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# Promoting Workplace Diversity Without Inadvertently Violating Employment Laws

Webinar – July 7, 2020

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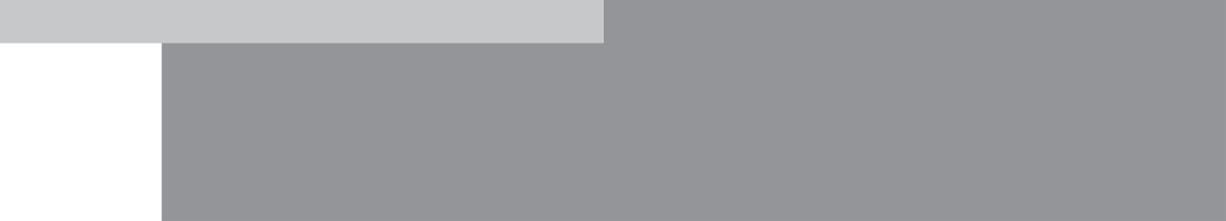
# As big corporations say 'black lives matter,' their track records raise skepticism



A portrait of George Floyd is seen at a peaceful march after curfew in New York on June 6. (Holly Pickett for The Washington Post)

# Overview

- Legal Background
  - Equal Employment Opportunity Laws
  - Laws that Impact Social Media
- Scenarios
- Questions



# Legal Background: Equal Employment Opportunity Laws

# Legal Background

- Discrimination based on race (and other protected categories) is prohibited under:
  - **Title VII of the Civil Rights Act of 1964** (42 US Code Section 1981)
  - **New York State Human Rights Law** (New York Executive Law Section 296) and
  - **New York City Human Rights Law** (New York City Administrative Code Section 8-107).
- Race-based discrimination is the unfavorable treatment against a job applicant or employee based on his/her race or color (including race-related characteristics such as skin tone, hair texture or facial features).

# Disparate Treatment v. Disparate Impact

- **Disparate treatment:** Employer intentionally takes protected status into consideration when making employment-related decisions. Disparate treatment includes harassment claims.
- **Disparate impact:** Employer adopts a policy or practice that seems neutral and nondiscriminatory but has a disproportionately negative effect on members of a protected class.
- ***Ricci v. DeStefano*, 557 U.S. 557 (2009):** “We conclude that race-based action like the City’s in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action [of engaging in disparate treatment by rejecting the results of a firefighter examination], it would have been liable under the disparate-impact statute.

# Reverse Discrimination



“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”

*Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007) – NOT A TITLE VII CASE

- Courts have held that Title VII and other anti-discrimination laws also protect members of majority or historically privileged groups.
- Remember Ricci v. DeStefano
- Google example

# Affirmative Action

- Affirmative action plans may be required (government contractors) and/or permitted in certain circumstances. However, affirmative action plans cannot set quotas or reserve employment opportunities exclusively for certain groups.
- Supreme Court: “While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota[.]” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)

# Voluntary Affirmative Action

- The Supreme Court, *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979), allows voluntary affirmative action (i.e., limited race-conscious actions) if:
  1. The preferences are intended to “eliminate conspicuous racial imbalances in traditionally segregated job categories” (i.e., must be intended to remedy discrimination rather than promote diversity)
  2. The rights of nonminority employees are “not necessarily trammled,” and
  3. The preferences are temporary in duration.
- Examples of NFL’s Rooney Rule, Mansfield Rule (never challenged).
- Consider recent cases involving racial preferences in higher education; unclear how it applies to employment law.
- Tread very carefully (and with legal counsel).

