

DECEMBER DIVERSITY, EQUITY, AND INCLUSION UPDATE

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December 3rd is International Day of Persons With Disabilities:

What it is and why it matters

International Day of Persons With Disabilities highlights and promotes the rights and well-being of people with disabilities.

Established by the United Nations in 1992, the goal of the International Day of Persons With Disabilities is to promote the rights and well-being of persons with disabilities in all aspects of society.

The program's theme and focus include building a "sustainable post-COVID-19 world by and for persons with disabilities."

To raise the campaign's visibility, UNESCO is using its social media platforms to highlight the stories of people living with disabilities through the coronavirus pandemic.

The pandemic has exacerbated inequities in healthcare, education, employment, and community participation for people with disabilities.

According to the UN, more than 1 billion people globally have some type of disability. This includes nearly 61 million US adults, according to the Centers for Disease Control. That means about 26% of Americans may experience differences in how they manage daily tasks and requirements.

Cyber and IT-oriented companies often play key roles in developing assistive technologies. These technologies are any product or system that maintains, increases, or improves the functional capability of people with disabilities.

Assistive technologies are a broad category and include:

- Computer hardware, like specialized switches, keyboards, or pointing devices.
- Software, like screen readers or eye and head trackers.
- Specialized learning materials.

How to be good teammates for people with disabilities

Language is an important starting point for being a great person to work with when it comes to accessibility and inclusiveness. Everyone knows that words have the power to hurt or to heal, to lift up or to put down.

Beyond using inclusive, affirming language, here are some suggestions to improve workplace accessibility:

MAKE FRIENDS FIRST

Many people with disabilities don't consider their disability or disabilities a defining characteristic of their life. If they don't, take appropriate opportunities to ask about their family or their interests in music, TV, sports, food, and hobbies. If they do, be prepared to ask about and receive their stories about their life without questioning their choices or offering unsolicited advice or sympathy. When trying to connect with a person with disabilities, look for some of these pieces of shared humanity.

TRAIN EVERYONE

Employers should educate managers and teammates about the rights of people with disabilities in the workplace. This includes possibly invisible disabilities, and everyone's role and opportunity to improve workplace accessibility. It may help to find trainings that reframe or clarify disability and ability as attributes that are defined differently from situation to situation, that acknowledge that disability can fluctuate over time, and that recognize the disability community is not monolithic — even within the communities, people disagree on definitions, appropriate terms, and the advocacy and support needed. Consider being responsive to the people in your organization rather than only generalizing from outsider perspectives.

ELIMINATE PHYSICAL BARRIERS

Although work from home is part of the new normal, some organizations are urging or mandating that people come back to the office in some capacity. As people return, take time to make sure people with disabilities can easily navigate in every space, from the parking lot to the restroom to the boardroom.

This may include making accommodations that involve more than accessible doorways and ramps. For example, some organizations may find it important to manage environmental stimuli like the presence of fragrances and other indoor air quality factors, the audio

environment, and access to adjustable light levels. Doing so can improve employee health across many categories of disability, including for employees who may have undiagnosed or undisclosed allergies or mental health, or neurological or sensory processing disorders and conditions.

MAINTAIN FLEXIBILITY

As one source points out, in some instances, "no matter how accessible your workplace is, it won't be enough for people with severe mobility impairments." If you're in that situation, consider inviting the employee or employees in question to help design accommodations that work for the whole team, such as exploring whether they could work in a totally remote role. Part of this flexibility can also include learning a person's preferred way to communicate. Some people with disabilities may find email or Slack chats easier; others may prefer video calls.

ENHANCE DIGITAL ACCESSIBILITY

Offer closed-captioned video calls, email summaries of key points from meetings, and make sure employees can access visual information (using large enough type in colors and background combinations with adequate contrast, for example). Encouraging people to follow up through whatever communication mediums work best for them. That way, people who process information differently are less likely to feel excluded.

<https://www.zdnet.com/education/computers-tech/international-day-persons-with-disabilities/>

A Closer Look at Legal Rights of Long Covid Patients

In an announcement made by the U.S. Departments of Justice and Health and Human Services in July 2021, long Covid-19 survivors are now protected under the Americans with Disabilities Act. The announcement came on the 31st Anniversary of the Americans with Disabilities Act (ADA). The guidance indicates that Long Covid is classified as a disability when the person has physical or mental symptoms, causing an impairment that substantially limits any activities. President Biden recently announced that people with long COVID should qualify for disability protection and benefits, including housing, unemployment benefits, and health care. However, disability coverage seems like a distant dream for some people who have a hard time proving their medical condition.

Long COVID After-effects

In their recent article, the New York times approaches the effects of long COVID on some people. According to the Centers for Disease Control and Prevention, a high number of patients continue to have symptoms and seek treatment for conditions that include breathing difficulties, fatigue, joint and muscle pain, headaches, depression, anxiety, and suffering from “brain fog” long after getting Covid-19.

The American Academy of Physical Medicine and Rehabilitation recently announced that the number of Americans currently suffering from long Covid is hard to estimate. Still, they believe it could be anything between 3 and 10 million.

Other studies show that about 10% of those contracting Covid-19 will become long Covid sufferers, which will lead to the largest increase in the number of disabled people, according to disability rights activists.

Protection Under the Disabilities Act

Advocates were asking for guidance for Covid disabilities for quite some time, and both recent developments and announcements were welcomed. Bloomberg law reported that Arc’s senior director of public policy, Nicole Jorwic announced, “It makes us happy that the White House recognizes the disabilities suffered by many COVID long haulers by offering them protection under the Americans with Disabilities Act.”

Some of the accommodations for those qualified as long Covid sufferers include that anyone with dizziness is allowed to be accompanied by their service animal and allowing students with difficulty concentrating extra time to complete tests.

