

Social and Political Issues and the Workplace - Implications for Employers

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Over the past year, employers have had to grapple with seismic social, cultural, and political developments impacting profoundly how they do business. From a worldwide pandemic severely affecting global communities, markets and workplaces, to the murder of George Floyd catapulting racial and social justice issues to international prominence, to a tumultuous presidential election and its resulting fallout, to the brutal attacks on the Asian American and Pacific Islander (AAPI) community, there has been a fundamental shift in how employers interact with the world around them and manage their ever-changing workforces.

How a company responds – or fails to respond – to social justice and political issues can impact employee morale, consumer satisfaction, community perception, a company’s relationships with its investors and its financial health. And while employees have always brought their experiences and influences to work, increased polarization and a lightning-fast news cycle have seen businesses not only scrambling to adapt their policies and practices to respond to new realities, but also proactively making commitments to issues and causes important to their leadership, their employees, and the communities they serve.

In addition to concerns surrounding corporate responsibility and satisfying employees, consumers, and the public at large, employers find themselves having to respond to a wide range of on- and off-duty employee conduct, including:

- Social media activity;
- Attendance at protests and rallies;
- Messaging on clothing and masks;
- Workplace civility and safety; and
- Leaves and time off

While traversing these issues, employers need to navigate a patchwork of federal, state, and local employment laws, including but not limited to:

- Laws governing political activity and privacy;
- National Labor Relations Act (NLRA) obligations;
- State free speech protections;
- Americans with Disabilities Act (ADA) and Family Medical Leave Act (FMLA) requirements; and
- Federal and state occupational safety and health obligations

Amid this backdrop, there are a number of steps employers can take to prepare their workplaces for the effect of social and political issues and respond to developments as they occur, including:

- Implicit bias and other diversity training;
- Employee Resource Groups/Business Resource Groups/affinity groups; and
- Developing internal and external company messaging and other responses.

This paper reviews the relevant legal backdrop and aims to offer practical guidance for employers as they navigate these sensitive and pressing issues.

I. Employee Off-Duty Conduct

A. *What Types of Off-Duty Conduct May Have Workplace Implications?*

Numerous types of off-duty conduct could have workplace implications, including posting on social media or participating in demonstrations and counter demonstrations. Other forms of protests also could be relevant, such as taking a knee during the national anthem. Due to the mutual accessibility of social media accounts and that many co-workers are linked on the platforms, employees often may know the political and social views and activities of their co-workers, supervisors and subordinates, and this knowledge can create friction that seeps into the workplace. Employees may lodge complaints with their employers about posts or other conduct they find particularly upsetting, including (subjectively or objectively) politically, racially, or sexually offensive statements or images. If the employer takes no action, employees may conclude the employer condones the off-duty conduct – and vice versa. Further, social media posts that can be offensive based on race, gender, LGBTQA+ status or other protected categories may demonstrate discriminatory animus if the employee is ever accused of discrimination or harassment in a lawsuit. An employer should know its obligations, limitations, and options in responding to such complaints.

B. *What Laws Govern?*

1. First Amendment

For many people, the first thing that pops to mind when considering employee social media posts or public protests is the First Amendment of the U.S. Constitution. The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble.”

While the First Amendment secures many essential rights for Americans, it does not apply to private employers. Rather, the Bill of Rights, which includes the First through the Tenth Amendments, restricts a *government’s* ability to interfere with individual liberties, such as freedom of speech, privacy, and religious exercise. It does not restrain private citizens or organizations. Thus, while private employees have a First Amendment right to free speech and to engage in peaceful public protest without government infringement, the Constitution does not protect them from discipline by their private employer.¹

In contrast, public employers risk running afoul of the First Amendment if they discipline employees for exercising their rights to free speech or peaceful public protest.

¹ See *Carter v. Transport Workers Union of Am. Local 556*, 353 F. Supp. 3d 556, 576 (N.D. Tex. 2019) (granting motion to dismiss First Amendment-based retaliation claim against airline company). Notably, the state of Connecticut extends the First Amendment protection of free speech to the employees of private employers.



2. The NLRA

Although government action (and restrictions thereon) may not be involved in private employment relationships, it does not mean there are no legal guardrails for private-sector conduct.

