



Anti-Racism and the Workplace: Employment Challenges and Opportunities in the US

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Agenda

- Demonstrating Care for BIPOC Employees
- Addressing Employee Conduct on Social Media
- Managing and Responding to Leave of Absence Requests
- Reconciling Value Statements with Legal Obligations



Demonstrating Care for BIPOC Employees

- Pronounced "bye-pok"
- Who are BIPOC employees?
 - Black, Indigenous and People of Color
 - Any non-white employee
- Why use this terminology?
 - Acknowledges that various groups of "non-white" people experience racial injustice differently



EMPLOYER AND LEADERSHIP DO'S & DON'TS

- **DO** treat employees with compassion
- **DO** your own research around race relations in America
- **DO** be <u>active</u> against racism as opposed to passively not endorsing it
- **DO** issue an authentic corporate statement expressly condemning racism
- **DO** acknowledge intersectionality
- **DO** listen to BIPOC employees and their stories and BELIEVE THEM
- **DO** evaluate diversity in the workplace on an ongoing basis



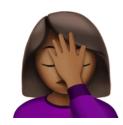
EMPLOYER AND LEADERSHIP DO'S & DON'TS

DON'T - engage in isolated, performative activism/allyship

DON'T – lead with condemning looting; re-focus conversations around the underlying reason for it

DON'T – assign more work to BIPOC employees (*e.g.*, lead the D&I initiative, organize a town hall)

DON'T – engage in racial "gaslighting"





What is Racial Gaslighting?

"Racial Gaslighting" is a tactic used to diminish the credibility of accusations of racism and shift the scrutiny onto the accuser – forcing them to question and re-asses their own response to the racism, rather than the racism itself.



Racial Gaslighting Examples

- "But what about black on black crime?"
- "Well...other people are dying, too."
- "I don't see color."
- "I can say that because my best friend/boyfriend/spouse is black."
- "But we had a Black President, so hasn't there been enough change?"









National Labor Relations Act

Who is subject to the NLRA/NLRB?

<u>Section 7</u>: Employees may discuss wages and other terms of employment and may take "concerted" action in an effort to improve their working conditions.

"Concerted activity": when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment.

In union <u>or</u> non-union environments



Category 1: Rules that are Generally Lawful to Maintain

- A. Civility rules
- B. No-photography rules and no-recording rules
- C. Rules against insubordination, non-cooperation, or on-the-job conduct that adversely affects operations
- D. Disruptive behavior rules
- E. Rule protecting confidential, proprietary, and customer information or documents
- F. Rules against defamation or misrepresentation
- G. Rules against using employer logos or intellectual property
- H. Rules requiring authorization to speak for company
- I. Rules banning disloyalty, nepotism, or self-enrichment



Category 2: Rules Warranting Individualized Scrutiny

Possible examples:

- Broad confidentiality rules
- Rules prohibiting disparagement of employer
- Rules prohibiting use of employer's name
- Rules restricting employees from speaking to the media generally
- Rules banning off-duty conduct that would harm employer
- Rules prohibiting false or inaccurate statements



Category 3: Rules that are Unlawful to Maintain

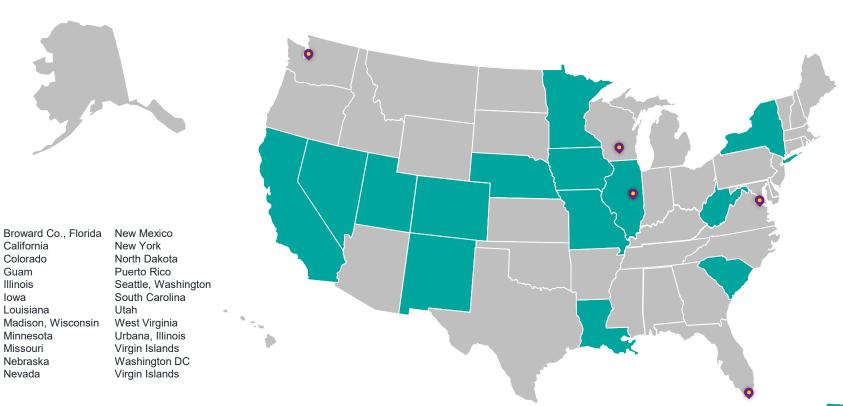
- A. Confidentiality rules specifically regarding wages, benefits, or working conditions
- B. Rules against joining outside organizations or voting on matters concerning employer

