MAY DIVERSITY, EQUITY, AND INCLUSION UPDATE

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Six misunderstood concepts about diversity in the workplace and why they matter

Diversity and inclusion in the workplace are a sensitive topic. People are afraid to get things wrong or to use the wrong word. It doesn't help that the words involved are confusing.

You have probably encountered these concepts at a mandatory training session, a workplace event, or on Twitter. They often involve decades of complex scholarship being reduced down to a single word, and, as such, they can easily be misrepresented.

But for any progress to be made, and for real diversity and inclusion to be achieved, getting to grips with what they actually mean is crucial. Here then are six of the most embattled concepts.

1. Allyship

Once limited to LGBTQ discussions (as in "straight ally"), this term became popular in 2020 following the murder of George Floyd. As its 2021 Word of the Year, dictionary.com defines allyship as:

The status or role of a person who advocates and actively works for the inclusion of a marginalized or politicized group in all areas of society, not as a member of that group but in solidarity with its struggle and point of view and under its leadership.

Allyship, then, isn't about waving the correct flag during the correct month, or getting drunk at Pride with colleagues (well, not just that). It's an action word that requires action; like education (of self and others), effective activism, consistent advocacy and using your platform or privilege (see below) to amplify the voices of marginalized others.

If, for example, your workplace did the white-text-on-a-black-square thing on social media in June 2020, and nothing else, they were probably engaging in performative allyship. This kind of

superficial show of solidarity chiefly benefits those performing it, as opposed to the group suffering the discrimination.

2. Class discrimination

Within UK society, working-class people face inequalities related to, for example, access to sought-after unpaid internships, entering higher managerial and professional jobs and their average salary once in those jobs.

Yet the concept is easily understood – we have all seen snobbery in action (see John Cleese's classic 1966 sketch with the Two Ronnies). However, the misunderstanding here concerns not the definition of the concept, but the legality of the discrimination.

Social class is not protected in the Equality Act 2010, the piece of UK legislation that outlaws discrimination in the workplace. This often surprises people, presumably because it feels like something that should be covered by legislation – and indeed it is, in over half of all European countries. Just not in the UK.

3. Intersectionality

This term is often vilified, but its meaning is actually straightforward. Every person has multiple intersecting identities (age, class, gender, sexuality, race and so on) which can lead to specific outcomes, particularly in relation to discrimination or privilege.

White women, Black men and Black women may face some common issues in the workplace – a pay gap, for example. But research shows that the latter group often face challenges specific to how their identities as both women and Black people intersect.

The term misogynoir was coined to designate the specific type of discrimination that Black women face. This can manifest as medical misdiagnoses; racial differences in pain management after giving birth; pervasive, harmful stereotypes such as that of the "angry Black woman"; and gendered racist abuse of the kind directed at former Labour Shadow Home Secretary Diane Abbott during the 2017 election.

4. Gender pay gap

Not to be confused with equal pay. "Equal pay" means paying a man and woman equally if they are doing the same work: this is a legal requirement. The gender pay gap, meanwhile, is the difference in average hourly earnings between all men and women in a specific company, sector or country.

Research shows that it can be caused by both old-fashioned discrimination and also differences in what economists call human capital: the economic value of an employee's education, training, experience, skills, health and other traits. Women's experience and career

choices are often affected by gendered expectations regarding child-rearing and the wider division of labour in the family. There are other pay gaps too, relating, among other characteristics, to race, to sexual orientation and to disability.

5. Privilege

Often (and mistakenly) used interchangeably with “privileged”. To wit, the Conservative MP Jonathan Gullis, made headlines in October 2021, when he defied any “left woke warrior to visit Stoke-on-Trent North, Kidsgrove and Talke and try tell the people there that they are somehow ‘privileged’”.

As activist Janaya Khan has put it, privilege doesn’t refer to what you have gone through, but what you haven’t had to go through. It designates the advantages, and/or lack of disadvantages, that any one person might have because of who they are.

US activist Janaya Khan on what activism – and privilege – really means.
“White privilege”, therefore, does not mean that white people are always privileged. It does mean, however, that a white person living in Kidsgrove will not have to consider whether they will face discrimination – whether out shopping, going to school or playing football – simply because of their skin color. That is a specific disadvantage they don’t have to even think about. And it is the not having to think about that is the privilege.

6. Pronouns

Gender identity and gender presentation are not always aligned. Sometimes one’s gender identity evolves over time. The move to be explicit about which pronouns we want people to use when referring to us in the third person – as the American singer Demi Lovato did in 2021, when they came out as non-binary – can be a way to signal one’s gender identity.

A recent viral video showed a man, when asked what pronouns they use, rejecting the whole idea by replying, “I don’t do pronouns”. Sharing your pronouns if you are cisgender (that is, not trans) is easy, however, and signals solidarity with trans and non-binary people.

It is also helpful because we can’t always assume we know what someone’s gender identity is. Misgendering (calling someone by the incorrect pronoun) can contribute towards the stress a trans person experiences as a minority. Recent tribunal decisions have mentioned that regular, deliberate misgendering could be considered discrimination. If you make a genuine mistake, though, apologizing and correcting yourself “need be no more complicated than correcting yourself after getting someone’s name wrong”.

https://theconversation.com/six-misunderstood-concepts-about-diversity-in-the-workplace-and-why-they-matter-181289

The 5 factors every successful diversity, equity and inclusion policy should have, according to an expert

Dealing with discrimination at work can be difficult. But speaking out about it can be even more challenging. It's up to companies and employers to make sure they're creating a safe space for their BIPOC talent.

That's why Ekwok Sanni-Thomas, DE&I strategist, content creator, and founder of Inside Voices, is working to amplify Black voices and hold companies accountable for diversity, equity, and inclusion in their organizations.

According to Bain, a management consulting company, less than 25% of Black employees feel included at work. Similarly, Gallup reports that one in four Black workers are discriminated against on the job, and race-based discrimination is the most common kind Black employees face.

Though companies have amped their diversity tactics in the last two years, there's still work to be done. Sanni-Thomas spoke to Make It about the five factors he believes every successful DEI policy should have and how he's making workplace diversity more transparent.

Setting S.M.A.R.T. goals

For companies whose diversity and inclusion efforts aren't resonating with employees of color, Sanni-Thomas advises making S.M.A.R.T. objectives and being intentional in meeting them:

Specific: WHO is involved? WHAT is being accomplished? WHEN should this be done? WHERE does this take place?

Measurable: How will you keep track of progress?

Attainable: Is this a goal that can be reasonably accomplished?

Relevant: Why am I working towards this goal?

Timely: When will the plan go into action? When should I expect results?

"There are companies that have done incredibly innovative and transformative things, but don't apply that same rigor to DE&I," Sanni-Thomas says. "There needs to be a top-down approach with the attitude and the importance conveyed by the leadership of the organization to everyone within it. Everyone should be accountable for it."

Encouraging others to speak up

Issues like these are what urged Sanni-Thomas to launch his platform, Inside Voices. The website allows BIPOC employees to give anonymous reviews on their companies, with a focus on diversity, equity, and inclusion in the workplace. Using a scale from strongly disagree to strongly agree, individuals are able to rate their companies in areas like advocacy, fairness, and representation.

Sanni-Thomas, originally from the UK but currently living in Brooklyn, is no stranger to workplace discrimination. He shares that after being discriminated against on the job, he reported the incident, but the company failed to protect him – a story that several previous, Black employees identified with. He then realized he no longer wanted to suffer in silence.

"I was just the last in a long line of black people that had joined the company and left under disappointing circumstances for the sake of being polite," he tells CNBC Make It. "And I didn't want to add to that list. I didn't want to leave without having a way to warn people about the environment that seemed rosy, but was not a safe space."

In addition to his web platform, Sanni-Thomas also uses TikTok to raise awareness for diversity issues at work. Using skits and trending sounds, he posts "survival tips for professionals of color" and has a following of almost 30,000 supporters.

Sanni-Thomas hopes that Inside Voices will help "demystify" diversity at work and create a safe space for people of color to voice their opinions.

"My mission is to make diversity more transparent, to help people that aren't believing our experiences understand what we're going through, and then to also amplify the voices and represent us professionals of color who are going through these experiences and don't see anybody speaking to the nuances of what it's like to be us in the workplace."

https://www.cnbc.com/2022/04/22/the-5-factors-every-successful-dei-policy-should-have-according-to-an-expert.html

If a company is really dedicated to DE&I? Ask these questions during your interview

DE&I has been a huge buzzword for organizations and job seekers alike in recent years. However, many companies' diversity, equity, and inclusion efforts may not be as effective as advertised, and employees don't realize it until they're on the receiving end of racism and discrimination.

According to Bain, a management consulting company, less than 25% of Black employees feel included at work, showing that businesses' DE&I campaigns aren't always translating in the office.

During an interview, when asked 'do you have any questions for us?,' most candidates will inquire about mobility, the future of the company, or opportunities for training. This would also be a great time to get the scoop on the company's culture, before it's too late.

Ekow Sanni-Thomas, DE&I strategist and founder of Inside Voices, a web platform where employees of color can anonymously review DE&I at their company, is no stranger to being blindsided by workplace racism and discrimination. While working in financial services, Sanni-Thomas felt like he thoroughly "vetted" companies, but still ended up having a negative experience.

"I was discriminated against by another employee, I reported it, and the company failed to protect me and eventually pushed me out," Sanni-Thomas shares with CNBC Make It. "And when I was on the way out, I had conversations with people that, had I been able to have before I joined, I never would have joined."

For jobseekers curious to find out more about a company's culture and dedication to DE&I during the interview process, Sanni-Thomas recommends asking these three questions:

1. How transparent and measurable are your company's DE&I goals?
2. Do you know what percentage of diverse groups you're trying to hire, and by when?
3. Are these numbers available to the public?

Sanni-Thomas says that companies that are truly dedicated to antiracism and DE&I will be completely transparent and eager to share their methods for ensuring their employees feel safe and supported, such as affinity and employee resource groups. They'll also share how they keep track of diversity in their organizations.

"Even if the interviewer doesn't have the numbers on hand, they should be happy to send them to you afterwards. And if that isn't something that the company is able to share with the public, I can assume it's only going to be lip service."

Though necessary, having these conversations can be pretty daunting, especially when speaking to someone like a potential boss or executive. Sanni-Thomas shares that he, too, approached these issues with hesitancy at the start of his career, but over time, his attitude changed.

"Over the course of my 13-year career, I've learned that it's quite common for people to enter the workforce aware of the discrimination they may face, but with a belief that they will be able to weather the storm," he says.

"I was one of those people. But as I rose through organizations, I had the opportunity to be more vocal. And my audience and tone changed over that time. I went from politely trying to point out this was happening, to realizing that people knew it was happening, and feeling like I needed a megaphone to galvanize support."

https://www.cnbc.com/2022/04/14/3-questions-to-ask-in-a-job-interview-to-find-out-if-a-company-is-dedicated-to-dei.html

4 Most Common Interview Questions to Avoid (and 4 You Actually Want to Ask)

Asking inappropriate interview questions can spell trouble for employers.

With college graduation approaching, a surge in job openings and more people switching jobs or re-entering the workforce, asking job candidates the right interview questions is critical to make the most of the job interview.

On the other hand, asking inappropriate interview questions can spell trouble for employers and lead to claims of discrimination or bias.

First, the questions you want to stay away from. Some may be common knowledge, but the new work world has changed the way we interact (more virtual) and communicate (more casual), and even seasoned managers, HR, and company recruiters can benefit from a refresher.

For some practical insights and tips, I recently connected with Maggie Smith, VP, of Human Resources for Traliant, a compliance training company that offers online training on preventing discrimination and harassment, diversity, equity and inclusion and other workplace topics. Beyond complying with local, state and federal anti-discrimination laws, HR and hiring managers should consider their motives. "It's important to take time to think about what and why you're asking certain questions," Smith said. "Are you consciously or unconsciously screening out certain people? If the initial interview questions don't relate to someone's experience and qualifications to do the job, that can be a red flag."

4 interview questions to avoid

The Equal Employment Opportunity Commission (EEOC) says it's illegal for an employer to discriminate against a job applicant because of their race, color, religion, sex (including gender identity, sexual orientation and pregnancy), national origin, age, disability or genetic information. Further, employers may not base hiring decisions on stereotypes and assumptions about a candidate because of these personal characteristics. Here are four questions to avoid:

1. How old are you?

Asking someone's age or what year they graduated is a form of age discrimination, which for people 40 and older is prohibited under the Age Discrimination in Employment Act (ADEA).

Even so, age-biased language pops up regularly on job postings that emphasize 'digital natives' or 'young, energetic go-getters.'

2. Do you have any children?
Generally, the best practice is to avoid questions about a candidate's family status or whether they have kids or plan to. It could be perceived as an attempt to discriminate for or against people with kids or those with caregiver responsibilities. Recently, the EEOC published guidance on avoiding caregiver discrimination.

3. Your name's unusual. Where are you from?
This is another example of a question that may seem like small talk, but it's not relevant to the job, and could be used to discriminate or show bias toward people based on their ethnicity, accent, national origin or culture.

4. Do you have any disabilities?
Under the Disabilities Act (ADA), employers can't ask candidates about the nature or severity of a disability or what medications they are taking. However, it is okay to ask candidates if they can perform the essential job duties, with or without accommodation. Here again, the best approach is to focus on a candidate's ability to do the job.

Asking the same set of questions to all the candidates for a particular position is an interview-compliance best practice. Once that's covered, it's time to learn more about the person beyond the resume.

4 interview questions to get the conversation flowing
"Whether the interview is face-to-face or virtual, you want to connect on a human level," Smith said. "By really listening and being approachable and inclusive, you are reflecting the qualities your company culture values, and helping candidates feel comfortable opening up about the kind of work environment where they can bring their whole selves to work."

1. What did you learn about our company that made you want to apply for the position?
This question can reveal how prepared candidates are going into the interview and whether they were curious enough to learn a bit about your company and industry. An informed candidate will also ask more meaningful questions, which benefits them and HR and hiring managers.

2. What do you value most in a job and organization you work for?
This opens up conversations around work culture, flexible work options, different work styles and what candidates need to feel connected, supported and valued.

3. Can you share some examples of projects or situations where you thrived and others that were more challenging?

This question is a way to discover candidates' likes and dislikes. Knowing what they are passionate about and how they approach a new project can lead to a conversation about job satisfaction and motivation.

4. What are your expectations for the position?
There's no right or wrong answer. The idea is to give candidates an opportunity to discuss their understanding -- or surface any misunderstandings -- about the position and set realistic expectations.

Bonus question: Have some fun. "Asking something that isn't work-related allows candidates to share another dimension of themselves," Smith said. Some examples include: 'What would your perfect day look like?' or 'What's the last show you binge-watched?' or 'What are you reading now?'

https://www.inc.com/kevin-j-ryan/bat-club-florida-baseball-equipment-subscription-service.html

10 Steps to Mental Health Wellness for Your Employees

The seemingly never-ending pandemic has affected all aspects of the workplace, with employee mental health and well-being becoming one of the top employee-related issues you need to deal with on a daily basis. The EEOC recently reported that approximately 30% of Americans with Disabilities Act-related charges it received in 2021 involved employees alleging discrimination based on mental disabilities. This statistic should not shock anyone given the statistics we previously recounted concerning employees' reports on the impact the pandemic has had on their mental health and what they expect employers to be doing to support their mental health. So, what can you do to address the mental health crisis sweeping the nation – not only to minimize the chances of getting sued but to positively impact the lives of your workforce? This Insight will offer a 10-step plan you can put into place to help you with this most important of topics.

What are We Dealing With?

Workplaces are seeing an increase in employees reporting new mental health concerns and pre-existing mental health concerns exacerbated by the pandemic, remote work, and now a return to the workplace. The increase in mental health discrimination charges is founded largely on employee anxiety and post-traumatic stress disorder. Some employees with mental health conditions who have been working from home for almost two years are overwhelmed with anxiety at the prospect of returning to the office. You are most likely seeing an increase in the

number of employees asking to work from home on a permanent basis as an accommodation of their mental health conditions.