Section 7 of the National Labor Relations Act of 1935 applies to both unionized and non-unionized nonsupervisory employees in the private sector. Section 7 protects employees' right to "engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection." This includes the right to discuss terms and conditions of employment, which are defined very broadly by the National Labor Relations Board (NLRB). Employees are protected under Section 7 not only when discussing the terms and conditions of their employment while in the workplace, but on the internet via social media and blogs as well. An employee doesn't necessarily lose the protections of the Act even when their discussion or conduct includes obscene or inappropriate language, or language that otherwise violates the employer's policies. Employers must accordingly ensure that their policies and practices regarding employee speech do not limit these broad rights under Section 7. The NLRB has closely scrutinized employer rules or policies that could limit workplace speech where such speech is protected under Section 7, and employers violating the Act can be subject to an unfair labor practice charge.²

Employers should be careful not to restrict political speech where it is protected by other federal laws as well. For example, where an employee's speech relates to gender, sex, race, religion, disabilities, age, or other characteristics, it also may be protected by Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and other applicable anti-discrimination laws, including at the state or local level. Therefore, coaching or disciplinary actions based on such speech may risk claims of discrimination or harassment.

² For more information on this issue and how it may develop under the new administration, see Frederick Miner, [Are You Prepared for the Return of the War on Employee Handbooks?](#), Littler Insight (Apr. 14, 2021).

3. State Off-Duty Conduct and Political Activity Laws

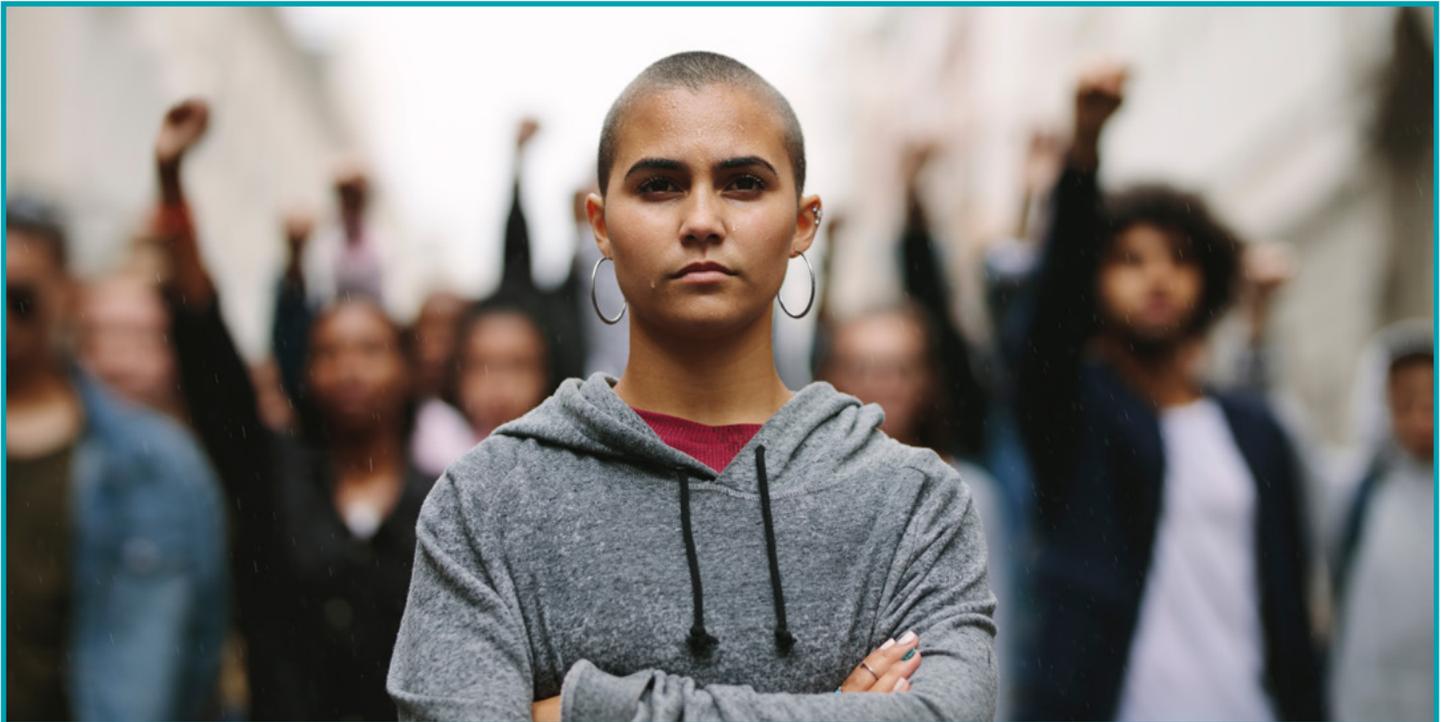
In addition to the above federal authorities, other laws may affect a private employer's response to employee off-duty activities.

