

# **AUGUST MENTAL HEALTH AND DE&I UPDATE**

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**Assembled By**  
**Matt Glowacki, Diversity Equity & Inclusion Chair**  
**Jefferson County HRMA & WI SHRM**  
[Matt@MattGlowacki.com](mailto:Matt@MattGlowacki.com)

## **Biden Administration Aims to Improve Mental Health Coverage in New Proposed Rules**

The Biden administration on Tuesday proposed new rules to better ensure that people seeking coverage for mental health and substance misuse care can access treatment at the same level as those seeking coverage for physical medical treatments.

The rules from the Health and Human Services, Labor and Treasury departments would push insurers to comply with the Mental Health Parity and Addiction Equity Act, which was enacted in 2008. That law requires insurance plans that cover mental health care and substance misuse treatments to give the same level of coverage for those services as they do for other illnesses. It prohibits private health insurance companies from imposing copayments, prior authorization and other requirements on mental health or substance misuse care benefits that are more restrictive than those imposed on medical and surgical benefits.

But the administration says too many insurers are not complying with the law and do not provide enough access to mental health care.

"Mental health care is as important to the well-being of America's workers as medical care, and we must eliminate barriers to getting people the lifesaving care that they often need," Acting Secretary of Labor Julie Su said in a statement. "Today's announcement reaffirms the Biden-Harris administration's commitment to ensuring equal access to mental health and substance use disorder benefits for all workers and improving employee wellness."

The proposed rules "provide clear guidance to plans and issuers on how to comply with the law's requirements," the administration said in its announcement.

The rule comes as mental health continues to decline for millions of Americans. Scores of research has found that rates of depression, anxiety, stress and other problems have increased

in the past few years, spurred by the pandemic, financial stress and high inflation, increased workloads, and other problems. At the same time, people are having trouble getting professional help to address mental health concerns.

Nearly 1 in 3 Americans who need mental health care report that they are unable to receive it, according to the latest data from Mental Health America. State by state, those percentages range from 18 percent in West Virginia to nearly 39 percent in Indiana.

The proposed rule will be open for public comment for 60 days before being finalized.

<https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/biden-administration-mental-health-coverage-parity-proposed-rules.aspx>

### **New 24/7 mental health support programs – however and whenever employees need it**

In response to the country's workplace mental health crisis, new programs are looking to take support a step further providing employees with in person, virtual and self-directed formats along with care navigators to help them in their ever-evolving mental health journey.

Chances are, your grandparents never took a mental health day. Your parents most likely didn't, either. Previous generations often took a more skeptical approach toward the importance of mental health and viewed seeking treatment as a personal or moral failure instead of a health issue. They pushed through rather than admit to needing a day to heal mentally.

Those prevailing attitudes, however, have changed in recent years. Rather than being ashamed of needing support (never mind admitting it at work), two-thirds of workers say that they want their employer to help them take care of their stresses and anxieties, according to a recent survey by the wellness app, Calm. Luckily, that same survey also found that most employers – nearly nine in 10 – want to do just that, stating that strengthening mental health benefits was a top priority.

In April 2023, the TELUS Mental Health Index found that three in five U.S. workers were at moderate or high risk of developing a mental health condition such as anxiety, depression or addiction. These risks are exacerbated by a significant shortage of mental health providers in the U.S., with more than 100 million people living in areas the federal government has identified as lacking mental health professionals.

While the ultimate responsibility to seek care remains with the individual, more employers are taking steps beyond increasing physical and mental health care benefits to support the total wellbeing of their workforce. This article provides a snapshot of what that support can look like.

### *Support for contributing factors*

Modern life is rife with stressors. Debt, divorce, legal problems, physical ailments and social isolation to name a few. Each of these independently can lead to stress, anxiety and depression, but the fact is that many of us deal with more than one of these issues concurrently at some point in our lives. More employers are recognizing this and providing non-traditional support that can lead to better mental wellbeing on the job.

Research indicates how different areas of health – physical, mental and financial – are interconnected. The Index also showed that the mental health risk of those who reported a decline in their physical health, or who have a significant physical health challenge, is 35+ points higher than those reporting good physical health. Strong ties between poor sleep and a lack of exercise and higher mental health risk scores were also evident.

For years, Employee Assistance Programs, better known as EAPs, have provided referrals to a set number of consultations with mental health professionals. Today, with a greater acceptance of telemedicine, these programs increasingly recommend online counseling and treatment options. Some even offer tools such as self-directed online cognitive behavioral therapy (CBT), a common type of talk therapy that helps people learn how to identify and change inaccurate or negative thinking patterns so they can view challenges more clearly and respond more effectively.

For stressors unrelated to physical or mental health, many employers have started widening their EAP plans with programs to provide debt counseling and financial planning to address non-medical sources of stress that may impact an employee's wellbeing.

Studies have shown that employees who have participated in EAP provided through their benefits plan or can experience greatly reduced absenteeism and presenteeism, despite reporting the same levels of stress. In addition to these productivity gains, employers can also benefit from reduced health care costs, lower employee turnover and unplanned leaves of absence as a result of EAP participation.

But EAPs are not the only answer in responding to the country's workplace mental health crisis. New programs, such as Total Mental Health which we recently launched, are looking to take a step further providing employees with mental health supports however and whenever they need it with 24/7- in person, virtual, self-directed formats, along with care navigators to help them in their ever-evolving mental health journey. Many other services are following suit giving companies a greater ability to support the mental health needs of their staff.

### *Workplace accommodations*

Employers can establish policies, processes and accommodations to mitigate sources of stress in the workplace and increase awareness of the signs of stress. Some of the most common policies include:

Comprehensive safety programs. Implementing a comprehensive workplace health and safety (CWHS) program recognizes and protects psychological health in the workplace. These programs can include measures such as normalizing and supporting mental health, enabling adequate rest and time off and operationalizing DEI norms and policies.

Flexible work schedules. Allowing employees to have more control over where and when they work can help them better balance their personal and professional responsibilities, such as shifting start and end times to accommodate childcare responsibilities or the ability to work from home to take an elderly relative to a medical appointment.

Manager awareness training. Mental Health Awareness Training (MHAT) has been shown to improve management's attitudes about mental health and their willingness to promote mental health at work, such as by encouraging employees to take breaks throughout the day. Just knowing that it is OK to take a 10-minute walk for some fresh air sometimes is enough to reduce an employee's stress level.

Zero tolerance policies. Today, most employers have established zero-tolerance policies toward workplace violence and harassment that cover all employees, contractors, clients, customers, visitors, partners and anyone else who might come in contact with company personnel. For those that don't, the first step is to assess the current state of the workplace and identify any formal or informal policies that already exist and strengthen them – in writing.

Enforce protection laws. Employees with diagnosed depression, post-traumatic stress disorder (PTSD) or other mental health conditions are protected against discrimination and harassment at work because of their condition. They have a right to privacy in the workplace and may have the right to get reasonable accommodations that can help them perform and excel at their job.

Any new policy or procedure will be best adopted and accepted when it is developed in consultation with representatives from at-large employees, as well as the appropriate HR, operations, security and other stakeholders. And for any tools or services provided through a workplace benefits plan, it's important that employers engage and inform their staff on their availability, but also educate them on how to access and use them. This can go a long way in increasing usage and broader engagement with these health and wellbeing supports.

Employers have a responsibility to recognize and protect the mental health of their employees. This can be achieved onsite through the implementation of policies and processes that promote a healthy work-life balance, reduce workplace stress and prevent violence and harassment. Providing help for non-work-related stressors through an EAP, and other mental health services in a benefits plan, acknowledges the whole of the employee's living situation, only part of which is on the job.

There are opportunities now for companies to step up and help their people while helping stem the tide of mental health issues in the workplace across the country. There is both a human and business case to be made.

<https://www.benefitspro.com/2023/08/01/new-247-mental-health-support-however-and-when-ever-employees-need-it/>

## **How to Effectively — and Legally — Use Racial Data for DEI**

Summary. After the recent U.S. Supreme Court ruling striking against affirmative action in higher education, leaders might be concerned that their DEI initiatives and programs will face additional scrutiny and legal challenge.

Following the U.S. Supreme Court ruling striking down race-conscious admissions in higher education, some corporate leaders may be concerned that beyond reducing the already low diversity of their hiring pipelines, the ruling might cause their diversity, equity, and inclusion (DEI) initiatives and programs to face additional scrutiny and legal challenge.

While reducing liability is a responsible move, leaders should take care to ensure their efforts to protect against legal risk don't turn into a fear-driven abandonment of effective DEI practices. The key to sustaining DEI progress and commitment through this volatile time lies in acting intentionally: curtailing your usage of racial data that is the most legally risky, while taking decisive action to continue using racial data to eliminate discrimination, remove bias, and create fairer workplaces.

### *Curtail Legal Risk*

To understand how to best act on this complex topic, it's important to start with the legal foundations. According to Title VII of the Civil Rights Act, it's illegal to consider any single candidate's or employee's race — even with the intention of creating a more diverse, equitable, or inclusive workforce — in any employment decision. Employers can't create de facto hiring quotas (e.g., "50% of the employees hired in this department must be women"), or "reserve seats" for employees from certain groups, even in the interest of diversity.

According to the law, even after the recent Supreme Court ruling, gender-conscious or race-conscious hiring practices are permitted, but only as part of limited, temporary, and highly structured voluntary affirmative action programs, undertaken only if employers find evidence of company-wide or industry-wide hiring discrimination, only to correct the initial imbalance, and only without "undue harm" on members of non-targeted groups (meaning that employers cannot lay off white workers to hire workers of color).

So long as these guidelines are followed, neither employers nor DEI practitioners need to panic. Removing the word "diversity," vowing to strip all mentions of race at work, or shutting down race-related affinity groups are harmful overreactions that don't reflect real legal risks. As it

stands, the vast majority of workplace DEI programs are strongly supported by legal precedent and are unlikely to be affected by this Supreme Court ruling.

When done right, DEI programs can reduce the risk of employment discrimination and hostile work environment claims and can mitigate risk across your organization. However, employers can nevertheless reduce their risk by auditing their existing programs to ensure they don't run afoul of existing laws. Policies that instruct hiring managers to use the race of individuals as a "tiebreaker" or "plus points" for individual candidates are impermissible under the law. Setting aside concrete numbers or percentages of roles or seats for members of specific social groups is similarly risky. Avoid practices like hard rules forbidding employees not of a particular race from joining employee resource groups or instructing recruiters to fill a position with someone meeting specific demographic criteria (e.g., "you must fill this role with a woman of color.") Essentially, if a policy, process, or practice requires knowing the racial characteristics of an individual to make a decision affecting their employment, you may want to review it.

### *Collect Racial Data to Identify Disparities*

Some leaders may read the preceding paragraph and assume that an easy way to reduce risk is to simply not collect any racial data at all. However, making this conclusion would be throwing the baby out with the bathwater, and could put your company's DEI progress at risk.

While using the racial data of individuals to influence a hiring decision would be illegal, aggregating racial data for the overall candidate pool to identify overall race-related disparities is well within reasonable grounds. Collecting demographic data in conjunction with an employee engagement survey might reveal racial gaps in meeting participation deserving a closer look. Collecting demographic data in conjunction with HR data might reveal racial gaps in turnover deserving intervention. In other words, collecting demographic data, including race, can reveal adverse impact caused by existing practices, prior discriminatory practices, or historical limitations on the labor pool, all criteria specifically listed by the Equal Employment Opportunity Commission's Voluntary Affirmative Action Guidelines.

Not only is this data-driven approach compliant with current guidelines for employers, but it is also highly effective in ensuring DEI initiatives deliver measurable impact. Socially conscious investors, employees, and customers want employers to go beyond public statements of commitment, to take specific actions that remedy real inequities in organizations, industries, and society. Collecting racial data to gain information about inequalities in your organization, your industry, or even society is one of the highest-value DEI-related actions you can take as a leader, and ensures that when you act, you will be working purposefully with a clear goal in mind.

### *Use Racial Data to Remove Universal Barriers*

A common misunderstanding of DEI initiatives is the assumption that, if a racial disparity is identified, DEI initiatives rectify the disparity by giving marginalized groups preferential treatment — so-called "reverse discrimination." For example, some managers might assume

that if an analysis reveals racial hiring discrimination, DEI initiatives would seek to “give jobs to marginalized people” at the expense of white employees in return.

Not only would such a crude and zero-sum approach be blatantly illegal; it’s also far from the reality of DEI work. Most effective DEI programs use racial data to identify discriminatory barriers that are compromising fairness and meritocracy in the workplace, and to develop initiatives that remove those barriers for everyone.

For example, if an analysis using racial data uncovers disproportionate barriers for Black, Asian, Latine, and Indigenous manager candidates due to the lack of a standard promotions process and high barriers to entry for candidates, a DEI initiative might follow up by working with all leaders to develop a standardized promotions process, train leaders on how to use it and how to interrupt biases, and automatically consider all employees for promotion after three years in a position. These initiatives would have the added benefit of reducing manager favoritism, nepotism, and other unethical practices that might negatively impact workers from any background. Most DEI initiatives follow this pattern: They collect data on marginalized groups to design workplaces that work better for everyone.

#### *Use Racial Data to Correct Discrimination*

When employers seek out pay equity audits, they learn whether employees of different backgrounds are being paid fairly for equal work. If the answer is no, then responsible employers may proactively offer back pay to the affected employees to rectify the inequality. The extra pay isn’t “taken” from the non-affected employees like in a zero-sum game; it’s given from the employer to make things right: expanding the pie, rather than fighting over it. Similarly, if an employer uses racial data to identify that white managers are receiving disproportionately more opportunities to take on challenging projects, network, and receive mentorship from senior leaders, in addition to removing universal barriers to opportunity, they might proactively create more opportunities to offer challenging projects, networking, and mentorship to members of marginalized groups.