# What You Can Do

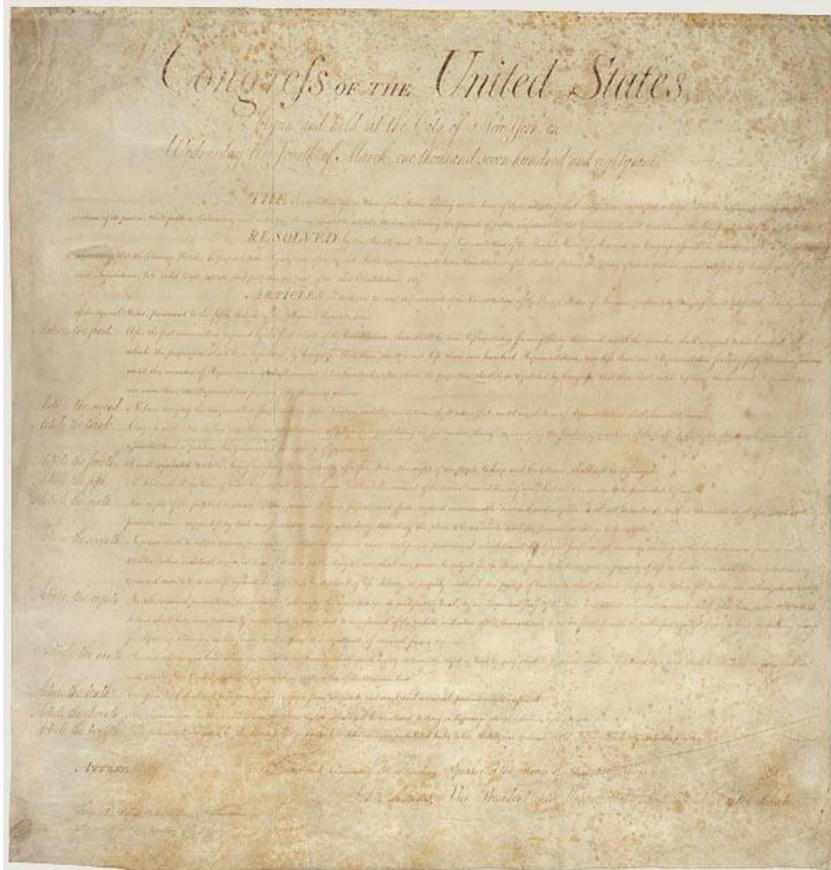
- Try to focus on process, not outcomes (although it may be helpful to create thoughtful goals).
- Carefully consider what employment practices might be contributing to any lack of diversity within the company (e.g., you give preference to employee referrals but most employees are white, which may limit diverse referrals).
- Review job descriptions to ensure that “minimum requirements” are actually required.
- Hiring: Focus on outreach, recruiting, training, etc.; expand recruiting sources; involve more diverse groups in hiring and recruiting process.
- Retention and Promotion: Implement programs to provide mentorship and development opportunities; provide thoughtful training programs; regularly check in with employees.

# What You Shouldn't Do

- Do not set rigid quotas.
- Do not express racial (or other protected) preferences in job postings.
- Do not make work assignments based on race or other protected characteristics, even at a client's request.
- Use caution when relying on employment tests.

# Legal Background: Laws That Impact Social Media

# First Amendment



“Congress shall make no law...abridging the freedom of speech, or of the press...”

In general, First Amendment does not apply to private employers or employees

First Amendment protects right of public employees to speak as citizens about matters of public concern. This right is balanced against the right of a public employer to control its workforce.

# National Labor Relations Act

Section 7: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other **concerted activities** for the purpose of collective bargaining or other mutual aid or protection...”



# Anti-Retaliation and Whistleblower Protections

Most Employment Laws Contain Prohibitions on Employer Retaliation:

- **Title VII:** prohibits an employer from taking an adverse action against an employee for engaging in legally protected activity.
- **ADA/ADEA/FMLA:** prohibits an employer from taking an adverse action against an employee or applicant because s/he has opposed a practice that is unlawful under the ADEA/ADA/FMLA.
- **OSHA:** prohibits an employer from taking an adverse action against an employee who complains about unsafe or unhealthful conditions.
- **New York Labor Law 740:** prohibits an employer from taking adverse action against an employee who reports the employer's fraudulent conduct.

Social Media Posts May Also Implicate Whistleblower Laws.

# New York Labor Law 201-d

Prohibits employer from refusing to hire or employ, or terminating or otherwise discriminating against an individual because of his/her...

- (1) political activities
- (2) legal use of consumable products
- (3) legal recreational activities

...outside of working hours, off of the employer's premises and without use of employer's equipment or other property.

