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Title VII and COVID-19: Mitigating Community Spread of Workplace Discrimination

The widespread proliferation of the 2019 novel Coronavirus across the United States is presenting a host of unprecedented challenges. National attention is rightly focused on mitigating the spread of this virulent and dangerous contagion while providing much needed relief to our faltering economy and labor markets. Employers, however, must prepare to recognize and mitigate another type of threat: the spread of xenophobia and workplace discrimination.

The novel Coronavirus originated in Wuhan, the capital of China's Hubei province. Consequently, there are those who have referred to the novel Coronavirus as the "Chinese virus," "Wuhan virus," or even the "Kung-flu." Putting aside the debate over the usefulness of such geographic labels, the use of controversial language to describe the novel Coronavirus may be perceived as scapegoating a particular country or demographic, particularly Asians and Asian-Americans, opening the gate for potential workplace discrimination claims against employers.

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of "race, color, religion, sex and national origin." National origin discrimination involves treating people (applicants or employees) unfavorably because they are from a particular country or part of the world, or because they appear to be of a certain ethnic background. It can also involve people being treated unfavorably because they are married to (or associated with) a person of a certain national origin.

There are early signs of reports of people harassing and (wrongly) blaming Asians and Asian-Americans for originating and spreading the Coronavirus. In fact, such mistreatment has already caught the attention of Janet Dhillon, Chair of the U.S. Equal Employment Opportunity Commission, who issued a statement on March 26, 2020 directly urging

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employers and employees alike “to be mindful of instances of harassment, intimidation, or discrimination in the workplace” related to the present pandemic.

So how exactly can employers be proactive to identify and mitigate the potential for controversial remarks which could form the basis of a workplace bias or harassment claim?

1. Lean Hard on Anti-Harassment and Anti-Discrimination Policies.

Although employers should never condone use of derogatory sentiments directed at a protected group, now is the time to lean extra hard on your strong anti-harassment and anti-discrimination policies. Instruct your managers to be proactive in identifying any terms or comments evoking anti-Chinese or anti-Asian sentiments as these comments might cause you workplace discrimination issues. Let your employees know such comments are not acceptable and coach offenders on how to avoid using potentially offensive terminology.

2. Beware of teleworking.

More Americans than ever before are teleworking due to social distancing orders. People tend to feel more secure making questionably appropriate comments with a computer screen separating them from others. There is nothing wrong with levity, but workers must be mindful of jokes or memes they send to each other, particularly if those communications are lampooning certain demographics, and even more so when they use company technology to do so. Employers should ensure their employees understand that company anti-harassment and anti-discrimination policies apply equally to the virtual workplace *and* the physical workplace.

3. Post-Coronavirus Monitoring.

When employees return to the office once the Coronavirus threat is controlled, monitor for employees blowing off steam by making racially-charged jokes or exchanging xenophobic memes. Also, if an employee asks you not to work with someone because of their national origin (whatever it may be), you must respond “no.” Accommodating such a request is tantamount to condoning racist sentiments and very likely will qualify as an actionable ground for a workplace discrimination claim.

CONCLUSION

The novel Coronavirus has injected a great deal of uncertainty into the national psyche. Fear and uncertainty are symbiotic. Unfortunately, Coronavirus-related uncertainty may manifest as fear in your employees—not necessarily fear of the Coronavirus itself, but fear of others, particularly Asians and Asian-Americans.

During his first inaugural address, with the Great Depression raging, President Roosevelt famously proclaimed: “the only thing we have to fear is fear itself.” This statement rings as true today as it did in 1933 as we face the raging Coronavirus. President Roosevelt also observed during his first inaugural address, less famously, though of equal import: “we now realize as we have never realized before our interdependence on each other; that we cannot merely take but we must give as well.”

As the nation confronts the Coronavirus, Employers are and will be on the front lines. Employers must be mindful that misguided, xenophobic fear exists, and they have a legal obligation to snuff out discrimination from the workplace. Employers who do not do so may face liability in a workplace discrimination claim.



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