Recognizing the Symptoms of Long Covid

From early June, the CDC released guidelines to help doctors with diagnosing and treating long Covid. However, this is a challenge because the long-term symptoms are not fully understood yet since they include a broad spectrum of symptoms.

These symptoms often have physical, social, and psychological consequences, leading to functional limitations that often challenge these patients’ quality of life and wellness.

The consequences are that patients often struggle to get cover for their medical treatment from insurance companies and can’t find the mental support required. In addition, it is expected that some patients with long Covid will take legal action against health insurance companies for refusing to cover them for their disabilities.

Workplace Rights

Another area where considerations are needed for sufferers of long Covid is the workplace accommodations for disabilities, as indicated by the Department of Labor. Despite ADA requirements that employers with 15 or more employees have reasonable accommodations for anyone with a disability, everyone does not view these as the same.

So far, there have been no new developments in how the U.S. Equal Employment Opportunity Commission will enforce any anti-bias laws in private workplaces for long Covid sufferers. However, the ADA allows workers to sue an employer for alleged discrimination or failure to accommodate their disability.

The Education Department issued guidance to address children with long COVID needs. The document discusses the responsibilities of schools and public agencies to provide services and reasonable modifications to children with long Covid disabilities.

Disability Backlog and Problems with Diagnosing Long Covid

People seeking benefits are required to provide the relevant agency with a positive coronavirus test. However, this is difficult for some patients who got it at the beginning of the pandemic when these were in short supply. That means that there is no direct medical evidence for these patients for their long-term symptoms and disabilities.

Another problem plaguing these people is the backlog in the system of the Social Security Administration. Applicants must provide medical evidence to support their claims, and the waiting period for claims often stretches for months on end.

Proving long Covid is tricky because no two individuals have the same symptoms. Additionally, it requires a coordinated effort by various medical specialists, making it difficult to get an accurate diagnosis.

Hopefully, the efforts made by the current administration will address some of the most fundamental legal rights of long Covid patients, especially the right to qualify for a disability benefit.

<https://www.legalscoops.com/a-closer-look-at-legal-rights-of-long-covid-patients/>

Accommodating Employees Disabled by ‘Long COVID’

In this month’s column, we discuss employers’ obligations to reasonably accommodate employees claiming to qualify for disability status under the ADA due to long COVID, and steps employers should consider in responding to employees’ requests for accommodation.

ADA Basics

The ADA prohibits employers with 15 or more employees from discriminating against a qualified individual on the basis of disability. 42 U.S.C. §12112(a). An individual has a covered disability if that person has (1) a physical or mental impairment that “substantially limits” one or more of the individual’s “major life activities,” (2) a record of such an impairment, or (3) is regarded as having such an impairment. *Id.* at §12102. Major life activities include working, concentrating, thinking, communicating, breathing, sleeping, walking, standing, lifting, bending, speaking, and performing manual tasks. *Id.* A major life activity may also be the operation of a major bodily function, such as functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. *Id.*

Employers must make “reasonable accommodations” for an otherwise qualified employee with a disability, unless the employer can demonstrate that the accommodation would impose an “undue hardship” on the operation of their business. *Id.* at §12112(b)(5)(A). An “undue hardship” is a significant difficulty or expense for the employer, which is assessed considering the feasibility and cost of the accommodation, the resources available to the employer, and the nature of the employer’s business. 42 U.S.C. §12111(10); 29 C.F.R. §1630.2(p). If a particular accommodation would result in undue hardship, an employer is not required to provide it but must consider other potential accommodations that would not cause undue hardship. *EEOC, Revised Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act* (Oct. 17, 2002) (10/17/2002 EEOC Guidance).

Is Long COVID a Disability?

On July 26, 2021, DHHS and DOJ published joint guidance (Departments’ Guidance) establishing that long COVID can be a disability under Titles II and III of the ADA.[1] The Departments’ Guidance notes that some people with long COVID (known as “long haulers”) experience neurological damage, lung damage, heart damage, kidney damage, circulatory system damage, and/or mental health conditions. According to the Departments’ Guidance, long COVID *may* be a disability if the condition substantially limits one or more major life activities. For example, a long hauler may experience memory lapses and “brain fog,” which may substantially limit their major life activities of concentrating and thinking.

The Departments’ Guidance confirms that long COVID is not automatically given disability status, as an individualized assessment is necessary in each case. This is consistent with the ADA’s requirement that the existence of disabilities must be determined on a case-by-case

basis. See *Albertson's v. Kirkingburg*, 527 U.S. 555, 566 (1999). Moreover, at least one federal court has ruled that contracting the COVID-19 virus alone does not establish the existence of a disability under the ADA. See *Champion v. Mannington Mills*, 2021 WL 2212067, at *4 (M.D. Ga. May 10, 2021). Long COVID is manifested through a range of symptoms varying in severity, so although it may be apparent that, for example, an individual with limited breathing capacity will qualify as disabled, other individuals affected by long COVID in less severe ways may not satisfy the ADA “disability” definition. CDC, *Post-COVID Conditions* (Sept. 16, 2021).

Although the Departments’ Guidance specified that “employment is outside of the scope of this guidance document,” the EEOC announced that it agrees with the Departments’ analysis of long COVID. 9/9/2021 EEOC Guidance. The EEOC recognizes that long COVID “may be a disability” under the ADA “in certain circumstances.” In a Sept. 9, 2021 Notice, the EEOC stated that it would release guidance about COVID-19 and ADA “disability” in the employment context “in the coming weeks.” 9/9/2021 EEOC Guidance.