The EEOC acknowledged in its pandemic guidance that employees with certain pre-existing mental health conditions (such as anxiety disorders, obsessive-compulsive disorders, and PTSD) may have a harder time managing the disruption COVID-19 caused. The difficulties such employees may have had, coupled with the fact that symptoms of these conditions can be vague and highly individualized, can make it difficult for employers to navigate the accommodation and interactive process required by the ADA.

What Can You Do?

To reduce the risk of ADA claims and potentially liability, you should equip yourself with the tools necessary to navigate employees' requests for accommodation related to mental health conditions. They can also help address situations where employees are struggling to perform their jobs because of mental health conditions. In addition to avoiding liability, you should be aware that their workplace culture and investing in employee well-being is a key tool to retain and recruit good employees.

There is a distinct difference in how you should approach promoting employee mental health and wellness and addressing mental health conditions in the workplace that require an accommodation. You should be careful that your efforts to support employee mental health do not pry into an employee's personal medical information in violation of the ADA. To this end, we have outlined a 10-step approach for managing employee mental health in the workplace.

A 10-Step Plan for Addressing Employee Mental Health

1. End the Stigma: The biggest challenge you may face is removing the stigma associated with mental issues. People are often afraid to speak up about mental health problems for fear of being seen as incapable of performing their job or generally having something wrong with them. The most effective way to overcome this stigma is for leadership to start the conversation on mental health. It may be a cliché, but leading by example works. Starting and continuing the conversation can be tricky, however. It has to be done with care, so that the conversation does not feel invasive, artificial, or run afoul of the ADA.
2. Gather Input: Understand how your work environment impacts employees' mental health. This can be accomplished by asking employees about workload, flexibility, leadership, and culture.
3. Determine the Landscape: Evaluate your workplace culture to determine if it supports employee mental health. This can be accomplished with a workplace mental health checklist – which can be created in collaboration with your workplace law attorney.

4. Smooth the Path: Consider ways you can make employees more comfortable seeking accommodations. This includes emphasizing that employees need not disclose their diagnosis as part of the accommodation or FMLA process.
5. Take Stock. Now is a perfect time to audit your company resources for employees with mental health issues or when they are experiencing work- or family-related stress. These should include a review of your EAPs, hotlines, wellness programs, and. It is just as important to analyze whether employees are using these resources, and if not, what reasons might exist.
6. Promote Resources: Ensure that employees are aware of the mental health resources that your organization offers. These should include benefits related to mental illness and substance use treatment.
7. Train on Accommodations: Provide training to your supervisors and managers to recognize when an employee may be raising or requesting an accommodation based on a mental health issue – which may not be easy to identify. Employees with mental health conditions may request accommodations such as time off, emotional support animals, reduced work schedules, task lists, weekly meetings with their supervisor, and similar relief.
8. Know the ABCs of WFH: Understand that just because someone worked from home during the pandemic does not mean remote work is a reasonable accommodation. However, you need to also understand that simply because you want employees in the office does not mean remote work is not a reasonable accommodation. Examine each situation on a case-by-case basis.
9. Stay in Your Lane: Respect an employee's privacy and understand that managers should not ask for specifics regarding any mental health issues (such as diagnosis). It is not their role to determine whether the employee has a qualified disability. Rather, they should direct the employee to Human Resources.
10. Be There. Finally, your organization should be equipped to offer support of a general nature without running afoul of the ADA. Although disability discrimination law does not allow an employer to ask questions regarding a medical condition, you and your company leaders can still offer empathy and support. For example, if a supervisor notices that an employee has been late more times in the last month than in the preceding three years of employment, they may be able to ask the employee "I noticed you have been struggling to get to work on time, is everything okay?" or "Is there something we can do to help?"

Conclusion

If you have questions about best practices to support employee mental health or would like assistance in preparing a workplace mental health checklist suitable for your company, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Employee Leaves and Accommodations Practice Group. We will continue to monitor further developments and

provide updates on this and other workplace law issues, so make sure you are subscribed to Fisher Phillips' Insight System to gather the most up-to-date information. https://www.fisherphillips.com/news-insights/10-steps-to-mental-health-wellness-for-your-employees.html

Majority of managers reluctant to hire applicants with mental health problems

A new Tranzo survey of 670 executives in all Dutch sectors shows that a majority (64%) is reluctant to hire applicants with mental health problems (MHP). In addition, one in three managers would not quickly hire an employee who has ever had MHP, even if those problems are no longer an issue. The publication by Kim Janssens et al. will soon be published in Occupational & Environmental Medicine (OEM), part of the British Medical Journals.

The research focused on the knowledge, attitude and experiences of managers with regard to employees who have had, for example, depression, burnout, anxiety and stress. The conclusions have major consequences for social inclusion in the Netherlands, especially since earlier Tilburg research shows 75% of employees choose to be open about mental health problems at work.

The most important findings

- The majority (64%) of a representative group of managers (670) in all Dutch sectors were reluctant to hire a job applicant with MHP despite the fact that only 7% had negative and 52% had positive personal experiences with such employees.
- Still 30% of the managers surveyed are reluctant to hire applicants with past MHP. That means that even after recovery, the stigma persists which can lead to employment discrimination.
- 91% of the managers had one or more concerns regarding hiring employees with MHP. Future interventions and education should address these concerns. Prevalent ones included reports of not knowing how to help (39%) or deal with (19%) the employee and the concern that it will negatively affect the workplace atmosphere (40%).
- This study illustrates that workplace stigma is a problem for social inclusion. That is why interventions are needed to reduce prejudices and improve the knowledge of managers about this in order to support employees with MHP instead of excluding them.

https://phys.org/news/2021-01-majority-reluctant-hire-applicants-mental.html

To combat mental health discrimination at work, first shift beliefs

One in five Americans received treatment for their mental health in 2020. And yet the issue is rarely discussed beyond the most intimate circles.

“Unlike most physical health disorders, mental health problems remain deeply stigmatized,” said Matthew Ridley, a doctoral candidate in economics at MIT. Curious about this stigma, he set out to study how revelations about mental health might affect workplace relationships. Would they change how one person views another? And, if so, how? “There is a huge economics literature trying to understand discrimination based on gender and race, but very little of this looks at mental health,” he said.

In a working paper, Ridley demonstrates two key findings. First, people exhibit a strong desire to avoid working with someone they know has a mental health condition — in this case, moderate to severe anxiety or depression. Second, those who suffer from mental health challenges are strongly inclined to hide this fact from potential coworkers.

For companies and leaders, this means that establishing an environment that is supportive of mental well-being requires more than simply encouraging disclosure; companies must first focus on increasing awareness and crafting campaigns that shift beliefs and decrease stigma.

Uncovering a “deep-seated norm against openness”

Using the Amazon Mechanical Turk crowdsourcing service, Ridley recruited about 1,700 participants to take part in his study. Each person completed a survey to determine their degree of anxiety or depression in recent days. (The survey asked other questions, like education level and political affiliation, to obscure the fact that the experiment centered on mental health.) After this, two people were partnered together to complete a straightforward task: through an online chat window, one person with a map guided their partner from one point in a city to another. Successfully completing the task earned both participants $2.

In a paid online experiment, people were willing to pay 30% of their earnings to conceal symptoms of mental illness from a partner.

Within this setting, some of the participants could demand an extra payment for getting paired with partners they didn’t want to work with (or for not pairing with partners they did want to work with). If a potential partner acknowledged recent feelings of anxiety or depression, people on average demanded 70 cents more to work with them — more than 30% of their average earnings. When they were nonetheless forced to partner with someone who was potentially anxious or depressed, they sometimes invested more effort in completing the task. This result, together with survey data that asked directly about the relationship between mental health and productivity, suggests they thought their partner would be less productive — an incorrect belief given participants with anxiety or depression proved just as competent at completing the task as their healthy counterparts.

On the flip side, people were willing to pay roughly 30% of their earnings to conceal symptoms from their partners. “Even in cases where a person’s partner was unable to reject them, and even when their earnings were fixed no matter how badly they did, people still wanted to pay

to hide any indication of mental illness," Ridley said. "Given these are one-off anonymous interactions, it's a bit dispiriting, as it suggests a deep-seated norm against openness."

What leaders can do

The findings are particularly relevant as workplaces increasingly consider policies of transparency concerning mental health; while these efforts are likely well-intentioned, if the right foundation is not already in place then employees might be extremely reluctant to discuss their mental well-being, and those who do may face discrimination.

"There are, fortunately, some key strategies for changing beliefs and stigma in the workplace," said Kana Enomoto, global director of brain health at the McKinsey Health Institute and former head of the federal Substance Abuse and Mental Health Services Administration.

At a most fundamental level, employers need to recognize the problem. This begins with explicit directives that forbid stigmatizing language (like "addict") and mitigate discriminatory or exclusionary behavior by, for example, including "neurodiversity" in diversity, equity, and inclusion agendas. Enomoto also described the importance of training leaders and managers to recognize signs of emotional distress and mental health crisis, in the same way they are currently trained to respond to physical emergencies. "Someone has to know how to use the defibrillator," Enomoto said. "The same type of mental health training should be given to employees."

Next, when it comes to normalizing and encouraging disclosure, companies should lead by example, promoting champions of the issue who are willing to share their own experience with mental health challenges. This approach is especially fruitful when someone of status — a senior partner or the CEO, for example — steps forward to describe personal struggles with mental health. Such a move can establish a culture in which people might feel respected and supported for disclosing their conditions.

"These are contact-based education strategies for reducing stigma," Enomoto said. "It turns out that if you know people who fall under a given category then you're much less likely to be prejudiced or discriminatory toward that group. You can recognize them in their wonderful complexity as human beings rather than simply as a label."

Third, employers should appoint a senior leader who is accountable for making progress**,** such as a chief wellness officer. Part of this job is assuring benefits for mental well-being are at parity with benefits for physical well-being. Enomoto described the common challenge of securing appointments with mental health providers — calling 40 offices and getting either no response or long waitlists. "No employer would tolerate that for cardiologists or oncologists," she said. "It's not acceptable for behavioral health."

Finally, companies need to recognize that different subgroups have different needs**.** According to work done by Enomoto and her colleagues at McKinsey, Gen Z workers report

more behavioral health issues than older generations and some communities of color report a greater fear of stigma around mental health treatment. Employers must listen carefully to their employees when devising mental health policies, recognizing that a universal response may prove insufficient in the face of different needs.

An effect on earnings

For Ridley, this paper is but a "proof of concept" — results that flow from a single and particular online task. He would like, and has plans, to study these strands of stigma and discrimination in a real workplace. But despite the limits of these findings, Frank Schilbach, an associate professor of economics at MIT and one of Ridley's advisors, said they lay the groundwork for important future investigations.

For example, Ridley's work is some of the first to look at discrimination as it applies to traits that are malleable and often able to be hidden (in contrast to characteristics like race). In the economics world, Ridley's paper also contributes to an important but understudied aspect of the labor market. While people with mental health issues may earn less because they are less productive — though Ridley shows this is untrue for his experimental setting — other forces could equally contribute to lower earnings.

"Matthew's work is important because it sheds light on some potential other channels in which subjective assessments, including discrimination, play a role in contributing to the earnings gap of people with mental distress," Schilbach said. "People may earn less not because they're working less well, but because, in this case, of how they are treated by their coworkers and bosses."

Ridley's paper comes at a moment when companies are reckoning with questions and concerns around mental health. "COVID-19 has opened the aperture on the issue," Enomoto said. Though Ridley has hypotheses about what is causing his results — people may perceive coworkers with mental illness as a burden; those with mental illness may expect to be discriminated against and so hide their symptoms — getting to the root will be essential to relieving the stigma so many face.

"Eventually, people should be able to tell their employer that they're going to see a therapist to feel better about themselves and the world, in the same way they might say they're getting a tennis coach to improve their service and volley," Schilbach said. "We need interventions that make workplaces more amenable to workers who are in mental distress, policies that normalize treatment. There is a lot of work to be done to improve people's awareness and acceptance of illness and therapy."

https://mitsloan.mit.edu/ideas-made-to-matter/to-combat-mental-health-discrimination-work-first-shift-beliefs

Anxiety, PTSD Drive Rise in Mental Health Employment Bias Claims

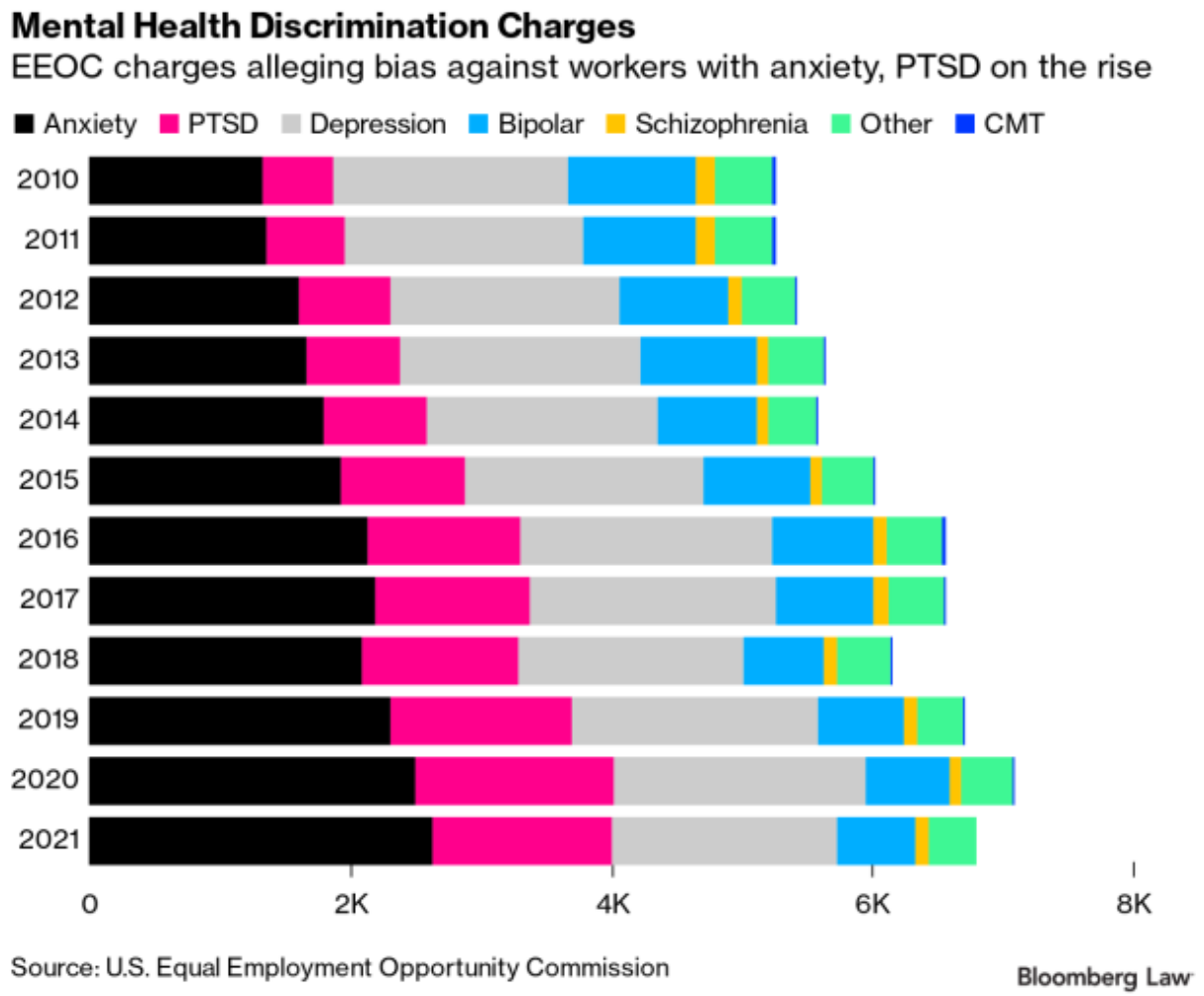
An increasing number of workers are accusing their employers of discriminating against them based on their mental health conditions, a change fueled largely by rising numbers of bias charges based on anxiety and post-traumatic stress disorder, according to the EEOC.

