

THE GEORGIA NON-PROFIT AND LAWS PREVENTING DISCRIMINATION IN EMPLOYMENT

**By: Benjamin D. Briggs
Anna C. Curry
TROUTMAN SANDERS LLP
600 Peachtree Street NE
Bank of America Plaza, Suite 5200
Atlanta, Georgia 30306**

INTRODUCTION

Georgia employers are subject to federal antidiscrimination laws as well as to state and local antidiscrimination laws. In many instances, these laws also apply to Georgia non-profit organizations with employees. In most cases, these antidiscrimination laws govern every aspect of employment -- from making hiring decisions to providing retirement benefits. Thus, non-profit organizations should become familiar with and ensure they comply with these laws to avoid potential liability exposure, costly litigation and damage awards.¹ Toward that end, this Article provides a brief overview of federal, state, and local antidiscrimination laws that apply to Georgia non-profit organizations.

FEDERAL LAW

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Applicability To Non-Profit Organizations

Title VII of the Civil Rights Act of 1964 (“Title VII”) applies to non-profit organizations if the non-profit organization employs fifteen (15) or more employees and is engaged in an industry affecting commerce, Title VII applies.

Status of Volunteers

Volunteers are not “employees” under Title VII and do not count toward the fifteen (15) employee threshold if they are truly volunteers and do not receive compensation for their work. If your organization does not have at least fifteen (15) “employees,” Title VII does not apply.

¹ This Article is a general guideline for Georgia non-profit organizations and should not be construed as legal advice. Non-lawyers should seek the advice of an attorney in all legal matters.

Title VII Protections

Title VII prohibits an employer from discriminating against an individual with respect to hiring, discharge, compensation, promotion, classification, training, apprenticeship, referral for employment, or other terms, conditions, and privileges on the basis of:

- Race
- Color
- National origin
- Religion
- Sex (including pregnancy, childbirth, or related medical conditions)

Title VII also prohibits discrimination or retaliation against an employee who complains of discrimination on any of these bases, files a complaint with the Equal Employment Opportunity Commission (“EEOC”), initiates a lawsuit based on such discrimination, or participates in such a proceeding. Finally, Title VII prohibits harassment based on any of the above-mentioned protected characteristics.²

Religious Organizations and Title VII

Religious corporations, associations, educational institutions and societies are exempt from the provisions of Title VII with regard to discrimination on the basis of religion. Therefore, such organizations are permitted to discriminate on religious grounds in the employment of individuals working in both religious and secular activities. Significantly, however, the exemption for religious corporations, associations, educational institutions and societies does not permit religious organizations to discriminate on the basis of any other protected characteristic under Title VII.

Remedies for Violations of Title VII

Remedies available under Title VII include injunctive relief, affirmative relief in the form of promotions and reinstatement, back pay, orders directing employers to change or abolish employment practices, and reasonable attorney’s fees or costs. Title VII also allows for compensatory and punitive damages (up to \$300,000 in some cases) and jury trials.

² Title VII contains a narrow exception that allows for intentional discrimination on the basis of religion, sex or national origin where religion, sex or national origin is a bona fide occupational qualification (“BFOQ”) reasonably necessary to the normal operation of the particular business or enterprise. Because the BFOQ exception is construed narrowly by courts, employers should tread cautiously and consult with counsel before relying on the exception as a basis for an employment decision. Moreover, with respect to religion in particular, employers rarely rely on the BFOQ exception because another section of Title VII specifically permits religious corporations, associations, educational institutions and societies to discriminate on the basis of religion.

II. THE CIVIL RIGHTS ACT OF 1866 (SECTION 1981)

Applicability To Non-Profit Organizations

The Civil Rights Act of 1866 (Section 1981) applies to all non-profit organizations, regardless of their size.

Section 1981 Protections

Section 1981 prohibits discriminatory employment decisions and harassment based on race. The protections of Section 1981 do not extend to other characteristics protected under Title VII, such as sex or religion.

Remedies for Violations of Section 1981

Remedies available under Section 1981 include injunctive relief, affirmative relief in the form of promotions and reinstatement, back pay, compensatory damages, punitive damages and reasonable attorney's fees and costs. Significantly, compensatory and punitive damages under Section 1981 are not subject to statutory damage caps applicable to damages under Title VII.