Practical Implications

The Departments’ Guidance and the EEOC’s agreement with that Guidance signals that employers should consider making reasonable accommodations for employees with long COVID. The EEOC has required that employers engage in an informal dialogue with employees who request accommodations for their disabilities called the “interactive process.” The purpose of this dialogue is for the employer to collaborate with the employee in determining whether a reasonable accommodation is possible, such that the accommodation will enable the employee to perform the essential functions of the job. See 10/17/2002 EEOC Guidance; *Holly v. Clairson Indus., L.L.C.*, 492 F.3d 1247, 1256 (11th Cir. 2007).

Potential reasonable accommodations for employees with long COVID may include job restructuring, transferring an employee to a vacant position, making changes to an employee’s workstation or permitting the employee to work from home, and/or modifying the employee’s work schedule (e.g., reduction in hours and/or time off). See 10/17/2002 EEOC Guidance. For instance, for long haulers who have difficulty concentrating, a possible accommodation may be relocating that employee’s workstation from a busy part of the office to a quieter location. See EEOC, *Persons with Intellectual Disabilities in the Workplace and the ADA* (May 15, 2013). An employer similarly may consider accommodating the “brain fog” experienced by some long haulers by providing uninterrupted work time, memory aids such as flowcharts and check lists, and allowing the use of noise cancellation technology in the office. Job Accommodation Network, *Accommodating Employees with COVID-19-Related Symptoms* (Jan. 3, 2021).

Employers may consider accommodating long haulers whose symptoms worsen after physical or mental activities by modifying their work schedule or permitting employees to take rest breaks. The EEOC explains that a modified schedule could include “adjusting arrival or departure times, providing periodic breaks, altering when certain functions are performed, allowing an employee to use accrued paid leave, or providing additional unpaid leave.” 10/17/2002 EEOC Guidance. For example, in a case in which an on-campus police officer’s high

blood pressure symptoms were triggered by his 12-hour shifts, the U.S. Court of Appeals for the Eleventh Circuit held that a reasonable jury could determine that modifying the employee's schedule to instead consist of eight-hour shifts was a reasonable accommodation. *Snead v. Fla. Agric. & Mech. Univ. Bd. of Trs.*, 724 Fed. Appx. 842, 846-47 (11th Cir. 2018).

The reasonable accommodation requirement under the ADA never requires an employer to reallocate essential functions of an employee's job. 10/17/2002 EEOC Guidance. Similarly, an employer is not required to bump another employee out of their position in order to accommodate a disabled employee.[2] See *U.S. Airways v. Barnett*, 535 U.S. 391, 405 (2002); *Jackan v. New York State Dept. of Labor*, 205 F.3d 562, 566 (2d Cir.), cert. denied, 531 U.S. 931 (2000). In contrast, an employer may be obligated to allow a disabled employee to work a modified schedule as a reasonable accommodation provided that such an accommodation would not pose an undue hardship to the employer. 10/17/2002 EEOC Guidance.

Accommodation of individuals suffering from "brain fog" due to long COVID may pose a particular challenge for employers. In a case in which a Chief Psychologist with supervisory and clinical responsibilities suffered from a memory impairment, the U.S. Court of Appeals for the Seventh Circuit considered two categories of potential accommodations: (1) relying upon common strategies to compensate for memory difficulty such as note-taking, and (2) job restructuring in the form of eliminating administrative and supervisory responsibilities and structuring a lighter caseload. *Id.* at 288. The court did not find either of these accommodations to be viable solutions in part because it was only speculative that such tactics would actually allow the Chief Psychologist to perform the essential functions of his job. *Id.* at 289. Moreover, the court did not approve of the second category of accommodations because it would require the employer to eliminate essential supervisory functions of the Chief Psychologist's job. *Id.*

Ultimately, employers should educate themselves about long COVID so that they can recognize requests for disability accommodations. An employee's request for a disability accommodation may not—and is not legally required to—be in writing or contain the terms "reasonable accommodation," "Americans with Disabilities Act," or "disability." EEOC, *Disability Accommodation Tips* (last accessed November 17, 2021). Nevertheless, employers have an obligation to engage in the interactive process once they receive a request from an employee or have reason to know that an employee is experiencing job-related problems due to a disability. 10/17/2002 EEOC Guidance.

<https://www.law.com/newyorklawjournal/2021/11/30/accommodating-employees-disabled-by-long-covid/>

Ummm Is ADHD Considered a Disability?

If you have attention deficit hyperactivity disorder (ADHD), focusing and paying attention can be an everyday challenge.

But whether your condition is mild or debilitating, you may wonder whether having ADHD is considered a disability, and if there are ways your workplace can help better accommodate you.

Is ADHD really a disability?

There are lots of “invisible” disabilities out there — and ADHD is among them. In the U.S., ADHD is considered a disability under the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973 with some stipulations. If ADHD limits your ability to work or participate in society, it’s considered a protected disability.

The Centers for Disease Control (CDC) also considers ADHD to be a neurodevelopmental disability.

Keep in mind: Though labels like “disability” may help professionals diagnose conditions or provide appropriate treatment and services. You don’t personally have to define your own ADHD as a disability.

So, is ADHD a mental disability?

Even though ADHD is often considered a disability, it’s not frequently referred to as a *mental* disability. Though mental disorders like anxiety, ADHD, or bipolar disorder are sometimes associated with disability, they don’t always go hand-in-hand.

If ADHD impacts day-to-day life, then it may be considered a mental disability.

The American Psychiatric Association defines ADHD as a disorder rather than an illness or disability. ADHD technically also meets most of the criteria to be considered a mental illness as outlined by the association, including:

- being a treatable health condition
- involving significant changes in emotion, thinking or behavior
- being associated with distress
- affecting social situations, work or relationships

The National Alliance of Mental Illness (NAMI) uses the terms “mental disorder,” “mental illness” and “mental health condition” interchangeably, so basically, ADHD could also be considered any of these.

ADHD is most often referred to as a mental disorder, but when it significantly impacts your day-to-day life, may also be considered a mental disability.

