Racial Unrest, LGBTQ+ Ruling, Social Media & Civil Rights Issues

What Employers Should Know and What Employers Can Do to Reinforce Policies Against Discrimination, Mitigate Potential Legal Claims, and Create a More Harmonious Workplace Culture During These Challenging Times



Presented By: Reminger Co., LPA Employment Practices Group

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AGENDA

- Introduction No easy answers or one-size solution.
- Current Issues Catalyst for a renewed emphasis on workplace policies and practices.
- Anti-Discrimination/Harassment Policies Key policies to review and reinforce.
- Social Media/Electronic Communication Legal considerations and best practices.
- Cultural Considerations Rethinking your organization's values and beliefs.
- Key Takeaways What can you start implementing today?



Racial Unrest

- Global response to George Floyd's death and ensuing protests, demonstrations, & unrest

 impacting businesses directly & indirectly.
 - Employees missing work to attend a protest or rally.
 - Increased employee conflict and divisiveness.
 - Heightened awareness and scrutiny of employment practices.
 - Emotional breakdowns, angry outbursts and anxiety.
- How are employers responding? Proactively or reactively?
 - Moment of reflection... and be deliberate with your response.
 - Some employers choosing a neutral stance.
 - Some choosing to relay a strong message.
 - Opportunity to revisit employment policies and practices.

Racial Unrest

- How is the current climate impacting your workplace?
 - Circumstances and situations can range from minor disputes to outright rage and threatening behavior.
 - Employers are strongly encouraged to address these issues *early and directly* to defuse escalation.
 - Recent real-life example: Manager is supervising two employees; one is an employee who
 spent several days protesting and the other is married to a police officer; there is an
 argument that breaks out in the workplace and then continues via texts and social media
 posts. What should the manager do? To what extent should the manager get involved?
 Are there legal implications and risks?

*At the very least, ensure your policy against discriminatory or harassing conduct is emphasized and employees know who to go to with an issue.



L.G.B.T.Q. Ruling

- The U.S. Supreme Court ruled in a landmark case on June 15, 2020 that Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination, applies also to discrimination based on sexual orientation and gender identity.
 - The *Bostock v. County of Georgia* concerned a government worker named Gerald Bostock who was fired for joining a gay softball league. He argued that this was illegal based on the Title VII.
 - The Supreme Court heard Mr. Bostock's appeal along with Don Zarda, a skydiving instructor who lost his job after saying he was gay, and Aimee Stephens who was fired from a funeral home for being transgender.
 - Justice Neil Gorsuch wrote in the majority opinion that discrimination "on the basis of sex" clearly covers gay and trans people.

L.G.B.T.Q. Ruling

What does this mean for employers?

- It means that LGBTQ+ employees now have explicit protections under federal law.
- It means that a company or government agency that discriminates against an employee based on sexual orientation or gender identity can face the same legal penalties as they would in other cases of discrimination.
- Depending on the size of the employer, compensatory & punitive damages can generally range from \$50,000 to \$300,000 *exclusive* of lost wages.

*If you haven't done so already, you will want to update your EEO policies!



BEST PRACTICE TIP:Employers should update

Employers should update their employee handbooks to include sexual orientation and gender identity. *Management training is imperative to awareness and reducing legal claims.*



Equal Employment Opportunity Policy

- Send out communication addressing employee issues and concerns; reminder of the company's EEO policy and that it is taken seriously.
- Urge employees to treat each other with dignity and respect; encourage employees to come forward without fear of reprisal.
- Review current employment practices to ensure all facets of the employee life cycle are aligned with EEO philosophy:
 - Recruitment, interviewing, hiring and onboarding
 - Performance management/corrective action
 - Advancement opportunities/development
 - Pay practices and benefits administration
 - Employment termination practices

BEST PRACTICE TIP:

Avoid perceptions of unequal treatment or disparate impact.

Be sure you base every employment decision on a business-related, non-discriminatory reason AND take all complaints seriously.



