PREA LEGAL LANDSCAPE:

Employment Litigation

April 7, 2021

an end to silence | IMPACT/JUSTICE | NATIONAL PREA RESOURCE CENTER

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National PREA Resource Center Mission

The mission of the PRC is to assist adult prisons and jails, juvenile facilities, lockups, community confinement, and tribal facilities in their efforts to eliminate sexual abuse by increasing their capacity for prevention, detection, monitoring, responses to incidents, and services to victims and their families.

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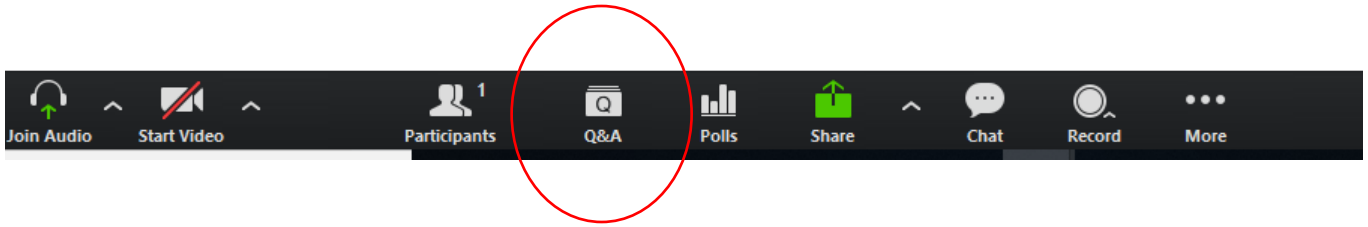

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COVID-19 disclaimer

This webinar is designed to provide guidance and an overview of the PREA Legal Landscape related to Employment Litigation and will not specifically address concerns or answer questions related to COVID-19.

The PREA Resource Center (PRC) recognizes that coming into compliance or maintaining compliance with this Standard and others during the COVID-19 crisis presents specific challenges that you may not have faced before. If you have questions related to compliance during this crisis, please direct them to the PRC via “Contact Us,” and they will be shared with the PREA Management Office (PMO).

Or you may contact the PMO directly at **PREACompliance@usdoj.gov**.

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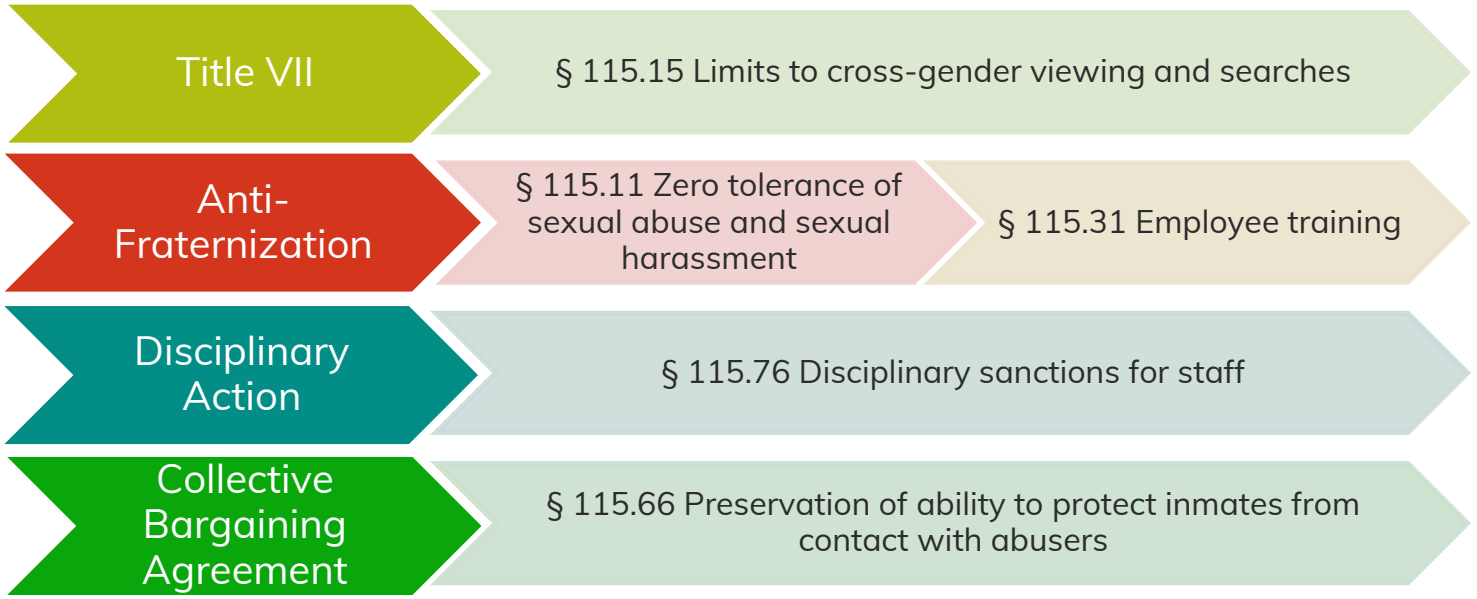
PREA Legal Landscape