Why is ADHD considered a disability?

The Americans with Disabilities Act (ADA) is a U.S. federal law that went into effect in 1990 to help protect the rights of people with disabilities. It's meant to:

- make discrimination against people with disabilities in the public sector illegal
- make sure people with disabilities receive equal opportunities and the same protections as others, regardless of ethnicity, sex, age, religion, etc.

Meanwhile, the Rehabilitation Act of 1973 aimed to prohibit discrimination on the basis of disability in federal programs. Under both acts, ADHD is considered a disability in the states — though with special stipulations.

It's only considered a protected disability if it's severe and interferes with your ability to work or participate in the public sector. If you can work and function in society no prob, you're unlikely to receive benefits from federal or state governments.

ADHD is considered a disability by the Americans with Disabilities Act (ADA) and Rehabilitation Act of 1973.

Is ADHD a developmental disability too?

According to the Centers for Disease Control and Prevention (CDC), ADHD is considered one of the common developmental disorders or disabilities among children, meaning that it impacts neurodevelopment. Developmental disabilities may impact one or all of the following:

- learning
- language
- behavior

Along with other conditions like autism, cerebral palsy, and hearing loss, ADHD is considered a developmental disability.

Is ADHD a learning disability?

According to the NINDS and the Learning Disabilities Association of America, ADHD isn't considered a learning disability. Still, according the National Resource Center on ADHD, up to 50 percent of children with ADHD may have a coexisting learning disability.

Learning disabilities are a subtype of development disabilities. According to the National Institute of Neurological Disorders and Stroke, someone with a learning disability has difficulty:

- understanding written or spoken word
- performing calculations and other tasks

ADHD isn't considered a learning disability, but as many as 1 in 2 children with ADHD also have a learning disability.

So, does work have to accommodate your ADHD since it's a disability?

According to the Americans with Disabilities Act (ADA), companies with more than 15 employees legally can't discriminate against workers with disabilities and must make reasonable accommodations for them.

This law *might* apply to people with ADHD in some cases. According to the ADA, your job only has to make accommodations that don't cause "undue hardship" — basically things that aren't wildly expensive, time-consuming or result in a major productivity loss for the biz.

If you're working for a company with less than 15 workers — you're not necessarily SOL. You still might be protected under your state's anti-discrimination laws.

The ADA *might* protect you in the workplace if your employer has more than 15 employees or your state has other anti-discrimination laws. It's complicated, but basically your employer should have to make reasonable accommodations related to your ADHD.

Do you need to bring up your ADHD at work?

Disability advocates recommend waiting to bring up your ADHD until a situation arises where you feel it's necessary. For instance, if you're really overstimulated by the loud AF part of the office, you're in, you might ask to be moved to a quieter space. If your boss is hesitant, it may be a good time to bring up your ADHD.

If your employer refuses to make accommodations for your ADHD, consider taking some or all of the following steps to protect yourself:

- Document the interactions with your employer in a notebook with the date. (Pro tip: Don't leave these on your office computer!)
- Consider consulting an employment attorney.

If you're not having issues at work, you probably don't need to bring up your ADHD. But you may want to bring up your ADHD at work if your employer isn't accommodating your ADHD-related needs.

Can you get disability benefits if you have ADHD?

Technically, you *can* get disability benefits in the U.S. if you have ADHD — but there are super strict rules about which people with ADHD qualify for them.

In order to apply for social security disability (SSDI) for ADHD in the first place, you have to:

- have been diagnosed with the condition since childhood
- prove that your ability to participate in work or school is severely hindered by your ADHD
- have ADHD diagnosis documentation from a medical professional that confirms symptoms including inattentiveness, impulsiveness, and hyperactivity
- have documentation that at least 2 out of 3 of the following are a direct result of ADHD: problems communicating, functioning in social settings, or functioning in one's personal life relative to people of the same age

A government official will scope out your school, work, and life by looking for patterns of severe functional impairments. They may delve into your grades, test scores, life history, medical docs, and more.

Simply having an ADHD diagnosis doesn't mean you can get disability benefits. There are strict rules in place to qualify for disability benefits with ADHD. Folks who do qualify must concretely prove that ADHD has severely impacted their day-to-day life since childhood.

Tips for living and working with ADHD

ADHD treatment options vary widely for children and adults with ADHD. They can also be different from person to person depending on how ADHD personally affects you.

Some treatment and ADHD management tools include:

- therapy such as cognitive behavioral therapy
- meditation
- enlisting a work or life coach
- prescription meds like Adderall
- natural remedies including melatonin, light therapy, zinc, exercise, and probiotics
- essential oils like rosemary, frankincense, or vetiver

The takeaway

- ADHD is considered a disability by many associations and governing bodies, including the Americans with Disabilities Act (ADA).
- If ADHD limits your ability to work or partake in society, it's considered a protected disability by the ADA.
- The CDC considers ADHD to be a neurodevelopmental disability.
- It's not considered a learning disability, even though as many as half of children with ADHD may have a coexisting learning disorder.
- Your employer may be legally obliged to accommodate your ADHD in some cases.
- In extreme cases, you may be able to get disability benefits if you have ADHD.

<https://greatist.com/health/is-adhd-a-disability>

Supreme Court Will Determine If Customers Can Sue Businesses for “Emotional Distress.” This Has Serious Implications for Religious Freedom.

KEY TAKEAWAYS

While this case has flown largely under the radar, it will have colossal implications for the ongoing legal battle to protect religious freedom.

Holding businesses liable solely for someone’s hurt feelings could lead to a torrent of frivolous claims for alleged violations of federal anti-discrimination law.

The court should not invent a right that currently doesn’t exist, nor should it hold businesses responsible for damages they cannot predict, quantify, or foresee.