Certain states prohibit employers from taking adverse actions against employees (*i.e.*, firing, demoting, etc.) because of their lawful, off-duty conduct—including political activity.³ In California, for example, Labor Code Section 1102 prohibits an employer from discharging, or threatening to terminate an employee for following any particular "course or line" of political action or activity, which includes a gathering or rally to protest actions by federal, state, or local government officials.⁴ Similarly, California Labor Code Sections 96(k) and 98.6 more broadly protect employees from being demoted, disciplined or discharged for "lawful conduct occurring during non-working hours away from the employer's premises."⁵

Similar prohibitions exist in other states, including Colorado, Louisiana, Minnesota, Missouri, Nebraska, Nevada, New York, South Carolina, and Utah. Connecticut actually extends the First Amendment protection of free speech to the employees of private employers.⁶ Some localities, such as Seattle, Washington and Madison, Wisconsin, also have political activity laws prohibiting such retaliation and/or discrimination.

Each of these state and local laws define political activity differently and not all definitions explicitly encompass protesting. For example, New York's off-duty conduct law defines "protected" activities to include, among other activities:

- political activities, such as running for public office or campaigning for a candidate for such office, or fundraising for the benefit of a candidate, political party or political advocacy group; and
- legal recreational activities, broadly defined to include virtually all non-compensated leisure time activity. This definition arguably includes protesting.



³ Zoe Argento, *Dear Littler: Can A Boss Fire Someone for Off-Duty Political Activities?*, Dear Littler (Jan. 20, 2017).

⁴ In California, courts have held that advocacy of forcible or violent conduct does not qualify as protected "political" activity.

⁵ California law also covers employees who are family members with people who have engaged in conduct protected by the law. Cal. Lab. Code § 98.6(e).

⁶ Conn. Gen. Stat. § 31-51q. Some of these laws provide exceptions for public or religious employers, or for off-duty employee conduct that creates a material conflict with respect to the employer's business interests.

Thus, in New York, it generally is unlawful for employers to discriminate against employees for engaging in political or recreational activities outside of working hours, off the employer's premises and without use of the employer's equipment or other property, if such activities are legal.

Meanwhile, the District of Columbia lists "political affiliation" as a protected category under the human rights law, along with race, religion, and similar categories, such that private employers generally cannot discriminate against or harass individuals based on their endorsement of a particular party.⁷

As these examples show, absent some exception, disciplining an employee because of lawful, off-the-clock political expression could be illegal in certain locations and may create risk. For example, in December 2020, a district court in Colorado held that an employee claiming she was terminated for social media posts could go to trial on the issue.⁸ In that case, a private employer investigated complaints that the employee, a supervisor, posted images and videos of Confederate flags on her personal Facebook page. During the investigation, the employer learned of the employee's inappropriate behavior at work with her subordinates and terminated the employee for this misconduct but not because of the posts themselves. The employee sued, claiming that she was in fact terminated in retaliation for the Facebook posts. Although the court granted summary judgment for the employer as to the First Amendment-based wrongful termination claim, it found a triable issue of fact as to whether the employer violated Colorado's lawful, off-duty activities statute⁹ and Colorado's political activity statute.¹⁰

Of course, not all states offer such protections for employees engaging in lawful political activity outside the workplace. For example, Indiana protects employee conduct only where related to an employee's firearms ownership or use of tobacco products but not for other political activity conducted away from the workplace.¹¹

Even where protections for political activities exist, however, employees can be disciplined or terminated from employment if they violate a company's attendance policies. For example, if employees are absent from work without permission while engaging in a protest, they may be subject to discipline or termination in keeping with that policy. The caveat is consistency. An employer cannot discipline an employee who missed work to attend a political or social justice rally if it does not otherwise enforce the attendance policy as to employees who miss work for other reasons.