Prisoner Litigation

Employment Issues

Criminal Prosecution

Employment Litigation: Topics Discussed



Title VII

Title VII of the Civil Rights Act of 1964

- "[i]t shall be an unlawful employment practice for an employer—

  (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (2012)

- **Therefore, hiring female staff for female units/facilities at the exclusion of men; or forcing female staff to work only in female units/facilities could potentially create legal problems under Title VII.**

- *See also Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

Title VII: BFOQ Exception

Exception to Title VII: the "Bona Fide Occupational Qualification" - BFOQ

- Permits employers to discriminate in hiring or firing decisions.
- Specifically permits an otherwise discriminatory hiring practice when it is "reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1) (2012).

Title VII: BFOQ

Pre-adoption of PREA Standards (before 2012)

BFOQ in favor of male hires:

***Dothard v. Rawlinson*, 433 U.S. 321 (1977)**

- **Facts:** Female worker sued Alabama Dept. of Corrections for violation of Title VII with height, weight and strength requirements and hiring only men for direct supervision of maximum-security male inmates.

- **Findings:** Sex found to be a **BFOQ** for direct supervision positions in Alabama male maximum-security prison, but the court struck down height, weight, and strength requirements.

Title VII: Case Law

Pre-adoption of PREA Standards (before 2012)

BFOQ in favor of female hires:

Everson v. Michigan Dep't of Corr., 391 F.3d 737 (6th Cir. 2004)

- **Facts:** Michigan DOC policy barred male officers from working in certain positions at its female prisons in response to several lawsuits for sexual abuse of female prisoners by male staff. Male officers filed class action suit alleging gender discrimination under Title VII and Michigan's Civil Rights Act.

- **Findings:** The court held that in this case, because of the rampant sexual abuse in Michigan's female prisons, the employment policy barring male guards from working in certain positions was a **BFOQ** and was "**reasonably necessary** to the normal operation of its female prisons."

Title VII: Case Law

Pre-adoption of PREA Standards (before 2012), continued…

But some cases did NOT find BFOQ

Henry v. Milwaukee Cnty., 539 F.3d 573 (7th Cir. 2008)

- The sex-based classification which reduced the number of shifts available to female guards was **not a BFOQ.**
- Ruled it is not reasonably necessary to have same-sex guards on duty in each pod at all times, as long as there was at least one male and one female working at all times in the detention center.

Breiner v. Nevada Dep't of Corr., 610 F.3d 202 (9th Cir. 2010)

- The department's exclusion of men from supervisory positions where they had little direct contact with female inmates violated Title VII because it restricted male employees' opportunities for promotion. The employment policy was **not reasonably necessary** to normal operation of the women's prison.

§ 115.15 Limits to cross-gender viewing and searches

§ 115.15 Limits to cross-gender viewing and searches

- (a) The facility shall not conduct cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners.
- (b) . . . , the facility shall not permit cross-gender pat-down searches of female inmates, absent exigent circumstances. Facilities shall not restrict female inmates' access to regularly available programming or other out-of-cell opportunities in order to comply with this provision.
- (c) The facility shall document all cross-gender strip searches and cross-gender visual body cavity searches, and shall document all cross-gender pat-down searches of female inmates.

§ 115.15 Limits to cross-gender viewing and searches, continued…

- (d) The facility shall implement policies and procedures that enable inmates to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in exigent circumstances or when such viewing is incidental to routine cell checks. Such policies and procedures shall require staff of the opposite gender to announce their presence when entering an inmate housing unit.
- (e) The facility shall not search or physically examine a transgender or intersex inmate for the sole purpose of determining the inmate's genital status. If the inmate's genital status is unknown, it may be determined during conversations with the inmate, by reviewing medical records, or, if necessary, by learning that information as part of a broader medical examination conducted in private by a medical practitioner.
- (f) The agency shall train security staff in how to conduct cross-gender pat-down searches, and searches of transgender and intersex inmates, in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs.

Implications of § 115.15 Limits to cross-gender viewing and searches

Implications of § 115.15

No cross-gender strip or cavity searches.

Male staff do not pat-down search female inmates/detainees, except under exigent circumstances.

- Therefore, female staff are required specifically at female prisons/detention facilities at all times to perform searches of female inmates/detainees.
- **PREA solidifies this BFOQ.**

Female staff can pat-down search male, female, transgender, and intersex inmates/detainees.

- Therefore, women are likely to be universal pat-down searchers.
- PREA makes female staff necessary at male and female facilities.

