

Full Steam Ahead: *Keeping the Track Clear in Today's Divided Workplace*



2022 Employment Law Seminar



Speaker Introductions



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Divided World. Divided Workplace?



Divided World. Divided Workplace?

- Current Landscape
- Diversity, Equity, and Inclusion Programs
- The Impact of “Thinking Different”



Setting the Table

Supporting a Positive Environment With Policies and Practices



- Professionalism/Code of Conduct
- EEO and Nondiscrimination
- Workplace Accommodations
- Workplace Violence
- Political Activities
- Limitations on Solicitation
- Use of Company Facilities and Equipment

Setting the Table

Supporting a Positive Environment With Policies and Practices

Policies should be clear they are not intended to interfere with protected speech and activities, and enforcement efforts should likewise respect employees rights in this regard:

- NLRA acknowledgment/right to concerted activity
- Protected communications related to:
 - Sexual harassment and sexual assault
 - Reporting unlawful conduct

Going off the Tracks

The Political Activist at Work

- You open up your morning email to find that your employee, Kelly, has sent an all-staff email advocating for a local ballot measure, including how to donate to the cause.
- Your momentary hope that no one will respond is dashed when you start seeing the responses come in fast and furious, with strong opinions on all sides.
- It's getting divisive and personal, and no one is getting any work done.
- What can you do?



Going off the Tracks

The Political Activist at Work



- Adopt workplace policies that limit political activity to employee's personal time and not during work hours or through use of company resources.
- Also consider application of professionalism, acceptable use, and non-solicitation policies.

Going off the Tracks

The Political Activist at Work

- But be careful!
 - Enforce consistently
 - Consider and apply labor laws and NLRA regulations
- Consider risks:
 - Discrimination claims
 - Morale
 - Reputational issues



Going off the Tracks

The Political Activist at Work



- Special considerations for public employers:
 - First Amendment protections
 - Restrictions on use of public resources for political activity

Going off the Tracks

The Socially Conscious Employer

Considerations when the employer is the speaker:

- Determine who can speak on behalf of the employer.
- Affirm company values, and show support for individuals impacted by current events.
- Avoid definitive statements about unfolding/unclear events—don't place blame too soon.



Staying Between the Rails

The Crossing Between Religion and Work

- Consider the recent example of the High School Football Coach who began praying at the 50 yard line after the game:
 - Some claimed their students felt pressure to participate in order to get playing time; he claimed it was totally personal and after his duties were done.
 - The School worried that by allowing it to occur it was in violation of the “Establishment Clause” which prohibits the government from endorsing religion.



Staying Between the Rails

The Crossing Between Religion and Work

- Title VII and its state equivalents prohibit employers from using religion, and a person's individual religious beliefs, as a basis for any employment decisions.
- They also require that employers reasonably accommodate an employee's religious belief or practice where it may conflict with a work requirement, so long as doing so does not pose an undue hardship.
- This typically includes allowing reasonable religious speech or expression, subject to hardship limitations.

Staying Between the Rails

The Crossing Between Religion and Work

- Examples of potential religious accommodations:
 - A Catholic employee requests a schedule change so they can attend church services on Good Friday.
 - A Muslim employee requests an exception to the dress and grooming code allowing her to wear her headscarf.
 - An employee claims that they can't comply with a vaccine requirement because it contradicts their religious beliefs.



Staying Between the Rails

The Crossing Between Religion and Work

- In this context, an undue hardship exists if the **employer can prove** an accommodation would be more than a *de minimis* cost or impact under Title VII and most state laws.
- Note, Oregon follows statutory undue hardship test. See, ORS 659A.121.
- Examples:
 - Many employers were not able to accommodate exceptions to make requirements due to safety concerns
 - Where scheduling exceptions would violate collective bargaining rules

Staying Between the Rails

The Crossing Between Religion and Work



- Employers, both public and private, can also violate the law by requiring religious observance or other acts that have been found to be “coercive.”
- For this reason, managers/supervisors should be aware of the potential risks involved with their own religious expression given its potential to influence or become coercive.
- For public employers, like the School District in the football coach example, this goes even further because of the Establishment Clause.

Staying Between the Rails

The Crossing Between Religion and Work

- Of course, employer's obligations here include preventing and appropriately responding to religious harassment. This includes where, for example, an employee's colleagues or even third parties create a hostile work environment on the basis of an employee's religious beliefs.
- Example: An openly devout employee is talking openly about his beliefs on the production floor, a group of co-workers complain, saying they have asked him to "stop preaching at them."

Staying Between the Rails

The Crossing Between Religion and Work

- The recent *Dobbs* decision has triggered robust debates that touch upon deeply held personal, philosophical, and often religious beliefs both within and outside the workplace.
- It also may implicate additional legal considerations for employers.
- In particular, the Pregnancy Discrimination Act and Title VII prohibit discrimination against an employee because they had an abortion or expressed that they were considering having an abortion.



Staying Between the Rails

The Crossing Between Religion and Work

- Example: An employee files a complaint about her manager, who has been particularly outspoken lately about her pro-life beliefs. She complains that she was recently passed over for a promotion and feels the decision was “payback.”
- It would also be unlawful for a manager to pressure an employee to have an abortion, or not to have an abortion, in order to retain her job, get better assignments, or stay on a path for advancement.

Gathering in the Dining Car

Strategies for Successful Affinity Groups in the Workplace

- Encouraging employee inclusion and diversity, while avoiding friction, discrimination, and other legal traps.



Gathering in the Dining Car

Strategies for Successful Affinity Groups in the Workplace

- Affinity groups: a group of people organized to advance the interests of a specific demographic or identity trait.
- Age, race, gender, sexual orientation, nationality, and disability status are typical.
 - Groups typically focus on a “protected class” but not always.
- Group activities, discussion, events, training (virtual or in-person).

Affinity Groups

Avoiding Pitfalls

- Avoid unequal **group** treatment
- Avoid unequal **individual** treatment



Affinity Groups

Preventing Claims of Discrimination

- Guard against internal affinity group member discrimination
 - No gatekeeping or exclusion
 - All are welcome
- How to value membership or attendance?
 - Can membership or attendance be valued in promotions?



Affinity Groups

Labor Considerations



- Don't overstep labor protections at play:
 - Concerted activity?
 - Employer right to control?
 - Employer dominance?
 - Who *should* manage the affinity groups?
And how?
- Off-the-clock affinity groups?
 - Wage and hour considerations?

Affinity Groups

Maintaining Success (Public Employers)

- Be aware of First Amendment protections and avoid political affiliation discrimination
 - First Amendment rights
 - Local laws may apply as well
 - Consider the impact of corporate political and social positions



The Light at the End of the Tunnel



Thank You!



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