One of the surprising benefits of using data in this way is that it can help your workforce understand the rationale behind your DEI initiatives. Because most people assume that workplaces are inherently fair or are meritocracies until proven otherwise, DEI initiatives (e.g., starting an employee resource group with event programming mostly directed at Latine employees) might be met with apathy or backlash from those anxious about preferential treatment. By grounding DEI work in data (e.g., with an analysis showing a relative lack of community, support, and belonging for Latine employees compared to White employees) you can help your workforce understand the importance of DEI programs and take pride in your commitment to supporting your workforce.

### *Use Racial Data to Design Fair Processes*

You cannot use individuals' racial information to give them a 30% score bump compared to other candidates. You cannot allocate 30% of positions to members of marginalized racial groups, outside of a highly-bounded voluntary affirmative action program following the guidelines discussed above.

However, you may stipulate that each stage of your hiring process be composed of at least 30% qualified candidates of color before proceeding (a practice known as the Mansfield Rule, or the Inclusion Rider). While these practices typically aim to correct for industry-wide discrimination or limited labor pools, no one candidate has higher or lower odds of being hired than the next candidate. The employer simply takes additional time to intentionally expand the candidate pool before proceeding.

Processes like these can be combined with other bias-disrupting practices to further ensure fairness. For example, you can make it clear that any voluntarily shared racial data will not be associated with an individual's candidacy. You may even require that individuals handling racial data for candidate pool diversity work separately from those who will make employment decisions.

### *Use Racial Data to Demonstrate DEI Progress*

Some leaders may invest in DEI initiatives and programs out of the applaudable initial justification that they are "obviously" needed to support the workforce. However, when these initiatives run their course, those leaders can feel unsure what to do next. When times are good, these DEI initiatives are seen as a marker of a successful, people-centered workplace. But when organizations are under financial pressure, face business challenges, and must juggle competing priorities, the lack of a solid justification for DEI can consign it to the top of the list for budget cuts. Organizations that are neither able to demonstrate an evidence-based reason for DEI programs' existence, nor an evidence-based assessment for DEI programs' effectiveness will never be able to decouple their DEI efforts from short-lived trends and fads.

As for organizations that can initiate DEI programs using data showing racial disparities or unmet needs, racial data can be the single most powerful tool in justifying their continued existence. If your network analysis or belonging survey quantifies a racial gap in access to decision-making processes, you might use these findings as rationale to design new decision-making processes, create advisory boards to inform leaders, and lean on employee resource groups to share information to employees of color about their input is being sought out. By once again running those same analyses and comparing the data you receive, you'll be able to make powerful inferences regarding the success — or failure — of your initiatives and draw on these findings to further improve your DEI programs.



## *Principles to Remember*

### Don't:

Panic, abandon your DEI efforts, or compromise effective initiatives out of unfounded fear. Make employment decisions about or resources for individuals dependent on knowing their race or ethnicity, without a prior analysis showing disparity, and without first talking to legal counsel.

Allocate or reserve a percentage of desirable resources (e.g., promotions, positions, assignments) to members of racial group, without a prior analysis showing disparity and without first talking to legal counsel.

Use people's racial data to give them a boost or a demerit in any decision, without a prior analysis showing disparity, and without first talking to legal counsel.

Express racial preferences, criteria, or restriction for any role or position, without a prior analysis showing disparity, and without first talking to legal counsel.

### Do:

Use racial data to inform recruitment efforts and diversify candidate pools (e.g., by using the Mansfield Rule).

Aggregate racial data to preserve anonymity without losing group-level insight. Draw upon racial data to identify racial inequalities and disparities in your organization.

Cite racial data to design DEI efforts and initiatives that remove barriers and correct for discrimination.

Reference longitudinal racial data to show DEI progress, communicate about the efficacy of DEI programs, and celebrate your wins.

Partner with attorneys and legal experts early on to design and communicate about legal — and effective — DEI programs.

DEI work isn't going anywhere, and leaders know it: 85%, according to a recent survey, view social issues as "urgent" concerns. Employees and consumers continue to expect organizations to not just make commitments to do better, but achieve measurable outcomes that can prove that their talk isn't empty. Doing so will require that evidence-based DEI work — that requires collecting and using racial data legally and effectively, alongside other demographic data — becomes the new standard of this work. Done right, you'll be able to simultaneously shore up your legal risks and accelerate your organization's transition to the higher standard of transparency, accountability, and effectiveness your constituents expect from their DEI programs.

This is simply the next evolution of DEI in a longer fight for greater diversity, equity, and inclusion at work grounded in the Civil Rights Act of 1964, with decades of widespread support. How your organization meets the needs of this moment will decide how well you adapt to the next stage in your DEI journey.

<https://hbr.org/2023/07/how-to-effectively-and-legally-use-racial-data-for-dei>

### **Black workers report more barriers to mental health support**

“It is vital that companies continue to break down stigma and prioritize diversity, equity and inclusion,” The Hartford’s chair and CEO said in a statement.

Black workers were also more likely to say they encounter difficulty discussing mental health at work due to their race, ethnicity, cultural background or gender identity.

Black workers in the U.S. face greater barriers to mental health support, a finding which highlights a need for companywide education, according to a July 20 report from The Hartford and the National Alliance on Mental Illness.

Researchers found that Black workers were more likely to rate their mental health as “fair/poor” compared to their White, Hispanic/Latino, and Asian American/Pacific Islander peers. Black workers were less likely to say their employer had empathetic leadership and an open, inclusive environment that encourages discussions about mental health.

Among other barriers, Black workers were more likely to say they encounter difficulty discussing mental health at work due to their race, ethnicity, cultural background or gender identity. Black workers were also more likely to report exclusion, hostility and discrimination at work that affected their mental health.

To address those barriers, The Hartford and NAMI recommended employers have senior leaders lead initiatives that normalize talking about mental health. Employers also can provide companywide mental health education and create employee resource groups to serve as safe, accepting spaces.

“All Americans deserve safe, supportive and mentally healthy work environments,” said Christopher Swift, The Hartford’s chair and CEO, in a statement. “It is vital that companies continue to break down stigma and prioritize diversity, equity and inclusion.”

<https://www.hrdiver.com/news/black-workers-mental-health-support-nami/689493/>

## **Proposed EEOC Regulations Aim to Clear Up New Pregnancy Law**

Over a month after the implementation of the landmark Pregnant Workers Fairness Act, the EEOC has released proposed regulations elaborating on what qualifies as a “reasonable accommodation” under the law.

The long-awaited proposal from the Equal Employment Opportunity Commission will be published in the Federal Register on Friday and will remain open for public comment for 60 days. They were approved by majority vote of the commission on Aug. 1.

The types of reasonable accommodations pregnant workers can seek include job restructuring, part-time or modified work schedules, more frequent breaks, and telework, according to the proposed rules. They may also seek temporary suspension of their employer’s requirements to perform an essential function of a job.

The agency already started accepting complaints under the PWFA on June 27 when the statute went into effect, despite the lack of formal EEOC regulations on its enforcement. The law requires the commission to issue guidelines with examples of reasonable accommodations for workers affected by pregnancy, childbirth, or related medical conditions.

It mirrors the Americans with Disabilities Act, requiring employers to provide reasonable accommodations to pregnant employees as long as they don’t “impose undue hardship on the operation of the business.”

The regulations clarify that because “an employer may have to accommodate an employee’s temporary inability to perform an essential function, the proposed rule adds additional factors that may be considered when determining if the temporary suspension of an essential function causes an undue hardship.”

The legislation drew support from both worker advocates and business groups and comes after over a decade of calls for implementing increased protections for pregnant workers.

The Pregnancy Discrimination Act, passed in 1978, prohibits employers from discriminating against current or prospective employees on the basis of pregnancy, but doesn’t explicitly guarantee accommodations.

According to the Federal Register notice, the PWFA responds to existing limitations and fills the gaps in federal legal protections. “Some pregnant workers have not received simple, common-sense accommodations, such as a stool for a cashier or bathroom breaks for a preschool teacher,” it said.

Women of color are often more likely to hold physically demanding jobs that can present challenges for pregnant workers, the draft said.

### *Seeking Accommodations*

The proposed regulations also clarify that workers with healthy and normal pregnancies are permitted to seek accommodations under the PWFA, and that there's no threshold for severity of the physical or mental conditions for accommodation requests.

The proposed rules also include a broad definition of "pregnancy, childbirth, or related medical conditions," which includes current, past, and potential pregnancy, lactation, use of birth control, menstruation, miscarriages, and abortion.

The notice says the law "is carefully designed to limit the burden on covered entities" and that most accommodations, in addition to being temporary, are anticipated to have low to no cost to employers.

"Whether a physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions usually will be obvious," the draft said.

It outlines examples of conditions obviously tied to a pregnancy. These include when a pregnant employee can't lift over 20 pounds and has a physical condition related to their pregnancy, is seeking time off for prenatal or pregnancy-related medical appointments, or for therapy sessions for postpartum depression.

At a National Industry Liaison Group Conference in Phoenix last week, EEOC Chair Charlotte Burrows said the agency is working to ensure both employers and employees have the information they need to feel comfortable with the new law.

She said the PWFA will "strengthen civil rights protections and strengthen the clarity, frankly, of some of our statutes."

<https://news.bloomberglaw.com/daily-labor-report/proposed-eec-regulations-clarify-pregnant-workers-fairness-act>

## **The Average Workday Has Shrunk by 37 Minutes**

*Employees are calling it quits a little earlier than they did a year ago—but that's actually a good thing*

Employees are working more than half an hour less per day than they did a year ago, new research finds—but the shift is generally good news.

Data from the ActivTrak Productivity Lab—which analyzed more than 38 million hours worked from 134,260 anonymized employees between January 2022 and June 2023—found that the

length of the workday decreased 33 minutes quarter over quarter during that time period, and 37 minutes year over year.

This shortened work time in work hours was entirely at the end of the day, with workers shutting down earlier than the previous five quarters.

But take that change with a grain of salt: Although time worked has shrunk, it's declined to 10 hours a day from 10 hours and 37 minutes a day. Nearly one-third (28 percent) of employees remain overutilized as they continue to log 10-plus hour days, the analysis found.

The decline in hours worked has a positive impact, the researchers say: Ending the workday earlier contributes to a decrease in overutilization and a positive shift in overall employee well-being.

"This shift did not result in a loss of productivity, but rather an improvement in workload balance," said Productivity Lab manager Sarah Altemus. "Factors such as the return of commutes for in-office workers, seasonal summer schedules and better time management could be contributing to this shift."

We rounded up additional articles on the news and related topics from SHRM Online and other outlets.

#### *Decline in Employee Well-being*

The findings about work hours—and their impact on employee well-being—come as employee well-being has declined over the past year. Recent data from MetLife showed a significant drop in overall holistic health in the past year, which incorporates physical, financial, mental and social health, with just 40 percent of employees saying they feel holistically healthy. Financial and mental health, in particular, have experienced sharp declines.

Just 55 percent of employees said they are financially well, although employers don't seem to understand the full scope of the problem: 83 percent said their employees are financially well, according to MetLife.

#### *Company Breaks and Summer Schedules*

As the ActivTrak Productivity Lab report notes, some employers have altered summer schedules for employees or added specific summertime benefits.

Consulting firm KPMG, for instance, offers its employees two weeklong companywide breaks—one in the summer and one in the winter—on top of the vacation time it offers. The firm also this year added a summer jump-start program, designed to let people start their Fridays a little bit earlier from Memorial Day weekend through Labor Day weekend.

The breaks and summer benefits are some of the initiatives the consulting company with roughly 40,000 U.S. workers has implemented to help improve employees' mental health—a

focus that has become even more important as employees struggle with stress, anxiety and other issues as a result of the pandemic, inflation and other factors.

"We want them to just go and really disconnect," Jason LaRue, KPMG's national managing partner of talent and culture, said of the companywide breaks. "We know disconnection is a big part of being able to stay charged over a longer period of time. Productivity is really a function of health and capability. Both of those things have to be true in order to be able to optimize performance and productivity."

### *Productivity Declines*

Although the analysis found that worker productivity has been stable, other data has found big dips in productivity. Employee productivity has taken a hit over the past several quarters, with experts pointing to an array of factors contributing to the overall decline in productivity, including economic uncertainty, layoffs, burnout and a high rate of quitting.

But new data shows signs of improvement. After five consecutive quarters of productivity declines—the longest stretch in decades—workers initiated a big turnaround in the second quarter, with labor productivity spiking by 3.7 percent after a 1.2 percent dip in the first quarter, a Labor Department report found in May.

Gregory Daco, chief economist at EY-Parthenon, told Fortune that one reason for the resurgence in productivity is that companies likely reached their limit with low output and invested in productivity enhancement. Employers can keep this trend up by keeping strong performers on board through doubling down on retention efforts, long-term training programs and technology integration, he said.

<https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/the-average-workday-has-shrunk-by-37-minutes.aspx#:~:text=Data%20from%20the%20ActivTrak%20Productivity,minutes%20year%20over%20year.>

## **Amazon Latest Employer to Bulk Up Benefits to Address Employee Challenges**

Amazon has rolled out a slew of new benefits for its employees, including an emergency savings fund, a mental health app and financial counseling, as wellness challenges mount for workers. The new benefits come as employers navigate a precarious time: Companies are seeing massive dips in employee well-being, while at the same time trying to compete for talent in a tight labor market and stay ahead of economic pressures.

"We have a number of listening channels to understand what the top and evolving needs of employees and their families are," said Lian Neeman, director of global benefits at Amazon.

"There were financial and mental health concerns that cropped up, and we knew we wanted to address them."