Review Your Policies - Social Media Policies Should Still Reinforce Workplace Rules

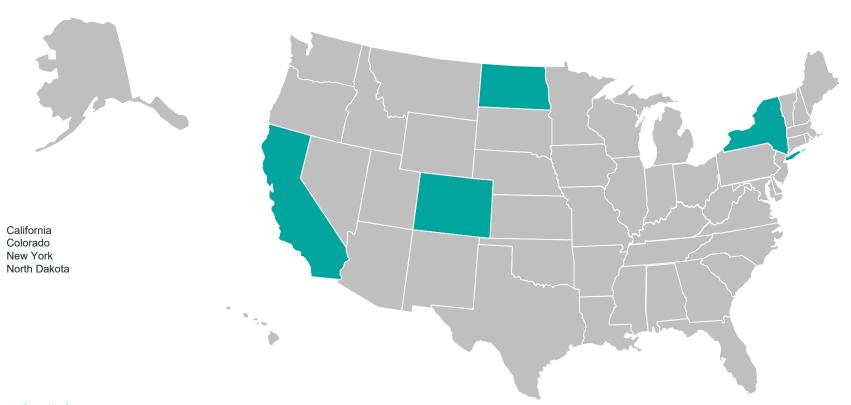
- Internet use on company devices/networks is subject to monitoring
- Confidentiality and non-disclosure requirements apply for employees and patients (HIPAA)
- Harassment and discrimination policies apply
- No employees may speak as company representatives without authorization



Employee's Political Activities or Opinions



Employee's Lawful, Off-Duty Activities



California – Labor Code Sections 96(k) and 98.6



Colorado § 24-34-402.5

Colorado

Employer may not terminate the employment of any employee due to the employee engaging in any *lawful* activity off the premises of the employer during nonworking hours unless such a restriction:

- (a) Relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer; or
- (b) Is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest.

New York Labor Law 201-d



Employer may not discriminate in employment because of:

- Political activities
- 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

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

North Dakota § 14-02.4.01

North Dakota

Employers are prohibited from discriminating against employees on the basis of participation in *lawful* activity off the employer's premises during *nonworking* hours which is not in direct conflict with the essential business-related interests of the employer

Connecticut – Right to Free Speech



Employers are prohibited from disciplining or discharging an employee on account of the exercise of rights guaranteed by the <u>First Amendment</u> of the US Constitution

- Religion
- Speech
- Press
- Peaceably assemble
- Petition the government

Key Questions to Ask





Ohio Children's Hospital Nurse Fired For Yelling Racial Slur in Viral Video

California prison workers suspended for George Floyd remarks

Some Hampton Roads workers fired for insensitive racial social media posts

SC town official fired over Facebook post calling for shooting of George Floyd protesters

Lexington Medical Center employee fired after posting a racial slur on Facebook

Disney Cuts Ties With ABC News Executive Over 'Racially Insensitive Remarks'

Amy Bloom, a Broward County prosecutor, was also fired this week after making a post on Facebook calling protestors "obnoxious" and that she's "never seen such animals except at the zoo."

The editor-in-chief of Bon Appétit has resigned after a photo of him in brownface resurfaced

A writer from a *Law & Order* spin-off and the play-by-play broadcaster for the NBA's Sacramento Kings found themselves out of jobs after making social media posts this week that their bosses found too incendiary or insensitive, highlighting an apparent surge in such firings across many lines of work.

