C. *What Policies May Be Implicated?*

Employers may have policies that are relevant to, or even potentially govern, their employees' off-duty conduct, including social media policies, codes of conduct and civility statements. Social media policies serve to warn employees of behavior to avoid, but an employer is not necessarily prohibited from disciplining an employee if the specific conduct is not listed in the policy (assuming the discipline would be legally permissible). Code of conduct and civility statements typically focus on the importance of employees working together and respecting one another, but offensive and racially charged social media posts can strain these ideals.

Employers should review these policies to ensure compliance with state and local laws and modify them as needed if operating in multiple jurisdictions. Employers should develop procedures for addressing complaints of off-duty conduct that threatens workplace harmony and undermines codes of conduct and civility statements. While employers can discipline employees in many states consistent with the NLRA and other pertinent laws, they may need to develop alternative strategies in states where such discipline is prohibited to ensure offended employees feel valued and supported.

7 D.C. Code §§ 2-1401.01, 2-1401.02, 2-1402.11.

8 *Patterson-Eachus v. United Airlines, Inc.*, Cal No. 19-cv-01375-MEH (D. Colo. Dec. 9, 2020).

9 Colo. Rev. Stat. § 24-34-402.5.

10 Colo. Rev. Stat. § 8-2-108.

11 A private employer in Indiana cannot require an applicant or employee to divulge whether they are a firearms owner or condition employment on their agreement to forego such ownership. Ind. Code § 34-28-8-6.

II. Employee On-Duty Conduct

It is said that a healthy workplace is one in which employees bring their full selves to work, and that is true. But when that full self comes with an employee's (controversial) public comments and private opinions, it can adversely affect that workplace. And, it is when employee comments and opinions bubble over into disruption, loss of productivity, poor morale, and unnecessary conflict that employers wonder what they can lawfully do to channel political speech and conduct in the workplace.

A. *What Types of On-Duty Conduct May Have Workplace Implications?*

Amid continuing social and economic turmoil, not surprisingly, employees want to express their strongly held beliefs in a variety of ways.

As discussed above, attendance at protests and rallies is one increasingly common way that people are expressing their positions. While this conduct often takes place outside the workplace, there can be instances where protests occur at work.

Clothing also is a common mode of workplace expression. Employers seeking to avoid messaging that alienates their clientele, causes tension, and may affect employee morale may be interested in limiting such speech. Thus, it is in the confluence of employee expression and employer clothing/attire policies that lies the rub.

B. *What Laws Govern?*

Employees can be disciplined or terminated from employment if their political activities disrupt their employer's business, but employers should be mindful of the NLRA and political activity laws discussed above. Determining whether on-duty protest activities are for "mutual aid or protection" or for purely political or social justice purposes may not always be clear. An employer that disciplines or terminates an employee from employment based on such behavior should take heed it is engaging in delicate action that should be reserved – more appropriately perhaps – for extreme employee conduct.

Employers seeking to implement policies concerning messaging on employee clothing and accessories (e.g., face masks) remain subject to the same laws discussed above. That being said, employees typically have no legal right to wear clothing that bears purely political or social justice messages or images in the workplace.



With that in mind, many employers adopt a neutral policy prohibiting non-employer sponsored messaging of any type. In doing so, these employers attempt to avoid a claim that they discriminate against any group or favor others. Although this may be the simplest policy to pen, its challenges lie in implementation and consistent application. The key to such a neutral policy is communication, consistency and a lack of bias. Challenges arise where employers do not include diverse perspectives when considering policy approaches and communicating about them or have permitted some messaging to be worn on certain topics while banning others. Thus, for example, an employer considering Black Lives Matter (BLM) or LGBTQA+ messaging on employee masks or clothing might consider having diverse perspectives included in the policy discussion as it considers the impact of a decision on its unique employee and consumer populations or the synergies between its policy approach and articulated corporate values. Depending on an employer's comprehensive assessment, it may have a harder time explaining its acceptance of certain messaging but prohibition against others.

Even where an employer has a neutral policy, it should be careful to train supervisors and managers to avoid demonstrating favor towards particular messaging while disciplining employees for expressing themselves with other messages. Inconsistency breeds discontent and fuels a perspective that certain types of messages or employees are more valued than others thereby undermining an employer's efforts to sustain an inclusive workplace culture. Importantly, employers should also analyze whether the employees' desire to express political or social justice messages through their masks and clothing could constitute protected activity under the NLRA and adjust their response as necessary.