Accusations of mental health discrimination accounted for about 30% of Americans with Disabilities Act-related charges in fiscal year 2021, according to newly released statistics from the U.S. Equal Employment Opportunity Commission. That's an increase from the 20% reported in FY 2010.

Anxiety and PTSD are the leading conditions contributing to that trend, accounting for nearly 60% of all mental health charges and 17.6% of all ADA charges in fiscal 2021. In fiscal 2010, anxiety and PTSD accounted for only 35% of mental health charges, and 7.4% of all ADA charges.

Meanwhile, depression and bipolar disorder charges made up 7.5% and 2.7% of ADA claims in FY 2021, respectively. Those percentages have remained generally consistent for the past two decades.

The mental health conditions the EEOC tracks are anxiety, PTSD, depression, bipolar disorder, schizophrenia, cumulative trauma disorder, and "other" psychological disorders.



'Bipartisan Issue'

The EEOC, which enforces the ADA in the workplace, acknowledged in its pandemic guidance that employees with pre-existing mental health conditions may have a harder time adjusting to life—and work—during a public health crisis.

The American Rescue Plan enacted last year includes funding for programs that support mental health care. The White House also released a strategy to address the "national mental health crisis."

The EEOC should do more to educate workers about their rights and employers about their obligations to make accommodations, said Lewis Bossing, a senior staff attorney at the Judge David L. Bazelon Center for Mental Health Law, a Washington-based advocacy organization.

"This isn't something the EEOC shouldn't have seen happening; they kind of predicted it in 2020 when they issued that guidance," Bossing said. "It seems to me that maybe the EEOC needs to get in the game."

The agency is “working to expand our outreach efforts and resources in this area to help ensure employers, employees and mental health providers understand the employee’s rights under the ADA,” EEOC Chair Charlotte Burrows said in a statement.

Republican Commissioner Andrea Lucas, in a separate statement, said the EEOC should focus on “education, outreach, and updated guidance.”

“This should be a bipartisan issue,” she said.

‘Clear Violation’

Rachel Berlin Benjamin, an Atlanta-based plaintiffs’ attorney with Hall & Lampros LPP, said she’s seen the surge in mental health-related discrimination cases firsthand in the past two years. Often it starts with a mental health breakdown at work, followed by termination.

“In all of these cases, employers have rushed to judgment and fired my clients because of their perception that my clients can’t perform the job,” Berlin Benjamin said, calling it a “clear violation” of the ADA.

The EEOC has sued companies for discriminating against people with mental illnesses at least twice in the past year.

In December, the EEOC sued Milner, Ga.-based fabrication company Ranew’s Management Co. for allegedly terminating its chief financial officer after he asked for leave for severe depression. Two months later, the company settled for $250,000 and agreed to update its policies.

Dragon Rig Sales and Service LLC, a Beaumont, Texas-based industrial equipment and services company, faced an EEOC lawsuit in August 2021 for refusing to hire someone who was taking medications to treat anxiety and opioid addiction. At the time, the EEOC’s Houston District Director Rayford O. Irvin said in a statement that “enforcement of the ADA is a top priority of this agency.”

Employers can have a hard time seeing those conditions on the same plane as other disabilities, said Brian Sutherland, also an attorney at Hall & Lampros.

Sutherland in 2018 represented a 9-1-1 dispatcher who was fired after taking medication to treat bipolar disorder and PTSD and requested temporary leave while being treated in a psychiatric hospital. A federal jury found that the termination violated the ADA and the Family and Medical Leave Act and awarded the employee $622,000.

“A person who experiences anxiety or depression has a disability under the law just like somebody who has a wheelchair or visual impairment,” Sutherland said. “That’s not always as obvious to the employer.”

Reasonable Accommodation

But what's considered a reasonable accommodation for mental health conditions varies by situation, and the EEOC's guidance isn't always clear, employers say. Reasonable accommodation can take many forms, from adjusting an employee's work schedule to providing breaks or leave to see medical professionals.

Atoyia S. Harris, an employment law counsel at Proskauer Rose LLP, said she's seen an uptick in clients seeking advice on accommodating employees with mental health conditions. That increase is likely linked to both the pandemic and the lessened stigma around mental health, she said.

"Particularly when it comes to mental health conditions, there's really no one-size-fits all solution," Harris said. She advises clients to train their human resources teams and supervisors on mitigating accommodation concerns.

The EEOC has slightly conflicting guidance on remote work as a form of ADA accommodation, said Nicole Eichberger, a partner at Proskauer.

In one guidance, the agency says employers are not required to automatically allow an employee to continue telework as a reasonable accommodation under the ADA, she said. But the agency's mental health guidance says telework "may" be a reasonable accommodation.

"When we look at those factors, they aren't so clear on helping employers make these decisions," Eichberger said.

https://news.bloomberglaw.com/daily-labor-report/anxiety-ptsd-drive-rise-in-mental-health-employment-bias-claims

United States: Disability Accommodation And COVID-19: Ten Emerging Issues To Consider

As we enter the third year of the global COVID-19 pandemic, many U.S. businesses are implementing long-delayed return-to-office plans and hoping to establish a new equilibrium. Public health experts, economists and policymakers increasingly speak of "endemicity," a phase in which COVID-19 transmission rates fall to a constant but manageable baseline level, perhaps confined to certain regions, rather than actively accelerating and spreading throughout the population in epidemic fashion. Some refer to this next phase as "living with COVID" or even consider it a "return to normal."

In the employment law context, however, "living with COVID" does not represent a return to normal. Rather, developments since 2020 make clear that human resources professionals can expect-and are already encountering-numerous COVID-19 related challenges to their disability accommodation practices. This Insight reviews a "top ten" list of emerging issues in this area,

broadly relating to increased claims for accommodation, administering the interactive process, and assessing the reasonableness of proposed accommodations.

Issues Related to Increased Claims

The ADA Amendments Act of 2008 (ADAAA) was explicitly adopted to increase the population that would qualify for coverage, and possibly accommodation, under the Americans with Disabilities Act (ADA). Since the ADAAA's adoption, employers generally have absorbed the notion that the term "qualified individual with a disability" is to be construed broadly. Even so, developments during the COVID-19 pandemic have expanded the potential pool of covered individuals who may seek the ADA's protections far beyond what even experienced practitioners may have anticipated. Three of our "top ten" emerging issues fall into this category.

1. New Requests Based on COVID-19 and "Long COVID"

It should not surprise anyone that a virus that has infected more than 60% of the U.S. population, and claimed the lives of 1 million Americans, will result in additional direct claims under the ADA. We learn more almost daily about the direct impacts of COVID-19 infection on different bodily functions, as well as the constellation of prolonged health conditions that have been termed "long COVID." Employees have begun to bring ADA claims based on impairments brought about by COVID-19 and its after-effects.[1] While most COVID-19 infections are brief, especially for those who have been vaccinated, the Equal Employment Opportunity Commission (EEOC) has noted that "[t]he limitations from COVID-19 do not necessarily have to last any particular length of time to be substantially limiting," and that restrictions that last several months may qualify.[2] In addition, the mitigating measures or treatments used for COVID-19 may themselves have negative side effects that substantially limit an individual's major life activities or bodily functions.[3] Of course, whether a COVID-19 infection directly qualifies as an actual disability will require a case-by-case assessment.[4]

2. New Requests Based on Pre-Existing (but Undisclosed) Physical Conditions

The ADA defines a covered "individual with a disability" to include a person who "has a physical or mental impairment that substantially limits one or more major life activities."[5] Importantly, "a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[6] Because these definitions cover virtually all chronic conditions and diseases, and because the ADAAA precludes consideration of almost all measures that mitigate the impact of such impairments, observers often note that virtually anyone in a workplace might qualify for the ADA's protections. Historically, however, employees whose chronic conditions were well-controlled by mitigating measures rarely have needed to invoke the ADA if their conditions were not substantially limiting.

On the other hand, the EEOC has long recognized that certain pre-existing conditions could make individuals more susceptible to serious illness and complications during a pandemic. In March 2020, the EEOC updated its guidance on "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act," which it first issued during the spread of the H1N1 virus.[7] The Pandemic Preparedness Guidance cautions employers against making proactive inquiries "to identify those at higher risk of influenza or coronavirus complications," but also anticipates that such employees may voluntarily disclose, or at least seek accommodation in connection with, their high-risk status.[8] The EEOC's subsequently issued guidance ("What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws") further cautions that an individual's COVID-19 infection may actually "worsen the individual's pre-existing condition that was not substantially limiting, making that impairment now substantially limiting."[9]

The Centers for Disease Control and Prevention (CDC) lists numerous conditions that can place an individual at higher risk of complications from COVID-19.[10] This list includes conditions that are relatively prevalent among U.S. adults, such as Type 1 and Type 2 diabetes, obesity, hypertension, pregnancy and physical inactivity. Given how much is still unknown about the long-term effects of COVID-19 infection and its interaction with these conditions, it is foreseeable that many individuals who never disclosed such conditions to their employers will now seek accommodation to reduce their risk of contracting COVID-19 and experiencing long-term complications. Employers therefore should prepare to deal with an increase in inquiries from employees who previously did not need or seek accommodation prior to the pandemic. Employers may need to provide reasonable leeway for employees who wish to continue certain protective measures, given continuing COVID-19 transmission risks.[11]

3. New Requests Based on Psychological, Emotional and Mental Health Issues

From its inception, the ADA has protected individuals with mental impairments as well as physical ones. Employers have long struggled with how to interpret the ADA in the context of mental illness, particularly when an individual claims to be impaired in the major life activities of socializing or working with others. Covered mental impairments may include any mental or psychological disorder, including intellectual disabilities, emotional or mental illnesses, learning disabilities and neurodiversities.[12]

Given this scope of coverage as well as the societal disruption created by the pandemic, employers should anticipate an increase in ADA claims based on psychological and emotional impairments. Throughout the pandemic, employers have faced claims from individuals who are concerned about their own perceived risk of contracting COVID-19, or of transmitting it to vulnerable family members, and claim that their underlying anxiety or depression has been exacerbated. As a general matter, the EEOC notes that "employees with certain preexisting mental health conditions, for example, anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder, may have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic."[13]

Moreover, in settings where employees have been working remotely for two years or longer, many have suffered the effects of prolonged social isolation on their mental health, and are finding it difficult to readjust to working alongside others in person. These difficulties may be compounded for those neurodiverse employees who need extra support in returning to a physical workplace after a long period of telework. Even the COVID-19 vaccine complicates this picture, given the polarization that surrounds it: on the one hand, vaccinated employees express anxiety about working with unvaccinated colleagues, while on the other, some unvaccinated employees have sought medical exemptions from vaccine requirements based on anxiety about the novelty of the vaccines themselves. As we continue "living with COVID," employers should expect to see an increase in ADA requests tied to mental and emotional health issues.[14]

Issues Related to Administering the Interactive Process

With so many Americans working remotely over the past two years, many circumstances that previously might have yielded accommodation requests, such as employee or family illnesses and unexpected school closures, have flown beneath the radar (or perhaps, just below the webcam). Many employees with remote work arrangements have simply managed these circumstances without formally filing for accommodation, perhaps by extending their work hours or weeks. After two years with relatively fewer requests, even the best accommodation management team might need a refresher course to get back up to speed. But there have also been short- and long-term legislative and regulatory changes during the pandemic that require additional attention. Three of our "top ten" emerging issues relate to administering the interactive process.

4. New Types of Time Off and Leaves of Absence

Unsurprisingly, accommodation requests often arise when available leaves have been exhausted and an employee is still coping with the circumstance that gave rise to the leave. It is vital to understand exactly when available time off runs out in order to anticipate when accommodations may be sought, especially because leave itself may be an accommodation in some circumstances.[15]

This area has been complicated during the pandemic by an explosion in new types of leave, expanding both the pool of employees who may take time off and the reasons they may seek to do so. Some leaves were specifically created to address pandemic-related circumstances, as in California and New York State, which have established discrete paid COVID-19 sick time and vaccination time under state law.[16] Other laws are more general and coincidentally became effective during the past two years, as in Connecticut[17] and the District of Columbia,[18]which each adopted new paid family and medical leave laws, and Maine[19] and New York, which created new forms of paid time off.[20] Some leaves have both come and gone during this period of time, including the Federal Families First Coronavirus Response Act, which ended in 2021, and numerous local public health emergency leave ordinances, or PHELOs, that expired in tandem with the underlying emergency declarations.

Administrators will have their hands full not only identifying the various leave and time-off requirements that may apply to a given employee, but also interpreting them. Regulations and formal guidance may be scant or have been hastily compiled and may not provide the detail needed to address complex accommodation requests or repeat circumstances. In addition, there may be numerous overlapping leave entitlements under different state and local laws, with little guidance available to assist employees in making a request or employers in knowing what is required of them.

5. State Approaches to the COVID-19 Vaccine, Part 1

Soon after the COVID-19 vaccines were authorized by the FDA, the EEOC issued guidance stating that "federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be fully vaccinated against COVID-19, subject to the reasonable accommodation provisions of Title VII and the ADA and other EEO considerations."[21] Under federal EEO laws, employees may seek a medical exemption from a workplace vaccine mandate based on a condition or disability that contraindicates the vaccine. However, several states have taken a different path with respect to the COVID-19 vaccine, creating a patchwork of sometimes conflicting rules, such that an employer cannot simply apply its ADA process when evaluating an employee's medical exemption request.[22] For example:

- Montana treats COVID-19 vaccination status as a protected class, while Tennessee permits employees to object to COVID-19 vaccination for any reason.[23] In either case, an employee would not have to raise a medical or disability concern in order to obtain an exemption under state law, whereas the ADA would so require.
- Alabama, Arkansas, Florida, Indiana, North Dakota, South Carolina, Utah, and West Virginia have all created legislative exemptions from vaccine mandates based on recovery from past COVID-19 infection.[24] Having had COVID-19 does not contraindicate the vaccine; the CDC cautions that "No currently available test can reliably determine if you are protected after being infected with the virus that causes COVID-19" and advises individuals to obtain the COVID-19 vaccine even if they have previously had the virus.[25] Nor does every case of COVID-19 rise to the level of a qualified disability under the ADA, without a showing that a major bodily function or major life activity has been impaired. Yet each of these states permits employees to claim "recovery immunity" as a basis for medical exemption, whereas the ADA would not.

6. State Approaches to the COVID-19 Vaccine, Part 2

In addition to creating new bases for employees to seek medical exemptions from the vaccine, some states have also restricted employers' ability to inquire into these exemption requests. This is a departure from the customary ADA interactive process, which envisions a cooperative exchange of information between employer and employee to understand the employee's limitations and need for accommodation. Those who administer this process will need to be mindful of these restrictions when they are dealing with vaccine-related requests, as opposed

to other types of ADA-covered accommodation requests that would still involve the usual degree of interaction. Such restrictions have been adopted in the following states:

- Alabama, where employers are required to construe employee requests for medical exemption "liberally" in favor of granting the exemption;[26]
- Florida, where an employer is required to approve a request for medical exemption upon receipt of a statement signed by a physician or physician assistant that COVID-19 "vaccination is not in the best medical interest of the employee";[27]
- Indiana, where an employer that receives a completed exemption request for an exemption based on either medical reasons or COVID-19 recovery must allow the employee to opt out of the COVID-19 vaccination requirement "without further inquiry," even though the statute otherwise invokes the ADA's accommodation standards;[28]
- Kansas, where an employer is required to approve a request for medical exemption upon receipt of a written statement from a health care provider that receiving the COVID-19 vaccine would "endanger the life or health of the employee";[29] and
- South Carolina, where a "medical exemption must be honored regarding any COVID-19 vaccine or booster requirement" and may be based on "the presence of antibodies, a prior positive test or pregnancy."[30]

Issues Related to Reasonableness

Apart from the fact that more individuals may invoke the ADA's protections, and that different standard may apply to their requests, employers "living with COVID" must also acknowledge that the past two years have overturned long-held assumptions about how work gets done. Whether a requested change to a job is "reasonable" cannot be determined without defining the essential functions of that job, including where and how it is performed. But in many workplaces, those baselines have shifted dramatically, perhaps permanently. We round out our "top ten" list with four issues related to the reasonableness of various accommodation requests.