Amazon's new benefits, introduced in July, expand the retail giant's FamilyFlex program—which was launched in late 2021 and focuses on a number of benefits, including family benefits, parental leave, work/life balance and flexibility—and have already garnered positive feedback from workers who are eager for more help.

The focus on financial wellness is a no-brainer, Neeman told SHRM Online, as employees have been hit hard by continued high costs of living and are looking for guidance on how to stretch their dollar.

A slew of recent statistics finds that financial stress has risen exponentially for workers in the past year. A report from financial wellness firms Salary Finance and FinFit, for instance, found that roughly half of workers say they are suffering from financial stress and that it's affecting their mental health.

"When you're in an inflationary environment, people are focused on, 'How can I make my dollar go further?' When you go to the grocery store, eggs and milk and things like that are more expensive these days—whatever your salary is," Neeman said. "That certainly informs our strategy and what areas we choose to invest in."

Among the retailer's new financial benefits are a free counseling perk—all employees, along with their families and household members, can access a free 30-minute consultation for each financial issue they'd like to discuss—and a financial health resource through provider Brightside Financial Care that employees can use to reduce or consolidate debt, create spending plans, discuss short- and long-term financial goals, or access resources for other needs.

Amazon also is implementing an emergency savings fund that helps employees save for a rainy day directly from their paycheck. Employees can set aside a portion of their paycheck automatically each pay period and access the funds when they are most needed. Emergency savings funds are a fairly new offering among employers: Just 2 percent of employers said they offer such a program, according to SHRM's 2023 Employee Benefits Survey.

Mental health benefits are another focus for Amazon, with Neeman pointing to mental health as a "crisis that is affecting our country."

"People are expecting more," she said. "And it's led us down a path of, 'How do we support not just our employees, but their families?'"

Amazon increased the number of free general counseling sessions for employees, offering workers five sessions every year, up from three; added a 24/7 virtual mental health support through the app Twill; and added free pediatric mental health counseling via Brightline.

Amazon also is enhancing cancer care benefits: It's now offering in-house cancer case management for employees and employees' family members who have been diagnosed with cancer, as well as a travel and lodging benefit when eligible workers receive an evaluation or treatment out of town.

Amazon's benefits announcement is the latest in a string of employer benefits and compensation moves. In July, Chobani boosted wages and announced it was increasing its 401(k) match and adding a child care and elder care benefit later this year, while Walmart last week said it is adding a financial literacy education benefit for employees.

Although signs of economic instability have caused some reluctance in benefits investments—some employers have been eyeing cuts to benefits programs in preparation of a potential recession—it appears that the continuing tight labor market and high employee expectations are largely causing employers to keep or boost benefits.

Research from consulting firm WTW earlier this month, for instance, found investment in employee benefits remains a key priority for most U.S. employers, although many still face cost challenges as benefit expenses continue to rise. Competition for talent (80 percent) and rising costs (67 percent) are the top two priorities influencing employers' benefits strategies, followed by focus on inclusion and diversity (41 percent) and rising mental health issues (39 percent), according to WTW's Benefit Trend Survey.

"Employee benefits are significant differentiators in attracting and retaining key talent, and companies must prioritize them in order to be an employer of choice," said Courtney Stubblefield, managing director and insights and commercialization leader for health and benefits at WTW. "Employers must focus on what their workforce needs by assessing the value of benefits and their impact on employees."

Neeman said competitive benefits clearly help Amazon vie for talent, but more importantly, the move is about supporting employees. That support in turn will only help the company's goals, she said.

"We want employees to be supported; we want to create an environment where they can come into work and focus on inventing and delivering on behalf of customers," she explained. "And you get to that place when you have healthy, supported employees who understand the full value proposition of Amazon and what it means to be Earth's best employer."

<https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/amazon-adds-employee-benefits-financial-mental-health.aspx>



## **Survey: 73% of Companies Struggle to Get Workers Back to the Office**

As COVID-19 changed workers' expectations about where they can do their work, a new survey reveals that companies are struggling to get staff back into the office.

Indeed, 73 percent of organizations surveyed report challenges getting workers to return to the workplace. Because of this pushback, 68 percent are considering or implementing talent strategies to increase on-site work.

The survey, conducted by The Conference Board, also reveals the push for on-site work may be hindering efforts to retain workers. 71 percent of respondents from organizations that are mandating their on-site work policy reported difficulty retaining workers.

The survey highlights the multiple competing objectives among which HR leaders must strike a delicate balance. As organizations navigate the world of work in the pandemic's aftermath, they must contend with rising uncertainty about the long-term impacts of remote work on productivity and profitability, an economy with elevated inflation and recession risk, and an ongoing labor shortage.

This survey of 185 US Human Resource executives was conducted from April 25 through May 14, 2023. It is the fifth survey in the Reimagined Workplace series, which explores the long-term impacts of the pandemic on both the workforce and workplace. Insights from the survey include:

- Businesses report difficulty enticing workers to return to the office.
- 73 percent of HR leaders surveyed report difficulty enticing workers to return to the office.
- Getting workers to return to the office was the second most difficult objective respondents reported, exceeded only by finding qualified workers (80 percent).
- Most businesses are trying to increase on-site work.
- 68 percent of organizations surveyed are considering or implementing talent strategies to increase on-site work.
- Team building and celebratory events top the list of strategies:
- Team building and celebratory events: 62 percent
- Flexible days/hours: 59 percent
- Relaxed casual dress code: 56 percent
- More than half of workers still work remotely at least part of the time.
- 56 percent of workers continue to work remotely at least part of the time, according to surveyed HR leaders.
- 76 percent of professional and office workers work a hybrid or remote schedule.

"To attract and retain talent, the C-suite will need to develop policies that balance workplace flexibility with the cultural and social benefits of on-site work," said Robin Erickson, PhD, Vice

President of Human Capital, The Conference Board. "While every organization is different, hybrid work is the likely solution in many instances. And, as these survey results make clear, offering hybrid work is a critical tool in the toolkit for attracting and retaining workers, especially amid a strong labor market that continues to defy expectations."

Organizations are having major difficulties finding and retaining workers.

88 percent of organizations employing mostly manual services workers report difficulty finding qualified workers.

75 percent of organizations employing mostly office workers report difficulty.

68 percent of organizations employing mostly manual services workers report difficulty retaining workers.

54 percent of those employing mostly office workers report retention difficulties.

Organizations mandating on-site work have much greater difficulty retaining workers.

71 percent of respondents from organizations that are mandating their on-site work policy reported difficulty retaining workers.

That's compared to 46 percent that give workers a choice of where to work.

Voluntary turnover among fully on-site workers has increased 26 percent in the last six months, twice the rate of increase among fully-remote workers at 13 percent.

Remote work may not be to blame for decreasing US productivity.

US labor productivity peaked in 2021 when 38 percent of all US workers were remote.

As remote work has declined, so has productivity.

It is too soon to say whether any apparent correlation between remote work and productivity is causal.

Employee well-being, including mental health and sense of belonging, are suffering.

- 43 percent of surveyed HR leaders report decreased employee mental health from six months ago.
- 32 percent report decreased sense of belonging/inclusion.
- 31 percent report lower levels of employee engagement.
- 30 percent report a decrease in employee intent to stay.
- Businesses are—or soon will be—cutting costs.

- 29 percent of respondents report that their organization had implemented layoffs in the last six months.
- 19 percent report that they expect to implement layoffs in the next six months.
- Implemented layoffs were most prevalent in information services, publishing, and telecommunications; health care and pharmaceutical; and manufacturing.
- Layoffs expected in the next 6 months are most prevalent in retail, wholesale, travel, and entertainment; information services, publishing, and telecommunications; and manufacturing.
- Employee well-being has declined more in organizations that recently implemented cost-cutting measures.
- Of organizations that have implemented cost cutting measures, 46 percent report a decline in employee mental health, compared to 36 percent who have not cut costs.
- 37 percent of organizations who have cut costs report a decline in employee sense of belonging, compared to 26 percent of those who have not cut costs.
- 36 percent of organizations who have cut costs report a decline in employees' intent to stay, compared to 22 percent of those who have not cut costs.
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The Conference Board also recently conducted a complementary survey of 2,000 US respondents, the results of which help inform companies' strategies to keep employees satisfied in a competitive labor market while effectively fostering innovation, creativity, efficiency, and value creation.

"In our research, we found that, in general, employees feel that fully-remote work is best for their own productivity, but that hybrid work best supports their company's productivity," said Denise Dahlhoff, PhD, Senior Researcher, Consumer Research, The Conference Board. "To address concerns about reduced flexibility, organizations can emphasize the advantages of working on-site, such as increased networking opportunities, relationship building, collaboration, and career growth."

<https://www.prnewswire.com/news-releases/survey-73-of-companies-struggle-to-get-workers-back-to-the-office-301890629.html>

## **How One Tech Company Is Proving Why Taking Care Of Your Employees Is Profitable**

What if it were possible for a business to grow by 50% year over year, all while paying their employees a living wage starting at \$80,000, implementing seven weeks of company-wide shutdowns as well as a four-day work week, providing employees with stipends for vacation, personal growth, tech and wealth building—and donating 5% of revenue to a non-profit? These policies may sound unrealistic if you're trying to run a business that actually makes money, but CHANI, an astrology-focused tech and media company, is showing how taking care

of your employees while simultaneously giving funds to a social impact organization can also grow your bottom line.

Since the CHANI app first launched in 2020, the company has grown by more than 50% each year in terms of the number of subscribers and revenue; it now has more than one million downloads; and their employees have increased from three to 35 people in less than three years. In addition, CHANI donates 5% of their revenue to their sister organization FreeFrom, a non-profit that helps financially empower survivors of gender-based violence.

CHANI is eponymously named after the astrologer Chani Nicholas, the face of the brand that she founded with her social activist wife, a former investment banker, Sonya Passi. Passi says making money is of course important to them, but getting rich is not at the heart of why they built the foundation of their business on doing good.

“The quality of work that [an organization] can do in the world when the people who work with you are taken care of—and when you are generating abundance for more than yourself—is so much greater than when you're driven only by the bottom line,” says Passi, who serves as the CEO of both CHANI and FreeFrom. “If we didn't have the numbers to back it up, I think a lot of people would roll their eyes and say, ‘Well that's cute,’ but every single month since the app launched our numbers have grown. I'm the one who writes the check each month to give 5% of CHANI's revenue to FreeFrom. I think living in a capitalist world, we are so indoctrinated with a scarcity mindset, and I refuse to invest in a scarcity mindset. I believe that abundance begets abundance, and my experience running these two organizations is showing this to be true.”

Passi, who has been doing gender-based violence activism since she was 16, started her first non-profit to provide legal services to survivors while she was in law school at the University of California, Berkeley, before working as an investment banker in New York City, where she met Chani Nicholas in 2014. Passi launched FreeFrom in 2016 to create workplaces that work for survivors, while simultaneously building the CHANI business together with Nicholas. She modeled CHANI's benefits structure after what she had already done at FreeFrom, which focused on creating cultures that allow survivors to thrive.

“The number one obstacle for the safety of survivors is financial insecurity,” says Passi. “We know safety is not achievable on a minimum wage. Also, 99% of survivors experience economic abuse, which looks like anything from having debt in your name that you don't know about, to not having access to your own bank accounts. Finally, there is the gender and racial wage gap that means you're already underpaid. The approach that I take to all of our work is that physical safety demands financial security.”

In addition to paying employees a living wage of no less than \$80,000 (“A wage you can actually afford to live on in an expensive city,” says Passi), CHANI's benefits include unlimited menstrual leave, gender-based violence paid leave, four months paid parental leave, stipends for vacation, personal growth and wealth building, among others.

These benefits don't follow the status quo, where policies such as minimum wage and national paid leave continue to be up for debate, but rather are designed to account for the space, time and money that Passi says healing trauma requires.

"If you can create a workplace where survivors can thrive, everyone can thrive," says Passi. "What I know is for every employer that is actively trying to extract from their employees, there are two more that are just doing it because everyone else is. It's almost like they don't know their own power. Leaders have power not just within our own workplaces, but we have power to change culture."

Creating a workplace structure where employees can thrive at work and home is not only the right thing to do; it also makes good business sense, given that the ongoing labor shortage may be here to stay, there has been a pandemic-fueled shift in employees' placing greater value on their lives outside of work, and the fact that purpose-driven companies are more likely to attract and retain talent.

Milcah Halili, director of engineering at CHANI, who has been at the company for more than two years, says he was drawn to the company's business-for-good ethos. "I looked at the job description and I loved the benefits that they offered. The company seemed to be human-centered first," says Halili. "What really appealed to me at the time was I noticed CHANI gives 5% of the app's proceeds to survivors through FreeFrom. That really spoke to me as a survivor myself. And so, despite not knowing that much about astrology at the time, that was enough for me to feel confident that this was the kind of company that I wanted to work for."

In addition to a company's purpose becoming increasingly important to employees, offering mental health benefits is also moving up on employees' priority lists. Research finds there is a rise in mental health challenges ranging from anxiety to depression, and it could be costing the economy more than \$47 billion annually in lost productivity.

CHANI is offering an alternative model for working: one that allows for employees financial empowerment while also giving more time and space to care for oneself. A side benefit for the company may be that employees may be better able to focus on work during their work day, leading to increased engagement and productivity.

"We're very clear with our teams that this is still a workplace," says Halili. "This is not where we do the healing, but we encourage each other to heal on our own time so that we can show up for work."

Policies are important for making workplaces more fair and ethical, but policies ultimately don't make up workplace culture—people do. In a landscape full of buzzwords such as "wellbeing washing" making the news (which highlights the practice of companies promoting their wellness policies more to increase their employee brand than to truly prioritize employee wellbeing), authentically building cultures where people can better focus on work while also offering the space to tend to oneself are workplaces where people want to stay. This is key,

given that the average cost of replacing an employee is one-and-a-half to two times their annual salary.

