistant manager for a U.S. employer located in a Middle Eastern Country. Sarah applies for the branch manager position. Although Sarah is the most qualified person for the position, the employer informs her that it cannot promote her because that country's laws forbid women from supervising men. Sarah files a charge alleging sex discrimination. The employer would have a "Foreign Laws" defense for its actions if the law does contain that prohibition.

An American employer cannot transfer an employee to another country in order to disadvantage the employee because of race, color, sex, religion, national origin, age, or disability. For example, an employer may not transfer an older worker to a country with a mandatory retirement age for the purpose of forcing the employee's retirement.

(*Continued*)

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WHAT U.S. EEO LAWS COVER

The federal EEO laws enforced by the EEOC are Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and the Equal Pay Act (EPA). These laws prohibit covered employers from discriminating on the bases of race, color, sex, national origin, religion, age, and disability. Examples of conduct prohibited include:

- *Discriminatory employment decisions*—Title VII, the ADEA, and the ADA prohibit discrimination in all aspects of the employment relationship, including recruitment, hiring, assignment, transfer, firing, layoffs, and other conditions or privileges of employment.
- *Discrimination in compensation and benefits*—Title VII, the ADEA, and the ADA prohibit discrimination in compensation based on race, color, sex, national origin, religion, age, and disability. In addition, the EPA prohibits pay discrimination between men and women who are performing substantially equal work. Although the EPA does not apply outside the United States, such claims are covered by Title VII, which also prohibits discrimination in compensation on the basis of sex.
- *Harassment*—Title VII, the ADEA, and the ADA also prohibit offensive conduct that creates a hostile work environment based on race, color, sex, national origin, religion, age, and disability. Employers are required to take appropriate steps to prevent and correct unlawful harassment and employees are responsible for reporting harassment at an early stage to prevent its escalation.
- *Retaliation*—Title VII, the ADEA, the ADA, and the EPA prohibit employers from retaliating against employees because they have opposed unlawful discrimination or participated in a discrimination related proceeding.

FILING A CHARGE

If you believe that you have been discriminated against, you may file a charge with the EEOC. An individual alleging an EEO violation outside the U.S. should file a charge with the district office closest to his or her employer's headquarters. However, if you are unsure where to file, you may file a charge with any EEOC office. For information on filing a charge of discrimination see *How to File a Charge of Employment Discrimination.* Charges may be filed in person, or by phone, mail, or facsimile.

Example:

Isaiah is a U.S. citizen working in Canada for a U.S. employer that is headquartered in New York and has an office in Detroit, Michigan. Isaiah alleges a failure to accommodate his religious beliefs. Although the charge will be processed by the New York District Office because it is closest to his employer's headquarters, Isaiah may file the charge in any convenient EEOC office.

American women have equal opportunity legal protection regarding expatriate assignments. While things are clearly improving, the "glass border" still exists where women are victims of discrimination for important overseas assignments.[84]

FUTURE TRENDS IN EEO

The issue of affirmative action may be at the forefront of litigation and legislation in the years to come. With the plaintiffs' successes in much-publicized cases and the huge jury verdicts and settlements, an increasing number of EEO class-action lawsuits are likely, although the 2011 Supreme Court decision in *Wal-Mart Stores, Inc. v. Dukes* does place constraints on the ability of plaintiffs to successfully argue for class certification in some situations. The number of ADEA class-action cases should increase in the years ahead due to the aging of the workforce (more workers over 39 years of age) and downturn in the economy (resulting in more terminations) and because of the Supreme Court rulings in *Smith v. Jackson* and *Meacham v. Atomic Power* allowing "disparate impact" theory and putting more of the burden of proof on the employer in "disparate impact" cases.

Employment practices liability insurance should become even more common in the years ahead although premiums already have increased substantially because of the increased risk of large jury verdicts. A growing area of business-related insurance, some policies make stipulations about how HRM should be practiced as a condition of coverage. Providing training in EEO laws is often one such condition. Requiring alternative dispute resolution as a condition of employment is another recommended HRM policy that has gained in popularity.