Title VII: Case Law

***Teamsters Local 117 v. Wash. Dep't of Corr.*, 789 F.3d 979 (9th Cir. 2015)**

- **Facts:** In 2009, WDOC designated 110 positions for female staff to patrol housing units, prison grounds, and work sites to address sexual abuse, inmate privacy, and security.
- In 2011, corrections union filed civil rights claim of sex discrimination under Title VII, claiming that 60 of the 110 female-only assignments discriminated against men.

- **Finding:** Ninth Circuit Court of Appeals in 2015: “We conclude that the Washington Department of Corrections’ individualized, well researched decision to designate discrete sex-based correctional officer categories was justified because sex is a bona-fide occupational qualification ("BFOQ") for those positions.”

Title VII: Case Law

Teamsters Local 117 v. Wash. Dep't of Corr., continued

What does this look like?

- WDOC policy - "It targeted only guard assignments that require direct, day-to-day interaction with inmates and entail **sensitive job responsibilities** such as conducting pat and strip searches and observing inmates while they shower and use the restroom."

- WDOC consulted with experts and research and could point to these efforts in justifying its policy, showing:
  - "objective basis in fact;" and
  - "reasoned decision-making process."

Title VII: Case Law

Teamsters Local 117 v. Wash. Dep't of Corr., continued

- "The BFOQ defense 'may be invoked **only when the essence of the business operation would be undermined by hiring individuals of both sexes**." *Breiner v. Nev. Dep't of Corr.*, 610 F.3d 1202 , 1210 (9th Cir. 2010)

Title VII: Discrimination

Discrimination

- The plaintiff has the burden, …, to present sufficient evidence to establish a prima facie case of discrimination. To do so, she must demonstrate that she:
  - 1) is a member of a protected class;
  - 2) was qualified for [her] job;
  - 3) suffered an adverse employment decision; and
  - 4) was replaced by a person outside the protected class or treated differently than similarly situated non-protected employees.

- If the plaintiff satisfies those criteria, the burden then shifts to the employer, who must provide a legitimate, nondiscriminatory reason for its employment action. Finally, if the employer meets its burden, the plaintiff must show that the given explanation is a pretext for discrimination. Citing *Redlin v. Grosse Pointe Pub. Sch. Sys.*, 921 F.3d 599, 606-607 (6th Cir. 2019).

Title VII: Case Law

Roman v. Cty. of Monroe, No. 18-13548 (E.D. Mich. Dec. 10, 2019)

- **Facts:** Agency has new policy requiring three female guards on each team for each shift at the main county jail.
- Two female corrections officers allege that their workplace assignments constitute unlawful sex discrimination, depriving them of more favorable work assignments at a less stressful prison facility. They are subject to worse working conditions than men who have less seniority.

Title VII: Case Law

***Roman v. Cty. of Monroe*, No. 18-13548 (E.D. Mich. Dec. 10, 2019)**

- **Finding:** County's motion for summary judgment denied.
- "The County has not offered a reasoned explanation why it would be inadequate to have one or two female guards per shift in the main jail, as before, with the remainder available to work in the dormitory."

- Under BFOQ, **is it "reasonably necessary"** to have three female officers instead of two? **For jury to decide.**

Title VII BFOQ: In summary

- **“Bona Fide Occupational Qualification” (BFOQ) -** Specifically permits an otherwise discriminatory hiring practice when it is “reasonably necessary to the normal operation of that particular business or enterprise.”
- Implications of 115.15 Limits to cross-gender viewing and searches: **PREA Standard solidifies this BFOQ.**
- However, an agency must have **an objective "basis in fact"** for "its belief that gender discrimination is 'reasonably necessary'—not merely reasonable or convenient—to the normal operation of its business.”
- It must be “the product of a **reasoned decision-making process**, based on available information and expertise.”

Title VII: Cultural Shift

Teamsters Local 117 v. Wash. Dep't of Corr., represents cultural change affected by PREA:

- Indeed, the startling statement by one of the union's experts underscores the legitimacy of the state's efforts to combat sexual abuse: "Sexual abuse is present in all areas of our society. . .[F]emale inmates must be taught as part of the rehabilitation process to deal [**2] with all abusive staff: males and females. . ."

- **Court: "*We reject any suggestion that female prisoners would benefit from being subjected to abusive prison guards as "part of the rehabilitation process" so that they may better "reintegrate into society."*** *See, e.g., Prison Rape Elimination Act, 42 U.S.C. § 15601(11) ("Victims of prison rape suffer severe physical and psychological effects that hinder their ability to integrate into the community and maintain stable employment upon their release from prison.")"*

Title VII: Discrimination as Symptom of Hypersexual Culture

Discrimination

- 2017 - Title VII Sexual Discrimination Settlement Female corrections officers won $20 million settlement for sexual harassment and abuse at hands of male officers and inmates.
  - ➢ Sexual discrimination under Title VII.
  - ➢ No discipline for male officers who committed acts, encouraged acts of inmates, or retaliated against women for reporting wrongdoing.
- December 2019 – 42 U.S.C. § 1983 case filed by female inmates for sexual abuse by male staff at camp at FCC Coleman.
  - ➢ Hypersexual culture persisting.
  - ➢ Lack of discipline enforced against male officers.
  - ➢ Lack of enforcement of zero tolerance of sexual abuse.

