

Diversity Initiatives and Benevolent Employment Discrimination: Mitigating Claims for Well-Intentioned Companies

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Benevolent Discrimination is Still Illegal and Other Unwitting Ways Employers Get in Trouble

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What is “Benevolent Discrimination”?

- Discrimination typically thought of in context of invidious, negative, malevolent, oppressive, or unfair treatment of traditionally disadvantaged groups
- *Benevolent* discrimination is usually “well-intentioned” efforts to address overtly odious discrimination or “help” people who are perceived as weaker, needy, or incapable.
 - May still come from a superior/inferior framework, so benevolent discrimination has potential to perpetuate stereotypes
 - Varies on subjective perspectives (political, cultural, experiences) and intended results
- Laws, though, prohibit making employment decisions based upon protected characteristics, so decision makers must consider other angles

Civil Rights Statutes Prohibiting Discrimination

- **Title VII**
 - Title VII prohibits employment practices that discriminate because of race, color, national origin, sex (including pregnancy), and religion
 - Employment policies and practices may be discriminatory under Title VII based on disparate treatment or disparate impact
 - Even a “neutral” policy can be discriminatory if it has a disparate impact
 - Who is covered?
 - Title VII applies to employers with 15 or more employees
 - Title VII does not cover independent contractors
 - States laws may differ; some state laws largely mirror federal law, while other states don't have any protections for certain categories

Potential Violations Disguised as Benevolent Actions

Gender Discrimination

- Interview questions referencing marriage, child plans, childcare, etc.
- “Providing the opportunity” to women to organize lunches and events
- Mansplaining
- “Permitting” women to work from home during Covid but expecting men back in the office
- “Protecting” women from challenging assignments or promotion under the assumption that it would be too stressful of interfere with family commitments
- “Light duty” for the pregnant woman

Civil Rights Statutes Prohibiting Discrimination

- **The Pregnancy Discrimination Act (PDA)**
 - Forbids discrimination based on pregnancy when it comes to any aspect of employment
 - This includes hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment
 - An employer that allows temporarily disabled employees to take disability leave or leave without pay must allow an employee who is temporarily disabled due to pregnancy to do the same
 - Who is covered?
 - Employers with more than 15 employees
 - Pregnant employees may have additional rights under the Family and Medical Leave Act (FMLA)
 - There are 47 states (and D.C.) that have some form of legal protections for employees against pregnancy discrimination

Potential Violations Disguised as Benevolent Actions

Pregnancy Discrimination

- Not Providing Reasonable Accommodations
- Reassigning a pregnant employee to a less stressful job; as long as the employee can perform her job, she must be allowed to do so
- Failing to promote an employee who has recently given birth because the company doesn't want to interfere with her family life

Potential Violations Disguised as Benevolent Actions

Religious Discrimination

- Not everyone wants to be saved
- Asking about denomination or attendance
- Mandated vaccinations

Potential Violations Disguised as Benevolent Actions

Racial and National Origin Discrimination

- Pure race-decisions - “reverse discrimination” is still discrimination
- Certain types of training - Critical Race Theory, White Fragility
- Team-building bad ideas
- Conversational micro-aggressions
- Compliments on an accent
- Asking someone “where are you from”

Civil Rights Statutes Prohibiting Discrimination

- **Age Discrimination and Employment Act (ADEA)**
 - ADEA protects certain employees 40 years of age and older from discrimination
 - Cannot discriminate on the basis of age in hiring, promotion, discharge, compensation, or terms, conditions or privileges of employment
 - It is unlawful to harass a person because of his or her age
 - An employment policy or practice that applies to everyone can be illegal if it has a negative impact on employees age 40 or older
 - Who is covered?
 - Employers with 20 or more employees
 - Does not apply to independent contractors
 - State law analogs

Potential Violations Disguised as Benevolent Actions

Age Discrimination

- Requiring older employees work from home due to health concerns with COVID-19
- Mandatory additional technology training
- Asking about retirement

Civil Rights Statutes Prohibiting Discrimination

- **Americans with Disabilities Act (ADA)**
 - The ADA prohibits discrimination on the basis of disability
 - Prohibits discrimination in recruitment, hiring, promotions, training, pay, social activities, and other privileges of employment.
 - Restricts questions that can be asked about an applicant's disability before a job offer is made
 - Requires that employers make reasonable accommodation unless it results in undue hardship.
 - “Regarded/perceived as” claims are just as actionable as actual discrimination under the ADA
 - Who is covered?
 - Employers with more than 15 employees
 - May be additional state law considerations

Potential Violations Disguised as Benevolent Actions

Discrimination Based on a Disability

- Getting an impaired employee “help”
- Assuming too much about cause of performance issues
- Keeping someone home during Covid
- Sharing protected health information
- When the cure is worse than the disease...uncomfortable accommodations