Jane Doe

Yesterday at 11:38 AM · 🚱

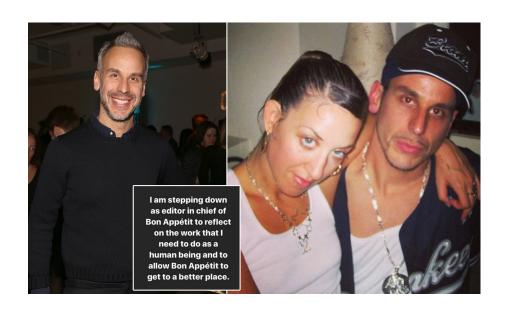
How about using their 'white privilage' to buy some self-respect instead?

WATCH: White Cops, Civilians Wash Feet Of Black Organizers, Ask For Forgiveness



DAILYWIRE.COM

WATCH: White Cops, Civilians Wash Feet Of Black Organizers, Ask For Forgiveness



- Adam Rapoport, Bon Appetit
 Editor-in-Chief resigned after the
 emergence of an old photo of him
 wearing brown face
- Exit comes after criticism on social media over Bon Appetit's practices, including allegation that the magazine pays white editors to appear in videos but not people of color



Are Protests Protected Activities?

- Maybe. "Concerted activity" occurs when 2+ employees take action for their mutual aid or protection regarding terms and conditions of employment.
- Fighting systemic racism and participating in #BlackLivesMatters protests

 including that which exists at workplaces may certainly be framed as protected, concerted activity.
- Example: anti-immigrant rallies have been framed as a call for "job security" against undocumented workers.

Are Protests Protected Activities?

Non-disruptive political advocacy for or against a specific issue related to a specifically identified employment **Protected** concern, that takes place during the employees' own time and in non-work areas On-duty political advocacy for or against a specific issue Subject to restrictions imposed by lawful and neutrally applied work rules related to a specifically identified employment concern Leaving or stopping work to engage in political advocacy Subject to restrictions imposed by for or against a specific issue related to a specifically lawful and neutrally-applied work rules identified employment concern

Leaves for Protected Activity?

- Neither state nor federal law requires employers to provide time off to employees who wish to attend a protest.
- Employers may treat an employee's timeoff request to protest as they would any other leave request.
- No call/no show = not protected.
- However, in states where lawful off-duty conduct is protected, be aware of potential retaliation claims if you discipline or reprimand employees for such conduct outside of work.

Leaves for Personal/Mental Health?

Portland mayor gives city workers 40 hours off to grieve death of George Floyd, others

- NYC paid sick leave expressly provides that employees are able to use sick days if they have a mental illness/health condition, or if they are caring for a family member with the same. They can also use sick leave if they need a medical diagnosis, care, or treatment related to a mental illness/health condition, including seeking preventative care for mental illness/health condition. No proof of symptoms are required.
- California's paid sick leave law does not expressly state employees can take leave for mental health.
 However, proposed bill (AB 1844) specifically allows paid sick leave for the diagnosis, care, and treatment
 of behavioral health conditions, including mental illness, anxiety, depression, and substance use
 disorders.
- Mental health illnesses are covered under the FMLA so it would be appropriate to permit employees to
 use sick leave for mental health illness/conditions.



Should Corporate Employers Make a Statement?

We at [Brand] are committed to fighting injustice by posting images to Twitter that express our commitment to fighting injustice.

To that end, we offer this solemn white-on-black .jpeg that expresses vague solidarity with the Black community, but will quietly elide the specifics of what is wrong, what needs to change, or in what ways we will do anything about it. This is doubly true if [Brand] is particularly guilty of exacerbating these issues.

We hope this action encourages you to view [Brand] positively without, you know, expecting anything from us.



Make a Statement If It Is...

- Genuine
- Consistent with policies and values of the organization
- Committing to action not a passive observation
- Supported by budget and resource allocation
- NOT UNLAWFUL