In *Cummings v. Premier Rehab Keller*, the Supreme Court will decide whether Congress meant to create a private right of action to sue for compensatory damages for emotional distress under existing federal civil rights laws.

While this case has flown largely under the radar, it will have colossal implications for the ongoing legal battle to protect religious freedom, especially as it intersects with modern interpretations of civil rights law and governmental anti-discrimination provisions.

Jane Cummings, who is deaf and legally blind, had attempted to make a physical therapy appointment at Premier Rehab in Keller, Texas, for her chronic back pain. Premier Rehab is a small business and a top rehabilitation clinic that is also a recipient of federal funds.

Due to her disability, Cummings requested that Premier provide her with a sign language interpreter. Premier declined, instead offering to refer Cummings to a different clinic or provide alternative accommodations.

The alternative accommodations it offered Cummings—to communicate with her through written notes, lip reading, and gesturing—were, she believed, insufficient to meet her needs. Cummings first asked Premier Rehab for an interpreter in October 2016, returning a few days later and again in February 2017. Each time Premier denied her one.

Eventually, Cummings chose another provider that offered the accommodations she sought but received treatment she believed to be “unsatisfactory.” In August 2018, Cummings sued Premier Rehab.

Five years and several appeals later, the Supreme Court is now set to hear oral arguments in her case on Nov. 30.

Cummings’ lawsuit against Premier Rehab alleges that its refusal to provide an interpreter caused her “humiliation, frustration, and emotional distress.”

Even though abundant remedies for emotional distress exist under state law, she claims that Premier Rehab's conduct violated federal anti-discrimination statutes, specifically, the Rehabilitation Act of 1973 and Section 1557 of the Patient Protection and Affordable Care Act of 2010, which prohibit recipients of federal funding from discriminating against disabled individuals.

Under current law, compensatory damages are available to plaintiffs under Title VI of the Civil Rights Act and the statutes that incorporate its remedies.

For example, a plaintiff may recover "compensatory damages" under the Rehabilitation Act of 1973 (29 U.S.C. § 794a(a)(2)) and the Affordable Care Act of 2010 (42 U.S.C. § 18116(a)). But the Supreme Court has never articulated whether such compensatory damages include damages for emotional distress.

Advancing a theory of emotional distress damages under federal civil rights law may sound appealing, but the impact of such an outcome could be devastating to small businesses that form the backbone of the American economy.

Federal anti-discrimination laws function like a contract: Businesses that receive federal funding agree to comply with them, accepting that they may be held liable if they violate them.

Courts have allowed individual victims to sue businesses that violate these laws when the laws themselves are sufficiently clear so as to put businesses on notice of this possibility. As 10 states argue in an amicus brief supporting respondent Premier Rehab, it's highly doubtful that Congress intended to include damages for dignitary harms like emotional distress as a remedy for violation of civil rights laws.

The Supreme Court established the availability of compensatory damages for victims of discrimination in 2002 in *Barnes v. Gorman*. The purpose of compensatory damages is to compensate victims for their losses or injuries. They differ from punitive damages, intended solely to punish the violating party for discriminatory behavior.

Cummings does not claim she endured physical injuries, incurred financial harm, or suffered any other tangible loss as a result of Premier Rehab's denying her an interpreter. Rather, she is suing solely on the basis of emotional distress.

Courts can and have recognized emotional distress as the sole, legitimate justification for bringing suit, occasionally even determining that emotional distress damages are recoverable as an award of compensatory damages. But, the Supreme Court has yet to determine whether they can be recovered as an award of compensatory damages after a violation of civil rights law.

For example, emotional distress damages are available as a remedy in employment discrimination law and tort law against individuals and entities that engage in intentional

misconduct that causes emotional distress or that engage in negligent conduct that leads to it. Damages for emotional distress are often awarded when it is accompanied by objectively harmful conduct that violates individuals' rights.

In the Barnes v. Gorman case, for example, a jury awarded compensatory and punitive damages to a disabled person who suffered injury after being transported in a police van that was not equipped to transport someone with his disability. The Supreme Court ruled he could not be awarded punitive damages but left the compensatory damages untouched. But, as the lawyers for Premier Rehab point out, the plaintiff in that case suffered actual physical harm, not just emotional distress.

But Cummings' case is different. Businesses and individuals can choose what they say and do, but not how they make others feel. Holding them liable solely for someone's hurt feelings could lead to a torrent of frivolous claims for alleged violations of federal anti-discrimination law, making it harder for those suffering from real discrimination to obtain the compensation they deserve and bring violators to justice.

The ramifications of the Supreme Court's decision in Cummings v. Premier Rehab Keller will likely extend far beyond disability law. Emotional distress is almost entirely subjective and could be used as a pretext to sue people and businesses under anti-discrimination law where the only alleged discriminatory conduct involved is honoring one's religious beliefs.

If Premier Rehab is forced to pay emotional distress damages to Cummings, what of the medical practitioners who refuse to perform mastectomies on transgender patients or bakeries that decline to make custom cakes for same-sex couples?

By way of example, Evan Minton, who identifies as transgender, sued a Catholic hospital after it cancelled a scheduled hysterectomy. Although that lawsuit alleged that the hospital violated a California state anti-discrimination statute, there is no reason why Minton could not have filed an action in federal court for alleged violations of federal anti-discrimination laws if damages for emotional distress are compensable under those laws.

One could easily imagine other similar cases that could conceivably bankrupt countless small businesses and individuals who oppose the Biden administration's continuous redefinitions of gender, marriage, and life.

As the courts continue to recognize sexual orientation and gender identity as protected classes under federal civil rights law, allowing people to sue violators for causing them vaguely defined and often unverifiable emotional distress would open a Pandora's box of harmful effects on religious freedom.

Granting Cummings compensatory damages under federal civil rights law for her emotional distress would set an irresponsible legal precedent with untold, unknowable, and uncontrollable consequences.