7. Remote Work Forever?

In 2005, the EEOC advised that "[t]he ADA does not require an employer to offer a telework program," but that an employer that chose to do so "must allow employees with disabilities an equal opportunity to participate in such a program."[31] Employers with such programs might issue formal documentation outlining technical aspects of these arrangements, such as requiring an employee to have secure network access and a physically appropriate workspace, stipulating that remote work was not meant to facilitate child care or other family responsibilities during work hours, and reserving the option to withdraw these arrangements at any time. Obviously, even without these arrangements, employees had increasingly worked remotely for decades-not only in field positions, but wherever stable internet access could be found.

However, prior to the pandemic, it was routine for employers to argue-and courts to accept-that "physical attendance in the workplace [was] itself an essential function of most jobs."[32] As a result, employees seeking telework to accommodate physical impairments that were aggravated by workplace conditions often found their claims dismissed as unreasonable.[33] In a 2015 en banc ruling, the U.S. Court of Appeals for the Sixth Circuit rejected an employee's telecommuting request, declaring, "Better to follow the commonsense notion that non-judges (and to be fair to judges, our sister circuits) hold: Regular, in-person attendance is an essential function-and a prerequisite to essential functions-of most jobs, especially the interactive ones."[34] In addition, the court rejected the EEOC's argument that technology had advanced enough to permit at least partial remote work, stating "[N]o record evidence-none-shows that a great technological shift has made this highly interactive job one that can effectively be performed at home."[35]

How times have changed! Regardless of whether employers were inclined to grant remote work at the start of 2020, many were compelled to do so by public health restrictions. Between March 2020, when the World Health Organization declared COVID-19 a pandemic, and April 7, 2020, 42 states, the District of Columbia and Puerto Rico imposed various forms of "stay at home" or "lockdown" orders, with exceptions for narrow categories of "frontline essential" workers. Businesses across a wide range of industries moved to remote work in a hurry, typically without formal remote work policies and without a detailed review of essential functions for individual roles. And, while many of these lockdown orders were scaled back over the summer and fall of 2020, continuing concerns about COVID-19 transmission kept these remote work arrangements in place far longer than anyone could have anticipated. This was especially true in workplaces that linked return-to-office plans to COVID-19 vaccination, with remote work often becoming a default accommodation for employees who could not obtain the vaccine. Many businesses are only now (in the spring of 2022) bringing employees back to the physical workplace, and many are considering a long-term or even permanent adoption of remote and hybrid work models.

Against this backdrop, employers should anticipate both that requests for remote work accommodations will increase, and that it will be harder to deny them. For their part, employees who have worked remotely for more than two years will likely be prepared to show that they have worked just as well, or even more productively, outside the workplace, especially once freed from their commutes. The EEOC has signaled its interest in this subject; its first COVID-19-related disability accommodation suit involves a claim from a worker who was recalled to her physical worksite in mid-2020 after the lifting of pandemic-related restrictions. She allegedly requested to continue partial remote work because of a pre-existing pulmonary condition, but her request was denied and she was fired.[36]

Pre-pandemic case law suggests that where employers have permitted remote work in the past, and indeed benefited from it, they will need to explain a decision to withdraw or deny such arrangements going forward.[37]Employers should be prepared for a fact-specific examination of a job's essential functions, as the ADA contemplates. Certainly, it will be more

difficult to rely on blanket assumptions about the "essentialness" of in-person work-especially in those cases where a court or an arbitrator is still conducting remote proceedings.

8. Inclusion Concerns (or, The Other Side of the Remote Work Coin)

As noted above, many employers have seen significant benefits from remote work, and are willing to embrace it not only for reasonable accommodation purposes but more broadly. However, the fact that remote work may become a favored accommodation for various types of impairments raises a question as to whether employees are allowed to fall "out of sight, out of mind." It is likely too early to assess whether remote employees will be disadvantaged as compared to their counterparts who are working onsite when it comes to assignments, promotions or compensation decisions. These issues may not emerge until mid-year or year-end performance reviews are conducted, at which point employees may already have become disengaged from the workplace. As part of their inclusion programs, employers should give serious thought to whether they are prepared to support these new ways of working, including by supporting managers in developing and setting direction for hybrid teams in an equitable manner. Employers should also ensure that their formal review processes are able to capture the contributions of those working from afar.

9. Cost Considerations and "Significant Expense"

A reasonable accommodation is one that an employer can adopt without undue hardship.[38] Undue hardship means that an accommodation would require "significant difficulty or expense" to an employer when considered in light of the following factors:

- the nature and cost of the accommodation needed;
- the overall financial resources of the facility or facilities involved, the number of persons employed at the facility, and the effect on expenses and resources;
- the overall financial resources of the covered entity, the overall size and number of employees of the business, and the number, type, and location of its facilities;
- the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce, and the geographic separateness and administrative or fiscal relationship of the facility or facilities to the covered entity; and
- the impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the facility's ability to conduct business.[39]

Given the above framework, the financial cost of an accommodation will rarely be a significant enough expense to constitute an undue hardship. Indeed, as the EEOC has noted, "[p]rior to the COVID-19 pandemic, most accommodations did not pose a significant expense when considered against an employer's overall budget and resources (always considering the budget/resources of the entire entity and not just its components)."[40]Nonetheless, as COVID-19 continues to circulate, employers may expect that numerous employees will simultaneously request similar accommodations, resulting in costs that may become significant when

measured cumulatively. Cost considerations related to COVID-19 accommodation may include the following:

- COVID-19 Testing-In many workplaces that have adopted COVID-19 vaccination mandates, individuals who are granted exemptions but must report to a physical worksite are required to take regular COVID-19 tests as part of their accommodation. The availability and expense associated with COVID-19 tests has varied widely throughout the pandemic, with average costs sometimes running as high as several hundred dollars per test, depending on the type of test used and whether reimbursement is available through group health insurance or public funding. In addition, employers may be required to bear the costs of such tests, and possibly also pay for time spent testing, whether under statutes specific to COVID-19 vaccine exemptions,[41] pre-COVID-19 medical testing provisions[42] or general wage-hour principles implicated by the way the testing program is implemented.[43] Employers should consult with counsel to review their testing program design and obligations.
- Remote Work Expense Reimbursement-Even where an employer is inclined to grant a remote work accommodation, it may not be as simple as sending the employee to a home office. Rather, employers need to consider where the employee is located, and account for various state and local provisions requiring reimbursement for necessary, out-of-pocket expenses incurred by employees in connection with performing their work.[44]
- Vaccination Incentive Programs-Particularly in 2021, many employers sought to incentivize, rather than require, employees to obtain COVID-19 vaccines through the use of cash incentives or other gifts. While the EEOC has provided limited guidance regarding such incentives, it remains unclear whether individuals who cannot obtain the vaccine for ADA-protected reasons must be offered the same incentive, and if so, what alternative method of qualifying for such an incentive would be appropriate.[45] Such incentive programs have often been stymied by the possibility that incentives must be paid regardless of whether employees actually get vaccinated.

10. Accommodation Requests Based on Family Considerations

Finally, throughout the pandemic, employers have received requests from employees for modified work arrangements based not on the employee's own disability, but that of a family or household member. Although the ADA and analogous fair employment laws do prohibit associational discrimination, employers' accommodation obligations are usually limited to situations where an employee's own health condition creates an impairment.[46] Employees may have recourse under the Family and Medical Leave Act, or state and local leave laws, when they are caring for a covered family member who has a serious health condition and is undergoing treatment. However, these laws do not necessarily address the situation where an individual has a long-term vulnerability that puts them at higher risk of COVID-19 complications, such as being immunocompromised or having other underlying health conditions, or a simple inability to receive vaccination due to age.

On the other hand, the wide use of remote and hybrid work may have created internal precedents that make it difficult to deny such accommodation requests. There also may be workplace culture considerations, particularly in small- to mid-size organizations that pride themselves on family friendliness. And the EEOC has recently issued guidance regarding caregiver discrimination, cautioning employers that while they are not required to grant accommodations to employees for the purposes of caregiving, they also must not discriminate against employees on any protected basis in granting flexible work arrangements.[47] To the extent that "living with COVID" means something very different for employees with vulnerable family members, this will be an important area to watch.

https://www.mondaq.com/unitedstates/employee-benefits-compensation/1188714/disability-accommodation-and-covid-19-ten-emerging-issues-to-consider

Small businesses get hit with record numbers of disability lawsuits

U.S. small businesses have been battling soaring inflation, labor shortages and supply-chain snarls during the pandemic. Now many are hit by another unexpected challenge: disability lawsuits.

Industry associations and business owners say serial plaintiffs filing dozens or hundreds of cases are increasingly using the 1990 Americans with Disabilities Act to extract tens of thousands of dollars in settlements — and not to promote access as the landmark civil-rights law intended.

Authorities have started to crack down. District attorneys in California recently announced a civil lawsuit against a law firm they say filed “thousands of fraudulent, boilerplate lawsuits against small businesses.”

The number of ADA lawsuits filed in federal court alone soared to an all-time high last year, according to data compiled by law firm Seyfarth Shaw, which represents defendants in these cases.

The ADA law was a milestone for civil rights, giving people with disabilities the right to equal opportunity, including access to buildings and transportation. It provides disabled citizens the right to seek redress for denial of access, said Carl Tobias, a University of Richmond law professor who teaches about U.S. tort law.

“When a federal law provides remedies for people who face difficulties in gaining access to public accommodations, such as hotels and restaurants, those people are entitled to their day in court,” Tobias said.

But it’s the growing number of plaintiffs seeking monetary settlements from local shops or restaurants that has alarmed policymakers and even disability advocates such as Hene Kelly, former chair of the California Democratic Party Disabilities Caucus.

Companies should be ADA compliant, but small businesses are often unaware of violations, and fixes might be physically difficult in old buildings or hilly streets, such as those in the San Francisco Bay Area, said Kelly, who’s now regional director of the CDP. And paying to settle suits leaves less money to fix barriers to access, she said.

“It’s a delicate situation,” said Kelly, who is disabled. “We need something that helps businesses and helps people with disabilities.”

In New York, the number of ADA lawsuits has soared to 2,744 from 125 in 2013, according to Seyfarth Shaw. California accounts for more than half of the 11,452 federal suits filed last year over disability issues.

Among them are hundreds of cases brought by a plaintiff represented by Potter Handy, the law firm that is now the focus of a lawsuit by district attorneys in San Francisco and Los Angeles. The district attorneys claimed in a press release that Potter Handy “likely defrauded tens of millions of dollars” from California small businesses.

“We will hold accountable those who exploit vulnerable business owners, hurt immigrant communities, and subvert the intent of laws designed to promote accessibility,” said San Francisco district attorney Chesa Boudin, who last July started an investigation into ADA lawsuits targeting Chinatown businesses, including many run by immigrants with limited English.

Attorney Dennis Price, of Potter Handy, wrote in an email: “It is unfortunate that these DAs are picking on disability access advocates for political reasons. Both DAs are facing serious recall threats and are filing these claims in order to generate support.”

One of his clients, Orlando Garcia, has filed more than 1,000 ADA lawsuits in California federal court since 2020, according to data compiled by watchdog Lawsuit Reform Alliance of New York, or LRANY. Garcia has cerebral palsy and uses a wheelchair, according to court filings. Price said he was unavailable for comment.

Last June, Garcia sued Lola's Chicken Shack, a restaurant in Alameda, near San Francisco, for lack of accessible outdoor tables and a high front door threshold. The owner, Mark Rogers, said he hired ADA consultants, fixed violations — but refused to pay to settle the suit.

"I have nothing against ADA requirements. They're a good thing," he added. Rogers, who has Parkinson's disease, said he postponed brain surgery to focus on the lawsuit.

On March 24, after nine months of litigation, a California judge dismissed the case, noting in a filing that the restaurant promptly fixed alleged access barriers and that additional requests, including for nominal damages, were "unpersuasive."

The suit was "just one more mountain after another to climb over," said Rogers, who, like many business owners, is struggling with supply-chain issues and inflation. "I'm sitting on pins and needles every day to see if I'm going to have enough chicken."

Another defendant was Michael Lee, owner of Sandwich Board, a takeout restaurant also in Alameda. After Garcia sued last June, Lee said he hired an ADA consultant, added a table to the counter and removed a couple of non-compliant tables.

Sandwich Board, started by Lee's parents nearly 40 years ago, never had an ADA complaint before, he said.

"Sometimes I can't sleep at night, or I lose appetite. My bank account is just draining out," Lee said. A judge dismissed the case on March 30.

Now Lee can turn back to other daily challenges. He had resisted raising sandwich prices in the face of 50% price increases for cold cuts and disposable gloves — but finally did so recently.

Garcia's lawyer, Price, said by email that "our clients find that their requests are blown off, they come back to a business several months later and it's still non-compliant despite promises from managers and owners to fix it."

Small businesses also report receiving demand letters on alleged ADA violations. Such letters are routine in the U.S. legal system, designed to give defendants notice of potential claims against them and offering to settle prior to having a suit being filed.

But the settlement amounts may range from $10,000 to $25,000, according to Tom Stebbins, executive director of LRANY. Fearing the possibility of expensive and time-consuming legal action, business owners pay the money, he said.

“It’s an absolute shakedown,” said Stebbins, speaking generally about such settlements, for which there’s no public record.

The real cost of abusive ADA lawsuits is difficult to estimate, according to Nathan Morris, senior vice president at the U.S. Chamber of Commerce’s Institute for Legal Reform.

However, small businesses are disproportionately affected by legal action in general. Those with under $1 million in annual revenues, which accounted for about 7% of the total, bore 39% of commercial tort liability costs, according to a 2020 report from the Institute for Legal Reform. Commercial torts are claims brought against businesses for unlawful acts where they may be held liable.

In recent years, ADA cases have expanded to the virtual world. More than 4,000 lawsuits against websites, apps or video content were filed in 2021, a 15% increase from the previous year, according to UsableNet, an accessibility consultancy.

In Florida, one plaintiff filed 26 suits against gas stations for lack of closed captioning on videos at the pumps. That case was dismissed by a judge who said in court filings that the suit aimed at collecting payments “in an unethical fee-sharing arrangement” with the lawyer. The judge fined the plaintiff and lawyer $59,900 each, according to the filing.

https://www.telegraphherald.com/news/business/article_8feba361-9403-5925-aaeb-d62f387a18a2.html

Extraordinary Workplace Misconduct: Celebrating you is a piece of cake…

In the latest entry in our series on extraordinary workplace misconduct, we must come to terms with the fact that not everyone loves birthdays or surprises. And, when an employee tells you that they don’t want a surprise birthday party, you’d best oblige them or you could face a discrimination suit and a nearly half a million-dollar jury verdict!

As the Washington Post, New York Times, and our Twitter scrolling reported, a Kentucky-based medical laboratory, Gravity Diagnostics, was found liable by a jury for disability discrimination when it fired an employee who suffered from an anxiety disorder that caused panic attacks. As a result, the jury awarded **$450,000** in damages for lost wages and emotional distress.

However, it's the series of events that prompted the employer's actions that are truly extraordinary.

Prior to his birthday in 2019, the employee asked his employer if they could skip the festivities this year, due to his anxiety disorder. However, somewhere in that game of office telephone, the message got lost. So, on that fateful birthday, the employee walked into work, and to his horror, there awaiting him was a birthday party—in **his** honor. The employee's colleagues and a banner lined Gravity Diagnostics' break room to give him birthday wishes.