III. AGE DISCRIMINATION IN EMPLOYMENT ACT ("ADEA")

Applicability To Non-Profit Organizations

The ADEA applies to non-profit employers if they have 20 or more employees and engage in an "industry affecting commerce." As with Title VII, volunteers are not considered "employees" unless they are compensated for their work. Thus, true volunteers should not be counted toward the 20-employee threshold when determining whether a non-profit is covered by the ADEA.

ADEA Protections

The ADEA prohibits employers with 20 or more employees from discriminating against an individual with respect to hiring, discharge, compensation, promotion, classification, training, apprenticeship, referral for employment, or other terms, conditions, and privileges of employment on the basis of the individual's age, provided that the individual is age 40 or older. The ADEA also prohibits discrimination or retaliation against an employee who complains of discrimination, files a complaint with the EEOC, initiates a lawsuit based on such discrimination, or participates in such a proceeding.

Remedies for Violations of the ADEA

Remedies available to a successful plaintiff in an ADEA case include injunctive relief, affirmative relief in the form of promotions and reinstatement, back pay, orders directing

employers to change or abolish employment practices, and reasonable attorney's fees and costs. Plaintiffs may not seek punitive damages under the ADEA, but if the plaintiff establishes that the employer committed a "willful" violation of the ADEA, the plaintiff is entitled to liquidated damages in an amount equal to the amount of actual damages they recover.

IV. AMERICANS WITH DISABILITIES ACT ("ADA")

Applicability To Non-Profit Organizations

Title I of the ADA directly affects employers and is the focus of this section. Title I of the ADA has the same coverage requirements as Title VII. Thus, the ADA applies to non-profit employers if they have 15 or more employees and engage in an "industry affecting commerce." It does not, however, apply to churches, parochial schools, private membership clubs, and certain other entities. As with Title VII, volunteers are not considered "employees" unless they are compensated for their work. Thus, volunteers should not be counted toward the 15-employee threshold when determining whether a non-profit is covered by the ADA.

ADA Protections

Title I of the ADA requires employers to provide qualified individuals with disabilities an equal opportunity to benefit from the full range of employment opportunities available to non-disabled individuals. Specifically, the ADA prohibits employers from discriminating against persons with disabilities who are able to perform the essential functions of a job, either with or without reasonable accommodation. This protection extends to all aspects of employment, including applications, testing, hiring, assignments, evaluations, disciplinary actions, compensation, promotions, leave, and benefits. The ADA also prohibits discrimination or retaliation against an employee who complains of discrimination, files a complaint with the EEOC, initiates a lawsuit based on such discrimination, or participates in such a proceeding.

In addition, Title I of the ADA requires that covered employers make reasonable accommodations to individuals who are otherwise qualified and able to perform the essential functions of their jobs. The EEOC defines "reasonable accommodation" as "modification or adjustment to a job, the work environments, or the way things usually are done that enables (a disabled person) to enjoy an equal employment opportunity." Reasonable accommodations are required in at least three situations:

- to allow an employee or job applicant to perform the essential functions of a job;
- in application and testing procedures; and
- to permit an employee with a disability to enjoy privileges and benefits that are substantially equivalent to those given to non-disabled employees in similar situations.

Once an individual requests an accommodation, an employer must make a reasonable accommodation for known disabilities of the employee or job applicant unless:

- the accommodation would pose an undue hardship on the employer;
- the accommodation would pose a direct threat to the health or safety of the individual for whom the accommodation is made or others;
- the only available accommodation is to transfer the individual to a fully staffed position; or
- the only available accommodation requires creating a new position for the individual (except in circumstances allowing temporary alternative work).

Remedies for Violations of the ADA

Remedies available under the ADA mirror those available under Title VII, including compensatory and punitive damages.

V. FAMILY AND MEDICAL LEAVE ACT (“FMLA”)

Applicability To Non-Profit Organizations

The FMLA applies to profit and non-profit employers with 50 or more employees who are employed within a 75-mile radius of the worksite where the employee requesting leave works. Only those employees appearing on the employer’s payroll will be considered to be employed each working day of the calendar week, whether or not they receive any compensation for that week. Volunteers do not fall within the definition of “employees” and are not covered under the FMLA, nor do they count toward the 50-employee threshold for determining whether the Act applies.

FMLA Protections

The Family and Medical Leave Act requires covered employers to provide eligible employees with up to twelve (12) work weeks of unpaid leave during a twelve (12) month period for specifically defined situations. Eligible employees are those employees who, as of the date of the commencement of the leave, have worked for the employer for at least 12 months and have worked for at least 1,250 hours during the preceding 12 month period.