In expanding emotional distress damages under anti-discrimination law, the justices must also wrestle with separation of powers questions. Every state has its own laws and tort remedies that allow victims of discrimination like Cummings to recover damages for intentional infliction of emotional distress. But Cummings asks federal courts to expand an implied right of action under federal civil rights law and apply it to every state, including allowing plaintiffs to recover potentially uncapped emotional distress damages.

This result would render all state laws that place a cap on damages that can be awarded for emotional distress effectively null and void.

Unless and until Congress explicitly authorizes damages for emotional distress under federal anti-discrimination statutes such as the Rehabilitation Act, the Supreme Court should not invent a right to sue under those statutes to recover solely for emotional distress.

In other words, the court should not invent a right that currently doesn't exist, nor should it hold businesses responsible for damages they cannot predict, quantify, or foresee.

Only time will tell if Cummings v. Premier Rehab Keller will become one of 2021's defining civil rights cases. But for now, the justices should refrain from creating a remedy that isn't needed, was not intended by Congress, and would likely make things worse.

<https://www.heritage.org/religious-liberty/commentary/supreme-court-will-determine-if-customers-can-sue-businesses-emotional>

Black job applicant files claim alleging dreadlocks kept him from being hired

SAN DIEGO — A legal claim was announced Tuesday alleging a Black applicant for a national audio/visual company seeking to fill positions in San Diego was racially discriminated against by the employer for his hairstyle, in what is believed to be the first case to cite a recent state law banning such discrimination.

Jeffrey Thornton says that while applying for a technical supervisor position for one of Encore Global's San Diego locations, he was told by a hiring manager that while he was fully qualified for the job, he would have to cut his dreadlocks in order to get the position.

Thornton alleges this violates the CROWN (Create a Respectful and Open Workplace for Natural Hair) Act, a state law prohibiting employers from withholding employment based on discrimination against the applicant's hairstyle.

Signed into law in 2019, the CROWN Act defines racial discrimination to include discrimination for "traits historically associated with race, including, but not limited to, hair texture and protective hairstyles."

An Encore Global spokesperson sent FOX 5 a statement on Wednesday saying the company regrets “any miscommunication with Mr. Thornton regarding our standard grooming policies,” which “he appears to fully meet.” The spokesperson said the company offered Thornton a job though it was unclear when.

Thornton says he previously worked for Encore Global in Florida, but was furloughed along with several other employees due to the COVID-19 pandemic. In October of this year, he says he received an email inviting him and other furloughed employees to contact the company about securing positions with them again, leading Thornton to interview for a position in San Diego.

He alleges he was told by a hiring manager that despite his qualifications, his dreadlocks precluded him from consideration. Thornton says that while he worked for the company in Florida, dreadlocks were not considered an issue for him or other employees.

“Professionalism isn’t about fitting into Eurocentric norms. Professionalism is about competency,” Thornton’s attorney, Adam Kent, said at a news conference Tuesday announcing the claim. “We all expect to be judged based on our abilities and on our character, but Mr. Thornton is being told in this case that it’s different for him.”

Kent said his client is asking “to be made whole for the damages he has suffered,” while also asking that Encore Global “is never again able to enforce grooming policies that disparately impact Black Americans.”

Full statement from Encore Global:

“Maintaining a diverse and inclusive workplace where every individual has a full sense of belonging and feels empowered to reach their potential are core values of our business. These values are key to fueling innovation, collaboration and driving better outcomes for our team members, customers and the communities we serve.

We regret any miscommunication with Mr. Thornton regarding our standard grooming policies – which he appears to fully meet and we have made him an offer of employment. We are continuously looking to learn and improve, and we are reviewing our grooming policies to avoid potential miscommunications in the future.”

<https://fox5sandiego.com/news/business/black-job-applicant-files-claim-alleging-dreadlocks-kept-him-from-being-hired/>

Two lawsuits from white male executives could impact DE&I initiatives

The lawsuits may serve as cautionary reminders for why Diversity, Equity, and Inclusion initiatives must comply with the letter of the law when it comes to workplace anti-discrimination.

Two recent employment anti-discrimination lawsuits may serve as cautionary reminders for why Diversity, Equity, and Inclusion (DE&I) initiatives must comply with the letter of the law when it comes to workplace anti-discrimination.

This month, former AT&T Assistant Vice President of Tax Research Joseph DiBenedetto sued his former employer in a US district court in Atlanta, Georgia, for “age, race, and gender discrimination in the workplace.” DiBenedetto alleges he was improperly terminated after 20 years of company service because he lacked the “longevity, skin color, and gender AT&T preferred.”

DiBenedetto claims the company was “increasingly aggressive” in its initiatives for “diversity” and “inclusion,” which he alleges included efforts to make leadership roles like his “less white” and “less male.” His lawsuit cites an email from CFO John Stephens, titled “More work to do in Finance” to help prove his case.

According to the complaint, the email contained updates from CEO John Stankey about the demographics of the company and used bar graphs to break down the workforce’s then-makeup in terms of race, ethnicity, and gender to conclude, “[AT&T] must focus more on attracting and retaining diverse employees throughout our organization, especially at our senior levels.” Less than two months after receiving that email, DiBenedetto’s lawsuit claims that he and at least 12 other employees—nine of whom were male, all were white, and all were over fifty years old—were terminated.

Asked about the lawsuit, AT&T spokesperson Jim Kimberly said in a statement, “Reducing our workforce is a difficult decision that we don’t take lightly, and each instance is reviewed thoroughly to ensure there is no discrimination of any kind, including based on age, race, or gender. We dispute the allegations in this lawsuit and will fight them in court.”