“I don't have a turnover problem,” says Passi. “I'm not wasting time, money and resources—both legal and HR—because I'm constantly losing people because they're exhausted or because they don't want to work in a toxic environment.”

Passi says paying people a living wage also benefits the bottom line. “We can do work that we're passionate about and we can love our jobs, but at the end of the day, the reason that my employees come to work is because they need to make a living,” says Passi. “And it costs the same amount of money, if not less, to pay people well and have them build expertise and longevity on your team as it does to short-change people a living wage and end up spending the same amount of money on HR, legal bills, rehiring and loss of productivity.”

The Great Resignation may be slowing, but the culture has changed and many people are no longer willing to burn themselves out to benefit the people at the top. In turn, workplace policies have been shifting, with more companies experimenting with a four-day work week. Research finds four-day work weeks may not only boost employee wellbeing, but also may actually increase worker productivity and even, slightly, profits. Yet the reality is that the benefits of other policies don't always play out, such as the research that shows employees at companies with unlimited vacation policies actually take less vacation than those with a set amount of vacation days. If the workplace culture values work above all, employees won't take it.

“One of the things that is challenging about cultivating this kind of culture is even though we offer these benefits, it doesn't mean that someone feels confident or empowered to take them,” says Halili. “A lot of the work that we do with our teammates—especially newer ones—is to guide them about unlearning that habit that they need to be constantly on or need to be constantly producing.”

Halili described a situation where his team was feeling a lot of pressure over a looming deadline, and pushed back against stopping work for two weeks during the company-wide summer break. So he talked over with his team about why they didn't want to take off the two weeks, reminding them that they were performing better after taking off a week for the company's spring break. “We're energized and more grounded right now because we've had that rest,” Halili recalls telling them. “After the break, we're able to communicate better and we're able to solve problems more creatively, because we're not coming from a place of lack or scarcity.”

The research supports that rest is productive as opposed to being always on, which can lead to a greater risk of burnout. All of this points to the fact that for businesses to thrive, people and society also need to thrive. The post-pandemic world is illuminating that we may need a new definition of what it means to ‘thrive’ exactly.

“I think it comes down to what your definition of success or wealth is,” says Passi. “For Chani and I, there is no individual wealth without the collective wealth and success. So I feel like I'm winning every single day because everyone [on our team] is experiencing abundance as well. Even if we had had a dip in sales, even if we had had a slow year, I would still feel like we were winning. I would still feel the abundance, because that's what I care about and what I value.”

<https://www.forbes.com/sites/hollycorbett/2023/07/31/how-one-tech-company-is-proving-why-taking-care-of-your-employees-is-profitable/?sh=6e1e01c5278c>

## **Acts Of Kindness Have Become A Workplace Standard, According To Groundbreaking Research**

Mounting research shows that there's a lot more to being kind than meets the eye. And just a little bit goes a long way. People who go above and beyond to practice kindness are happier and have better mental and physical health than those who don't spend as much time supporting others. Kindness builds happiness and well-being. Job seekers are more likely to apply for a job posting that lists kindness as an important value of the company. And loving-kindness meditations improve memory recall in people recovering from depression.

### *The Link Between Kindness And Employee Happiness*

In a recent collaboration, kindness.org commissioned Beekman 1802 to survey 1,365 employees from six well established companies including Ulta Beauty, Pura Vida, Nextdoor, Michigan University College of Arts and Letters and Traackr. Findings showed a direct link between kindness and overall employee happiness and job satisfaction.

Four key findings emerged:

- Being kind to your boss predicts happiness in the workplace.
- Kindness at work is a bigger predictor of happiness than income.
- Feeling valued is one of the biggest contributors to workplace happiness.
- Doing purposeful work is directly linked to levels of happiness at work.

"As we spend so much of our adult lives at work, we believe fostering environments of kindness in the workplace will have profoundly positive ripple effects in all aspects of life," Brent Ridge, co-founder of Beekman 1802 told me. "Creating this first of-its-kind, scientifically validated tool for companies to measure kindness is a critical first step, and this ground-breaking research demonstrates its importance."

Other studies have shown that small actions, such as buying a cup of coffee for a coworker, go a long way to raise morale and promote teamwork. And it's contagious for receivers who are more likely to perform a kind action for another colleague. A more recent study reported that when people with a history of depression engage in a loving-kindness meditation, it even improves their memory recall.

## *Companies Profit From Policies Of Kindness*

“We’ve known for a long time that kindness is good for companies, but this study reinforces how important it is for individual happiness as well,” Oliver Scott Curry, chief science officer at kindness.org, told me by email. “We’re confident that promoting kindness at work can help companies improve bottom line results while also creating happier, more fulfilling work environments.”

A study of 1,200 respondents found that 77% of job seekers believe mental health should be a priority in the workplace, and they search for employers who enact policies of kindness. Other key findings include:

- 77% of respondents were more likely to apply for a job posting that listed “kindness” as an important value of the company.
- 74% of respondents said it’s important to have a kind community in the workplace such as having managers check in on their team members for professional and personal support.
- 89% of workers see mental health and kindness as high priorities in the workplace.

“When businesses invest in their employees through acts of appreciation, words of encouragement or making investments in their success, they build a culture where people take pride in their work and feel a sense of engagement and accountability,” according to co-founder and CEO of &Open, Jonathan Legge. “When companies fail to do that, employees will simply check-out.”

## *Kindness Has Become A Workplace Standard*

More and more experts insist that a kind work culture is now a workplace standard. “The bottom line is that kindness is one of the most important values a company can prioritize, and we have shown conclusively the clear, significant impact it can have on organizational success,” states Jaclyn Lindsey, chief executive officer at kindness.org. “Through the study, we sought to lay the foundation for kindness as an expectation and standard for operational excellence and to introduce a new tool to readily measure kindness within any organization. Our assessment makes it simple to measure a company’s Kindness Quotient and identify key areas to strengthen company culture . . . It’s time to prioritize kindness in the workplace, and we’re proud to lead the way.”

Kindness sends the message that employees are valued human beings, not just worker bees. It boosts safety and belonging, which in turn, improves job engagement, satisfaction and performance. When employees feel cared about, they engage in better teamwork, and they are creative risk takers, willing to stick their necks out and stretch beyond customary bounds. In a kind culture, workers tend to be masters of self-correction, good problem solvers and solution focused. What more would a company want from their employees when these qualities add up to raising the competitive edge and promoting the organization’s bottom line?



<https://www.forbes.com/sites/bryanrobinson/2023/07/02/acts-of-kindness-have-become-a-workplace-standard-according-to-groundbreaking-research/?sh=e5fbe4139e5c>

## **Practical Takeaways for Employers from the Supreme Court Affirmative Action Decision**

On 29 June 2023, the US Supreme Court issued its decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*,<sup>1</sup> and reversed the longstanding rule that race can be considered as a plus factor among many factors when making higher education admissions decisions. Through this ruling, the court effectively ended affirmative action in college and university admissions.

The decision does not directly address affirmative action in employment, which already prohibits the use of plus factors. Thus, the immediate impact on employers will likely be limited. Nevertheless, the ripple effects of the court's decision may create added risks for employers and ultimately impact affirmative action and diversity initiatives in the long run.

### *The Decision*

The 6-3 majority opinion in *Students for Fair Admissions* addressed affirmative action in admissions at Harvard and the University of North Carolina, and determined that their use of race as a plus factor in admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment. In the higher education context, "affirmative action" generally means considering a student's race as one factor within a holistic review of the student's application. The majority determined that while promoting pluralism, diversity, and other values in education are commendable goals, they were not "sufficiently coherent" to survive strict scrutiny in the context of providing racial preferences in admissions for an indefinite period of time. While race, in and of itself, can no longer be an admissions factor, the ruling acknowledges that colleges and universities can still consider an applicant's explanation of how race influenced the student in relation to the individual student's leadership and character advocacy as it relates to specific admissions-related criteria. There were six total opinions from the Justices (majority, three concurring, and two dissents), with the dissents strongly criticizing the majority and advancing the argument that the Fourteenth Amendment allows for race conscious decisions to address historic discrimination and promote diversity.

**Mandatory and Voluntary Affirmative Action in Employment Should Not Be Impacted...For Now**  
In the employment arena, there are two forms of affirmative action—mandatory and voluntary. Put simply, mandatory affirmative action is required by applicable law, while voluntary affirmative action is not. As described in more detail below, mandatory affirmative action includes legal mandates applicable to covered federal contractors and subcontractors (covered contractors); voluntary affirmative action includes diversity-focused initiatives by companies that are not covered contractors. In addition, affirmative action in the employment context may target other underrepresented protected classes in addition to race.

Mandatory affirmative action based on race and gender applies to covered contractors under Executive Order 11246 and Office of Federal Contract Compliance Program (OFCCP) regulations.<sup>2</sup> These regulations require contractors to assess underrepresentation in their workforce and remedy through good faith efforts such as outreach, recruitment, and training. These regulations also require covered contractors to proactively assess compensation, hiring, and promotions systems to identify disparities based on race or gender that could be indicative of disparate treatment or disparate impact discrimination.<sup>3</sup> OFCCP prohibits the use of plus factors, preferences, or quotas in mandatory affirmative action programs. Indeed, OFCCP even states on its website that affirmative action in employment is legally distinct from affirmative action in higher education admissions because the former prohibits preferences, quotas, and set-asides.

Given OFCCP's positive view of affirmative action in employment and its prohibition against using plus factors, the agency will likely take the position that mandatory affirmative action is not impacted by the Students for Fair Admissions decision. OFCCP can also point to a number of federal circuit court cases upholding Executive Order 11246 and employment affirmative action, none of which were addressed in the court's ruling.<sup>5</sup> While these circuit cases may one day be subject to challenge, they reflect the current state of the law. Therefore, as long as covered contractors follow applicable regulations and any updated OFCCP guidance that might be issued as a result of the Students for Fair Admissions decision, the court's ruling should not materially impact covered contractors.

Similarly, voluntary affirmative action programs should not be immediately affected by the court's ruling. Voluntary affirmative action programs can be established by employers under Title VII of the Civil Rights Act of 1964 (Title VII) and related Equal Employment Opportunity Commission (EEOC) guidance. For a voluntary affirmative action program to be lawful, an employer must demonstrate a manifest imbalance in the workforce based on race or gender when comparing representation to availability. The voluntary program must seek to remedy this imbalance through broader outreach, recruitment, and training. Plus-factors, preferences, and quotas are strictly prohibited, just as they are in mandatory programs. There is also less legal risk where the program is seeking to directly remedy past discrimination as part of its justification (e.g., an employer receives an internal complaint of discrimination, investigates the complaint, determines it to be substantiated, and proactively takes action to address its findings). The Supreme Court has confirmed the permissibility of these programs where there is a manifest imbalance based on race or gender in the workforce.<sup>6</sup> Though permissible, multiple circuit court cases have determined that there is a limit to how far voluntary affirmative action can go, invalidating programs that do not sufficiently relate to Title VII's purpose of remedying and eliminating employment discrimination.<sup>7</sup>

#### *The EEOC's Statement*

Within hours of the decision being published, EEOC Chair Charlotte Burrows released a statement that the Students for Fair Admissions decision

“does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background. It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace.”

Although the EEOC statement is not binding on courts, it indicates how the EEOC will approach complaints or challenges to employment affirmative action and diversity-focused initiatives and further demonstrates that employer affirmative action programs and diversity initiatives that comply with the foregoing requirements are likely safe for the time being, but with added risks and legal considerations.

#### Supreme Court Decision May Lead to Changes in Employment Affirmative Action

Notwithstanding its limited immediate impact on the employment sector, the Students for Fair Admissions decision may trigger changes in employment affirmative action as a result of agency-driven action and legal challenges to employer programs.

For example, in the Students for Fair Admissions decision, the Supreme Court questioned whether the standard race/ethnicity categories (e.g., White, Black/African American, Hispanic/Latino, Asian, Pacific Islander, Native American), were specific enough to be good measures of underrepresentation in the admissions context, and noted that the current categories are very broad and include many different ethnicities and national origins. This could lead the EEOC and OFCCP to disaggregate these categories into more specific categories, such as East Asian and South Asian as noted by the court, for use in the employment context.

Likewise, covered contractors have been challenged by the recent sharp drop in the number of census occupation codes, which are the primary data source used by covered contractors in their diversity analytics. The most recent US census data includes only 237 occupation codes (down from 488 in the prior census). The substantial reduction in occupation code data is making it more difficult for covered contractors to determine labor-market diversity availability data for some job titles. With the likely increased focus on the use of diversity analytics to show a manifest imbalance, anything that makes this more difficult may pose added legal risk and require more agency guidance to help contractors construct compliant programs.

The Supreme Court’s ruling could also serve as a blueprint for future challenges to employers’ mandatory and voluntary affirmative action programs, with employees adopting some of the court’s reasoning to justify their own claims.

#### *Practical Takeaways*

Diversity-focused initiatives are likely not to be impacted in the near term, but employers should focus these initiatives more on non-discrimination in employment (through proactive trainings, OFCCP-style self-audits, and inclusive work environments) and ensuring equal employment opportunity (EEO) in hiring and advancement (through outreach, recruitment, and elimination of barriers). It is critically important that employers have affirmative action and

diversity programs reviewed by counsel to ensure compliance with existing law and future developments.

More formal mandatory or voluntary affirmative action programs are likely not to be impacted, although employers should strictly follow the applicable OFCCP regulations and EEOC guidance. Any race-conscious initiative (such as a diverse slate policy) should be reviewed by counsel and must be based on diversity analytics where the employer has identified a manifest imbalance in its workforce (a significant underrepresentation of a particular group) and should be narrowly focused on remedying that manifest imbalance. Employment decisions must not consider race or other protected characteristics as part of the decision.