When NOT to Make a Corporate Statement

When the leadership and ultimate decision-makers of the organization <u>do not</u> believe, agree or acknowledge:

the *permanence* of racism through organizations, industries and communities; or

that racism is a **system** of disproportionate opportunity

and penalties based on skin color



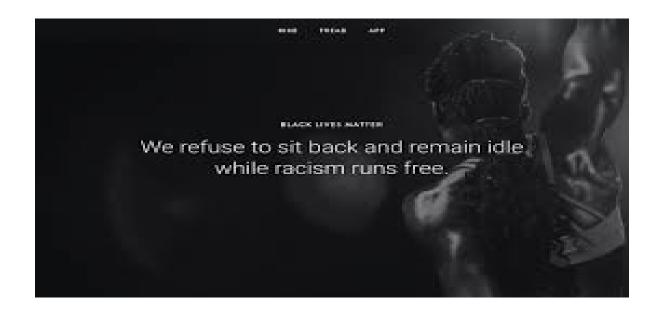
When NOT to Make a Corporate Statement

If you sell these:



When NOT to Make a Corporate Statement

Think twice before saying this:



Support Statements with an Action Plan

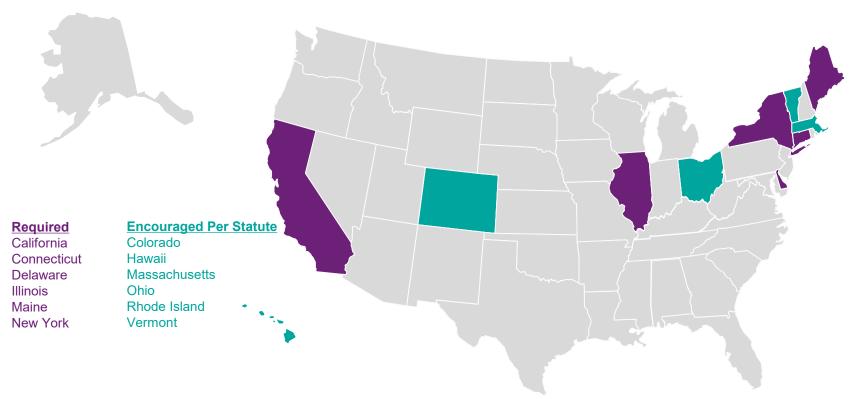
OUR ACTION PLAN

- Actively advocate against the use of armed policing in achieving Vision Zero
- Enhance our advocacy to reduce disproportionate impacts of traffic violence in communities of color
- Enhance and amplify our education programming in communities of color
- Support small businesses and organizations serving neighborhoods that are rebuilding
- Recruit and hire Black staff, leadership team and board members
- Organize our efforts with care, study, and input from local.

Comply with Anti-Discrimination Laws and Policy

- Avoid terms that can be construed as "hate speech."
- Ensure that BIPOC employees are not singled out for <u>MORE</u> favorable treatment
- Ensure that non-BIPOC employees are not <u>LESS</u> favorably treated, disparaged, stereotyped or vilified in an attempt to show solidarity with BIPOC employees.
- Ensure the statement is consistent with established company policy.
- When in doubt consult with employment counsel.

Anti-Harassment Training



Employer Opportunities

Employers have the opportunity to foster a more inclusive environment, to stand by their values, and improve business.

- Companies in the top quartile for racial and ethnic diversity are 36% more likely to have financial returns above their respective national industry medians. (Up from 33% in 2019 and 35% in 2014.)
- Companies in the top quartile for gender diversity are 20% more likely to have financial returns above their respective national industry medians.
- Companies in the top quartile of gender diversity on executive teams are 25% more likely to experience above-average profitability than peer companies in the fourth quartile. (Up from 21% in 2017 and 15% in 2014.)
- In the US, there is a linear relationship between racial and ethnic diversity and better financial performance: for every 10% increase in racial and ethnic diversity on senior executive teams, earnings before interest and taxes rise 0.8%.

Employer Opportunities

Employers can decrease employee turnover by emphasizing values, policies and platforms to allow more employees to feel respected and heard.

To maximize these opportunities, additional areas to consider:

- Implicit Bias Training
- Pay Equity Analysis
- D & I initiatives and Employee Resource Groups
- Partnerships with Diverse Third Parties



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Please write down the following affirmation code [AR723]

Within 2-3 business days after today's session, you will receive an email with a link to the *uniform certificate of attendance* and *program evaluation* to complete and SUBMIT to my colleague, Robin Hallagan at robin.hallagan@squirepb.com



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