The employee quickly began to suffer a panic attack and, instead of sticking around for the celebration, grabbed his lunch and hid in his car in the parking lot. The next day, in a meeting with supervisors, the employee was chastised over his behavior during the celebration. Unfortunately, in that same meeting, the employee began to suffer a second panic attack. The parties naturally interpret what happened next differently, but the employee told his supervisors to be quiet, balled his fists, and became red-faced. Concerned by the behavior, Gravity Diagnostics promptly terminated him.

The employee sued Gravity Diagnostics for disability discrimination in response to these events. The jury found that the employee suffered an adverse employment action based on his anxiety disorder, and awarded him $150,000 in lost wages and $300,000 for emotional suffering, making this quite the expensive birthday party.

While Gravity Diagnostics intends to appeal the award, there are several lessons that employers can draw from this saga. First, what constitutes a disability under federal and state law is broad. The federal Americans with Disabilities Act and state anti-discrimination laws generally prohibit discrimination and require reasonable accommodations for disabilities, which includes mental disabilities in addition to physical ones. Additionally, as our society becomes increasingly more receptive to mental health concerns, juries across the nation will be more willing to find in favor of plaintiffs and against employers in these cases.

Second, if an employee brings specific concerns to your attention, it is important to listen and respond appropriately to those concerns. If the concern is connected in some way to the employee's health – whether mental or physical – this becomes even more consequential. If the employee's concern involves a request that is relatively simple and easy to grant (e.g., "please do not throw me a birthday party"), it may be best simply to agree to the request. If it is somewhat more complicated, it may be necessary to engage in the interactive process that is required under disability discrimination laws. In this case, it was significant that the employee brought his wishes to his employer well in advance of the birthday in question.

Third, and finally, confronting an employee like this can backfire. Instead of chastising the employee, this miscommunication could have served as a teaching moment for both parties. Many employees have introverted tendencies (without mental disabilities), and employers should develop ways to work with those employees. While many employers emphasize the importance of being a team player, the focus should be on how well the employee works with others, and not necessarily on how they socialize with others. Although employees should engage with their co-workers in a civil manner, not everyone is comfortable with the same type

or level of social interaction or friendship in the workplace, and a wise employer will seek to engage those employees in a manner with which they are more at ease.

https://www.lexology.com/library/detail.aspx?g=40d244fd-c2d5-4c7a-a15a-0d9db8335e74

EEOC Issues New Guidance for Employers Regarding the Treatment of Employees with Caregiver Responsibilities

With more employees returning to the office, many employers have struggled with increased caregiving demands on employees' time as a result of the COVID-19 pandemic. To address these concerns, the Equal Employment Opportunity Commission (EEOC) issued new guidance last month clarifying federal employment discrimination law as it applies to employees with caregiver responsibilities (EEOC Guidance). In this article, we highlight the key takeaways from the EEOC Guidance, and review some examples of what might constitute unlawful "caregiver discrimination."

What Constitutes "Caregiver Discrimination" Under the EEOC Guidance

The EEOC Guidance provides that, in certain circumstances, it may be unlawful for an employer to discriminate against an employee in connection with the employee's caregiving responsibilities for children, older relatives, relatives with disabilities, or other family members in need of care. It is important to note, however, that federal employment discrimination laws, such as Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act of 1990 (ADA), and the Age Discrimination in Employment Act (ADEA), generally do not prohibit employment discrimination based solely on caregiver status.

Federal employment discrimination laws generally do not require employers to provide leave or other accommodations to employees based on an employee's need to provide care for a family member—as long as the employer administers its policies consistently for all employees. Employers are not required, for example, to excuse an employee's poor performance where the employee fails to meet reasonable performance expectations because of their caregiving duties. The EEOC Guidance notes, for instance, that an employer that has a practice of issuing written warnings to employees who arrive late to work may properly issue such a written warning to an employee who arrives late to work because of conflicting caregiving responsibilities.

Instead, the EEOC Guidance makes clear that "caregiver discrimination" is unlawful only when it is based on a protected characteristic of an employee or applicant, such as sex (including pregnancy, sexual orientation, or gender identity), race, color, religion, national origin, age, disability, or genetic information (e.g., family medical history), or when it is based on the employee's or applicant's association with another individual with any such protected characteristic.

Caregiver Discrimination Based on Sex and Pregnancy

The following are some examples of potentially unlawful caregiver discrimination based on an employee's or applicant's sex or pregnancy:

- Refusing to hire a pregnant applicant or taking adverse employment action (e.g., in a promotion decision) against a pregnant employee based on an assumption that the individual would focus primarily on caring for her newborn at the expense of her work responsibilities;

- Denying a male employee leave or a flexible work schedule to care for a sick family member (e.g., who tested positive for COVID-19), if the employer provides such leave or flexible work schedule to similarly situated female employees;

- Taking adverse employment action against, or permitting employees to make disparaging comments about, a pregnant employee because the employee opts to take reasonable preventive measures against exposure to COVID-19. For example, this might include unilateral reassignment of work duties or exclusion from certain work events or opportunities, even if intended solely to "protect" the employee; or

- Permitting disparaging comments by co-workers criticizing a female employee's decision to focus on her career rather than family or caregiver responsibilities.

Associational Disability Discrimination

The following are some examples of potentially unlawful caregiver discrimination based on an employee or applicant caregiver's association with an individual who has a disability covered under the ADA:

- Declining an employee's request for unpaid leave to care for a family member who has experienced extensive and prolonged COVID-19 symptoms, if the employer has granted unpaid leave of a similar length to employees who needed time off to address personal matters;

- Taking adverse employment action against an employee (e.g., in assignment of work) who is the primary caregiver of a family member with a disability, based on the assumption that the employee will not have sufficient time to adequately perform their job duties because of their caregiver obligations; or

- Refusing to hire an applicant because the applicant's spouse has a disability that would increase the likelihood of incurring higher health insurance costs, or taking an adverse employment action against an employee for adding a family member with a disability to their employer-sponsored health insurance plan.

Caregiver Discrimination Based on Race, Color, or National Origin

The following are some examples of potentially unlawful caregiver discrimination based on an employee's or applicant's race, color, or national origin:

- Refusing to hire an applicant, or taking adverse employment action against an employee (e.g., refusing office access), because the individual was born in a country with a high rate of transmission of the COVID-19 virus;

- Imposing more stringent COVID-19 preventative measures on an employee based on the employee's race or national origin (e.g., requiring an Asian employee to provide additional proof of vaccination because COVID-19 was first identified in an Asian country); or

- Denying an employee's request for leave to care for a sick family member from another country based on the assumption that the family member has contracted COVID-19, and/or administering the employer's leave policies inconsistently with respect to employees of color when compared with similarly situated white employees.

Considerations Under the FMLA and State/Local Laws

Employers should be aware that the EEOC Guidance does not address employment discrimination laws enacted by any state or local jurisdiction, some of which provide broader protections than federal employment discrimination law. For example, certain jurisdictions have enacted legislation that specifically prohibits employment discrimination on the basis of additional protected categories, such as familial responsibilities or caregiver status. Employers in these jurisdictions that take an adverse employment action against an employee because of the employee's caregiver duties might be subject to liability under state or local law, even if such action is permissible under federal law.

In addition, the EEOC Guidance does not address federal, state, or local leave laws that grant protected leave to eligible employees to care for sick family members. Employers subject to the Family and Medical Leave Act of 1993 (FMLA) may not retaliate against or interfere with an eligible employee's right to take leave under the FMLA, which includes leave to care for a covered family member with a serious health condition. Employees returning from FMLA leave are generally entitled to reinstatement to their previous job or to a position that is substantially equivalent in terms of compensation, benefits, opportunities for advancement, and other terms and conditions of employment. Numerous states and local jurisdictions have also enacted a variety of family and medical leave, paid sick leave, parental leave, and other, similar leave laws that may provide eligible employees a right to take leave to care for a family member with an illness, injury, or disability.

https://www.jdsupra.com/legalnews/eeoc-issues-new-guidance-for-employers-4680192/

All Hair is Good Hair: An Update on the CROWN Act and State CROWN Acts

The Federal CROWN Act (H.R. 2116)

Just last month, the U.S. House of Representatives passed H.R. 2116, known as the CROWN Act, which stands for Creating a Respectful and Open World for Natural Hair Act. This bill, if fully enacted, would ban race-based hair discrimination in workplaces, federal programs, and places of public accommodation. The bill would enact policies first introduced and passed in California in 2019, and since adopted in Oregon, Washington, and several other states. To date, it has not received action in the U.S. Senate, where its fate is uncertain.

State CROWN Acts

While the federal government is debating the merits of the CROWN Act, 15 states have already passed some version of the CROWN Act, including the three West Coast states.

As of 2021, the discrimination statutes of California, Washington, and Oregon all explicitly define race to include traits historically associated with a particular race, including hair texture and "protective hairstyles." While each state defines "protective hairstyles" a little differently, and have some other state-specific differences (see below), all West Coast employers should take note that their employees' hairstyles may be protected under the discrimination statutes.

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Action Steps for Employers

With these expanded definitions of "race," this is a good time for employers to take some steps to ensure inclusivity in the workplace as well as compliance with the law, including:

- **Review and update anti-discrimination and harassment policies.** If your employee handbook does not mention protected hairstyles and traits historically associated with race in its EEO, anti-discrimination, harassment and other related policies, then now is a good time to update your handbook or have legal counsel review it.

- **Dress code or grooming requirements should be reviewed and updated as needed.** Be sure to consider whether any standard is truly necessary and nondiscriminatory in impact, and if not, now is a good time to adjust. See EEOC Compliance Manual.

- **Provide training and education for all employees, including managers and supervisors.** Employers should train all employees, including managers and supervisors, that characteristics associated with a particular race, such as hairstyles or textures, are protected under the employer's policies. This point should be included in workplace

training on legal compliance, manager/supervisor obligations, and diversity, equity, and inclusion training.

With the passage of the CROWN Act in California, Washington and Oregon, and given the trend of other states and municipalities following suit, the cautious employer must remain proactive in identifying and preventing discrimination based on race and traits associated with race, including hair texture and natural hairstyles.

https://www.jdsupra.com/legalnews/all-hair-is-good-hair-an-update-on-the-7624390/

Black doctors say they face discrimination based on race

ATLANTA (AP) — Dr. Dare Adewumi was thrilled when he was hired to lead the neurosurgery practice at an Atlanta-area hospital near where he grew up. But he says he quickly faced racial discrimination that ultimately led to his firing and has prevented him from getting permanent work elsewhere.

His lawyers and other advocates say he's not alone, that Black doctors across the country commonly experience discrimination, ranging from microaggressions to career-threatening disciplinary actions. Biases, conscious or not, can become magnified in the fiercely competitive hospital environment, they say, and the underrepresentation of Black doctors can discourage them from speaking up.

“Too many of us are worried about retaliation, what happens when you say something," said Dr. Rachel Villanueva, president of the National Medical Association, which represents Black doctors. “We have scores of doctors that are sending us letters about these same discriminatory practices all the time and seeking our help as an association in fighting that.”

According to the Association of American Medical Colleges, Black doctors made up just 5% of active physicians in the U.S. in 2018, the most recent data available. People who identify as Black alone represent 12.4% of the total U.S. population, according to the 2020 U.S. census. For the 2021-2022 academic year, 8.1% of students enrolled in medical schools identified as Black alone. The medical school association and the National Medical Association in 2020 announced an initiative to address the scarcity of Black men in medicine — they made up only 2.9% of 2019-2020 enrolled students.

The American Medical Association, the country’s largest, most influential doctors’ group, is also trying to attract Black students to medicine, working with historically Black colleges and universities and helping secure scholarships, president Dr. Gerald Harmon said.

“We’re trying to put our money where our mouth is on this and our actions where our thoughts are,” he said, acknowledging that, among other things, a shortage of Black physicians contributes to poorer health outcomes for Black patients.

Some Black doctors who believe they've been mistreated are speaking out. Adewumi, 39, filed a federal lawsuit in September against Wellstar Medical Group and Wellstar Health Systems alleging employment discrimination based on race.

https://gazette.com/ap/national/black-doctors-say-they-face-discrimination-based-on-race/article_cc05dfe3-6297-5440-a58a-4791b0a959ad.html

Workplace inclusion drives have almost trebled since BLM protests, survey shows

About half of minority-ethnic workers said their employer had taken action to tackle racism in past 12 months

The number of employers implementing new diversity and inclusion drives has almost trebled since the end of the Black Lives Matter protests, new research shows.

A total of 27% of minority-ethnic workers said their employers had introduced new initiatives during the last 12 months in response to the global movement, according to an Opinium survey of 2,000 adults. This was an increase from 10% in 2020, the year in which protests began after George Floyd was murdered by a police officer in the US state of Minnesota.

The latest Multicultural Britain survey, undertaken by the pollsters in partnership with the advocacy organisation Reboot, said that almost half (47%) of minority-ethnic workers had seen their employer take some sort of action to tackle racism and diversity problems – up from 40% in 2020.

“We were interested in questioning whether promises made by employers after George Floyd were just an example of performative activism or if we were still seeing the action happening today, which is why we specifically asked whether employers have taken action,” said Priya Minhas, the lead researcher of the Multicultural Britain series.

In 2020, 73% of minority-ethnic people said they had experienced discrimination, but this year, for the first time since the Multicultural Britain series began in 2016, that figure dropped to 64%. Minhas said that it was difficult to tell whether this was positive change as a result of the global protests or because of people largely working from home and restrictions in socializing due to the pandemic.

“While there have been improvements in increased satisfaction in what employers are doing, and more people feeling that businesses and organisations are making an authentic effort to tackle racism, there is still work to be done and clearly there are still issues in the workplaces that need to be addressed,” she said.

The survey results show that there have been some positive changes in the workplace – somewhat allaying concerns that businesses and companies were committing to anti-racism only in the height of the summer of 2020.

Sereena Abbassi, an inclusion practitioner who has worked with organisations including Sony Music, the NHS and English National Ballet, said there were encouraging signs the protests were a watershed moment.

She said: “In some instances, there are businesses and employers who were very performative in their work and the catalyst seemed to be George Floyd’s murder for them to accelerate their work around diversity, inclusion and equity, but there are also others who have decided to take it very slow and are instead doing the work quietly, rather than showing up just for the optics.”

Abbassi added that she had seen a continued appetite from companies and organisations to want to work with her and that the protests had inspired people to change.

From the clients Abbassi has worked with, she feels training sessions and conversations have been successful in contributing to a more diverse and inclusive workspace.

She said: “More businesses are thinking about positive action and organisations have developed initiatives like mentoring schemes to ensure junior staff have contact with senior staff. After the protests we saw a lot of rage from people of color, but also white allies within organisations.”

Asked about the survey results that showed people were having fewer conversations about race this year than in the summer of 2020, Abbassi said a possible reason for this was that there was a real sense of fatigue when discussing race, especially for ethnic minorities who carry the burden of educating white people in their workplaces. She added that people may be concerned that having conversations about race would lead to them saying the wrong things and that it could cost them their job.

Lawrence Heming, the assistant director of EY’s UK diversity and equity team, said the survey results showed it was important for people to understand how recent events such as the pandemic and Black Lives Matter protests had affected things, either positively or negatively, for ethnic minorities.

Heming says although the results showed that some issues surrounding race were still prevalent and that "we are nowhere where I would say we need to be", there were findings that suggested things were slowly shifting.

He added: "More firms in the corporate sector are introducing initiatives and policies to tackle racism and more people are being more mindful on certain issues – this has had a positive impact, but it is important for places to still be held accountable, today, for the commitments they made in 2020."

https://www.theguardian.com/money/2022/apr/17/workplace-inclusion-drives-have-almost-trebled-since-blm-protests-survey-shows

Sexual Harassment in Our Nation's Workplaces

April is National Sexual Assault Awareness and Prevention Month.[1] The U.S. Equal Employment Opportunity Commission (EEOC) enforces Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits discrimination based on sex (including pregnancy, sexual orientation, and gender identity). Sexual harassment or sexual assault in the workplace is a form of sex discrimination that violates Title VII.