"Political activities" shall mean (i) running for public office, (ii) campaigning for a candidate for public office, or (iii) participating in fund-raising activities for the benefit of a candidate, political party or political advocacy group.

"Recreational activities" shall mean any lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material.



# Exceptions to 201-d

Exceptions: Among other things, the law does not protect activities:

- that create “a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or **business interest.**”
- “where the individual's actions were deemed by an employer or previous employer to be illegal or to constitute habitually poor performance, incompetency or misconduct.”

**WARNING: THERE IS ALMOST NO CASE LAW ON HOW 201-d APPLIES TO SOCIAL MEDIA**

# Scenario 1

- Your boss comes to you and says, “I saw that BigCo, Inc. just put out a statement in support of Black Lives Matter. Send something similar out from our company by the end of the day.”

# Points to Consider

- Remember that you already have policies and postings about equal employment opportunity.
- If you want to make a separate statement, remember to:
  - Make sure the message is genuine. Will employees see it as being consistent with actual company history and practices?
  - Who is your audience?
  - Be careful to not make promises you can't keep (or that you are prohibited from making under applicable law).

# Scenario 2

- You discover that a White employee has posted a racist comment on his Facebook page in which he uses the N-word to refer to Black protesters. The post was made during non-work hours.
- What about:
  - Two weeks later, a Black employee uses the same word in a social media post.
  - The post doesn't use the N-word but still disparages Black people for not “assimilating” as well as other ethnic groups.

## Points to Consider

- Review employment policies including social media and non-harassment policies. Can they be read to cover out-of-work conduct?
- Remember that you are setting a precedent with each decision you make.
- Consider context.
- Be thoughtful about how you document investigations, discipline and termination.

# Scenario 3

- You discover that an employee has posted a comment on his Facebook page stating “Black Lives Matter!” The post was made during non-work hours.
- What about:
  - A White employee responds with “All Lives Matter!”
  - “My company is racist. All of management is White, and Black employees never get promoted.”

## Points to Consider

- Although this type of “political activity” (“Black Lives Matter!”) is probably not protected under Labor Law 201-d, tread very carefully when making employment decisions based on political speech or preferences.
- Look for opportunities to train/educate employees rather than discipline.
- Remember protections under NLRA and Title VII (and other non-retaliation/whistleblowing protections).

# Scenario 4

- Employee appears on local news yelling “White Power!” at a group of protesters.
- What about:
  - Employee’s statement is part of a campaign speech.
  - Statement is “Black Power!”
  - Employee is arrested for defacing a statue of a former slaveowner.

## Points to Consider

- Political activity is protected. What is political?
- Be careful about the precedents that you set.

# Scenario 5

- In a company leadership meeting, the CEO states, “We need to stop just paying lip service to diversity. We need to hire more people of color. By the end of the year, 50% of all new positions must be filled by people of color.”
- What about:
  - An resident of a nursing home refuses to allow Black nursing staff to work with him.
  - An important customer says that she wants her account staffed exclusively by people of color.

## Points to Consider

- Quotas are prohibited. If you set goals, be careful that they aren't treated like quotas. Train those making hiring decisions about the distinction.
- Race discrimination based on customer preference is still illegal race discrimination.

# Scenario 6

- A Black applicant and a White applicant have identical experience and qualifications. When time to make the final decision arrives, the hiring manager says, “All things being equal, I think it is preferable to hire the Black applicant for diversity purposes.”

# Additional Best Practices

- Review the company's anti-discrimination/harassment policies. Are they simply boilerplate? Is that enough?
- Consider providing anti-discrimination/harassment training and include race and other protected categories in any current harassment training program. Is your training effective?
- Consider holding separate sessions for supervisors, managers and individuals involved in hiring so they can understand how to navigate relevant issues and promote diversity in the workplace.
- Make concrete, actionable plans to promote diversity in the workplace, especially including plans to expand recruiting pool, training opportunities, mentorship, etc.
- Create and maintain an organized and consistent discrimination complaint review and investigation process.

# Questions