The FMLA also ensures that the employees’ benefits will be maintained and that their jobs will be protected while on leave, and that they will not be discriminated against or retaliated against for exercising their rights to FMLA leave.

Remedies for Violations of the FMLA

Under the FMLA, remedies include injunctive relief, lost wages, employment benefits, liquidated damages (where appropriate) and attorney's fees.

VI. EQUAL PAY ACT OF 1963

Applicability To Non-Profit Organizations

The Equal Pay Act of 1963 was enacted as an amendment to the Fair Labor Standards Act of 1938. The EPA applies to non-profit employers engaged in commerce that have "sales made" or "business done" of at least \$500,000.00 annually. Certain exemptions apply for seasonal, non-profit educational centers and volunteers for private non-profit food banks. However, exemptions are narrowly construed. Therefore, non-profit employers should seek advice of counsel in determining whether all or a portion of its operations are exempt from the EPA.

Equal Pay Act Protections

The EPA prohibits an employer from discriminating between employees within any establishment on the basis of sex by paying them different wages for positions that require equal skill, effort, and responsibility, and which are performed under similar working conditions. Under the EPA, "wage" encompasses all forms of compensation; thus, a differential in fringe benefits, when all other compensation is equal, may serve as the basis for a claim.

Significantly, violations of the EPA can also constitute violations of Title VII, which likewise prohibits discrimination based on sex. Indeed, EPA claims and Title VII claims are often asserted together. Title VII's reach is, however, broader than EPA's. Therefore, even in situations where the EPA may not apply to a non-profit employer, Title VII may apply and should be taken into account.

Remedies for Violations of the Equal Pay Act

Remedies include both civil remedies and criminal penalties, although criminal penalties are rarely imposed. Civil remedies can include back pay, liquidated damages, injunctive relief (i.e., a mandate that the plaintiff be promoted), attorney's fees and costs. In some cases, courts will also permit recovery of front pay in lieu of injunctive relief.

VII. PREGNANCY DISCRIMINATION ACT OF 1978

Applicability To Non-Profit Organizations

The Pregnancy Discrimination Act ("PDA") is an amendment to Title VII. In turn, the PDA applies to non-profit organizations in the same circumstances as Title VII -- if the

non-profit is engaged in commerce and has fifteen (15) or more employees. Volunteers who are not compensated for their time do not apply toward the 15-employee threshold.

Pregnancy Discrimination Act Protections

The PDA prohibits employers from intentionally discriminating against pregnant employees or maintaining policies that adversely affect pregnant employees. Significantly, the PDA prohibits discrimination because of pregnancy or child birth only. It does not prohibit adverse employment decision based on employee conduct caused by the pregnancy (i.e., excessive tardiness), although such conduct may be protected under other antidiscrimination statutes. The PDA requires employers to provide pregnant women with the same leave time and health insurance benefits as other workers.

Remedies for Violations of the Pregnancy Discrimination Act

Remedies for violations of the PDA are the same as those permitted for violations of other portions of Title VII.

VIII. THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT ACT

Applicability To Non-Profit Organizations

The Uniformed Services Employment and Reemployment Act (“USERRA”) applies to all private employers in the United States, regardless of size. USERRA defines “employer” as an organization that pays salary or wages for work performed or that has control over employment opportunities, including a person to whom the employer has delegated the performance of employment-related responsibilities. While USERRA makes no specific mention of non-profit organizations, such organizations should assume the Act applies because they are not specifically excluded from the definition of “employer.”

USERRA Protections

USERRA prohibits employers from discriminating or retaliating employees based on service in the uniformed services and ensures that those employees receive certain benefits and reemployment rights, as well as limited protection from termination, upon return from military leave. Under the Act, employers must provide up to five years of unpaid military leave to employees and re-employ them without loss of seniority when they return from active duty. In addition, for a defined period of time after re-employment, an employer may terminate an employee only if “just cause” for termination exists. The Act also prohibits retaliation against individuals asserting their rights under the Act.

Remedies for Violations of USERRA

The remedies available to persons aggrieved by USERRA violations include injunctive relief, wages and other benefits (including overtime and vacation pay) which the employee would have received, reimbursement of court costs and legal fees, and in the case of a willful violation, liquidated damages (double lost pay and benefits).