Anti-Discrimination/Harassment Policy

- Revisit the wording and content of your anti-discrimination and harassment policies & procedures:
 - Is it clear and understandable? Are all protected classes included?
 - Do you include specific examples of unacceptable conduct?
 - Are their multiple managers listed to whom an employee can file a complaint?
 - Are there clear guidelines on how a "full and fair" investigation will be handled?
 - Does the policy cover the actions of third parties (vendors, guests)?
 - Is there an anti-retaliation clause?

*Require employees to acknowledge their understanding of the policy!



BEST PRACTICE TIP:

Discrimination and harassment charges are rising. Your best defense is to have well-written policies and well-trained managers. Consistent treatment and enforcement will reduce risks.

Joking is not a viable defense (it's the perception, not the intent that matters).



Electronic Communications

- Social media posts, tweets, texts and emails have opened a pandora's box of new and challenging issues ("textual harassment").
 - Most employment discrimination, harassment, & retaliation claims involve some type of electronic communication or evidence.
- When does digital communication cross the line?
 - Expression of opinion / viewpoint?
 - Racist, Sexist, Xenophobic, Homophobic, Hostile, Harassing?
 - Negative PR
 - Discipline-worthy?
 - Unlawful liability risk?

Electronic Communications

Employer Confusion / Reluctance:

- Regulating & Disciplining Off-Duty Conduct?
 - Some States expressly protect off-duty lawful activity, speech, political activity
- First Amendment / Freedom of Expression?
 - Generally does not extend to private sector workplace
- Addressed by Existing Policy?
 - Need not be Social Media policy per se
 - Relaxed NLRB standards regarding civility, insubordination, defamation, disloyalty, disruptive behavior

* NO One-Size-Fits-All - details matter



National Labor Relations Act

- Section 7 provides legal protection for engaging in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."
- Can an employee be disciplined for sharing personal views on social media? It depends...
 and proceed with caution.
- Stop and Consider:
 - Impact of the behavior/statements upon the workplace.
 - Does it violate company policy?
 - Is the subject/topic legally-protected?
 - So egregious to remove protection?

BEST PRACTICE TIP:

Speaking out about wages / working conditions (discriminatory conduct, lack of diversity, unequal pay, safety issues) alongside fellow employees is considered protected, concerted activity and *employers* should consult with counsel before taking any adverse employment actions.



Social Media Policy

- What should it include? Not too much... but just enough.
 - Establish clear boundaries for proper & improper use
 - Establish reasonable guidelines based on genuine business-related concerns
 - Address concerns precisely & avoid ambiguity by clearly defining prohibitions (trade secrets, confidential information, etc.)
 - Include numerous and specific examples for context
 - Incorporate existing policies by reference
 - Establish consequences for violations

BEST PRACTICE TIP:

Set ground rules for electronic communication. What is considered unacceptable conduct? *Train employees to understand the ramifications of their postings (digital footprint, reputational damage, legal risks).*



Hoodsjot

BEST PRACTICE TIP:

Remember to review state law protections (some states protect political views, for example). Your Social Media Policy should balance the protection of individual liberties and your business interests.







facebook

Workplace Culture

- What it means and why it matters?
- There are no one-size-fits-all solutions.
- Make sure your employment practices are aligned with your employment policies (consistency is key).
- Leaders should clearly define, communicate and model the types of behaviors they want employees to emulate.
- Use care and candor when dealing with conflict (get a neutral third-party involved if necessary).
- Keep an active pulse on employee perceptions and concerns.

*Take time to reflect on your company's core values and how you can create a more positive and productive culture.





Five Key Takeaways

- 1. Regularly communicate your expected standards of conduct (get ahead of any potential conflict in your workplace).
- Create clear EEO and Social Media policies (or revise/reinforce already existing ones).
- Make sure managers and supervisors are trained on handling issues and complaints on the front lines.
- 4. Get involved early, listen to concerns, take complaints seriously and follow policies consistently.
- 5. Consult counsel before taking action against an employee for social media posts.

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Future Presentations

Tues. July 14, 2020 @ 2:00 pm

Paid Leave Obligations for Public & Government Employers – What You Need to Know Patrick Kasson & Thomas Spyker

Tues. July 28, 2020 @ 2:00 pm

Workers Compensation Considerations for COVID-19
in Ohio, Kentucky, & Indiana
Ronald Fresco, Mark Bush, & Alex Beeman

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