Anti-Fraternization

Anti-Fraternization

- Policies that prohibit employees from engaging in relationships—romantic, financial, or otherwise—with current or former inmates/detainees/juveniles and their families, based on security and safety concerns.

Anti-Fraternization Policies: Examples

Pennsylvania Department of Corrections Code of Ethics

- "There shall be no fraternization or private relationship of staff with inmates, parolees, or members of their families," and that "[e]mployees will promptly report to their supervisor any information which comes to their attention and indicates violation of the law, rules, and/or regulations of the [DOC] by either an employee or an inmate . . ." Lape v. Pennsylvania, No: 05–1094, 157 Fed. Appx. 491 (3d Cir.2005)

Virginia Department of Corrections

- "Improprieties or the appearance of improprieties, fraternization, or other non-professional association by and between employees and inmates, probationers, or parolees or families of inmates, probationers, or parolees shall be discouraged." The agency would typically terminate those who violated this policy. Wolford v. Angelone, 38 F.Supp. 2d 452 (W.D. Va. 1999)

Anti-Fraternization Policies: Example

But,

Delaware Department of Corrections (2002)

- The policy stated, “No staff person shall have any personal contact with an offender, incarcerated or non-incarcerated, beyond that contact necessary for the proper supervision and treatment of the offender. Examples of types of contact not appropriate include, but are not limited to, living with an offender . . . Any sexual contact with offenders is strictly prohibited. Contact for other than professional reasons with the offenders outside of the workplace shall be reported in writing to the employee[']s supervisor.”

- **Struck down as being overly broad and vague**, as the policy would “prohibit all relationships with former inmates or parolees, even those that did not impact on security or operations.” The court also noted that the rule was not uniformly instituted. *Via v. Taylor*, 224 F. Supp. 2d 753, 758 (D. Del. 2002)

Anti-Fraternization

Courts traditionally have stricken down anti-fraternization policies when the facility did not adequately justify the security and safety needs underlying the policy.

Reuter v. Skipper, 832 F. Supp. 1420 (D. Or. 1993)

- **Facts:** A female correctional officer became involved with a former inmate and reported this relationship to her supervisor. The sheriff's office later issued a new rule making it a presumptive conflict of interest for a correctional officer to associate with any person who was imprisoned or convicted of a felony within the past ten years. The officer was terminated from her position, pursuant to this new rule. The officer brought a § 1983 action seeking a declaration that the First Amendment protected her association with the former inmate, and that the county sheriff's work rules were constitutionally overbroad.

Anti-Fraternization

Reuter v. Skipper, 832 F. Supp. 1420 (D. Or. 1993), continued

- **Finding:** The court granted the officer's motion for summary judgment: the court found that **the rule was not narrowly tailored** to meet the interest of "security and protection of the jail facility." The court found it violated Oregon's state constitution because it continued to punish ex-inmates for association. Finally, the **rule was overbroad** in that it prohibited association of employees with anyone who might have at one time been convicted of a crime.

Anti-Fraternization: Trend

The trend:

- Courts rarely find that anti-fraternization policies violate employees' constitutional rights, with most courts holding that correctional facilities' interests in preserving security and order outweigh employees' interest in personal or romantic relationships.

Anti-Fraternization: Case Law

Akers v. McGinnis, 352 F.3d 1030 (6th Cir. 2003)

- The Michigan Department of Corrections (MDOC) had a rule on "Improper Relationships with Prisoners, Parolees or Probationers, Visitors or Families." The Sixth Circuit held that the MDOC's regulation easily met the rational basis test. The court found that **MDOC had a legitimate interest in preventing fraternization** between its employees and offenders and their families, and that **the rule was a rational means for advancing that interest**. Consequently, the rule withstood the constitutional challenge.

Anti-Fraternization: Case Law

Poirier v. Massachusetts Dept. of Correction, 558 F.3d 92 (1st Cir. 2009)

- **Facts:** A female correctional officer employed at the Massachusetts Department of Corrections (MDOC) developed a relationship with a male inmate. Upon the inmate's release, the officer reported to correctional authorities that she would have continuing contact with him. Correctional authorities denied female officer's request for former inmate to reside with her, and later fired the officer for unauthorized contact. The officer claimed that the MDOC and its commissioner violated her Fourteenth Amendment right to intimate association.