COVID-19 Considerations

- Workplace policies intended to protect people with medical conditions, older workers, and people who are at higher risk
 - Must apply equally to all employees
- Direct threat analysis
 - Weighing of employer location, employee job duties and likelihood of exposure v. workplace safety/accommodations for telework, leave or reassignment
 - Difficult, risky, and expensive needle to thread in any situation
- Caregivers/Family responsibilities
 - Some protected, some not
 - Draw only appropriate distinctions

Social Justice Issues

BLM, #METOO, and Other Social Justice Issues

- Wade carefully into Diversity and Sensitivity Training
- Encouraging dialogue may be a bad idea... this is not the employer's responsibility and may lead to conversations that are asking for trouble
- Making corporate statements - must be consistent with company culture and keeping in mind the sensitive and polarizing nature of the issue
- Allow for flexibility outside of work for personal views, but remind folks that work is for work
- Emphasize common goals - mission statements, values, performance

Other Landmines

- Subjectively good intentions can spark employment law trouble in contexts outside of discrimination and harassment
- Employment law prescriptions aren't always consistent with business (or common) sense

Fair Labor Standards Act (FLSA) and Exempt Status

- The FLSA establishes standards for minimum wage, overtime pay, recordkeeping, and youth employment standards
- Exempt employees are not subject to the minimum wage and overtime pay requirements
 - Exempt = bona fide executive, administrative, professional and outside sales employees; salary basis at not less than \$684 per week
 - Job titles and descriptions do not determine exempt status. An employee's specific job duties and salary must meet all the requirements

Fair Labor Standards Act (FLSA) and Exempt Status

- Notable Quotables....
 - “They want to be paid a salary”
 - “They’re sales”
 - “That’s the industry standard”
 - “They won’t keep their time”
 - “They won’t clock out for lunch”/ “We automatically deduct their lunch hour”
 - “They’re happy with straight time”
 - “I told them not to work overtime”
 - “They like getting ahead on the weekend”
 - “I don’t pay travel time”
 - “I pay their room and board”
 - “No, that’s a bonus” or “It’s discretionary”
 - “It’s a fine”

Fair Labor Standards Act (FLSA) and Contractor Status

- “Contractor” is not a matter of agreement
- On January 6, 2021, the Department of Labor (Department) announced a final rule clarifying the standard for employee versus independent contractor under the FLSA. The effective date of the final rule is March 8, 2021
- Reaffirms an “economic reality” test for determining independent contractor and FLSA employee
- The actual practice of the worker and the potential employer is more relevant than what may be contractually or theoretically possible

DOL's 5 Factor Test

- Identifies and explains two “core factors” that are most probative:
 - The nature and degree of control over the work
 - Worker’s potential for profit or loss
- Identifies three other factors that may serve as additional guideposts in the analysis
 - The amount of skill required for the work
 - The degree of permanence of the working relationship between the worker and the potential employer
 - Whether the work is part of an integrated unit of production

Repercussions of Misclassification

- Misclassification raises all sorts of issues
 - Workers' Comp
 - Unemployment
 - Taxes and withholding
 - Personal liability
- The reason you want “contractors” is often the reason they’re really employees and/or it’s not necessary to solve your issue.
 - “We don’t want to pay taxes”
 - “We don’t want to pay overtime/they’re fine with straight-time”
 - “I want to be able to fire them quickly (and avoid unemployment)”
 - “It’s as short-term project”

Biden's Plans

- ABC and increased enforcement efforts
- Joint enforcement with NLRA, DOL, EEOC, and IRS
- Overtime regulation?

Equal Pay Act (EPA)

- The EPA is part of the FLSA and is enforced by the EEOC
 - prohibits sex-based wage discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort and responsibility under similar working conditions
- Virtually all workers are covered by the EPA
- Both the EPA and Title VII laws prohibit wage discrimination based on gender, but Title VII goes beyond ensuring equal pay to barring discrimination in all aspects of employment
- Use of salary history is going the way of the Dodo...

Reducing Discrimination in the Workplace

- Best practices for HR policies
 - A solid culture built on trust and common goals is the best policy
 - Policies that don't fit the place or the practice are doomed
 - Uniform and consistent enforcement of policies a must
 - Standardize and objectify performance data to remove subjectivity
 - Non-threatening promotions of diversity's benefits

Reducing Discrimination in the Workplace

- Best practices for HR policies
 - Emphasize recruiting in areas likely to yield diverse candidates, make sure job criteria and requirements are consistent with business necessity, and emphasize different perspectives
 - Apply diversity criteria that are not protected characteristics...economic status, geographic location, other demographics
 - Search out policies and perks to encourage diversity
 - Family-friendly HR policies, such as flexible work arrangements
 - Childcare tax programs
 - Student loan forgiveness
 - Reward managers who promote and sustain the mission