

Title VII and Self Direction: What You and the Individuals You Serve Need To Know

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When participants select workers to provide in-home services, questions arise about what are and are not legally allowed as criteria for hiring. Below are some guidelines on allowable hiring that may be helpful.

What determines what a person can and cannot do when employing in-home workers?

Title VII of the Civil Rights Act of 1964 (Title VII) generally prohibits discrimination by employers (and those authorized to act under the control of the employer) on the basis of race, color, religion, sex, or national origin. While Title VII is a strictly enforced area of law, the statute and subsequent federal court rulings have provided some guidelines for employers that are helpful here.

Bona Fide Occupational Qualification (BFOQ) & Privacy Concerns

Title VII allows for a defense in discrimination cases where an employer can show that a “**bona fide occupational qualification**” (BFOQ) existed. Specifically, an employer must be able to show that a BFOQ is reasonably necessary to the normal operation of that particular business, and requires the services of a person of a particular religion, sex or national origin. The Supreme Court interprets this exception very narrowly and makes clear that the burden is on the employer to demonstrate that the discriminatory criteria are reasonably necessary to the job. Federal case law has shown that a narrow set of contexts exists in which personal preference may be lawfully considered: privacy, safety, and authenticity.

Of particular interest here is the privacy context. Federal case law and the Equal Employment Opportunity Commission (EEOC) have both recognized the possibility of a sex-based BFOQ premised on the privacy interests of individuals who receive healthcare services. In these cases, the EEOC and courts scrutinize the extent to which the job requires workers to come into physical contact with the individual receiving services, particularly while the individual is undressed or exposed.

How does this affect self direction?

In self direction, it is likely allowable for a participant to insist upon receiving services of a person of a particular sex, but **only** when the worker's job involves issues of intimate personal privacy (e.g., assistance with bathing and showering). If the worker's job does not involve issues of intimate personal privacy, participants are prohibited from discriminating on the basis of any protected class.