To avoid potential lawsuits or complaints, as well as confusion relating to the applicability of the Students for Fair Admissions decision, it may be better to move away from the term affirmative action and use terms such as EEO and diversity-focused initiatives.

Employees may be confused about the Supreme Court's decision, so covered contractors should consider proactive messages and trainings for their workforces regarding their covered contractor status and continuing obligations to comply. Employers may nevertheless see more discrimination cases where it is perceived that affirmative action played a role in a hiring or promotion outcome.

If a complaint regarding an affirmative action or diversity initiative is filed with the EEOC or OFCCP, employers should be prepared to show that there is no plus factor, preference, or quota, being used.

<https://www.jdsupra.com/legalnews/practical-takeaways-for-employers-from-5679989/>

## **As Workplace Mental Health Worsens, Employee Engagement Plummet**

Citing long hours and excessive workloads, more than one-third of U.S. workers (34 percent) say their mental health is declining, according to a recent survey from The Conference Board. The survey of over 1,100 workers also uncovered a strong correlation between worsening mental health and decreased employee engagement, with nearly 70 percent of respondents who reported decreased mental health also reporting lower engagement.

### *Increased Pressure on Employees and Employers*

Employees and organizations have both been under growing economic and cultural pressure in the past year, as employees have also increased their expectations for better work/life balance. "Workers have been asking for more autonomy, flexibility and ownership over their experience of work," said Bernard Wong, senior manager of insights and principal at Mind Share Partners, a nonprofit group focusing on workplace mental health. "But many employers have been doubling down on efforts to downsize people-related costs, maximize productivity, and even

avoid contentious social and political issues. The constant push and pull has negatively impacted workplace mental health."

Meanwhile, businesses are feeling financial pressure from higher interest rates. "So managers are getting squeezed and asked to do more with less, which gets passed on to employees," said Sue Howard, president of consultancy HR BluePrints. "To make matters worse, many people have lost some of their social skills during the pandemic, making already difficult mental health conversations even tougher."

### *The Roots of Burnout: Broken Workplace Cultures*

The Conference Board report found the reasons behind worsening mental health included long hours and heavy workloads, two things Wong said "are largely driven by the employer side." "As valuable as health care benefits and self-care perks may be, they only equip employees to cope with fundamentally broken cultures of work, rather than addressing the root causes" of poor mental health, he said.

The close correlation between worsening mental health and reduced engagement is no surprise to Howard. "When an employee is having a mental health issue, it takes them much more energy and time to do their work, making them even more susceptible to burnout," she said. "If an employee could instead take a break, organizations would actually see greater productivity and less burnout."

### *Stigma Stops Conversations*

The survey also found that 38 percent of workers didn't feel comfortable talking to their manager about their mental health, a drastic increase from 18 percent a year ago. What's stopping these important conversations that could result in people getting help?

"There's still a lot of stigma around workplace mental health," said Abbie Rosenberg, founder and executive director of the nonprofit Mental Health Collaborative, which provides training programs on workplace mental health. "One misunderstanding managers and employees sometimes share is that mental health challenges are character weaknesses or are somehow different from physical illnesses, which they're not."

In addition, some of the increased worker discomfort about talking to managers "may be a byproduct of an increasingly contentious relationship between workers and employers," Wong said. "When workers feel insecure, unsure or ambiguous, and when the message of support [from managers and organizations] isn't clear, workers are going to err on the side of safety and not say anything."

### *Tips for Improving Workplace Mental Health*

What can organizations do to help address worsening workplace mental health? More scheduling flexibility and work/life balance were cited in the survey as the top "wants" of workers. More than half (55 percent) of respondents said that being able to take a guilt-free, paid-time-off day would be helpful for their mental health.

*What additional actions would the experts recommend?*

"Have company leaders share their personal connection to mental health issues," Wong said. "Doing so models vulnerability and allows others to share, catalyzing a culture of safety for workers to do the same, if they so choose."

"Companies should educate all of their managers and workers on how to navigate mental health conversations," said Amy Freshman, senior director of global HR at ADP, "so that people feel better equipped to reach out for assistance, and so managers and others can guide colleagues to the right [mental health] resources." Nearly six in 10 employees (57 percent) don't "feel their managers or colleagues are equipped to talk about mental health issues without judgment," according to the ADP Research Institute's most recent People at Work survey.

Walk the talk (i.e., make sure deeds align with words). "If your leaders are telling their personal mental health stories while employees are navigating toxic workplace dynamics and managing heavy workloads and even layoffs, people will notice the mismatch," Wong said. "Anything you say about supporting mental health needs to be translated into actual business practice and the everyday experiences of people."

*Comprehensive Approaches Needed*

Benefits, wellness programs and meditation apps are fine, but they don't address the underlying problem of unhealthy workplace cultures that aggravate mental health concerns. "A comprehensive approach to improving workplace mental health is necessary," Wong said. For example, General Dynamics Information Technology, a global enterprise with 30,000 employees, launched its "How Are You, Really?" campaign in 2021 after an employee died by suicide. The campaign raises awareness around mental health and fosters discussions about what supports, in terms of interventions, benefits, flexibility and cultural change, GDIT's people need from each other and from the company.

"We've challenged our traditional approach to work and incorporated more flexibility and choice for employees when work and life become unbalanced," said GDIT President Amy Gilliland. "This includes reprioritizing workloads, allowing people to take meaningful paid time off to rebalance, and flexing people's hours. We've received an overwhelming response to 'How Are You, Really?' Almost every day, an employee tells me about how the campaign has helped them."

Rosenberg offers a final word about the need for a comprehensive approach to improving workplace mental health. "Organizations need to change how they think about stress, job performance and self-care, rather than reacting to mental health crises [with benefits and wellness apps]," she explained. "Intervening once the building is already on fire is not the best long-term solution."

<https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/mental-health-employee-engagment.aspx>

## **The future of affirmative action in the workplace**

The Supreme Court's decision to end affirmative action in college admissions could embolden actors to challenge the diversity, equity, and inclusion efforts of employers.

Corporations have already scaled back the diversity, equity, and inclusion efforts they launched in 2020 amid an ultimately stunted racial reckoning. Now the question is whether the Supreme Court's ban on race-conscious admissions will lead them to further rein in these programs to avoid potential legal challenges.

One thing is clear: The laws surrounding affirmative action in employment haven't changed. Federal contractors have been required to take affirmative action, steps to ensure applicants are treated fairly, since 1965 when President Lyndon Johnson signed Executive Order 11246. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex, and national origin.

Under the Equal Employment Opportunity Commission's guidelines on voluntary affirmative action, employers are encouraged to take voluntary steps to "correct the effects of past discrimination and to prevent present and future discrimination" such as expanding their applicant pools to ensure a diverse body of applicants for any given position.

As the Equal Employment Opportunity Commission noted in a statement after the decision, the cases do not "address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background," clarifying that it is still legal for "employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace."

Still, legal threats from right-wing organizations that have already spent years trying to get organizations, including Starbucks and McDonald's, to end their DEI programs could increase. The Supreme Court's decision to ban race-conscious measures in college admissions is likely to encourage more lawsuits against race-conscious policies in employment, said Pauline Kim, an employment law expert at the Washington University in St. Louis School of Law.

<https://www.vox.com/politics/2023/7/9/23787408/affirmative-action-in-the-workplace-diversity-equity-inclusion-in-hiring>

## **GOP attorneys general shift the battle over affirmative action to the workplace**

NEW YORK (AP) — Thirteen Republican state attorneys general are cautioning CEOs of the 100 biggest U.S. companies on the legal consequences for using race as a factor in hiring and employment practices, demonstrating how the Supreme Court's recent ruling dismantling affirmative action in higher education may trickle into the workplace.

The state attorneys general sent a letter to the CEOs on Thursday arguing that the controversial June ruling declaring that race cannot be a factor in college admissions — consequently striking down decades-old practices aimed at achieving diverse student bodies — could also apply to private entities, like employers.

“Treating people differently because of the color of their skin, even for benign purposes, is unlawful and wrong,” they wrote. The GOP officials also suggested that Diversity, Equity and Inclusion programs could be a form of discrimination.

The letter and similar actions elsewhere have raised questions about the far-reaching consequences of the Supreme Court decision beyond higher education. But experts note the court’s ruling itself doesn’t directly change current employer obligations or commitments to DEI.

“The decision itself does not legally impact Title VII (of the Civil Rights Act), which is what governs employment discrimination or discrimination in the workplace,” Greg Hoff, associate counsel of the HR Policy Association, told The Associated Press.

Hoff and others say the court’s ruling only applies to higher education institutions and other entities that receive federal funding. They also note that affirmative action in college admissions is very different from DEI efforts in workplaces, which can include expanding outreach for new hires, creating employee resource groups for underrepresented workers, and reducing bias in hiring through such practices as “blind” applications.

“What we’ve been seeing a lot of since the decision came down is political opponents of DEI ... conflating affirmative action with DEI more broadly — because it serves their political purposes,” said David Glasgow, executive director of the Meltzer Center for Diversity, Inclusion and Belonging at New York University’s School of Law. “I think there’s a lot of quite deliberate attempts to muddy the waters here.”

Beyond DEI, affirmative action in the workplace is technically still upheld by Supreme Court precedent, Glasgow adds. But workplace affirmative action is rare, and he suspects today’s court would likely overrule those cases if challenged, mirroring the college admissions decision. While Thursday’s letter doesn’t mark legal action, experts expect future litigation down the road. The attorneys’ general letter also isn’t the first-time officials have argued that the Supreme Court’s ruling applies to private employers.

Last week, Sen. Tom Cotton, R-Arkansas, sent a letter to Target CEO Brian Cornell stating that the company’s DEI program and “racial quota for hiring” was discriminatory while also pointing to the affirmative action ruling. Target did not immediately respond to The Associated Press’ request for comment on Friday.



“They’re starting with letters, but I don’t think that they’re bluffs,” Temple University assistant professor of law Zamir Ben-Dan said. “It’s going to be a problem.”

The attorneys general said they would be paying attention to companies’ practices in hiring employees and contractors — and called out companies including Airbnb, Facebook, Google, Goldman Sachs, Microsoft and Netflix for programs intended to increase racial diversity with hires and suppliers.

In response, employers may take steps to avoid litigation, Hoff and HR Policy Association president and CEO Tim Bartl said.

“The increased risk for employers is this increased risk of litigation as a result of the decision — but again, not because of any changing obligations under Title VII,” Hoff said.

Tennessee Attorney General Jonathan Skrmetti, one of the signatories, said that the letter isn’t a warning to companies as much as it is a heads-up that racial preferences could run afoul of the law. He added that the group decided to take action in part to respond to speculation about the Supreme Court ruling not applying to employment.

“The court was very clear,” he said in a Friday interview. “The appropriate response to racial discrimination is not more racial discrimination.”

Not all state attorneys general cheered last month’s ruling or are eager to apply it outside college admissions. Only about half the nation’s Republican AGs signed the letter. And Democrats have been condemning the Supreme Court’s affirmative action ruling.

“For decades the Supreme Court has upheld targeted affirmative action programs to increase diversity in higher education,” the co-chairs of the Democratic Attorneys General Association, Nevada’s Aaron Ford and Delaware’s Kathy Jennings, said in a statement June 29, calling that day’s ruling “a major step backwards that tramples on those ideals.”

Ben-Dan anticipates that the results of any action taken in the workplace to undercut DEI will mimic what already happened when affirmative action had previously been weakened in higher education, noting that enrollment for nonwhite students — particularly Black students — went down after California banned affirmative action in 1996, for example.

“I imagine that it’s going to lead to a decline in racial diversity in workforces,” he said.

<https://www.seattletimes.com/business/gop-attorneys-general-cite-affirmative-action-ruling-in-warning-to-companies-over-discrimination/>

## **What is holding back mental health conversations in the workplace?**

In recent years, employers across every industry have become more aware of the importance of proper mental health support in the workplace – especially in the wake of the COVID-19 pandemic, which brought many of these issues to the forefront in a major way. In March 2023, Peninsula Group published the findings of a survey of 79,000 businesses from four countries, which revealed that nearly half of UK bosses have seen an increase in workplace mental health issues. These executives recognise that they have a responsibility to their employees – 94% said they are available to help staff who are struggling with mental health concerns.

The poll revealed that two-thirds of employers are confident their employees would talk to them about their mental health concerns. However, it also showed that only 12% of employees have actually done so – and one in seven of those who did speak to their bosses said nothing was done as a result of this.

In my own experience, there is often a gulf in perceptions and outlooks between company management and the rank-and-file employees, which can make it difficult to foster open and productive conversations about mental health. Many managers maintain too much of a distance from the everyday concerns and attitudes of their workers to be able to have empathetic conversations with them, and in the worst cases, this can lead to an unhelpfully adversarial “us vs them” attitude.

These problems are exacerbated by cultural differences between workers and their bosses, especially in blue-collar or service-based industries, where staff often face unique circumstances and challenges that the managerial class does not understand:

Many employees in the construction and engineering sectors are younger than their managers, creating a generational gap that hampers communication. Others may also be neurodivergent, meaning they will have particular mental health needs that need to be managed in specific ways. Some manual labourers will be used to working alone, on their own initiative, and simply prefer not to be actively “managed” at all; this means they will be less willing to open up on matters of mental wellbeing.

None of these factors are necessarily negative, and do not need to be a source of any problems in the workplace, but if managers do not take these dynamics into consideration, it becomes much more difficult for them to encourage these workers to be open about their mental health, or about any other workplace concerns they might have.

The result of this may be a dysfunctional working environment, in which managers and workers do not respect each other, where staff do not feel valued for their contributions or able to discuss their problems, and where clear and constructive communication is not possible.