In North Carolina last month, a jury awarded \$10 million to former hospital executive David Duvall. Duvall, a white male, had sued Novant Health in federal court for wrongful termination on the basis of race and gender in 2018. Duvall’s legal counsel presented statistics demonstrating that the number of white employees at or above the VP level decreased by 5.9% between 2016 and 2019, while the percentage of women and underrepresented minorities increased during that time. His lawyer, S. Luke Largess, said in an emailed statement to HR Brew that Duvall’s termination was done “solely to make room for more diverse leaders at Novant Health.”

In a statement, Novant Health spokesperson Megan Rivers said, “We are extremely disappointed with the verdict, as we believe it is not supported by the evidence presented at trial, which includes our reason for Mr. Duvall’s termination. We will pursue all legal options, including appeal, over the next several weeks and months.”

The statement concluded, “It’s important for all current and future team members to know that this verdict will not change Novant Health’s steadfast commitment to diversity, inclusion and equity for all.”

Largess’s statement to HR Brew emphasized that Duvall’s victory wasn’t about condemning DE&I programs, but ensuring that the pursuit of DE&I doesn’t contribute to workplace discrimination for other employees. Federal anti-discrimination laws, including [Title VII of the Civil Rights Act of 1964](#) and [the Age Discrimination in Employment Act](#), are designed to prohibit discrimination on the basis of protected characteristics, such as race, color, sex, age, or national origin. That means they apply to white men, too.

“The lawful way to implement D&I is through attrition and expansion, not through firing people to fill their positions with more diverse candidates,” Largess explained via email. “I think everyone recognizes that is wrong. Novant denied they had done that to Duvall, the jury found they had done just that.”

<https://www.morningbrew.com/hr/stories/2021/11/29/two-lawsuits-from-white-male-executives-at-separate-companies-could-impact-de-and-i-initiatives>

Intersectionality and why labels at work increase discrimination

INTERSECTIONALITY IS ONE OF THE MOST IMPORTANT WAYS TO HELP SUPPORT DIVERSITY, INCLUSION AND EQUALITY ACCORDING TO LEADERSHIP EXPERTS, SO WHY IS LABELLING AT WORK STILL SUCH A PROBLEM?

Intersectionality relates to how different parts of our identity merge and how this influences our interactions with the world, as well as how the world interacts with us. Our age, race, class, ethnicity, gender, sexual orientation, as well as other social factors related to work and home life are often used to define us, but these and other labels at work are continuing to increase discrimination and divide us.

HOW DOES INTERSECTIONALITY IMPACT WORK?

Labelling and a lack of awareness of intersectionality is at the root of many conflicts, prejudices, and lack of inclusion at work. Thom Dennis and G urge business to look at employees as unique individuals and to divert from a 'one size fits all' or a 'box ticking' mentality. Thom says: "Putting employees in specific boxes can lead to them missing opportunities or not being considered for them because it is believed that they do not fit the right mold."

G agrees: "Companies need to celebrate the rich and diverse talent they have within their team. That richness is a gift. Although no one should have to experience prejudice, experiencing adversity means you have had the opportunity to feel and gain unique knowledge."

As labelling and discrimination continue to persist in the workplace, what can business do to make a difference? We suggest five ways businesses can un-label.

- Think about Insider / Outsider dynamics. Systematically and systemically address unconscious biases and accept identity is complex. Managers should dissolve pre-wired thinking about who is in our tribe and who is not and celebrate and value differences without the need for labels. Seeing people as unique and that one size doesn't fit all really helps. Clamping down on outsider-ism and offering opportunities to all is key, even when interacting socially at work.
- When you know you don't know, stop making assumptions. Be curious, not judgmental and don't make assumptions. It's ok to ask questions about someone's identity if you are coming from a genuine place. Stay curious, courageous and keep the conversations going. Training and open conversation help to educate us. Openly verbalize your intention that you want to understand better.
- It's not about quick solutions, it's about progression. While it's good to have some solutions on hand to help maintain and celebrate diversity in the workplace, we know from the ongoing pandemic that anything can happen to throw all plans out of kilter. Focus on the progression you are making rather than how to fix the problem quickly by applying a plaster. It's about being able to evolve with openness and transparency and long-term thinking and application.
- Recognize that negative feelings are part of the process. Feelings of fear, shame, anger, frustration and embarrassment are all part of the process, and avoiding them stunts individual and company growth. Recognize and sit with these feelings rather than bottling them up and use the experience for learning and development.

- Think outside the box. D&I policies encourage collecting employee data related to social factors such as race, ethnicity, gender etc. Whilst this is an effective method for interpreting the diversity of a company overall, it is important not to get fixated on these labels. When we use such data to understand an individual employee, it takes away from who they are.

<https://www.thehrdirector.com/features/diversity-and-equality/what-is-intersectionality-why-labels-at-work-increase-discrimination/>

Why ending hair discrimination should be an essential part of companies' DEI efforts

2021 has been a landmark year for improvements in diversity and inclusion when it comes to race, gender, and sexual orientation. However, discrimination remains a major issue in workplaces nationwide and, with offices reopening, 97% of Black employees are concerned about returning to work environments where microaggressions are commonplace.

According to a study by the Gallup Center on Black Voices, one in four Black workers in the U.S. reported being discriminated against at work last year.

In an office environment, one of the prevalent types of discrimination Black workers face is hair discrimination. This issue is what sparked the creation of the Create a Respectful and Open World for Natural Hair (CROWN) Act in 2019, which aims to outlaw hair discrimination in the workplace and public schools. The bill has successfully passed legislation in 14 states and several cities, Tempe, AZ being the latest on Nov. 9. For workplaces in states without the CROWN Act, however, employers are responsible for facilitating initiatives that support Black employees, especially during The Great Resignation, as workers assert their power to secure opportunities with higher salaries, inclusive environments and more workplace flexibility.