- **Finding:** The court granted the MDOC's motion for summary judgment and found the **MDOC did not violate the officer's rights, giving great deference to the maintenance of prison security and order.**

Anti-Fraternization: Case Law

***Lord v. Erie County*, 476 Fed. Appx. 962 (3d Cir. 2012)**

- **Facts:** The warden advised the officer to stay away from his friend in light of the agency's anti-fraternization policy, which stated that "[e]mployees shall not develop a personal relationship with inmates during, or for at least one year after, the inmate's incarceration. (Examples of personal relationships include romance, co-habitation, business dealings or the provision of legal assistance)." The officer brought an action alleging violation of his First Amendment association rights and procedural due process rights.

- **Finding: The court found that the anti-fraternization policy did not violate his First Amendment rights, as mere friendships do not merit constitutional protection.**

Anti-Fraternization: Case Law

Calvin Lewis v. Randy Smith, *individually and in his capacity as Sheriff of St. Tammany Parish*, No. 18-4776 SECTION M (4) (E.D. La. Aug. 02, 2019)

- **Facts**: The Sheriff's Office internal affairs department called Lewis in to discuss the fact that he was living with Doe, a convicted felon, in violation of the anti-fraternization policy. The Sheriff's Office terminated Lewis's employment on May 19, 2017.

- **Anti-fraternization Policy:** The Sheriff's Office's anti-fraternization policy prohibits "fraternization" delineated, in pertinent part, as: romantic or intimate personal or other close relationships between an employee and a known felon, Transitional Work Program inmate, or any incarcerated individual.

Anti-Fraternization: Case Law

Calvin Lewis v. Randy Smith, continued

- Lewis filed a 42 U.S.C. § 1983 civil rights claim, alleging that this policy violates the First, Fifth, and Fourteenth Amendments to the United States Constitution.
  - First – right of association.
  - Fifth – equal protection: racial discrimination.
  - Fourteenth – the anti-fraternization policy is unconstitutionally overbroad and vague in violation of the Due Process Clause.

Anti-Fraternization: Case Law

Calvin Lewis v. Randy Smith, continued

- **Finding: Lewis' case dismissed with prejudice.**
- The Sheriff's Office has **a legitimate interest in regulating the behavior of its employees**, to minimize the risk for potential conflicts of interest and to protect the credibility and integrity of the office.
- First - The policy does not prohibit the relationship itself. …it affects that right only incidentally by requiring the Sheriff's Office employees to relinquish their jobs if they choose to violate the policy.
- Fifth & Fourteenth due process rights - In Louisiana, a public employee is generally considered an at-will employee; therefore, he has not stated an equal protection claim.

Anti-Fraternization: Relevant PREA Policies

§ 115.11 Zero tolerance of sexual abuse and sexual harassment

- (a) An agency shall have a written policy mandating zero tolerance toward all forms of sexual abuse and sexual harassment and outlining the agency's approach to preventing, detecting, and responding to such conduct.

Anti-Fraternization: Relevant PREA Policies

§ 115.31 Employee training

- (a) The agency shall train all employees who may have contact with inmates on:
  - (1) Its zero-tolerance policy for sexual abuse and sexual harassment;
  - (5) The dynamics of sexual abuse and sexual harassment in confinement;
  - (8) How to avoid inappropriate relationships with inmates;
- (b) Such training shall be tailored to the gender of the inmates at the employee's facility. The employee shall receive additional training if the employee is reassigned from a facility that houses only male inmates to a facility that houses only female inmates, or vice versa.

Anti-Fraternization: Relevant PREA Policies

§ 115.76 Disciplinary sanctions for staff

- (a) Staff shall be subject to disciplinary sanctions up to and including termination for violating agency sexual abuse or sexual harassment policies.
- (b) Termination shall be the presumptive disciplinary sanction for staff who have engaged in sexual abuse.
- (c) Disciplinary sanctions for violations of agency policies relating to sexual abuse or sexual harassment (other than actually engaging in sexual abuse) shall be commensurate with the nature and circumstances of the acts committed, the staff member's disciplinary history, and the sanctions imposed for comparable offenses by other staff with similar histories.
- (d) All terminations for violations of agency sexual abuse or sexual harassment policies, or resignations by staff who would have been terminated if not for their resignation, shall be reported to law enforcement agencies, unless the activity was clearly not criminal, and to any relevant licensing bodies.

Anti-Fraternization: Relevant PREA Policies

§ 115.76 Disciplinary sanctions for staff

- Enforce disciplinary sanctions up to and including termination.
- Keep track of lower-level disciplinary sanctions and review for evidence of patterns and practice of sexual misconduct. This history also helps bolster case for termination if need be.

Anti-Fraternization Policies: In summary

Generally, correctional facilities' interests in preserving security and order outweigh employees' interests in personal or romantic relationships.

But,

- A statute or policy **"is unconstitutionally vague if it does not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited."** Rowell v. Pettijohn, 816 F.3d 73 , 83 (5th Cir. 2016) (quotations omitted).

- Courts traditionally have stricken down anti-fraternization policies when the facility did not adequately justify the security and safety needs underlying the policy.

Collective Bargaining Agreements

Collective Bargaining Agreement (CBA)

- Between employers and union employees, public or private.