### *Key steps to foster open dialogue about mental health*

In order to avoid these negative outcomes, employers need to make sure they are taking all of the necessary steps to create a welcoming and supportive workplace, in which workers feel comfortable and empowered to have open conversations about even the most challenging mental health topics.

*Here are just a few steps your organisation can take to generate a more positive dialogue about mental health:*

#### *Instill a culture of empathetic management*

It is vital that your company's management culture treats workers as individual people first and foremost, rather than as resources to be managed. This means that those in charge of a specific team should strive to know and understand each member of their team as individuals, and recognize their personal needs.

As part of this, managers should take time to speak to workers who appear to be struggling; if a staff member is having trouble with timekeeping, or has taken extended sickness absence, it is always better to have a conversation and find out what might be troubling them, rather than hitting them with disciplinary measures or putting them straight on to a performance improvement plan.

#### *Develop individualized support plans to meet each worker's needs*

Good mental health in the workplace should be seen as interchangeable with physical safety. This is why psychological risk assessments for individual staff members can be a useful tool, building on the methodology used in carrying out standard risk assessments for dangerous physical tasks.

A psychological risk assessment involves speaking to your workers about their mental health background and individual needs, in order to find out what kind of support they might require from you, and identify anything they might need to stay mentally safe and well on the job. By creating these individual safety profiles and plans, it will be easier for managers and HR leaders to understand how to support each staff member.

#### *Create resources for managers to learn about mental health*

The principles of good mental health support cannot be learned overnight, or in a single training session. Companies need to provide their managers with access to high-quality training resources and information on an ongoing basis, and all members of the team must show a commitment to continuous learning and improvement.

After all, mental health crises can be extremely challenging to deal with, but if they happen in the workplace, bosses have a responsibility to know what to do. If a member of staff is struggling with suicidal feelings, for example, would your team feel confident in handling the matter? If such a situation arises, it is essential that colleagues around them know what steps to take, or at very least, that they have resources they can consult to help guide their actions.

### *Support your mental health first aiders*

Many modern workplaces will have a certain number of mental health first aiders on their team. Having these trained volunteers among your workforce can be invaluable in giving people a first point of contact if they are struggling, and allowing them to share their problems with a peer or colleague rather than going straight to management.

It is also vital to make sure that mental health first aiders are properly supported by the HR team and managers. After all, these are also individuals with their own mental health needs, who may become overburdened if they are required to do too much; make sure to surround them with supportive managers, and provide them with training and guidance to help them grow and evolve their own understanding of mental health.

### *Encourage staff to be proactive about their own mental health needs*

The most effective way to generate more positive conversations about mental health in the workplace is to do so at every level of the company, rather than simply from the top down. Workers need to know that their managers will support them with their mental health – but they also need to be encouraged to take their own mental wellbeing seriously, and to speak up if they are unhappy in order to improve their circumstances.

This means making sure that everyone on site knows who to speak to about their mental health needs. You can do this by posting contact details and key information in communal break rooms, or hosting coffee break talks on key topics relating to mental wellbeing, such as stress management and suicide awareness.

By taking these steps, companies will be able to make important progress towards their goal of creating a truly constructive environment of trust and open dialogue when it comes to mental health. This will not happen overnight, but by embedding these values into your HR strategy, you stand the best chance of creating the self-sustaining improvements that any company needs to truly transform its culture.

<https://www.thehrdirector.com/business-news/mental-health/whats-holding-back-mental-health-conversations-work/>

## **Can Employee Affinity Groups Result in Discrimination Claims?**

In the wake of the Supreme Court's Students for Fair Admissions college and university affirmative action decision last month, some employers are questioning the continuing legality of their Diversity, Equity, and Inclusion (DEI) programs. A group of state attorneys general recently sent a letter to Fortune 100 companies reminding them that federal and state laws prohibit individual employment decisions that are based on membership in a protected classification. A senator sent a letter to large U.S. law firms declaring that DEI programs which include quotas or hiring directives expose the firms to legal action.

One question that has followed these developments involves whether companies face legal risk if they sponsor or allow employee affinity groups. An affinity group includes workers with a common interest, such as the success of traditionally underrepresented persons like women or minorities. These employees form groups to foster networking, mentorship, and other measures to advance the interests of those persons in the workplace. Some groups are actively encouraged and sponsored by the company, while others are largely independent of the employer's DEI efforts.

Employee affinity groups are not addressed in the Students opinion. However, federal and state antidiscrimination laws could apply to groups that exclude employees based on a protected classification, or those that are used by companies to influence individual employment decisions. While there are no legal impediments to the concept of an affinity group, companies that recognize or encourage them should establish clear guidelines and protocols.

First, the affinity group should be open to all workers whether or not they belong to the protected class that is the basis for the group. Some proposed groups may be inappropriate, such as those based on political affiliations that could cause conflicts in the workplace. Next, the company should establish clear guidelines regarding the resources that will be made available to the groups, policies governing their operations, and compliance with all applicable EEO and other company rules.

Membership in or recommendations from the affinity group should not influence individual hiring or promotion decisions. One of the group's goals should be to increase the qualified pool of underrepresented employees eligible for advancement within the organization. In all cases, employers should not make a snap decision to recognize or prohibit employee affinity groups. The creation of such groups requires careful thought and planning as to their purpose, their connection to the company, and the consistency of their activities with legal and business needs. While corporate DEI efforts may be subject to increased scrutiny following Students, employers retain the ability to continue appropriately constructed and implemented diversity efforts.

<https://www.jdsupra.com/legalnews/can-employee-affinity-groups-result-in-1422868/>

### **Republican Attorneys General Warn Employers Against Race-Based Discrimination**

Attorneys general from 13 states recently sent a letter to business leaders warning them to end racial preferences in hiring.

On July 13, the attorneys general of Alabama, Arkansas, Indiana, Iowa, Kentucky Nebraska, Mississippi, Missouri, Montana, South Carolina, Tennessee and West Virginia signed the letter,

addressed to Fortune 100 CEOs. It comes just weeks after a Supreme Court decision ended affirmative action in college admissions.

The letter said companies will face "serious legal consequences" if they continue hiring practices that take race into consideration.

"Racial discrimination in employment and contracting is all too common among Fortune 100 companies and other large businesses," the letter noted. "These discriminatory practices include, among other things, explicit racial quotas and preferences in hiring, recruiting, retention, promotion, and advancement. They also include race-based contracting practices, such as racial preferences and quotas in selecting suppliers, providing overt preferential treatment to customers on the basis of race, and pressuring contractors to adopt the company's racially discriminatory quotas and preferences."

We have gathered a group of articles on the news from SHRM Online and other trusted sources.

#### *Targeting DE&I Initiatives*

The letter targets corporate diversity, equity and inclusion (DE&I) programs. The letter reflects a longstanding Republican goal of curtailing corporate diversity efforts that many conservatives see as hiring or promoting people of color at the expense of fairness to all.

Companies have for years sought to have their workforce reflect the demographics of a multiracial nation, saying a diverse workplace is good for business. Pew Research found in a February poll that 54 percent of Americans feel their company pays the right amount of attention to diversity initiatives.

In general, corporate diversity initiatives typically don't seek to hire one applicant over another because of race, but instead focus on expanding applicant pools or changing hiring procedures.

#### *'Potential Legal and Reputational Risk'*

The Supreme Court's ruling applies only to college admissions and does not affect a company's ability to take race into account when considering job candidates, but legal experts have warned that the decision could impact how courts analyze legal challenges regarding recruiting, hiring and promotion. The ruling could put companies in a more tenuous position when it comes to such cases, and the recent letter serves as a warning sign of how seriously some states may pursue action.

Morgan Lewis, a law firm specializing in labor and employment litigation, said businesses should consider the potential legal and reputational risk of their hiring practices and proactively re-evaluate their existing DE&I programs.

Nearly 70 companies signed a friend-of-the-court brief last year urging the Supreme Court to keep affirmative action in place. They warned that less diverse student bodies could lead to less diverse pools of talent. The brief—signed by companies including Apple, Google, Airbnb, Lyft

and Uber—said that DE&I efforts strongly rely on university admissions programs that lead to graduates educated in racially and ethnically diverse environments.

### *Democrats Disagree with Court Decision*

The letter specifically called out several companies, including Airbnb, Facebook, Google, Goldman Sachs, Microsoft and Netflix, for their programs to increase racial diversity in their workforces and supplier networks.

Despite the forceful nature of the letter, only about half of the nation's Republican attorneys general signed it, while Democrats have criticized the Supreme Court's decision on affirmative action.

The Democratic Attorneys General Association called the letter "anti-diversity, anti-business, and anti-economy."

### *DE&I Programs Differ from Quotas*

Conservatives have recently stepped up their attacks on businesses over what they perceive as "woke" policies, namely around diversity initiatives and ESG (environmental, social and governance) efforts. Defenders of corporate DE&I initiatives note that many of the things that employers have adopted, such as statistical breakdowns of their workforce or setting hiring goals, are aspirational and nonbinding.

### *High Court Makes Affirmative Action in College Admissions Illegal*

On June 29, the U.S. Supreme Court voted to curb affirmative action in higher education—ending a four-decade precedent that allowed colleges and universities to broadly consider applicants' race in their admissions processes. The ruling came in response to a pair of lawsuits accusing Harvard University and the University of North Carolina of racial discrimination in admissions.

In the workplace, DE&I programs, including training initiatives, outreach efforts, racial equity audits, equal pay provisions and other methods, promote equal opportunity for job applicants and employees.

The Supreme Court's ruling could lead to fewer employment opportunities for people of color—if fewer are admitted to colleges because of the removal of race-conscious admissions practices—and, as a result, impact employers' recruiting and hiring efforts in the future.

### *Diversity Declined Without Affirmative Action*

Racial diversity in the workplace significantly declined in several states in the years after they outlawed affirmative action in college admissions, according to a 2013 study by Harvard University.

The study, which examined the years 1990 to 2009, assessed employment data from nearly 6,000 state and local government agencies in California, Michigan, Nebraska and Washington state in the years following their prohibition of affirmative action.

### *Federal Contractors Must Consider Race, Disability, Veteran Status*

Three separate laws require certain employers that do business with the federal government to implement affirmative action programs.

Under Executive Order 11246, federal contractors and subcontractors with 50 or more employees who have entered into at least one contract of \$50,000 or more with the federal government must maintain a program for recruiting, hiring and promoting women and minorities.

Section 503 of the Rehabilitation Act of 1973 requires contractors with 50 or more employees and contracts over \$50,000 to take affirmative action with regard to individuals with disabilities. The Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA) requires contractors to take affirmative action to employ and promote veterans with service-connected disabilities, recently separated veterans and other protected veterans. VEVRAA requires contractors with 50 or more employees and a contract of \$150,000 or more to have a written affirmative action program.

<https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/affirmative-action-attorneys-general.aspx>

## **The Mental Health Crisis Caused By The Return To Office**

The Great Return to the Office, hailed as the elixir for the languishing economy and the panacea for remote work's woes, is slowly revealing an unforeseen dark side. Beneath the glitter of the office's glass walls, an insidious scourge is quietly permeating: a mental health crisis. Think of it as a silent workplace apocalypse – one where zombies aren't gnawing at your physical being, but where stress, anxiety, and burnout gnaw at your peace of mind.

Remember that feeling of relief when it seemed like we were emerging from the gloomy shadows of the pandemic, ready to embrace a shiny new world of 'normalcy'? We sang paeans to the much-awaited 'Return to Office', our perceived phoenix rising from the ashes of remote work. Yet, as we dusted our office desks and waved goodbye to Zoom meetings, a rather disconcerting trend began to surface. This isn't a whodunit mystery but a real-life drama where the villain is silently eating away at the fabric of our workforce: a rapidly escalating mental health crisis. Picture a silent office apocalypse – where the zombies aren't physically visible, but where stress, anxiety, and burnout gnaw at your sanity and wellbeing.

### *Declining Mental Health: The Invisible Struggle*

The silent alarm bells began ringing with the findings of a recent study by The Conference Board. It's like an unsettling bedtime story for CEOs, the monster under the business bed that refuses to be ignored. Around 34% of workers admitted to experiencing lower mental health levels compared to just six months ago. And as if this wasn't disconcerting enough, 37%



reported a decrease in their level of engagement and sense of belonging, paradoxically juxtaposed with them working harder than ever.

This trend is starker amongst Millennials, where 43% report decreased engagement, higher than the 38% of Gen X and 34% of Baby Boomers. Consequently, 40% of Millennials reported performing only what's expected of them or less - what's known as quiet quitting. This disengagement raises the critical question: does declining mental health make workers less engaged in their jobs, or vice versa?

Consider an artist for a moment, who was once passionate and inspired, now feeling a distancing disconnection from her muse. The canvas that was once vibrant and animated now appears hauntingly desolate. That's what it's like when an employee's connection to the mission and purpose of their organization wanes.

And the return to office looks like the key factor to blame. A whopping 52% of study participants indicated their preference for flexible/hybrid work schedules as a way of addressing their mental health struggles. And another form of flexibility, being able to take “no work” PTO days without guilt, would be valuable for 55% to help their mental health. That finding aligns with results from surveys and focus groups I run when helping clients transition to a return to office in a flexible hybrid work arrangement.

#### *The Mental Health-Workload Nexus*

The relationship between declining mental health and workload further amplifies these concerns. Among workers reporting decreased mental health, 48% work more than 50 hours per week. Half of the Millennials reported their workload as detrimental to their mental health, higher than 48% of Gen X and 40% of Baby Boomers.

Factors like poor workplace communication, the inability to balance personal and work life, and the time spent in meetings exacerbate these effects. A toxic work culture also takes a toll, with 26% of workers asserting that it negatively impacts their mental health.