Preventing and remedying harassment in the workplace, including sexual harassment, has long been a top agency priority. This EEOC data highlight focuses on charges alleging sexual harassment under Title VII filed with the agency beginning in FY 2018, when the #MeToo movement went viral and received international attention, through FY 2021. The data profiled below also includes other allegations of discrimination, including on the bases of race, retaliation, and national origin, filed concurrently with allegations of sexual harassment between FY 2018 and FY 2021.

These data do not tell the full story of sexual harassment in our nation's workplaces. In June 2016, the EEOC released a report on the study of harassment in the workplace which noted that workplace harassment often goes unreported.[2] For example, one study cited in the report found that 90% of individuals who say they have experienced harassment never take formal action against the harassment, such as filing a charge or a complaint.[3]

EEOC Charge Data (FY 2018 – FY 2021)

Between FY 2018 and FY 2021, the EEOC received a total of 98,411 charges alleging harassment under any basis and 27,291 charges alleging sexual harassment.

Of significant note is the increased number of sexual harassment charges received by the EEOC in the two years following #MeToo going viral in October 2017 (see Figure 1).

Figure 1. Sexual Harassment Charge Receipts, FY 2014 – FY 2021

Image

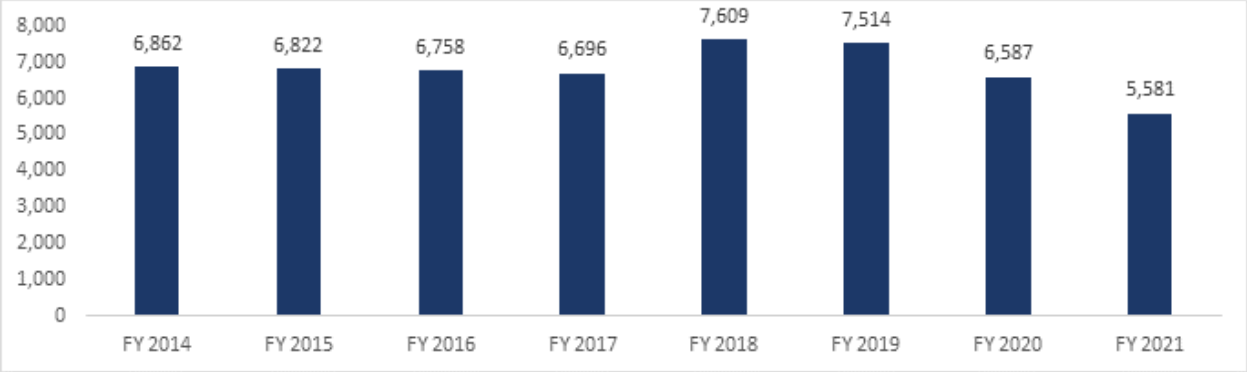


Figure 1. Sexual Harassment Charge Receipts, FY 2014 – FY 2021

Year	Charge Receipts
FY 2014	6,862
FY 2015	6,822
FY 2016	6,758
FY 2017	6,696
FY 2018	7,609
FY 2019	7,514
FY 2020	6,587
FY 2021	5,581

SOURCE: U.S. EEOC, Integrated Mission System, Charge Data, FY 2014 – FY 2021.

In FY 2018, the EEOC received 7,609 sexual harassment charges compared to 6,696 in FY 2017 – an increase of 13.6%. Additionally, sexual harassment charges as a percentage of all harassment charges began increasing in FY 2018. Between FY 2018 and FY 2021, sexual harassment charges accounted for 27.7% of all harassment charges compared to 24.7% of all harassment charges between FY 2014 and FY 2017. Sexual harassment charges also accounted for a greater percentage of the total charges under all statutes received by the EEOC between FY 2018 and FY 2021 (9.8%) compared to between FY 2014 and FY 2017 (7.7%). Also, between FY 2018 and FY 2021, harassment charges made up 35.4% of the total charges (277,872) received by the EEOC.

Figure 2. Percent of Sexual Harassment Charges Filed by Women, FY 2018 – FY 2021

Image

Figure 3. Percent of All Harassment Charges Filed by Women, FY 2018 – FY 2021

Image

SOURCE: U.S. EEOC, Integrated Mission System, Charge Data, FY 2018 – FY 2021.

Women also continue to file a disproportionate number of the charges filed with the EEOC alleging sexual harassment. Women filed 78.2% of the 27,291 sexual harassment charges received between FY 2018 and FY 2021 (see Figure 2). Additionally, women filed 62.2% of the 98,411 total harassment charges alleging any bases (e.g., race, national origin) received between FY 2018 and FY 2021 (see Figure 3).

Figure 4 provides the percent of total sexual harassment charges concurrently filed with a charge of race discrimination between FY 2018 and FY 2021. Of the 1,945 sexual harassment charges filed concurrently with a race charge, 71.2% designated Black/African American as the relevant race.

Figure 4. Percent of Sexual Harassment Charges Concurrently Filed with Race Charges, FY 2018 – FY 2021

Image

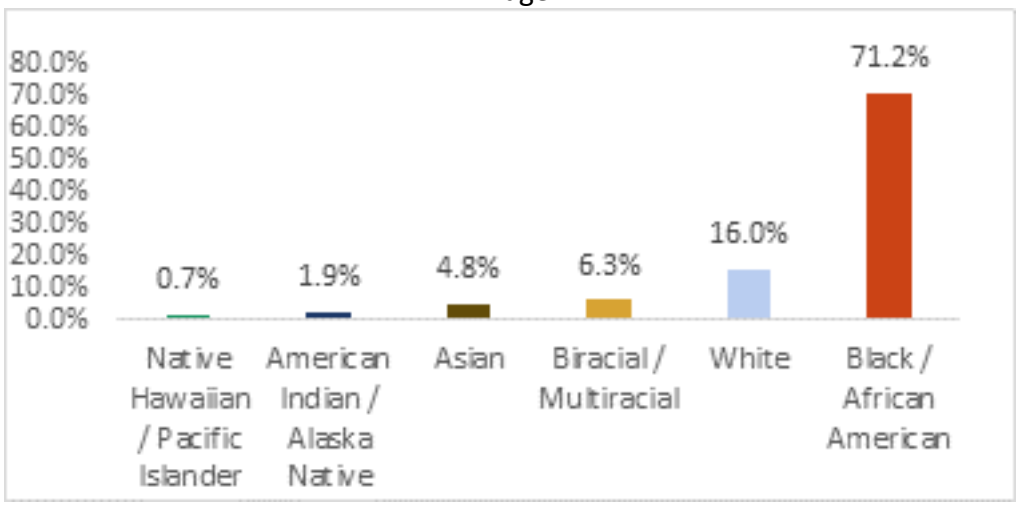


Figure 4. Percent of Sexual Harassment Charges Concurrently Filed with Race Charges, FY 2018 – FY 2021

Race	Percent of Charges
Native Hawaiian / Pacific Islander	0.7%
American Indian / Alaska Native	1.9%
Asian	4.8%
Biracial / Multiracial	6.3%
White	16.0%
Black / African American	71.2%

SOURCE: U.S. EEOC, Integrated Mission System, Charge Data, FY 2018 – FY 2021.

Additionally, of the 797 sexual harassment charges filed concurrently with a national origin charge between FY 2018 and FY 2021, 37.6% of the charges designated Hispanic and 15.7% designated Mexican national origin.

Charges alleging sexual harassment and retaliation are often linked. Figure 5 provides the percent of total sexual harassment charges concurrently filed with a charge of retaliation between FY 2018 and FY 2021. Of the 27,291 sexual harassment charges filed, 43.5% were concurrently filed with a retaliation charge.

Figure 5. Sexual Harassment Charges Concurrently Filed with Retaliation Charges, FY 2018 – FY 2021

Image

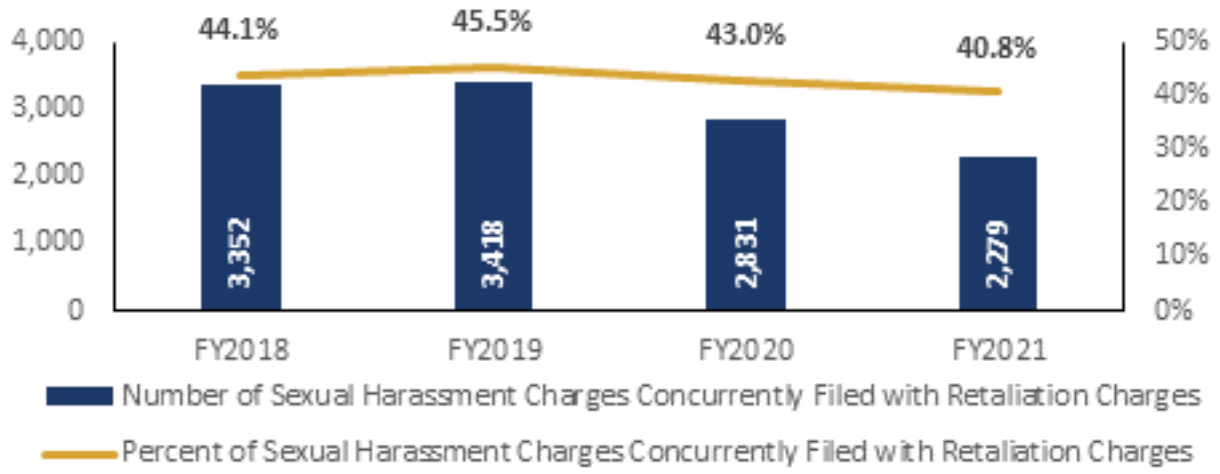


Figure 5. Sexual Harassment Charges Concurrently Filed with Retaliation Charges, FY 2018 – FY 2021

Fiscal Year	Number of Charges	Percent of Charges
FY 2018	3,352	44.1%
FY 2019	3,418	45.5%
FY 2020	2,831	43.0%
FY 2021	2,279	40.8%

SOURCE: U.S. EEOC, Integrated Mission System, Charge Data, FY 2018 – FY 2021.

Between FY 2018 and FY 2021, the most common issues alleged with sexual harassment charges received by the EEOC were those involving Discharge, Harassment (non-sexual), and Terms and Conditions (see Figure 6).

Figure 6. Five Most Common Issues, Sexual Harassment Charges, FY 2018 – FY 2021

Issue	
Discharge	48.3%
Harassment (non-sexual)	33.2%
Terms/Conditions	32.5%
Constructive Discharge	20.9%
Discipline	10.3%

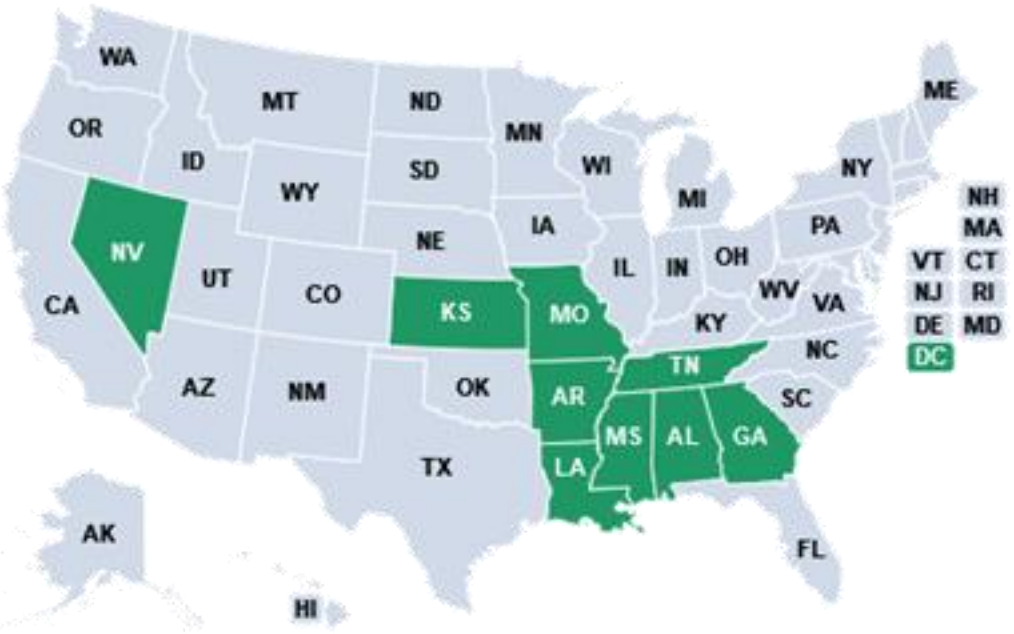
SOURCE: U.S. EEOC, Integrated Mission System, Charge Data, FY 2018 - FY 2021.

As expected, the states with the most sexual harassment charges generally correspond with the states with the largest populations. Examining the number of charges per 10,000 people, ages 16 and older, provides a better comparison of the states with the most sexual harassment

charges standardized by population. (See Figures 7 and 8). The top 10 states account for 24.5% of all sexual harassment charge receipts in the United States.

Figure 7. Top 10 States with the Most Sexual Harassment Charges per 10,000 Population Ages 16 Years and Older, FY 2018 – FY 2021

Image



SOURCES: U.S. EEOC, Integrated Mission System, Charge Data, FY 2018 – FY 2021. 2015-2019 American Community Survey (ACS) 5-Year Estimates, 16 Years and Older, Civilian Labor Force.

Figure 8. Top 10 States with the Most Sexual Harassment Charges per 10,000 Population Ages 16 Years and Older, FY 2018 – FY 2021

Number of Charges per 10,000 Population			
Alabama	1.00	Arkansas	0.75
Mississippi	0.93	Missouri	0.74
Georgia	0.83	Nevada	0.72
Kansas	0.80	District of Columbia	0.72
Tennessee	0.76	Louisiana	0.72

SOURCES: U.S. EEOC, Integrated Mission System, Charge Data, FY 2018 – FY 2021. 2015-2019 American Community Survey (ACS) 5-Year Estimates, 16 Years and Older, Civilian Labor Force.

Combatting Sexual Harassment in the Workplace

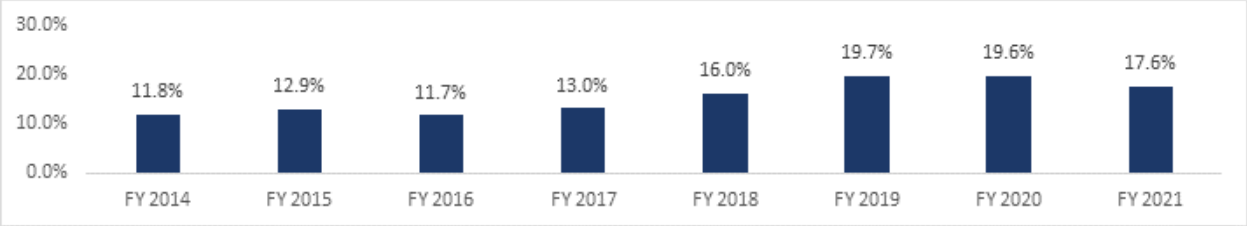
The EEOC will continue to use all available tools, including outreach and education, enforcement, and litigation to prevent and remedy sexual harassment in the workplace.

Between FY 2018 and FY 2021, the EEOC recovered nearly $300 million for individuals with sexual harassment claims through resolved charge receipts and in litigation. In FY 2021, EEOC resolutions that included a claim for sexual harassment increased to 10%, 1.2 percentage points higher than in FY 2018 (8.8%), and, in FY 2021, 28.6% of sexual harassment resolutions were resolved favorably to the worker. Additionally, between FY 2018 and FY 2021:

- 18.2% of total monetary benefits recovered by the EEOC included a claim for sexual harassment compared to 12.4% between FY 2014 and FY 2017. Figure 9 provides these percentages for each fiscal year between FY 2014 and FY 2021.
- The EEOC recovered $299.8 million for individuals with sexual harassment claims through resolved charge receipts and in litigation, benefiting 8,147 people (see Figure 10).
- The EEOC recovered nearly $104 million more for individuals with sexual harassment claims than in the period between FY 2014 and FY 2017--$83.8 million more through resolved charge receipts and an additional $20 million in litigation (see Figure 11).