Procedural Rights for Employees:

- "just cause" for discipline or dismissal
- grievance process
- arbitration process
- union representation at proceedings and investigations
- seniority bidding process for shifts/positions

CBA: Relevant PREA Standard

§ 115.66 Preservation of ability to protect inmates from contact with abusers

- (a) Neither the agency nor any other governmental entity responsible for collective bargaining on the agency's behalf shall enter into or renew any collective bargaining agreement or other agreement that limits the agency's ability to remove alleged staff sexual abusers from contact with any inmates pending the outcome of an investigation or of a determination of whether and to what extent discipline is warranted.

CBA: Relevant PREA Standard, continued

§ 115.66 Preservation of ability to protect inmates from contact with abusers

- (b) Nothing in this standard shall restrict the entering into or renewal of agreements that govern:
  - (1) The conduct of the disciplinary process, as long as such agreements are not inconsistent with the provisions of §§ 115.72 and 115.76; or
  - (2) Whether a no-contact assignment that is imposed pending the outcome of an investigation shall be expunged from or retained in the staff member's personnel file following a determination that the allegation of sexual abuse is not substantiated.

CBA: Relevant PREA Standard, continued

§ 115.76 Disciplinary sanctions for staff

- (a) Staff shall be subject to disciplinary sanctions up to and including termination for violating agency sexual abuse or sexual harassment policies.
- (b) Termination shall be the presumptive disciplinary sanction for staff who have engaged in sexual abuse.
- (c) Disciplinary sanctions for violations of agency policies relating to sexual abuse or sexual harassment (other than actually engaging in sexual abuse) shall be commensurate with the nature and circumstances of the acts committed, the staff member's disciplinary history, and the sanctions imposed for comparable offenses by other staff with similar histories.
- (d) All terminations for violations of agency sexual abuse or sexual harassment policies, or resignations by staff who would have been terminated if not for their resignation, shall be reported to law enforcement agencies, unless the activity was clearly not criminal, and to any relevant licensing bodies.

Categories of Employees

EMPLOYMENT SETTING CLASSIFICATIONS	**PUBLIC –** state and federal constitutional law; state laws re civil service; laws re private employees; due process rights	**PRIVATE –** federal and state anti-discrimination laws; privacy laws; common law doctrines (defamation)
UNION - CBA (most states); State and federal labor laws	**UNION/PUBLIC SECTOR** – CBA with binding interest arbitration (no strikes for public safety workers); discipline for "just cause"	**UNION/PRIVATE SECTOR –** National Labor Relations Act (NLRB); Can have CBA
NON-UNION	**NON-UNION/PUBLIC SECTOR –** see "PUBLIC" above	**NON-UNION/PRIVATE SECTOR –** most commonly at-will employees; May have employment contracts

CBA: Management Rights of Employers

Management Rights of Employers

- Determine the mission, **policies, and procedures.**
- Determine the operations or services to be conducted by employees.
- Determine the size, composition, and direct the work force.
- Hire, assign, **reassign,** evaluate, **transfer,** promote, or retain employees.
- **Discipline or discharge** for just cause.
- Effect a layoff.
- Make, publish, and enforce reasonable rules and regulations.
- **Implement new or improved methods**, equipment, or facilities.

CBA: Case Law

Roman v. Cty. of Monroe, No. 18-13548 (E.D. Mich. Dec. 10, 2019)

- **Facts**: Officers bid on their preferred shifts each year, then county and the officers' union assign shifts pursuant to a collective bargaining agreement. Seniority is one factor in the allocation of shifts.
- The CBA changed in 2016, broadly giving the county "the right to ensure adequate staffing of each gender," instead of requiring "at least two (2) employees of each gender" on each team.
- Plaintiffs assert that a new policy, which requires three female guards on each team for each shift at the main county jail, deprived them of more favorable work assignments at a less stressful prison facility; is **discriminatory** because they are subject to worse working conditions than men who have less seniority; and results in an **adverse employment action.**

CBA: Case Law

Roman v. Cty. of Monroe, No. 18-13548 (E.D. Mich. Dec. 10, 2019)

- **Finding**: Court denied defendant's motion for summary judgment.
- "Ultimately, a jury could conclude that Monroe County does not have a basis in fact for believing that shifts of at least three women in the main jail are reasonably necessary."

- **Still must do due diligence, with research and reasonable basis in fact before changing policies under management rights.**

CBA: Arbitration

Arbitration common in CBA's:

- "The arbitrator will have no authority to add to, subtract from, or modify any of the provisions of this Agreement, nor will the arbitrator make any decision that would result in a violation of this Agreement." (CBA, Washington State and Teamsters Local Union 117)
- **Binding arbitration**, therefore, courts are not prone to overturn decision of an arbitrator.
- An arbitrator's award will be vacated only if it "**indisputably and genuinely is without foundation in, or fails to logically flow from, the collective bargaining agreement.** The test is not whether the reviewing court agrees with the arbitrator's interpretation of the collective bargaining agreement but whether the arbitrator's interpretation and application of the agreement can be reconciled with the language of the agreement."