GEORGIA LAW

Georgia does not have a comprehensive law that prohibits private employers (including non-profit organizations) from discriminating in employment decisions. Thus, subject to only a few exceptions, non-profit organizations can ensure compliance with applicable antidiscrimination laws by following federal laws. Georgia law does, however, prohibit private employers from discriminating on the basis of age and disability, as well as paying unequal pay on the basis of sex. Further, Georgia has its own military leave statute and a law prohibiting employers from penalizing or disciplining employees who miss work to participate in jury duty or other court ordered process requiring the employee's attendance. These laws are summarized in the following sections.

I. AGE DISCRIMINATION

Georgia's Labor and Industrial Relations statute prohibits discrimination by any employer on the basis of age and protects individuals between the ages of 40 and 70. Under this statute, an employer is allowed to implement retirement policies so long as they are not intended to evade the purposes of the statute. The statute does not provide for a private right of action by the aggrieved employee. Instead, an employer found to have violated the statute is guilty of a misdemeanor and shall be subject to a fine between \$100 and \$250.

II. DISABILITY DISCRIMINATION

The Georgia Equal Employment for Persons with Disabilities Code applies to all employers, profit and non-profit, public and private, with 15 or more employees. The Georgia Act follows the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 in prohibiting employers from engaging in discrimination against qualified individuals with a disability. The Act also prohibits retaliation by employers against employees who have filed a charge, testified, assisted, or participated in an investigation, action, or proceeding in opposition to an unfair employment practice. One significant difference between the ADA and the Georgia Act is that the Georgia Act has no administrative prerequisites to filing suit.

Under the Georgia Act, successful plaintiffs may receive injunctive relief, hiring, reinstatement, or promotion, back pay, and court costs and attorney's fees where appropriate. Because Georgia's Equal Employment for Persons with Disabilities Code

closely parallels the ADA, Georgia employers who comply with the ADA also comply with the Georgia Act.

III. WAGE DISCRIMINATION BASED ON SEX

Georgia' Labor and Industrial Relations statute prohibits any employer with ten (10) or more employees that is engaged in interstate commerce from engaging in discriminatory wage practices on the basis of sex. Like the EPA, the Georgia Act prohibits employers from paying wages to employees of one sex at a lesser rate than that paid to employees of the opposite sex for comparable work. This section also prohibits retaliation against any covered employee who complains to his employer, institutes proceedings, or testifies in any such proceeding. Any person violating these provisions may be fined up to \$100. Additionally, an aggrieved employee can recover back pay and attorneys fees under the Georgia Act.

IV. GEORGIA MILITARY LEAVE

Georgia has a military leave statute that provides certain protection to employees who are absent from work due to military leave. Under the Georgia Act, any employee who leaves a position (other than a temporary position) to perform state or federal military service must be restored to that position or a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so. An employee reemployed under the Georgia Act, cannot be discharged or terminated without cause within one year of such reemployment. In this respect, Georgia law provides greater protection than that provided by USERRA. Employees discharged in violation of this law may bring an action for injunctive relief and lost wages and benefits.

V. JURY DUTY

No Georgia employers may discharge, discipline, or otherwise penalize an employee because the employee is absent for the purpose of attending a court proceeding in answer to a subpoena, summons for jury duty, or other court order or process requiring the employee's attendance. An employer that violates this law is liable to the employee for actual damages (i.e., lost pay and benefits) and reasonable attorney's fees.

LOCAL ORDINANCES

The City of Atlanta has adopted ordinances with sweeping antidiscrimination provisions more inclusive than those outlined in federal and state law. The Atlanta Ordinance prohibits discrimination by covered private employers on the basis of an individual's race, color, creed, religion, sex, domestic relationship status, parental status, familial status, sexual orientation, national origin, gender identity, age, disability, or the use of a trained dog guide by a blind, deaf, or otherwise physically disabled person.

The Ordinance applies to all private employers with 10 or more employees, and prohibits discrimination in hiring and employment with respect to the classes of individuals listed above. The Ordinance allows private citizens to file a lawsuit in Atlanta Municipal Court or file a complaint with the City's Human Rights Commission. Employers in violation of the Ordinance may be required to pay attorney's fees and costs of investigation, and may be subject to other fines as appropriate.

CONCLUSION

As detailed above, there are a number of antidiscrimination laws that apply to Georgia non-profit organizations with employees. Many of these laws relate to virtually every aspect of employment, including hiring decisions, promotions, compensation, terminations and benefits. Accordingly, all non-profit organizations should determine whether and to what extent the above-referenced antidiscrimination laws apply to their specific organizations and take steps to comply with all applicable laws.