Alternative Dispute Resolution: An Employer Reaction to Increased Litigation

One trend with regard to management reaction to increased legislation and litigation is in the area of **alternative dispute resolution.** As discussed earlier, many large employers have entered mediation agreements with the EEOC in an effort to expedite the resolution of employment disputes. Some companies have adopted **mandatory arbitration** to settle all claims related to employment. They cite the provisions of the Civil Rights Act of 1991 that allow alternative dispute resolution as an alternative to litigation. Although mandatory arbitration is controversial, and is opposed by the EEOC, many companies have nevertheless adopted this policy. The policy is almost always imposed after a process of mediation.

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Mandatory arbitration requires employees and job applicants to sign a contract in which they agree to binding arbitration in order to resolve virtually any dispute related to their employment. With mandatory arbitration, the employee forfeits the right to litigate the complaint. So, let's say you feel you were a victim of gender discrimination. With the mandatory arbitration policy, and after exhausting internal processes, you must submit your charge to the **American Arbitration Association** for a hearing and binding decision. If you refused to sign an arbitration agreement, a company could decide to not hire you and, in most states, could fire you if you refused to sign a newly imposed policy.

The courts have, in general, supported arbitration as an alternative to litigation in settling employment disputes. Given the likely increases in most forms of EEO litigation, mediation followed by arbitration may prove to be advantageous to all concerned.

Forced and binding arbitration (as a condition of employment) has been challenged in court for several reasons related to due process, and some agreements have been thrown out because they were deemed to be unfair or "unconscionable." Antonio Jackson filed a racial discrimination lawsuit against Rent-A-Center Inc. in Nevada. But Mr. Jackson had signed an arbitration agreement so Rent-A-Center moved to have the complaint dismissed. As is fairly standard, the arbitration agreement stipulated that any question of whether the arbitration was enforceable would be decided by an arbitrator. The Supreme Court took up the question of who has the authority to decide whether a mandatory arbitration agreement is "unconscionable." In the 5-4 decision in *Rent-A-Center, West, Inc. v. Jackson,* the Court ruled in favor of Rent-A-Center. Writing for the majority, Justice Antonin Scalia concluded that as long as the arbitration agreement designates the decision regarding unfairness to an arbitrator, it should be the arbitrator rather than the court who decides whether an arbitration clause is unfair or conscionable.[85]

ATT v. Concepcion

A 2011 Supreme Court decision also appears to put constraints on what states may do regarding the details of arbitration agreements. In *AT&T Mobility LLC v. Concepcion,* a 5-4 majority decided that the Federal Arbitration Act preempts states from conditioning the validity of arbitration provisions on the inclusion of specific procedures, including class arbitration.[86] Thus, parties with unequal bargaining power (e.g., job applicants) may be limited in their ability to seek judicial review at either the state or the federal level.

SUMMARY

Despite the confusing array of laws and regulations on EEO, the underlying principle should be clear. EEO simply means that individuals should be given an equal opportunity in employment decisions. EEO does not mean preferential treatment for one individual over another because of race, color, sex, religion, national origin, age, or disability. For instance, white males have won racial and sex discrimination suits against organizations that have violated Title VII by hiring less-qualified minorities or women. The EEO laws clearly state that treatment at work and opportunity for work should be unrelated to the race, sex, age, religion, national origin, and other personal characteristics of individual workers that are not job related.

Remember that this chapter discusses only federal EEO law and that there are numerous other state and local laws and labor regulations that can be the bases of a lawsuit. In fact, the trend is toward more state and local laws that regulate the workplace. In the applicable chapters, other laws are discussed that affect whom an employer hires (i.e., immigration laws), labor relations and collective bargaining, workers' compensation, unemployment compensation, wages, overtime pay, health and safety issues, whistleblower's protection, retirement, employee benefits, rights of privacy, protection against unjust dismissal, and other issues related to the workplace.

One Implication of Increased Litigation: Better HRM Practices

While the trend of increasing litigation can create competitive problems for U.S. employers in a global economy, many of the regulations and guidelines for HR practice, particularly EEO laws, actually encourage more effective HRM practices and underscore the need for HRM expertise. One large retailer specified that applicants for a district

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manager job for *certain* regions had to have a minimum of 5 years' experience as a district manager from some other retailer. This job specification created a disadvantage for women and minorities who may have been denied opportunities throughout the retail industry and thus could not have accumulated the required experience. This is an illustration of the "glass-ceiling effect," which refers to invisible barriers for women that serve as obstacles to moving up the corporate ladder. In addition, an internal study showed that years of previous experience was unrelated to performance as a district manager. The company was thus vulnerable to a lawsuit and, based on its own study, would have great difficulty proving that the 5-year specification was related to job success. The specification also forced the company to compensate the district manager job at a higher rate and made it much more difficult to recruit. This combination of facts seems to lead to a simple conclusion: change the job specification and reduce the number of years of experience required to be considered for the job. Many times, EEO laws and regulations and effective HR practices go hand in hand.