In the past year, there have been numerous reported incidents in which companies have permitted or prohibited political or social justice messaging on masks and clothing in the workplace. In a few instances, employers have banned BLM messaging – but following employee and public backlash, they have reversed their positions, in some cases even providing company-issued BLM clothing. In other cases, employers have prohibited such messaging on clothing and stuck with that ban, even when employees have brought claims with the Equal Employment Opportunity Commission (EEOC) and in court alleging race discrimination under Title VII or brought charges claiming certain messaging constituted protected activity under the NLRA.

In deciding the best approach regarding permitting or prohibiting social justice or political messaging on clothing in the workplace, employers should determine what is appropriate for their employees, customers, location(s), and company culture. They should consider what approach they have previously taken when dealing with political or social justice issues to ensure consistency with any prior precedent. Some employers elect to distribute company-issued merchandise to gain greater control over permitted messaging on attire in the workplace. For other employers, certain messaging ultimately may not be preferred for a variety of reasons. In any event, employers should remember that they can always limit employees from wearing messaging on clothing with obscene or harassing content that violates company policies.

C. What Policies May Be Implicated?

In addition to policies on dress and appearance, employer policies concerning codes of conduct, civility, "moonlighting," and non-fraternization may be implicated in these situations. Employers can adopt such policies in keeping with the limitations above. In doing so, however, employers should carefully evaluate their policies to ensure they do not restrict otherwise protected conduct. Even when such policies are legally compliant, employers need to be careful in their drafting and consistent implementation to ensure that they are not unsustainable in action. Employers are well advised to obtain guidance from counsel when implementing these types of policies, as this space is fraught and in constant flux.

III. Workplace Civility and Safety Considerations

A key additional implication surrounding social and political issues is that these hot-button topics can lead to disagreements in the workplace between co-workers, clients, customers, vendors, and visitors. These divergences at work can spiral quickly into heated arguments, threats, and even violent acts. Employers need to be mindful of their legal obligations to provide safe workplaces for their employees as well as the steps they can take to prevent violence from occurring in the first place.

A. Legal Duties of Employers

Employers' legal obligation to provide safe workplaces stems from the federal Occupational Safety and Health (OSH) Act as well as states that have adopted laws addressing workplace safety. The General Duty Clause of the federal OSH Act requires covered employers to "furnish to each of [their] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to [their] employees."¹² The Occupational Safety and Health Administration (OSHA), the federal agency charged with enforcing the OSH Act, defines workplace violence as any act or threat of physical violence, harassment, intimidation, or other threatening or disruptive behavior that occurs at a work site.¹³ Thus, by definition, workplace violence includes both verbal threats and physical assaults.¹⁴ Notably, employers' obligations to provide a workplace free of violence extends beyond disputes between employees to also include incidents involving customers, vendors, and visitors.¹⁵

OSHA's Enforcement Procedures and Scheduling for Occupational Exposure to Workplace Violence states that "employers may be found in violation of the General Duty Clause if they fail to reduce or eliminate serious recognized hazards."¹⁶ As a result, OSHA has instructed its inspectors to "gather evidence to demonstrate whether an employer recognized, either individually or through its industry, the existence of a potential workplace violence hazard affecting his or her employees."¹⁷ The focus of these investigations is "on whether feasible means of preventing or minimizing such hazards were available to employers."¹⁸

Although currently there is no federal OSHA standard specific to workplace violence, several states have required employers to implement workplace violence prevention programs. Among these states, California has issued a Workplace Violence Prevention in Health Care rule that requires health care employers to have a written workplace violence prevention plan as well as training for their employees. The relevant state agency is in the process of requiring the same for non-health care employers throughout California.

Beyond federal and state occupational safety and health laws, workplace violence issues can also trigger claims of discrimination and harassment from employees who allege that the violence was motivated based upon a characteristic protected by federal, state, or local law. Additionally, several legal obligations for employers arise based upon theories of common law. First, employers have a duty to keep individuals on their premises safe from injury, which includes any criminal or violent acts committed by employees, customers, vendors, and visitors at their workplaces. Moreover, when employees commit acts of violence, employers may be held liable either under a theory of vicarious liability for the violent acts of their employees acting within the course and scope of their employment as well as for negligent hiring or retention when they knew or should have known that the employee had a capacity for violence.

12 29 U.S.C. § 654(a)(1).

13 See OSHA, [Workplace Violence](#).

14 *Id.*

15 *Id.*

16 OSHA Instruction, Directive No. CPL 02-01-058, [Enforcement Procedures and Scheduling for Occupational Exposure to Workplace Violence](#) (Jan. 10, 2017).