Figure 9. Percentage of Sexual Harassment Monetary Benefits, FY 2014 – FY 2021*

Image



Percentage of Sexual Harassment Monetary Benefits*

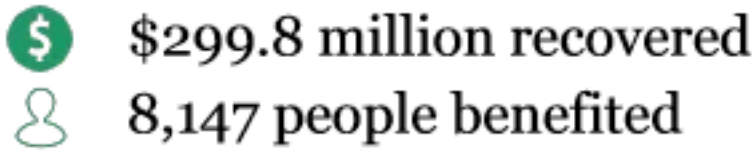
Fiscal Year	Percentage
FY 2014	11.8%
FY 2015	12.9%
FY 2016	11.7%
FY 2017	13.0%
FY 2018	16.0%
FY 2019	19.7%
FY 2020	19.6%
FY 2021	17.6%

*Excludes additional monetary benefits recovered by the EEOC through litigation.

SOURCE: U.S. EEOC, Integrated Mission System, Charge Data, FY 2014 – FY 2021.

Figure 10. Monetary Benefits from Resolved Sexual Harassment Charge Receipts and Litigation, FY 2018 – FY 2021

Image



SOURCE: U.S. EEOC, Integrated Mission System, Charge Data, FY 2018 – FY 2021.

Figure 11. Monetary Benefits from Resolved Sexual Harassment Charge Receipts and Litigation, FY 2014 -FY 2017 and FY 2018 – FY 2021

Image

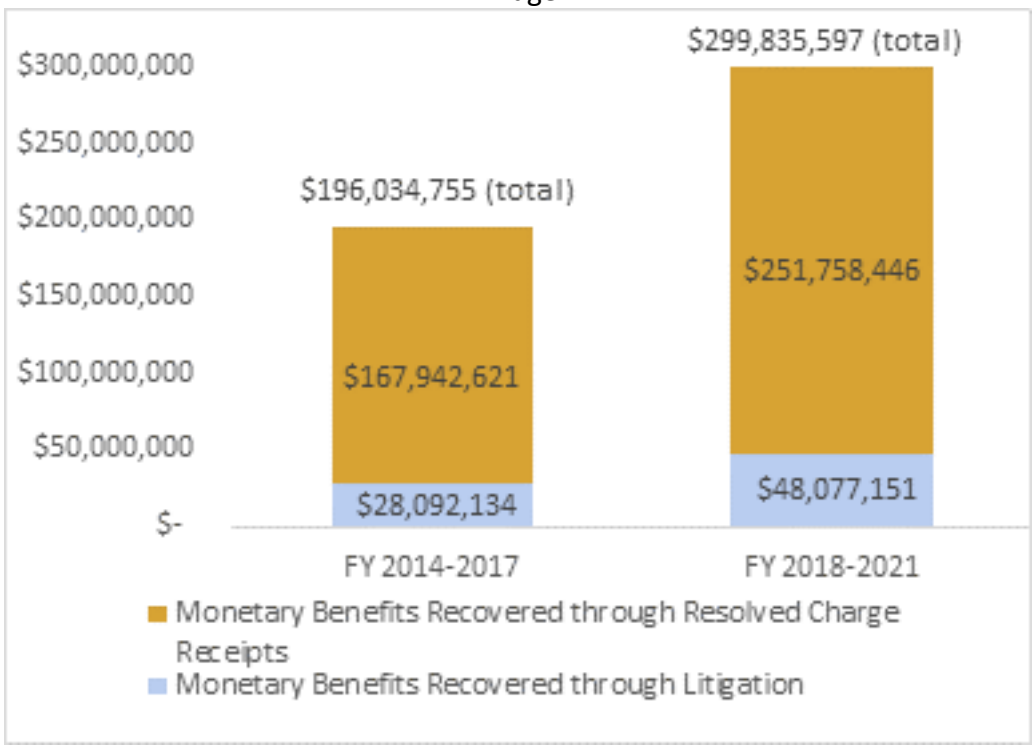


Figure 11. Monetary Benefits from Resolved Sexual Harassment Charge Receipts and Litigation, FY 2014 -FY 2017 and FY 2018 – FY 2021

Years	Monetary Benefits Recovered through Resolved Charge Receipts	Monetary Benefits Recovered through Litigation	Total Monetary Benefits Recovered
FY 2014 - 2017	$167,942,621	$28,092,134	$196,034,755
FY 2018 - 2021	$251,758,446	$48,077,151	$299,835,597

SOURCE: U.S. EEOC, Integrated Mission System, Charge Data, FY 2014 – FY 2021.

The EEOC advances opportunity in the workplace by enforcing federal laws prohibiting employment discrimination. More information is available at www.eeoc.gov.

https://www.eeoc.gov/sexual-harassment-our-nations-workplaces

Making your workplace inclusive for trans employees doesn't have to be complicated, advocate says

Olivia Hunt, the policy director for the National Center for Transgender Equity, offers her insights on making work better for transgender employees.

Nearly half (49%) of transgender employees in the US have reported discrimination— "being fired or not hired"—based on their gender identity, compared to 28% of cisgender LGB employees, according to a 2021 UCLA study. And despite a 2020 Supreme Court decision asserting that gay, lesbian, and transgender employees are protected from discrimination based on sex, transgender people in the US continue to face a high risk of unemployment or poverty, according to recent polling from the Center for American Progress.

So, what can an HR leader intent on creating an inclusive workplace do about it? The National Center for Transgender Equality is a nonprofit organization that advocates for the understanding and acceptance of transgender people throughout the US. HR Brew recently spoke with Olivia Hunt, the center's policy director, to hear her thoughts on how HR departments can cultivate a workplace that's truly inclusive for current and future transgender employees.

Recruiting. Hunt says employers should be "bold and proud about what they do to make their trans employees welcome within the organization" if they want to recruit more transgender employees. "Trans people talk to each other," Hunt explained. "And when an employer is

particularly good for trans people, a trans employee will go on Twitter or Facebook and talk about fantastic benefits they're getting from their employer."

Hunt pointed to Salesforce as a model for other employers because of the benefits the company offers to transgender talent. In November 2021, the company announced a commitment to transgender inclusion through a slate of new gender-inclusive benefits for its trans employees.

While more than 600 major companies offer gender-affirming health care, Salesforce offers several benefits in addition to gender-affirming health care, including new wardrobe reimbursement, partial payment for the fees associated with changing government IDs, and specialized mental-health services and counseling.

Manu Erwin, a transgender employee at Salesforce, Reviewing November, "It's life-changing from a financial perspective…The biggest benefit is the fact that it exists at all."

Hunt says that the Salesforce approach has been successful so far because the information is widely available, so transgender job candidates don't need to disclose anything about their gender identity during the interview process.

Belonging and being out. The UCLA study also found that 26% of LGBT employees weren't out to any coworkers, and those who were out were "three times more likely to report experiences of discrimination or harassment because of their sexual orientation or gender identity than those who are not out to anyone in the workplace."

Hunt said the key to inclusion once a trans employee is onboarded is to have policies that accommodate everyone. "The policy should be that trans employees are employees like anybody else," she explained. "They are part of the team. They are part of the community and should be treated accordingly."

OSHA has guidelines for how to approach workplace restroom access, which Hunt says is still being heavily debated, yet doesn't need to be complicated. "That's actually a simple answer, which is [to let] trans people use the bathroom that they're most comfortable using."

Trans employees may face added hurdles to changing their name at their job after they come out, with some businesses having cumbersome name-change processes.

"The truth is, [employers] don't need to do that," Hunt said. "You get to make your own policies and can easily document [employees] however you want." She says she often gives the example of someone wanting to go by Mike instead of Michael and requesting their email reflect that preference; that's not usually a problem at work, so there's no reason to treat a trans person's request any differently.

Further, the US Department of Labor (DOL) has guidelines for employers and supervisors when it comes to names and pronouns that suggest employers respectfully ask employees their preferred pronouns.

Employee Resource Groups. The Wall Street Journal reports that while there's been a rise in employee resource groups (ERGs), or "affinity" groups, in the US, Hunt cautions that trans employees can get looped in with LGB groups that have different needs and goals than those of transgender employees.

According to Hunt, the pressure to join an ERG can "actually be an additional stressor for a person who's just started transition. Or for a person who's already transitioned and joined the company who might not be immediately wanting to go into an affinity group where they're going to be singled out specifically for their trans status."

HR education. For HR professionals who want to create more trans-inclusive practices, but aren't sure where to begin, Hunt recommends reviewing resources from the National Center for Transgender Equality. She also suggests reading Ask A Manager.—KP

https://www.morningbrew.com/hr/stories/2022/04/29/making-your-workplace-inclusive-for-trans-employees

Joking About Age Bias Is Not Okay–Here's What To Do About It

Who hasn't experienced a comment that didn't land right and, when pushing back against the perpetrator, hear these words, "Oh, I was just joking."

It's a common defense mechanism supposed to make everything okay. Kind of like a get out of jail free card that allows folks to say what they want without thought or consequence–or so they think.

Joking about bias is never okay. That includes ageism, one of the most overlooked forms of bias.

What is Age Bias

Age bias occurs whenever age is used to diminish the competency and capability of another. It can happen across all ages whenever age gaps exist–whether only a few years or a few decades separate the parties.

It's important to address bias since it can often lead to discrimination. Simply put, age discrimination is unfavorable treatment as a result of one's age. The Age Discrimination in

Employment Act only protects those aged 40 and older. However, many cities and states do not limit protections by age.

While younger and older workers can be victims of age bias and discrimination, some of the most egregious examples often point to those older. This discrimination not only hurts individuals, it hurts the economy.

An AARP study found that the lost economic activity from those older Americans not being able to find work, change careers or earn promotions because of age discrimination cost the U.S. economy $850 billion in lost gross domestic product in 2018.

Perpetuating Age Bias Is No Joke

Social media is one of the most prolific platforms for perpetuating age bias. Sometimes content is staged as a joke, other times it's intended to insult. In both cases, perpetrators agitate the issue by playing off ageist stereotypes, myths and assumptions.

Like the TikTok video that begins, "POV: you start a new company, and you only hire Gen Z." (That translates to hiring only people under 26.) The video then shows all the flippant ways younger employees sign emails to their older boss.

"Talk soon, Loser, Mila"

"Hate you. (And JH), Hanna"

"Insert pleasantry here, Ben"

Not only did the video go viral on the platform, but it has been featured across multiple media platforms. Some praised the humor, while those more responsible pointed out the problem: age discrimination.

In her Inc. article, Suzanne Lucas, also known as Evil Hr Lady, points out what should be obvious–it alluded to ageism. If this entrepreneur is only hiring the youngest of the workforce, what's up? When she reached out to get the scoop, he said it was "just a silly video."

Her response?

"Whew! Just a joke! Ha-ha!"

"It's not funny."

Then she explained why. Suggesting it's okay to only hire folks under 26 is like saying we openly discriminate against anyone older.

Creating Inclusion Starts With Accountability

In the workplace, excluding a particular group interrupts the safety of belonging. The exclusion of older workers is particularly unsettling given that it impacts everyone and predicts the future work experience for anyone younger.

Ouch.

So, what's the best way to raise awareness about age bias so that videos perpetuating ageist behaviors don't go viral?

Let's start with personal accountability. If you hear yourself saying any of these phrases, the problem might be, well... you.

"Don't take it so personally."

"I didn't mean it like that."

"You're just over-reacting."

"Don't be so sensitive."

"I was only joking."

The person left feeling uncomfortable by a biased joke of any kind can raise awareness with non-confrontational questioning.

Lucas recommends asking, "Hmmm, can you explain how it's funny? Because it seems rude to me."

And then wait for the explanation.

Harvard Business Review suggests using content, pattern or relationship (CPR) to best address the offense. In their article, How to React to Biased Comments at Work, the authors explain content as a one-time incident. Pattern is when there has been a series of incidents. And relationship defines the impact on one's ability to work productively with others.

"When an issue is overt and egregious—someone makes an intolerant comment—a content conversation works fine. If the boss repeatedly reaches out to your direct reports and not to you, be sure you can cite a few instances and draw attention to the pattern or else your manager is likely to respond with sincere explanations of the single instance you're describing. Finally, consider addressing the relationship issues by helping others understand the cumulative effect of their behaviors on trust, cooperation, self-esteem, etc."

Managers and organizational leaders have a role to play, too. Not only is it critical to specify expected behaviors in employee handbooks, policies and ongoing internal communications, but it's also just as important to state what is not acceptable–and the consequences for inappropriate comments and behavior.

Most importantly, leaders need to model the behaviors they expect from everyone else. When leaders set the stage, creating an inclusive workplace becomes everyone's business.

And that's no joke.

https://www.forbes.com/sites/sheilacallaham/2022/04/25/joking-about-age-bias-is-not-okayheres-what-to-do-about-it/?sh=3db73f9fc008

Asian American women in the U.S. tech industry face more discrimination in the workplace than their white peers, according to a new study.

In the report "Pinning Down the Jellyfish: The Workplace Experiences of Women of Color in Tech," researchers at the Center for Worklife Law at the University of California looked into the experiences of women of color in the tech industry.

The report surveyed over 200 female tech employees across different backgrounds from 2019 to 2020. Participants were asked about sexual harassment, basic patterns of bias at the workplace and how discrimination happens in informal and formal interactions.

Findings revealed that while women of color in the tech industry reported experiencing more bias than white women in general, the degree of bias differed by racial and ethnic group. The study highlighted that woman reported "many of the worst experiences."

According to the report, women of East and South Asian descent felt they needed to do "extra work" in order to get the same level of recognition as their white peers and "to be seen as a good team player."

"Every e-mail that I wrote, I spell checked it, and I read it three times before sending out because if I made a typo or if I made a mistake, it was seen as not being skilled enough or that my English wasn't that good, as opposed to it being just a typo," a respondent of Indian descent was quoted as saying.

Women of East Asian and Southeast Asian descent were reportedly more often expected to play feminine roles, such as "the office mother," and were often ignored for leadership positions.

"[T]here were promotion opportunities that had come up, and they were never announced internally," one Asian participant said. "We would just hear, 'Oh. So-and-so is leaving the company.' And then, 'Oh. And we've hired this other person from outside the company to come in and take that place.' And it was always a white guy."

Women of Southeast Asian descent in particular claimed to have experienced the "forever foreigner" stereotype, with many of their colleagues questioning whether they are "really" American.

Meanwhile, South Asian women shared that they are the subject of negative racial and ethnic stereotypes. They also reported experiencing discrimination due to their accents.

"I've constantly been slotted into admin roles even though I have a Master's degree and have been physically looked past SO many times," said a South Asian participant. "There have been SO many executives who have come late or cancelled [sic] meetings with me because they've decided I'm not worth their time."

https://news.yahoo.com/asian-women-tech-experience-more-203925217.html

How Employers Can Create, Maintain a Religiously Inclusive Workplace

April includes Ramadan, Passover, and Easter, to name a few religious holidays, and it is a perfect time for employers to turn their attention to religious accommodations, explains Ogletree Deakins attorney Sean Oliveira. He offers several steps employers can take to maintain an inclusive workplace and comply with federal, state, and local laws.

Covid-19 vaccination mandates over the last year have repositioned how important employers' religious accommodation policies can be. For many employers, a significant number of resources have been spent on determining when it is appropriate to exempt employees due to their religion and just what an accommodation might look like.

This focus has naturally resulted in thousands of unwanted charges of discrimination before federal and state agencies enforcing anti-discrimination laws.