#### *Mental Health Support: A Decreasing Trend?*

Unfortunately, mental health and well-being support programs for workers seem to be on a downward trend. Available emotional well-being programs have dropped from 88% to 62% within a year, and financial well-being initiatives have seen a similar decline from 76% to 52%. Physical well-being programs, too, have seen a decrease from 74% to 54%. Despite availability, these programs are underutilized, with emotional well-being programs used by only 22% of those who have access to them.

The plot thickens when we delve into the reluctance surrounding mental health discussions. The study reveals a startling fact – about 38% of employees feel like they're walking on eggshells when talking to their managers about their mental health. It's akin to playing a high-stakes game of charades, where no one can decipher your clues, and the consequences are all too real.

Driven into a corner, employees have resorted to clandestine methods to address their mental health issues. The study reveals that 13% of workers took "unofficial mental health days," 19% opted for sick days, and 18% donned a brave face, continuing to work despite their internal struggles. It's like donning a mask each day, a facade that hides the turmoil within.

### *Cognitive Biases: Unseen Puppeteers in the Workplace Drama*

Our minds are like overworked office interns, continuously juggling and processing colossal amounts of information. In this constant frenzy, cognitive shortcuts, or biases, come into play. They help us swiftly navigate complex decisions but sometimes lead us astray, causing distortions in our perception, thinking, and decision-making.

The status quo bias is the human tendency to prefer the current state of affairs, leading to resistance to change. In the workplace, this bias can manifest in the continued adherence to traditional, inflexible work arrangements, despite evidence indicating their harmful effect on employee mental health.

Employers might be overlooking the findings of The Conference Board study due to the status quo bias. It's like sticking with an old, stuttering fax machine while a high-speed email system waits patiently on the sidelines. As comfortable as the current state may be, failing to evolve with the times has its pitfalls. In this case, it leads to the devaluation of employee mental health and well-being, reducing engagement and productivity levels.

The empathy gap refers to our inability to understand our own or others' emotional states from a different emotional state. In the current scenario, this bias could lead to a misunderstanding of employees' mental health struggles.

Imagine trying to comprehend the bone-chilling cold of the Arctic while basking in the tropical sun of Bali; difficult, isn't it? That's precisely how the empathy gap operates. Managers who have never grappled with mental health issues may find it challenging to understand their employees' struggles.

This cognitive blindspot could account for why 38% of employees feel uncomfortable discussing their mental health with their managers. It's akin to trying to explain the concept of color to someone who's been colorblind since birth.

This gap may also explain why mental health support programs are not being utilized. If the architects of these programs have never experienced mental health struggles, they might not create programs that truly address the needs of those who have.

In essence, the office is our mental orchestra, and these biases are the off-tune instruments. By recognizing and addressing them, we can finally begin to hear the symphony as it was meant to be played. It's high time we tune in and harmonize our workplaces with the notes of empathy, understanding, and flexibility.

### *Conclusion: The Future of Work is Here*

Employers have an opportunity to address the escalating mental health crisis. By adjusting workplace norms, embracing flexibility, and prioritizing mental health, we can create a healthier work environment. By adjusting the workplace norms and embracing flexibility, companies can retain their diverse talent, ensuring that their workforce mirrors society's richness. It's like baking a multi-flavored cake – each ingredient adds its unique flavor, contributing to the delicious final product. As we strive to reflect society within our organizations, flexible work arrangements and mental health awareness will be the yeast that makes our workplace culture rise to the occasion. This isn't just about checking boxes; it's about understanding that a healthy mind is the greatest treasure to find. It's time we start digging for it in our workplaces.

<https://www.forbes.com/sites/glebtsipursky/2023/07/21/the-mental-health-crisis-caused-by-the-return-to-office/?sh=5c168a65414c>

## **How Business Leaders Can Best Support LGBTQIA+ Employee Mental Health In The Workplace**

Roughly 7.2% of the U.S. adult population self-identified as LGBTQIA+ in 2022. Although Americans overwhelmingly support marriage equality and the U.S. federally legalized same-sex marriage in 2015, the government was slower to clarify federal workplace protections against discrimination based on sexual orientation and gender identity. It's no surprise that members of the LGBTQIA+ community experience higher rates of mental illness: according to 2015 research from the Substance Abuse and Mental Health Services Administration, LGB adults were about twice as likely to have had a mental illness in the past year than heterosexual adults, and trans individuals are nearly four times as likely as cisgender individuals to have at least one DSM-5 diagnosis.

Members of the LGBTQIA+ community face discrimination in all areas, particularly in the workplace—an environment that has been historically slow to implement changes and prioritize inclusivity across industries. With nearly half of LGBT individuals experiencing workplace discrimination at some point in their lives, it's more important than ever for businesses to be aware of how they can support every employee's mental health journey to ensure an inclusive, effective and safe workplace.

Discrimination is a traumatic experience; whether the act is indirect, subtle or unintentional (like microaggressions) or more explicit, its impact can be particularly damaging for members of a marginalized group such as the LGBTQIA+ community. When handled improperly, the consequences of social stigma and bias can compound the burden faced by people who already bear a disproportionate likelihood of discrimination. Like any other workplace hazard, companies have a duty to protect their employees and create policies that promote safety; workplace discrimination could compromise overall productivity and organizational success and cause long-term consequences for employee mental health.

In a 2022 survey from the Center for American Progress, 50% of LGBTQI+ adults "reported experiencing some form of workplace discrimination or harassment in the past year because of their sexual orientation, gender identity, or intersex status, including being fired; being denied a promotion; having their work hours cut; or experiencing verbal, physical or sexual harassment." This statistic is unacceptable in the modern world, and workplace leaders should take drastic measures to prioritize effective strategies for change.

While fostering a culture of acceptance is a company-wide effort, most of the responsibility to ensure employees feel safe and accepted at work falls on senior management. Leadership should implement a culture that rejects microaggressions and stigmas in the workplace, and I recommend starting with quarterly diversity, equity and inclusion training led by an LGBTQIA+ mental health expert. Frequent company-wide training is essential, but it's also important to recognize that the skill set required to lead in a way that rejects bias is more complex and requires more involved training. Training that caters specifically to senior leadership can help ensure that DEI initiatives take priority without exception.

Aside from actively participating in training, leading by example is one of the best ways management can support diversity. Even small steps, such as leaders putting their preferred pronouns in their email signatures and sharing pronouns during introductions as a model for safety and inclusivity, can significantly impact day-to-day culture. Still, while proactive measures reduce the potential for workplace discrimination, conflict can happen even in the most supportive environments, and companies need to be prepared.

In my opinion, there is no chance of preventing recurring incidents if there is no trusted and clearly communicated system that individuals can use to report workplace discrimination. Leadership can provide similar internal support by establishing a detailed anonymous online form or directing employees to external processes such as government or privately owned systems. California, for example, has public resources for submitting a discrimination complaint. Sweeping workplace microaggressions under the rug can negatively impact mental health, no matter how minor an incident may seem. Management should implement a system that includes at least two non-biased sources and optional anonymity to ensure every employee feels safe filing a report. Having these systems in place and handling each incident of discrimination or bias immediately and seriously will help ensure that employees feel supported and heard, which is key to fostering a culture that promotes mental health.

Training and systems that help prevent discrimination in the workplace are the foundation for supporting LGBTQIA+ employees. It's also crucial to implement initiatives that promote and improve overall mental health rather than just taking preventative measures against negative impacts on well-being. Management can start by taking inventory of existing support systems. Gym and wellness allowances are good for maintaining mental health but fall short of directly supporting struggling employees. However, a stipend for therapy and other behavioral health treatments can lessen financial barriers to mental health services not covered by insurance. And

if your company's health insurance plan doesn't cover therapy or other behavioral health services, it may be time to consider a different provider or plan options.

Employers across all industries need to do a much better job of supporting LGBTQIA+ employees and creating an inclusive environment in the workplace. As business leaders, we should focus on creating a continuously evolving culture where everyone strives to celebrate diversity rather than just tolerate it. Companies can work with their employees to develop policies and strategies that recognize and embrace diversity, equity and inclusion and, in the process, create an environment that protects LGBTQIA+ employee safety.

<https://www.forbes.com/sites/forbesbusinesscouncil/2023/07/24/how-business-leaders-can-best-support-lgbtqia-employee-mental-health-in-the-workplace/?sh=4a3510996084>

## **The Supreme Court Imposes New Obligations on Employers to Accommodate Employees' Religious Practices**

In a case decided last month, the U.S. Supreme Court made it more difficult for employers to deny employees' requests for accommodations for their religious practices, rejecting the understanding of Title VII (the fundamental federal law against employment discrimination) that had been in place for nearly 50 years. In *Groff v. Dejoy*, the Court held that an employer must grant an employee's request for religious accommodation unless it can show that the burden of doing so would result in substantial increased costs in relation to the conduct of its business.

### *A Little History*

Title VII prohibits employers with at least 15 employees from discriminating on the basis of religion. (Most states have similar statutes that apply to smaller employers.) The failure to "reasonably accommodate" an employee's religious beliefs is a form of discrimination. In 1977, the Supreme Court was presented with a case in which an employer (TWA) denied the request of an employee (Hardison) that he not be required to work on his Sabbath (sunset Friday through sunset Saturday), because granting the request would have deprived more senior employees of their seniority rights under TWA's contract with the union (the International Association of Machinists and Aerospace Workers) of which Hardison was a member. The Court held in *Trans World Airlines, Inc. v. Hardison* that Title VII did not require such an accommodation of the employee's religious beliefs, stating that such an accommodation would result in an "undue hardship" for the employer, and commenting that "[t]o require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship." That comment was cited by numerous courts in the following years, and "de minimis cost" effectively became the definition of "undue hardship" in religious accommodation cases. As a result, employers were able to deny requests for accommodations that many might consider relatively minor, such as allowing Muslim women to wear hijabs, allowing Sikh men to wear beards, allowing Jews to take off the High Holy days, and allowing employees to voluntarily trade shifts to accommodate Sabbath observance.

### *Mr. Groff's Claim*

Mr. Groff worked for the US Postal Service (USPS). He is an Evangelical Christian who requested that he not be required to work on Sundays. After USPS began making Sunday deliveries for Amazon, Groff was called upon to make Sunday deliveries. He transferred to a smaller facility that, at the time, did not make deliveries on Sunday. But in 2017, his unit began making such deliveries. Groff refused to accept such assignments, and other employees were required to take them. Some of them complained, and at least one filed a grievance. Groff received "progressive discipline," though he was not fired. In January 2019, he resigned (and claimed, later, that he did so because he expected to be terminated).

Mr. Groff sued USPS under Title VII, asserting that accommodating his religious obligation not to work on Sundays would not have caused "undue hardship on the conduct of [USPS'] business." The District Court ruled in favor of USPS, and the Third Circuit Court of Appeals affirmed, both relying on the Hardison decision. The Supreme Court took the case in early 2023.

### *The Supreme Court's decision*

The Supreme Court vacated the decision of the Third Circuit and sent the case back for further proceedings. While the Court did not overrule its decision in Hardison, it significantly reinterpreted that decision. The Court said that in the years since Hardison was decided, courts have been mistaken in relying on the phrase "more than a de minimis cost" to define the meaning of "undue hardship." The Court noted that the Hardison decision referred repeatedly to the idea of "substantial" burdens and held that the determination of whether a requested accommodation imposes an "undue hardship" requires a fact-specific inquiry into whether it imposes a burden that is substantial in the overall context of the employer's business. Or, as the Court put it in a sentence that will no doubt be quoted in numerous future lower court decisions, "[w]e think it is enough to say that an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business." The Court noted that this may include impacts on coworkers, though coworkers' religious biases or hostility to the accommodation of religious beliefs are not legitimate "costs" to be considered as part of the "undue hardship" analysis. The Court also observed that if an employer concludes that a particular requested accommodation (e.g., requiring other employees to work overtime) poses an undue hardship, it must consider other options (e.g., voluntary shift swapping) that would enable the accommodation of an employee's religious practice.

In a concurring opinion (the Court's opinion in this case was unanimous), Justice Sotomayor, joined by Justice Jackson, stressed that "undue hardship on the conduct of a business may include undue hardship on the business's employees." Thus, in the view of these two Justices at least, even a relatively inexpensive accommodation may create an undue hardship on the conduct of the employer's business if it imposes significant burdens on other employees by, for example, depriving them of bargained-for seniority rights. Whether this view commands the support of a majority of the Court will likely be determined in a future case.

### *A Few Observations*

Employers should be aware of this shift in the understanding of their obligation to accommodate employee requests for religious accommodations. Managers who consider such requests should be trained on the new standard. In general, it seems likely that requests related to rules on appearance should, absent genuine safety issues, generally be granted. Where an employer determines that it will deny a religious accommodation request, it should be prepared to show the “substantial increased costs” that granting the request would impose on its business. Arguably, at least, those “costs” need not be purely economic. It will be particularly interesting to see what impact the Groff decision has on cases now percolating through the court system in which employees have challenged employer refusals, during the COVID pandemic, to grant their requests, purportedly based on religious beliefs, to be excused from vaccine mandates. Employers may be required to show that allowing such employees to work remotely, or to wear masks and test regularly, would have created an “undue hardship” as now defined. They may respond that they were relying on federal guidance and/or (at least in some cases) mandates in insisting on vaccination. Going forward, it seems likely that employers will have to be more willing to grant these types of requests.

<https://www.jdsupra.com/legalnews/the-supreme-court-imposes-new-1827767/>

## **Biden Administration Renews Focus on Disability Discrimination as ADA Turns 33**

In a presidential proclamation on the 33rd anniversary of the Americans with Disabilities Act (ADA), President Biden stated that the landmark civil rights law “has had a profound impact,” but the United States has “much more to do,” signaling a continued emphasis by the administration on disability discrimination.