CBA: Arbitration

Arbitration continued,

- However, courts are evolving on justification to overrule arbitrator's decisions. For example:

Matter of Bukowski v. N.Y. Dep't of Corr. & Cmmty. Supervision, 148 A.D.3d 1386, 50 N.Y.S.3d 588 (App Div, 3d Dept 2017)

- **Facts**: Officer was terminated for kicking an inmate in the testicles, requiring surgical removal. Arbitrator reduced penalty from termination to 120-day suspension. NY Supreme Court vacated arbitrator's penalty, because it "shocked the conscience." Plaintiff appealed.

CBA: Arbitration

Matter of Bukowski v. N.Y. Dep't of Corr. & Cmty. Supervision,

- **Finding**: Appellate court agreed with Supreme Court's decision to allow termination to stand, but not its reasoning. "A court may vacate an award when it violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on an arbitrator's power. . . The **public policy exception** applies when strong and well-defined policy considerations embodied in constitutional, statutory or common law prohibit a particular matter from being decided or certain relief from being granted by an arbitrator." Citing *Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326-327 (1999).

CBA: Arbitration

Matter of Bukowski v. N.Y. Dep't of Corr. & Cmty. Supervision,

- **Finding, continued**: The court further states that plaintiff's behavior "violates a specific, strong and clearly expressed policy against the use of corporal punishment and unjustified, excessive physical force by correction officers against prison inmates." It also cites the Eighth Amendment, NY Constitution, and DOC policies against cruel and unusual punishment—public policies that preclude imposition of such a light penalty as imposed by the arbitrator.

CBA: In summary

- Frame Management Rights for Employers to include developing policies addressing prevention, investigation, and discipline of staff sexual misconduct.
- Frame modified discipline and work rules in terms of clarifying existing rules or presenting “instructive guidelines” regarding work rules already in place.
- Review CBA to ensure management discretion to enforce rules to prevent sexual abuse and misconduct by staff.
- Discipline staff applying sanctions up to and including termination for violating agency sexual abuse or sexual harassment policies, with termination being presumptive for staff who have engaged in sexual abuse.

Toolkit and Resources

Toolkit

- PREA Policies
- State Criminal Laws
- Anti-fraternization Policies
- Collective Bargaining Agreements
- Mandatory Reporting Laws

Resources

- PREA Resource Center
- Project on Addressing Prison Rape
- National Institute of Corrections
- Just Detention International
- RAINN
- Prison Legal News
- Human Rights Watch
- Local News/Social Media

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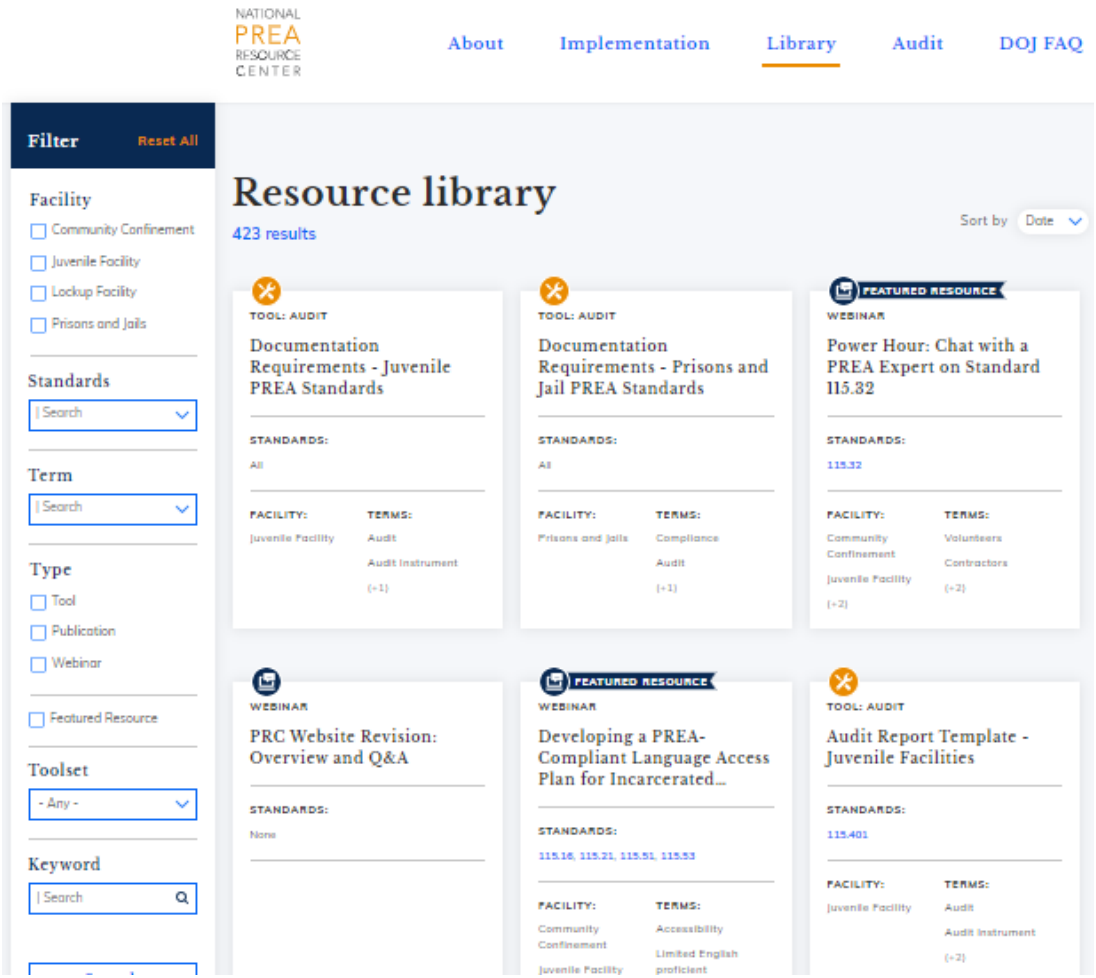