17 *Id.*

18 *Id.*



B. Practical Steps to Help Mitigate Risk

The key focus for employers to prevent workplace violence should be to foster a diverse and inclusive company culture, which includes respecting employees with differing opinions on controversial issues. To promote mutual respect among employees, employers should advise employees that they have the right to avoid engaging in workplace conversations or communications concerning racial, social, or political topics that are unrelated to their jobs. Employers also may consider banning political discussions or wearing to work clothing with slogans that may incite violence. As discussed earlier, employers should first consult with legal counsel to assess whether such a ban is considered banning political speech under applicable law.

OSHA also advises that employers develop a workplace violence prevention program that can be adopted in the company's employee handbook.¹⁹ As a result, employers should adopt into their employee handbooks written zero-tolerance policies and procedures that expressly prohibit workplace threats, harassment, intimidation and violence. These policies should define workplace violence as well as provide employees with examples of workplace violence and a list of prohibited weapons. Employers should state that they are committed to maintaining a safe work environment and that violating the policies and procedures may result in disciplinary action, up to, and including, termination.

In addition, employers' policies and procedures should encourage employees to report any behaviors or communications that could lead to violence from co-workers, customers, clients, vendors, or visitors. Example of such behavior includes: threats of violence (whether made in person, electronically, or even over social media), significant changes in a co-worker's personality, a co-worker's communication that they are contemplating suicide, or knowledge of a co-worker who is experiencing domestic violence. Employees should be reassured that any concerns reported will be taken seriously and investigated promptly and thoroughly in as confidential a manner as possible, and without fear of retaliation.

Employers that already have such policies should update them to include any of the aforementioned provisions and ensure that the zero-tolerance policy for violence is for employees, customers, clients, vendors, and visitors. Employers should also ensure that once they adopt and maintain such policies, they regularly communicate them to employees. Employers can periodically conduct trainings for employees to not only remind them of the company's workplace violence policies and procedures, but so employees can learn the warning signs of potential violence and the ways the company wishes them to respond if they experience or observe them.

¹⁹ See OSHA, [Workplace Violence](#).

Along with establishing zero-tolerance policies and procedures, employers should ensure they have adequate security measures to protect against potential violence, which will among other things, protect against common law claims under a theory of premises liability. Likewise, to protect against potential claims of negligent hiring or retention, employers should conduct background screens of employees at the time of hire.

Assessing security measures is work-site specific and may include creating or updating facility access controls, installing security cameras, or hiring appropriate security personnel. Employers may also designate an individual or committee responsible for managing workplace violence issues and implementing emergency plans in the event of a violent incident. Such plans should establish a liaison with local law enforcement to establish how incidents of workplace violence should be reported.

Lastly, employers should ensure they have sufficient general liability and workers' compensation insurance coverage for instances of workplace violence. To the extent the policies do not provide adequate coverage, employers may want to consider supplementing their insurance with specific workplace violence or active shooter policies. These policies generally cover expenses related to security consultants, public relations experts, death benefits to survivors, and business interruption.

IV. Employee Leave Requests

An oft-overlooked tool in the Diversity, Equity, & Inclusion toolbelt is offering inclusive benefits catering to employees' diverse needs. While such benefits have been on the rise in recent years among tech companies, the challenges of 2020 brought them to the forefront for employers of all sizes and in all industries across the country.

The collective trauma and stress of the past 15 months has affected many of us in very real and profound ways. According to Mental Health America, which offers an [online screening tool](#)—a collection of ten free, anonymous, confidential and clinically-validated questions an individual can answer to help evaluate their own mental health—the rates of anxiety, depression, and suicidal ideation are increasing for people of all races and ethnicities, with a disproportionate impact on black, indigenous and other communities of color.²⁰ This mental health crisis is affecting the ability of many individuals to function effectively in the physical or virtual office. These world events have necessarily required employers to respond to a higher number of leave requests than normal and, in some instances, adopt a more flexible approach to giving employees time off.

Employees struggling with their mental health can seek a leave of absence under various federal or state leave laws, under a company's own leave policies, or as a disability accommodation. At the federal level, two statutes typically come into play: the Americans with Disabilities Act of 1990 and its subsequent amendments and the Family and Medical Leave Act of 1993 and its amendments.