### *Quick Hits*

- July 26, 2023, marks the 33rd anniversary of the landmark civil rights law, the Americans with Disabilities Act.
- Nearly 9 million individuals in the United States aged 18 to 64 with a disability were employed in 2021, according to the latest estimates from the U.S. Census Bureau.
- President George H.W. Bush signed the ADA on July 26, 1990, banning discrimination against individuals with a qualifying disability on the basis of that disability. The law applies to employers with fifteen or more employees, including state and local governments, employment agencies, and labor unions. Under the law, employers must provide equal employment opportunities to individuals with disabilities, including in the job application process, hiring, discharge, compensation, job training, or other terms, conditions, and privileges of employment.

In his proclamation for the 33rd anniversary of the ADA, President Biden stated that disabled Americans are still “three times less likely to have a job” and “often earn less for doing the same work.”

According to the latest one-year estimates from the U.S. Census Bureau, 42.5 million, or 13 percent, of the total U.S. civilian noninstitutionalized population had a disability in 2021, and 8.7 million aged 18 to 64 were employed. Median earnings for individuals with a disability age sixteen and older during the previous twelve months in 2021 were estimated to be \$28,438 compared to \$40,948 for those with no disability.

The Biden administration also announced on July 25, 2023, that it is proposing a new rule to establish new accessibility standards for state and local government online and mobile app-based services—a potential precursor to similar standards for private sector websites. Further, the anniversary comes as regulators have been examining employers’ growing use of artificial intelligence (AI) to make employment decisions for the potential for discrimination against employees and job applicants with disabilities. Given these developments, employers may want to consider the many implications the ADA has for employers and the potential for increased scrutiny from federal regulators.

<https://ogletree.com/insights/biden-administration-renews-focus-on-disability-discrimination-as-ada-turns-33/>

**Recognizing and preventing burnout in the workplace:  
Advice on identifying the signs of burnout and supporting employees affected by  
it.**

In 2022, levels of burnout in America hit a high that even surpassed levels during the Covid lockdown. As we returned to offices and lockdowns were lifted, rates of burnout increased from 52% to 59%, marking a rise in stress and demotivation.

This tells us one thing pretty clearly: Covid wasn’t the problem.

The way we live and work in the busy modern world isn’t sustainable. As HR or communications professional, though, you can make changes to alleviate the burden of burnout and create a healthier, happier workplace. Here is some actionable advice to help you get started.

*Why should you worry about burnout?*

Burnout is a danger to businesses in more ways than one. By pushing employee mental health to one side, you’re likely to see an increase in:

- Poor work performance
- Job dissatisfaction



- Absenteeism
- Poor co-worker relationships

You're basically sending your staff down a one-way path to finding a new job. All of this will leave your company out of pocket, too, with burnout costing global businesses an estimated \$322 billion a year.

### *Signs of burnout in employees*

As an HR or communications manager, it's your job to look after the mental health of your employees. That all starts with being able to identify when something's wrong. In terms of burnout, there are plenty of signs that you should look out for that'll tell you that someone's struggling. These include:

- Uncharacteristically poor job performance (e.g. making mistakes, missing deadlines, or not completing tasks)
- Irritability
- Frequently distracted
- Signs of fatigue
- Sudden changes in mood (e.g. outbursts of anger or sadness)
- Withdrawing socially at work
- Frequently absent from work

Of course, sometimes being tired and angry is just someone having an off day or a bad week. But if you ever see even a few of these symptoms in a member of your staff, it's always better to address it than leave it.

Remember, too, that burnout spreads. If one employee seems to be experiencing it, it signals a problem with your work environment that's likely to trigger burnout in others. Helping your employee quickly could save the mental health of many others.

### *How to talk about burnout with an employee*

If you do think someone is struggling with burnout, arrange a time to talk to them privately. It's better if this isn't in a professional meeting as that can add to the individual's stress, but instead in a casual setting. Find them over lunch or invite them to sit down for a coffee and let them know that you wanted to make sure they're okay.

Ask questions that are helpful rather than accusatory. Once you identify whether or not they're feeling low or stressed, base your questions on what your company can do to alleviate the problem, like:

- What can we do to create a better work environment for you?
- How can we help you find the motivation and peace that you need?
- How can we stop this from happening again in the future?

It's important your employee feels listened to and understood. Showing any signs of annoyance or anger is likely to shut down the conversation and make them more inclined to look for a job elsewhere.

### *Create a burnout protocol*

Every case of burnout is slightly different. But, if an employee comes to you with burnout and doesn't know what to do about it, it's smart to have some steps already in place that you can both follow.

The first would be to give the individual some time off. Either encourage them to take a few holiday days or put them on sick leave. This will give them some time to unwind and breathe and show them that you're taking their mental health seriously.

Often, burnout is related to the tasks an individual is doing. If they're overworked, look to lighten their load and have a manager above them take some of the burden. Sometimes, this can be as simple as a manager giving them a couple of daily tasks rather than the employee being responsible for managing their entire workload.

Variation is also key in preventing burnout. Ask your employee if they'd like to shake up their work a little and incorporate some new, different tasks into their day.

If their mental health has really suffered, it's wise to direct the employee to find professional help. Particularly, they should look for those that offer a holistic approach to stress and burnout, like a rehabilitation facility with hiking and outdoor activities.

### *Preventing burnout in your team*

Though burnout is on the rise, it's fairly easy to keep at bay in the workplace once you know what you're doing. Key steps to prevent workplace burnout include:

- Encouraging laughter and conversation in the workplace
- Ensuring your staff get time in the day for a good break
- Implementing mental health days
- Allowing for flexible work hours and remote work where possible
- Offering leveling-up opportunities in-house
- Ensuring a varied workload for every member of staff

It's also important to talk to and listen to your staff before burnout becomes an issue. Let them know that you have a positive approach to mental health and that if anybody is struggling, they can come to you or a senior member of staff without worrying about their job.

Check-in with your team to see how everyone is doing and whether anything in the workplace needs to change. Encourage empathy and teamwork, and ensure all employees know that if they need a break, that's okay.

Work should never come before mental health, and with these strategies, you'll ensure your fellow employees know that. Just remember always to listen, be aware of the signs, and encourage an open conversation around burnout.

<https://www.ragan.com/recognizing-and-preventing-burnout-in-the-workplace/>

## **United States: New EEOC Resource Answers Employer Questions About ADA And Visual Disabilities In The Workplace**

The U.S. Equal Employment Opportunity Commission (EEOC) released an updated technical assistance document detailing how the Americans with Disabilities Act (ADA) covers job applicants and employees with visual disabilities.

The technical assistance explains when an employer may permissibly ask about an applicant or employee's vision and when such inquiries would violate the ADA.

*The guidance includes examples of questions an employer cannot ask an applicant, such as:*

- Whether the applicant has ever had any medical procedures related to their vision (for example, whether the applicant ever had eye surgery)
- Whether the applicant uses any prescription medications, including medications for conditions related to the eye
- Whether the applicant has a condition that affects the applicant's vision or that may have caused a vision impairment (for example, whether the applicant has diabetes)
- An employer may ask questions pertaining to the applicant's ability to perform job functions, with or without reasonable accommodation, such as:
  - Whether the applicant can read labels on packages that need to be stocked
  - Whether the applicant can work the night shift
  - Whether the applicant can inspect small electronic components to determine if they have been damaged
- 

The guidance also provides examples of when an employer can make vision-related inquiries when there is a reasonable belief, based on objective evidence, that the employee's ability to perform essential job functions is impaired by a visual disability:

Example: Abdul, a data entry clerk, has recently started making numerous errors when entering information into the employer's database. For example, he seems to be confusing the numbers 1, 7 and 9. Abdul's supervisor also has recently begun to see Abdul rubbing his eyes frequently and looking more closely at both his computer screen and printed materials. Based on these observations, the employer has a reasonable belief based on objective evidence that Abdul's performance problems are related to an eye condition and, therefore, may ask for medical information.

The guidance also discusses the reasonable accommodations that are available for employees with vision issues, including new technologies, many of which are free or low-cost. These include:

Screen readers (or text-to-speech software). Software applications can convert written text on a computer screen into spoken words or a braille display. These tools allow individuals to quickly review written text.

Optical character recognition (OCR) technology that can create documents in screen-readable electronic form from printed ones, including an optical scanner (desktop, handheld or wearable), and OCR software.

Systems with audible, tactile or vibrating feedback, such as proximity detectors, which can alert individuals if they are too close to an object or another person.

Website modifications for accessibility and taking steps to ensure that job applicants and employees can access and timely complete job applications, online tests or other screening tools.

Written materials in more accessible or alternate formats, such as in large print, sans serif fonts, braille, a recorded format, or an accessible shared document format, including those provided via QR code.

In line with other recent guidance from the EEOC and the U.S. Department of Justice warning of the improper use of artificial intelligence (AI) and algorithms in making employment decisions, the guidance describes how the use of AI can impact individuals with visual disabilities.

The document also addresses how an employer should handle safety concerns about applicants and employees with visual disabilities and how an employer can ensure that no employee is harassed because of a visual disability.

<https://www.mondaq.com/unitedstates/discrimination-disability--sexual-harassment/1348686/new-eeoc-resource-answers-employer-questions-about-ada-and-visual-disabilities-in-the-workplace->

### **Obesity and the ADA: Does alleged fat-shaming at work prove discrimination?**

Does obesity count as a disability protected under the law? That's the question a Connecticut court recently faced.

An employee sued his employer alleging he was discriminated against because he was "perceived as" being disabled due to his weight. Here's what happened, according to his complaint:

The employee worked at the State Department of Correction and was selected to try out for the Connecticut Department of Correctional Emergency Response Team, more commonly known as CERT.

For context, CERT programs involve emergency response. On prison teams, CERT members are specially trained officers who are tasked with responding to prison riots, disturbances and other situations that are likely to involve uncooperative or violent prisoners.

*Questionable methods: Obesity 'jokes' and fat-shaming*

As part of the selection process, the plaintiff and fellow CERT candidates were required to participate in a basic training program that lasted several days. During the basic training program, the employee alleged that the CERT instructors “subjected him to public humiliation and hazing by fat-shaming him.” Among other things, he asserted:

An instructor said to him: “[third] time trying out and you finally passed the sit-ups – too bad you are still fat and won’t make the team anyways.”

He was filmed while instructors made fat jokes about him, such as poking his stomach and saying, “Your belly wants to make me throw up” – and the videos of the alleged harassment were later shared.

In front of the class, instructors gave him the nickname “Marshmallow” because of his stomach and told the rest of the class to refer to him as Marshmallow. They also instructed him to put the nickname on his shirt.

Instructors recorded him as they ordered him to eat a donut in front of the class and told him to “eat it faster” or he would have to leave.

Instructors made fun of him when the candidates teamed up for the obstacle course drills. They allegedly laughed at him and said that no one wanted him on their team because he was fat.

Several days later, the employee was informed that he was being removed from the program due to his performance. However, he said that he passed the testing requirements. Ultimately, he was “denied the ability to become a member of the CERT and receive the benefits of the program.”

*Was it discrimination?*

The employee complained to his supervisor, who advised him to file an incident report. He did so – and then went on to file a lawsuit that alleged he was discriminated against because he was perceived as being impaired or disabled due to his weight. His complaint alleged violations of the Americans with Disabilities Act (ADA) and analogous state law – the Connecticut Fair Employment Practices Act.

First, the court dismissed the ADA claim on a technicality. The complaint specifically alleged a violation under Title II of the ADA, but “Title I of the ADA is the exclusive remedy for employment disability discrimination claims,” the court explained. As such, it dismissed the ADA claim.

Then it turned to the state law claim.

The state law at issue here prohibits employment discrimination and harassment because of an “individual’s race, color, religious creed, age, sex, gender identity or expression, marital status, national origin, ancestry, present or past history of mental disability, intellectual disability, learning disability, physical disability, including, but not limited to, blindness or status as a veteran.” It also provides protections for perceived physical disabilities. But the statute doesn’t specifically mention weight-related protections, the court noted.

The court examined state case law and determined that “there are no Connecticut Appellate or Supreme Court cases that have held that being perceived as overweight or obese constitutes a physical disability under the Act.” As a result, the court found that “being overweight or obese or perceived as such is not covered” under the law.

To support its finding, the court pointed out that the Second Circuit has looked at the issue of obesity under the ADA and found that it isn’t “a covered physical disability or impairment unless it is the result of an underlying physiological disorder or condition.” Simply put, obesity alone, without an underlying disorder, “is not an impairment but a physical characteristic, like eye color or height.”

The employee failed to allege a perceived disability recognized under state law, so that claim also failed. The court granted the employer’s motion to dismiss in its entirety.

#### *Heads up, HR: Size discrimination is gaining momentum*

You’ve probably heard that old adage: Just because you can doesn’t mean you should. The allegations in this complaint, if true, are alarming. Anyone in HR who received such complaints from an employee would rightfully have concerns about microaggressions, harassment and a toxic workplace. Some training would definitely be in order.

Obviously, the employer dodged a bullet here. It was able to get the case tossed quickly because this particular state law does not recognize weight as a protected class – but that’s not the case everywhere.

If you haven’t heard, a new wave of discrimination at work includes weight, height and level of attractiveness, according to researchers.

And new laws aim to help prevent that bias. The latest example? New York City recently passed legislation banning discrimination based on employees’ height and weight.

And New York isn't the only city that has put the kibosh on size discrimination. For example, San Francisco, the District of Columbia and Madison, Wisconsin, have passed ordinances that prohibit discrimination based on weight and physical appearance. And it's not just happening at local levels.

Currently, Michigan is the only state that has banned body size discrimination. However, state legislatures in Massachusetts, New York, New Jersey and Vermont are considering pending legislation that would prohibit weight discrimination.

<https://www.hrmorning.com/news/obesity-fat-shaming-discrimination/>