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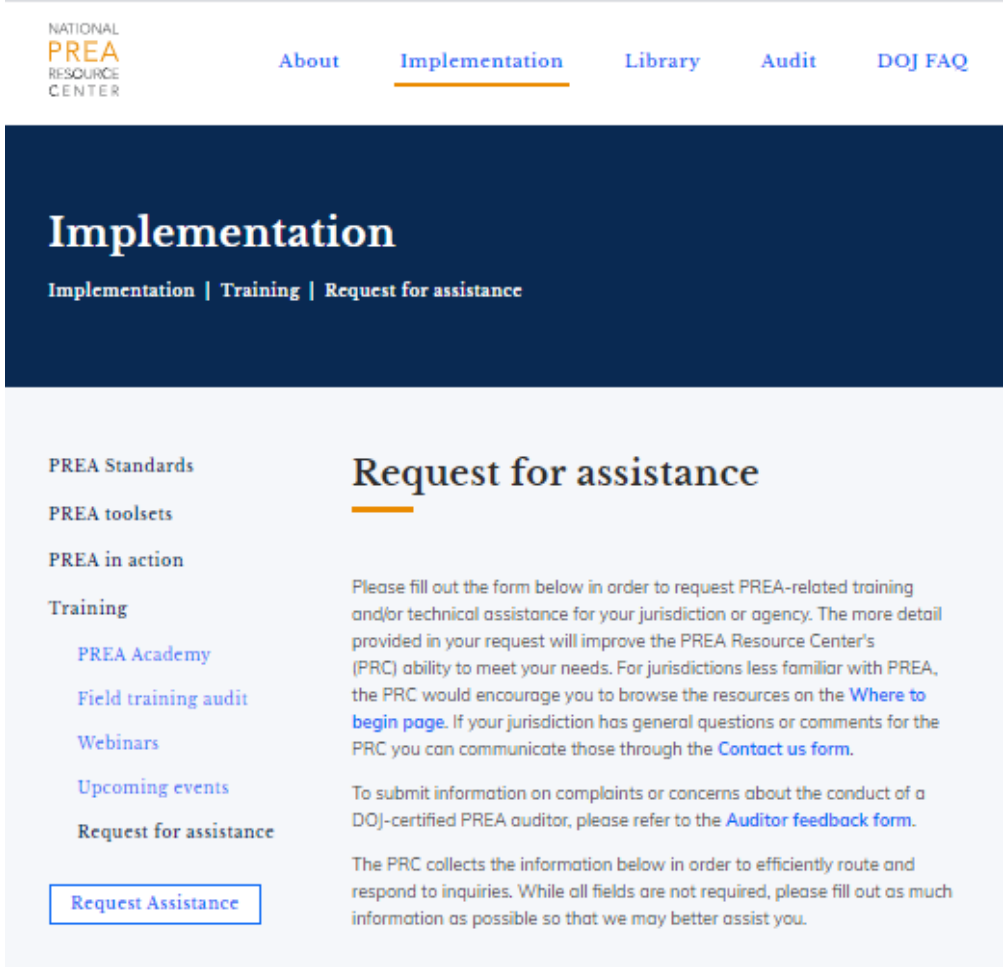

Request assistance

Jurisdictions can request assistance by completing a web form on the PRC website under the “Implementation” tab and clicking “Request for assistance” under “Training”.

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For more information about the National PREA Resource Center, visit www.prearesourcecenter.org.

To ask a question, please visit our Contact us page.

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Thank you!

Good luck!

Notice of Federal Funding and Federal Disclaimer

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