The ADA is a federal civil rights law that prevents discrimination against individuals with disabilities²¹ in several areas, including employment.²² The ADA requires employers to provide "reasonable accommodation" to qualified individuals with physical or mental disabilities who are employees (or applicants for employment) unless doing so would cause employers an undue hardship.²³ An accommodation is any change to the work environment, or in the way things are customarily done, that enables an individual with disabilities to enjoy equal employment opportunities. A reasonable accommodation is something that is feasible and that enables the individual to perform the essential functions

20 See Mental Health America, [COVID-19 and Mental Health: A Growing Crisis](#) (released Oct. 20, 2020).

21 Under the ADA, the term "disability" has a legal (not a medical) definition. The ADA defines a person with a disability as a person who has a physical or mental impairment that substantially limits one or more major life activities. This includes people who have a record of such an impairment, even if they do not currently have a disability, and individuals who are not disabled but are regarded as having a disability. See 42 U.S.C. § 12102(1).

22 The ADA applies to private employers with 15 or more employees. Many states have laws that mirror the ADA, but may apply to employers with less than 15 employees. As a result, while an employer may not be subject to the ADA, the laws of the jurisdiction where the employer operates may apply and may require the employer to provide reasonable accommodation to individuals with disabilities under state law.

23 See 42 U.S.C. § 12112(b)(5)(A).

of the position. If an employee requests a reasonable accommodation, or the employer otherwise knows that a medical condition may be impacting the employee's ability to perform their job, the employer is obligated to initiate the interactive process under the ADA to determine what, if any, accommodation, might be required to enable the employee to perform the essential functions of their position.

In contrast, the FMLA provides eligible employees with up to 12 weeks (or 26 weeks, in the case of certain family military-related leaves) of unpaid, job-protected leave per year for certain family or medical reasons.²⁴ An employee who is unable to work due to their own serious health condition may take leave under the FMLA.²⁵ That serious health condition does not need to rise to the level of a legal disability under the ADA for the employee to secure FMLA leave.

While garden-variety "stress" is not a disability under the ADA (and companion state law), anxiety and depression can be disabilities. Likewise, anxiety and depression can qualify as serious health conditions under the FMLA. Employers typically require employees seeking leave under the ADA or the FMLA to provide medical-related information to support their requests for leave. Since the onset of the COVID-19 pandemic, many people have had limited access to their medical providers to fill out the necessary paperwork, and others may not be willing to risk possible exposure to COVID-19 by making an in-person visit to a provider. Depending on the circumstances, employers may temporarily relax medical certification requirements when providing leave, while others may continue to insist that proper medical certification be provided.

Alternatively, employers may want to consider whether a leave of absence could be provided to an employee who is struggling with mental health issues under the employer's own leave policies, which may not require any medical documentation. For example, an employer's policy may provide up to 30 days of leave for an employee who needs time off to address a personal issue like extreme stress. If the employer's leave policy is discretionary, the employer should take care to make sure that it reviews and grants leave requests in a consistent manner that does not open the employer up to challenges that the policy is being administered in a discriminatory fashion.

Leaves of absence are not the only option available to employees who are struggling to effectively perform their jobs. Employers may consider offering employees a part-time or modified work schedule, which can constitute a reasonable accommodation under the ADA. Similarly, the FMLA allows employees to take leave on an intermittent basis, or a reduced leave schedule,²⁶ where leave is taken in separate blocks of time (e.g. , a few hours to a full day) due to a single qualifying reason. Providing leave in this manner can allow an employee to modify their schedule, or take a day off, when their mental health condition requires it so they can return to work and perform their jobs more effectively. Whatever avenue the employer chooses to take, compassion, understanding and flexibility can go a long way to helping employees who are struggling find solid ground so they can fully contribute to the working environment.

24 Generally, the FMLA applies to all public agencies, all public and private elementary and secondary schools, and companies with 50 or more employees. See FMLA, 29 U.S.C. § 2611(4). To be eligible for leave under the FMLA, the employee must work for a covered employer, have been employed for 12 months, and have worked 1,250 hours in the 12-month period prior to the start of the leave. *Id.* at § 2611(2). Many jurisdictions have their own family medical leave laws that may apply even if the employer is not covered by the FMLA, including California, Connecticut, the District of Columbia, Hawaii, Maine, Massachusetts, Minnesota, New Jersey, New York, Oregon, Rhode Island, Vermont, Washington and Wisconsin.