Title VII of the Civil Rights Act of 1964 requires employers to reasonably accommodate an employee's sincerely held religious belief, practice, or observance when it is in conflict with a workplace requirement and unless doing so would cause more than a minimal undue hardship. Both the case law and agency guidance tend to disfavor claims that an employee is insincere or has a belief, practice, or observance that is not religious in nature.

On the other hand, what counts as an undue hardship is defined rather broadly under Title VII.

As we approach—and pass—a plethora of religious holidays and events (Easter, Ramadan, Beltane, Passover, and Vaisakhi as examples), now may be a good time for employers to take a step back and look at their religious accommodation policies. Religious accommodation requests do not just come as exemption requests from mandatory vaccination. Requests can be for a schedule change, the wearing of certain clothing or symbols, facial hair and hairstyles**,** and the ability to have prayer breaks.

Here are key points that employers should bear in mind when considering their religious accommodation policies.

Listen to Your Employees

This should be the central component of any equal employment opportunity (EEO) policy.

Everyone likes it when the other side listens. Federal investigators and mediators that enforce anti-discrimination laws can tell you—the number one reason individuals cite for what pushed them to go to an agency to handle their complaints is that they felt snubbed by their employer.

Aside from diminishing charges of discrimination and lawsuits, the information obtained can help direct a workplace investigation and document conversations and views that could change over time. It also increases employee morale.

Don’t Spend Too Much Time Trying to Prove a Negative

Are you spending too much time trying to prove an employee’s belief, observance, or practice is insincere, or not religious in nature?

Many of us may be guilty of this, especially after seeing some of the religious requests floating around for Covid-19 vaccination mandates. A prudent employer will note though that neither the case law, nor the agency guidance has changed yet. And while it might still change, the difference could be narrowly construed toward Covid-19 related requests.

Defending a charge of discrimination or lawsuit based on insincerity or the religiosity of a belief, observance, or practice is still, and likely will remain, an uphill battle.

Unless it is otherwise abundantly clear, spending resources on this inquiry is effectively spinning your wheels. If you are tempted, move forward to an undue hardship analysis.

Do the Undue Hardship Analysis

Are you spending enough time determining whether an accommodation would cause an undue hardship?

Unlike sincerity and religiosity, employers will have an easier time if undue hardship is the reason for the denial of an employee’s request for religious accommodation. An employer need only show that a religious accommodation would cause more than a minimal burden in terms of costs, operations, or co-workers.

Here are some potential examples:

- The accommodation would violate a collective bargaining agreement and lead to grievances.
- Coworkers would have to bear the load of multiple additional duties.
- Productivity would suffer.
- A legitimate safety concern exists.
- Cost is prohibitive.
- Other individuals' religions would be hampered; and
- Any combination of the above is detrimental to an employer.

If there is one place to expend resources, it is with undue hardship. Make sure your policies allow for this analysis.

Have an Individualized and Consistent Process

Agency and plaintiff's attorneys both look for broad strokes and generalized decisions. Why? Because there lies the possibility for class cases.

The law requires that employers accommodate individual religious beliefs, practices, and observances. Employers may be well advised to heed the cliché that there is an exception to every rule.

If the process is not individualized enough, employers may unfortunately find that exception—in the form of a potential lawsuit. On the other hand, employers will want decisions to be consistent.

The easiest way to achieve consistent and individualized decisions is to have a centralized set of decision-makers well-trained in religious accommodation.

Make Your Policy Comply With State, Local Laws

Remember that states and localities can often have their own rules with regard to religious accommodation. These can come in the form of statutes and common law.

Federal law sets a floor, not a ceiling. While many of these laws simply mirror federal law, there are outliers.

As one example, California, Minnesota, and New York all have narrower undue hardship standards than federal law. Remaining compliant with state and local laws can be a challenge (especially for nationwide employers who may have to employ policy riders), but is a necessity.

Focusing on listening and establishing an individualized process, undue hardship analysis, and compliance with both federal and state/local law all can help make a religious accommodation policy reliably inclusive and compliant. Taking these steps now may lead to an increase in

employee morale and could save employers the time and money spent defending against charges of discrimination and lawsuits.

https://news.bloomberglaw.com/daily-labor-report/how-employers-can-create-maintain-a-religiously-inclusive-workplace

The unspoken weight-discrimination problem at work

After a year working at a Canadian fashion company, Courtney noticed she was being excluded from meetings with vendors. “It was portrayed to me that being out of the office for a whole afternoon [meeting vendors] wasn’t a good use of my time,” she recalls.

In August 2018, 18 months after starting the job, Courtney (whose surname name is being withheld for privacy reasons) sat with her manager for a performance evaluation. He spent the first 10 minutes praising her job performance, but the following 20 minutes took Courtney by surprise.

“He told me that my looks were affecting my job. He point-blank told me that he thought I was too fat to be in the position I was in. He told me he was embarrassed having me around our vendors in meetings, and that it ruined his reputation.”

Courtney’s boss also told her that she needed to start going to the gym and to stop wearing any fitted clothing. He told her to buy a new wardrobe and to wear makeup every day. “I was so shell shocked,” she says. “I kind of just sat there, to be perfectly honest. I felt like I was going to cry.” After the meeting, Courtney says her anxieties over her appearance significantly affected her work; she felt paranoid about what her colleagues thought. “My work 100% suffered. I was so distracted.”

Weight-based discrimination in the workplace is still legal in nearly all parts of the world, except for the US state of Michigan and a handful of US cities including San Francisco and Madison, Wisconsin. In many nations, characteristics including gender, race, religion and sexual orientation are officially protected under law, meaning employers can’t use them to discriminate. But with a few tiny exceptions, that's not yet the case for weight.

Of course, many people know that including weight as a factor in whether to hire or advance candidates or employees isn’t right. But this kind of discrimination still happens, whether openly or behind the scenes, based on people’s conscious and unconscious biases. It can take a significant toll, both economically and mentally, on those who experience it. Measures to tackle it legislatively are making glacial progress; meanwhile, this insidious form of discrimination remains hard to stamp out.

Overlooked, judged

"Weight discrimination can be experienced in lots of different ways, some subtle and some more overt," explains Rebecca Puhl, a professor at the department of human development and family sciences at the University of Connecticut, US. "We see people being discriminated against because of their weight when they're applying for jobs. They're less likely to be hired than thinner individuals with the same qualifications."

He point-blank told me that he thought I was too fat to be in the position I was in – Courtney
While there's no evidence to support the idea that weight is linked to certain personality traits, stereotypes feed into these hiring decisions. Puhl points to a 2008 study which found that overweight job applicants are viewed as being "less conscientiousness, less agreeable, less emotionally stable and less extraverted than their 'normal-weight' counterparts".

Once hired into for a job, people can experience weight discrimination in a variety of ways. It can be explicit, like the exclusion and comments Courtney experienced at the fashion company. A 2021 study, co-authored by Puhl, surveyed 14,000 people across Australia, Canada, France, Germany, the UK and the US who were participating in a weight management programme. Fifty-eight percent of respondents said they had experienced weight stigma from their colleagues.

Other discrimination can be subtle. "We also see people who have been overlooked for promotions, or are being wrongfully terminated from their job because of their weight," explains Puhl. A 2012 study of HR professionals showed they were more likely to disqualify obese people from being hired and less likely to nominate them for supervisory positions. At the fashion company, Courtney saw other people with the same job get promoted, while she remained at the same rank. "Anybody with my position was moving up within one or two years," she explains.

Weight discrimination manifests in all kinds of workplaces, according to Brian J Farrar, an employment attorney at Sterling Employment Law, located in Bloomfield Hills, Michigan. But he says it's especially prevalent in environments with a focus on physical appearance. "You tend to see it more where employees are interacting with customers," he explains. "In a restaurant or retail, you tend to have a higher potential incidence of weight discrimination."

There is a gendered element: Puhl says women are more vulnerable to weight discrimination in the workplace. "[They] experience it not only at higher levels, but also at lower levels of body weight," she says. "For men, their BMI [body mass index] has to increase quite high before the same level of weight discrimination kicks in for women." Puhl attributes this to different societal standards around weight and attractiveness between the genders.

Weight discrimination not only holds back people in their careers, but can also affect mental and physical health (Credit: Getty Images)
Farrar concurs, noting expectations of physical appearance aren't enforced universally among male and female employees. Income can also play a role in weight discrimination, he points

out, disproportionately affecting low-wage workers. “They may be less likely to come forward and report discrimination,” he says. “That may cause their employers to take advantage of them more.”

Weight discrimination can have multiple impacts, both in terms of a worker’s career progression – which links to their earning potential – and their mental health. On the economic side, one study from 2011 showed that a one-unit increase in a woman’s BMI correlates with a 1.83% decrease in hourly wages. And a 2018 study showed while being in a lower income bracket can increase the risks of obesity, the reverse is also true — being obese decreases one’s income, impacts more pronounced among women than men.

Weight-based judgment and rude remarks can also lead to negative health behaviors, like higher sleep disturbance and alcohol use, lower physical activity and poor eating habits. For Courtney, being judged for her weight led to severe anxiety which, coupled with other life stresses, led her to take a two-year sick leave from work.

Opening the door?

Experts like Puhl and Farrar, who has represented employees in Michigan in workplace weight-discrimination cases, agree greater adoption of legislation could have an impact on this issue. In the US, bills are currently circulating in New York and Massachusetts; the new laws would be similar to the protections in Michigan, where weight is included as a protected characteristic in the state’s civil rights act. Some states in Brazil and the city of Reykjavik have also passed laws protecting people from weight discrimination.

Puhl reminds us that change is slow – she has been testifying about the legislation in Massachusetts for more than a decade. She believes that these laws aren’t being prioritized because of persistent stigmas around weight. “If society continues to place personal blame on people for their weight, and if that blame is deemed socially acceptable, policy change is very challenging,” she says. But she believes Massachusetts “is pretty close” to passing a new law.

“That’s monumental, because the Michigan law was passed in 1976. We have not had a state since then pass anything. If Massachusetts does this, that will open the door for other states to follow suit.”

If society continues to place personal blame on people for their weight … policy change is very challenging – Rebecca Puhl

Legislation isn’t the only solution, of course, because it won’t eradicate pervasive negative attitudes around weight. But similar to previous advancements protecting gender, race and sexual orientation, legislation makes a difference.

“Is it going to get rid of weight stigma? No, of course not,” says Puhl. “We still live in the same society and culture where we have messages that weight is about personal responsibility or

laziness or discipline." But legal protections are important and necessary for significant societal change to take place.

Courtney believes having weight discrimination protections in Canada wouldn't have prevented her negative workplace experience, but says the existence of laws would have been reassuring. "I think knowing there is legislation almost feels like a validation that it's wrong to be discriminated against for one's weight," she says. After returning to work from sick leave, Courtney continued to experience weight-related bullying and negative comments from supervisors. She was eventually laid off – and feels relieved to be out of a "toxic situation".

"It has put a lot of self-doubt in my mind about my ability to do my job, about the career I want," explains Courtney. "It's made me rethink whether I feel like I can work within the fashion industry in general. I don't think I could ultimately have a long-lasting career if I'm always thinking that people are judging me."

https://www.bbc.com/worklife/article/20220411-the-unspoken-weight-discrimination-problem-at-work

Hiring friends and family might actually be good for business

Mark Zuckerberg, the CEO of Meta/Facebook, recently remarked in a podcast interview that when it came to hiring new staff, his preference was people whose "values aligned in the things that you care about". This, he said, was akin to "choosing a friend or a life partner". He went on to state that many young people were too "objective-focused" and "not focused enough on connections and … people".

This speaks to one of the eternal questions for managers in deciding who to hire: do you choose the candidate who has objectively higher ability or the one whose values are more in common with your own?

While some would unambiguously select the higher ability candidate, others like Zuckerberg might weigh differences in candidates' abilities against the extent to which they share the values of the employer. Some would go further and hire family or friends.

Many firms actually promote this with employee-referral incentive schemes that encourage hiring individuals of similar characteristics—or at the very least those who move in the same networks. The stated purpose of such schemes is to reduce the costs of hiring, increase employee retention rates and improve employee engagement. There are guides dedicated to helping managers who hire their friends.

On the other hand, such a buddying approach to recruitment seems to contradict anti-discrimination laws. These have been enacted around the world to ensure that certain groups of individuals are not treated more poorly than others. For example, the UK's Equality Act 2010 makes it unlawful to discriminate on the basis of age, gender, religion, race or sexual orientation (among others). The US equivalent, the Equal Employment Opportunities laws, similarly aims to reduce workplace discrimination.

The problem with hiring your friends

Broadly speaking, anti-discrimination laws promote diversity, while prioritizing hiring friends, family or those with shared values seems to do the opposite. The American psychologist Gordon Allport, in his 1954 work The Nature of Prejudice, noted a distinction between hiring based on negative prejudices (discrimination), and hiring based on positive prejudices (factors other than ability). He claimed that while hiring based on negative prejudices created social problems, hiring based on positive prejudices did not.

Gary Becker, the American economist, made a similar distinction in his 1957 book Discrimination but reached a different conclusion. He termed hiring based on negative prejudice as discrimination, and hiring based on positive prejudice as nepotism, and he argued that both led to economic inefficiencies. This was because both involved hiring workers for reasons other than ability, which he reasoned was the greatest predictor of output.

The role of human behaviour

But why would many companies explicitly focus on recruiting friends and family if it were really bad for business? Could it be that hiring decisions that don't prioritize a candidate's abilities might lead to lower output, but having employees with shared values is still better for an organisation overall?

In a recent paper myself and two research colleagues, Catherine Eckel and Rick K. Wilson, sought to find out. We conducted a controlled laboratory experiment with a sample of university students with strong social ties at Rice University, Texas. Upon admission, students at Rice are sorted into "residential colleges", which are essentially housing where they typically stay throughout their studies. Students of the same college live together, eat together and compete against other colleges in a variety of activities, inculcating a strong college-based identity and shared values.

In our experiment, we got the students to play a famous two-player game that economists use to measure trust. This simulates a manager-employee relationship by first giving an individual in the role of a manager a small sum of money—usually US$10 (£7.66).

They are then asked how much they would like to transfer to an individual in the role of an employee. Whatever they transfer is then multiplied, usually by three, and given to the employee. The employee must decide how much to give back to the manager. Both are trying

to end up with as much money as possible. Hence the manager is investing in the employee and trusting them to return some of the investment. The employee chooses how much to send back to the employer, which is a measure of reciprocity/effort.

In our version, managers had to choose between investing in an employee from the same residential college (meaning they had shared values), and one that was not. They were also made aware that different employees had different "abilities", in the sense that the multiplier that determined how much money they received from the investment would be smaller—for example, 2.5 instead of three.

In some cases, the employee with the shared values was "lower ability". This meant that the manager would need to trust them to give back a higher proportion of their money than the alternative choice would give back.

When faced with employees of equal ability, 80% of managers chose the one from their college. Even when their fellow college member was "lower ability", 40% of managers still chose them. In other words, while at least some managers were choosing partners based on ability, a significant proportion incorporated college membership into their decision.

Employees from the same college exerted more effort for their managers (meaning they returned a larger share of the money) when they were "lower ability" than the other candidate. This suggested that "lower ability" group members compensated for their handicap by increasing their effort. On average, when managers with a choice of candidates of "equal ability" went with their college mate, they made 10% more money. And among those offered a "lower ability" college mate and a superior outsider, they made 7% more by going with the collegemate.

These results imply that focusing on ability alone ignores the contribution to output of behavioral factors such as engagement, trust, motivation and effort. As long as differences in ability are not too large, hiring from within employee networks would appear to be a profitable strategy. Becker had it wrong, in other words.

So, while it was previously thought that hiring based on network or familial ties was mainly altruistic, our research suggests otherwise. It may still bring up managerial challenges, such as having to tell these employees what to do, or calling them out when they don't meet expectations. But employers trust employees more when they share their values, and the employees may compensate for their lower ability by working harder, benefiting the organisation as a result.

https://phys.org/news/2022-04-hiring-friends-family-good-businessnew.html