Glass-ceiling effect

The point is that the legality of human resource practices is often related to the effectiveness of human resource practices as well. Remember that the use of a "validated" selection model and procedures are **"high-performance work practices."** *Validated* means the procedures actually predict what the employer intends for them to predict. This is essentially what EEO law requires regarding the burden on an organization after adverse impact (e.g., 80 percent rule) is established.

Legal HR practices are often the most effective and valid

Organizations thus would do well to evaluate all of their HR policies and practices in the context of the laws and case law and adjust those practices accordingly after their internal assessment. The result just might be more legally defensible and more effective HR policies. The old adage, an ounce of prevention is worth a pound of cure, really applies to the legal issues related to HR.

While the implications of HR-related litigation may be confusing, there can be no question that managers will be on relatively safer ground if they adhere to the following strategy with regard to employment practices: (1) monitor personnel decisions to ensure there is no evidence of disparate treatment or adverse impact caused by particular personnel practices; (2) if there are disparities, determine whether the practices causing the disparity are essential for the business and/or are job related; and (3) eliminate the practices if they are not job related or replace them with practices that do not cause such a disparity or less of a disparity. Not only will such a strategy protect managers from EEO claims, it also will lead to better and more cost-effective personnel decisions. HRM specialists have the expertise to assist organizations to pursue these strategies.

In general, most would agree that EEO legislation has had positive effects on the occupational status of minorities and females. An additional benefit is that EEO laws and the threat of EEO litigation have helped to get managers to "clean up their act" with regard to personnel policy and practice. While the paperwork may be voluminous and the compliance requirements may seem ominous, there can be little question that EEO laws and regulations have fostered a fairer system of employment opportunity and a more systematic and valid process for personnel decisions. The efforts of managers in this regard are critical to organizational effectiveness and their mistakes can be extremely costly. Personnel practices may be the most heavily regulated area of organizational life today. HRM specialists in staffing issues cannot learn too much about this vital area.

EEO laws have fostered a fairer system

In the following chapters, there will be much more to say about labor legislation and employment practices. The importance of EEO issues for virtually all HRM activities cannot be overstated. Students should consider the implications of the Civil Rights Act, GINA, the ADEA, the PDA, the ADA, and the myriad of other federal, state, and local laws when specific HR functions are covered such as job analysis and design (Chapter 4), planning and recruitment (Chapter 5), personnel selection (Chapter 6), performance appraisal (Chapter 7), training and development (Chapter 8), compensation (Chapter 10), and incentive pay (Chapter 11).

The content of this chapter is more likely to go out of date faster than any of the others in this book. In the volatile area of EEO, current, state-of-the-art knowledge is a competitive advantage for any organization. Make sure your knowledge in this area is indeed current.

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Discussion Questions

1. In terms of EEO, how can customer requirements or preferences be used in the process of hiring people?
2. Given the great economic incentives for plaintiffs' attorneys today, why is the EEOC even necessary? Why can't a person simply be allowed to sue without the involvement of the EEOC?
3. Describe the procedures required to file a discrimination lawsuit under the disparate impact and disparate treatment theories. How is adverse impact determined? Provide a scenario illustrating evidence of adverse impact in an employment decision.
4. Based on your reading of the major EEO laws, what information should an employer include in a personnel policies and procedures manual given to all employees?
5. What has been the impact of the 2008 ADA Amendments Act? Explain your answer.
6. What steps would you take to prevent ADEA cases after a major restructuring or reduction in workforce?
7. Would you be less likely to join an organization that required you to agree to binding arbitration regarding labor disputes and to waive your right to a jury trial?
8. Should Title VII of the Civil Rights Act be amended to include sexual orientation? Justify your position.

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