25 See 29 U.S.C. § 2612(a)(1)(D). For purposes of the FMLA, a serious health condition entitling the employee to FMLA means an illness, injury, impairment or physical or mental condition that involves inpatient care or continuing treatment by a health care provider. See 29 C.F.R. § 825.113.

26 See 29 U.S.C. § 2612(b)(1); 29 C.F.R. § 825.202(a).



V. Workplace Inclusivity and Responding to Social and Political Issues

In addition to the legal considerations discussed in previous sections, there are a number of factors an employer should consider when responding to social justice and political concerns, including the inclusivity of the workplace, the organization's values, the values of their employees and customers or clients, and in some cases, the expectations and interests of their investors and boards.

Employers do not need to wait for a major event that captures the nation's attention to focus on making their workplaces more inclusive, representative of the communities they serve, and welcoming for all workers. While there are a number of legal considerations surrounding improving workplace diversity that are beyond the scope of this paper, promoting a culture of workplace inclusivity is one way employers can attempt to make the workplace less fractured at a time when the nation is increasingly divided.

One way to promote workplace inclusivity is implicit bias training. Everyone has implicit bias, or a positive or negative relatively automatic and unconsciously held set of associations about various topics and social groups. In the workplace, implicit bias can potentially lead to discriminatory decision-making during the employment lifecycle and undermine an employer's efforts to create equitable and inclusive workplace environments. Implicit bias trainings vary, but they generally seek to educate attendees by exploring relevant concepts and definitions, examining how our brains process information, introducing learners to relevant research, and providing real-world examples of how biases can present in the workplace. Most implicit bias training modules also typically suggest some steps that attendees can take to increase self-awareness in an ongoing effort to mindfully counteract their unconscious inclinations in their daily decision-making.

While the right kind of implicit bias education is always a great start, employers should give careful thought to post-classroom messaging, techniques for reinforcing the principles modeled by members of their most senior ranks, and implementing wider assessments of and/or revisions to any deficient organizational systems and practices to effect meaningful culture change and workplace equity. An employer may also want to implement other trainings, facilitated discussions, or listening sessions depending on their culture and the issues or needs specific to their organization.

Additionally, an organization may consider developing Employee Resource Groups (ERGs), Business Resource Groups (BRGs) or affinity groups, and having company leadership or management play an active role in the vital recruiting, mentoring, development, and business generation efforts of those groups.

Finally, employers should incorporate accountability measures to ensure leaders perform in a manner that is consistent with their diversity, equity and inclusion objectives. An employer should consider providing the tools noted above and giving its leaders reasonable opportunities to demonstrate equitable and inclusive decision-making principles. Coaching and feedback are critical to strengthening leadership capability. Some employers also consider incentivizing the development of these leadership skills through various means, including as a performance evaluation metric, bonuses and workplace recognition.

While the above are all ways that an employer can help to make their workplace more inclusive, after a major social justice development occurs, there is a growing expectation – from employees, the community, and investors – for organizations to respond. An employer will have to determine the appropriate course of action on a case-by-case basis, but there are a number of considerations an organization should weigh in determining whether and how to respond. Has the employer thoughtfully defined its values or mission? Has it taken its company culture, workforce, community, and customer or client base into account? Understanding there will not be unanimity among these groups, should the organization issue a response or statement and if so, what is the employer trying to convey with their messaging?

In developing internal and external responses to social justice or political concerns appropriate to the situation and the company's values, culture, and environment, an organization may want to consult with its legal and public relations teams, as well as the organization's diversity council or leadership of their ERGs or affinity groups, depending on the circumstances. A goal should be to craft messaging that is aligned with the organization's values and mission and make sure any statements accurately – and sensitively – convey what the organization would like to impart to its employees, its customers, its clients, and its community. With internal messaging, an employer may also want to work with counsel to train managers, when appropriate, to respond to inquiries in a manner that is consistent with the employer's objectives.

VI. Conclusion

The evolving workplace presents employers with the opportunity to soar in response to new challenges. As stakeholders – whether they are employees, customers, or investors – expect more of employers in social, cultural, and political spaces, it is important for employers to face these expectations with a clear understanding of what they can and cannot do. Whether it is in employment decisions, their internal and external messaging or emerging ways, employers succeed where they spend the time to understand the parameters of acceptable interactions with their employees and the communities they serve.