For Adjoa Asamoah, leading impact strategist and champion for the CROWN Act, the change starts with companies and organizations "living in their values."

"There are environments where the strategic plan is something that you pull out, come up with some random goals and put it back on the shelf and you don't revisit it again until it's time to assess your progress," she tells CNBC Make It. "But if people don't know what's actually in it, they can't really achieve those goals."

Asamoah adds that companies should work to ensure that racial equity, real diversity and true inclusion are embedded in how their corporate mission operates. "Make sure that you have policies in place to prevent racial discrimination. Revisit grooming policies and dress codes to confirm that they are actually inclusive."

While hair discrimination is not the only reason Black people are hesitant about returning to in-person work environments, the pressure to conform to Eurocentric norms on the job is undeniable. According to the Crown Research Study conducted by Dove in 2019, Black women are 80% more likely to alter their hair from a natural state to fit into workplace culture. Black women are also 30% more likely to be made aware of a formal workplace policy and are almost two times more likely to be sent home from work because of their hair. Asamoah explains the physical and mental impact that these conditions have on Black women.

“Black features have often been deemed inferior in this country and that being the reality in professional settings can certainly stress the idea that the way you were born is not okay. It’s so sad that to be consistent with what many would deem as professional, would require us to employ harmful excessive heat and use chemical relaxers that burn our scalps. The anti-hair-discrimination movement isn’t about telling people what to do with their hair, but celebrating the versatility of black hair.”

Additionally, she says that inclusive workplace cultures aren’t only beneficial for Black workers, but also for employers, as they help promote workplace efficiency and employee retention.

In a 2018 Deloitte study on Inclusive Mobility, researchers found that organizations with inclusive cultures have a higher retention rate and find it easier to recruit new employees than those without. Companies with more diverse teams had a 22% percent lower turnover rate. Deloitte also found that “organizations with inclusive cultures are twice as likely to meet or exceed financial targets as those without, three times as likely to be high-performing, six times more likely to be innovative and agile, and eight times more likely to achieve better business outcomes.”

“It’s important to encourage corporations and organizations to really understand the value and profitability of diversity,” says Asamoah. “DE&I in the workplace, particularly racial equity, makes people more productive because they’re in an environment where they feel appreciated and included.”

<https://www.cnn.com/2021/11/29/why-ending-hair-discrimination-should-be-part-of-companies-dei-plans.html>

Workplace Ageism Requires Leadership Action: 10 Steps To Proactively Address The Problem

It's about time the media started addressing the workplace *ism* that's been ignored for years—ageism. Shifting demographics are raising a thunderous roar of voices calling attention to the issue and demanding action. Now the topic of ageism is a daily topic of discussion in organizations and in social and online media.

Just yesterday, Fast Company wrote that tech has an ageism problem and suggested three things people 40 and over should do to stay relevant. Spoiler alert: These tips apply to anyone of any age. But what's important is that people are *finally* addressing the elephant in the room—workplace age bias and discrimination and the plethora of myths, assumptions and stereotypes that drive them.

That's good news because workplace ageism is real and impacts people across the age spectrum.

A couple of days ago, the Philadelphia Inquirer posted the story "Addressing ageism with urgency," citing a World Health Organization report around the importance of changing the narrative around age and aging and adopting strategies to counter ageist attitudes and behavior. Although the report was published last March, companies (and the media) are just getting their heads around it.

And that's good because ageism is a global phenomenon that requires global action to address.

Once everyone begins talking about workplace ageism, accountability measures will become commonplace. Perhaps driven by federally mandated legislation.

A third article, "Trump Judge Dismisses Age Discrimination Case Despite Credible Evidence: Our Court, Our Fight," outlines Eleventh Circuit Judge Robert J. Luck's dismissal of an assistant county attorney's claim that he was fired due to age discrimination. The authors assert this ruling "sets a troubling precedent in age bias cases that will hurt working people in all the states covered by the Eleventh Circuit (Florida, Georgia, and Alabama)."

The Protecting Older Workers Against Discrimination Act or POWADA eases the burden of proof for the complaining party. The bill permits the complaining party to rely on any type or form of admissible evidence sufficient for a reasonable finding that an unlawful practice occurred and declares that the complaining party shall not be required to demonstrate that age or retaliation was the sole cause of the employment practice.

The second piece of legislation is Protect Older Job Applicants or POJA, which prohibits employers from limiting, segregating, or classifying job applicants based on an applicant's age, and requires the Equal Employment Opportunity Commission to study and report on claims received from job applicants involving age discrimination. Both are long overdue and absolutely necessary to combat age discrimination in hiring.

Both pieces of legislation currently reside in the Senate pending further review. In the meantime, what is certain is that companies can no longer deny that age, like every other protected dimension of diversity, deserves leadership attention *and* action.

10 Ways Leaders Can Take Action Now

1. Ensuring age is a part of DEI programming. Helping employees recognize their own unconscious bias is part of any diversity, equity and inclusion initiative—recognizing how age bias manifests in the workplace and effectively challenging it is a critical first step. The fact that age bias, myths and stereotypes have the potential to amplify the potential prejudice and discrimination across other dimensions of diversity, such as race, gender, sexual orientation or ability, makes it even more urgent.
2. Conduct a complete age equity audit with a review of internal and external policies, processes and messaging. Is age included in the company's anti-discrimination and harassment policy? Does your diversity recruiting strategy include age as a dimension of diversity? Does your Equal Employment statement include age?
3. Avoid using generational labels such as Boomer, GenX, Millennial, GenZ since these labels have stereotypes attached to them. Refer to specific age ranges, if necessary, or default to 10-year brackets.
4. Don't lump older employees into a 40+ category. There are a lot of working years that follow 40. Call them what they are.
5. Report age demographics as a demonstration of your age IQ. Be transparent. Prospective employees, customers and stakeholders across that age spectrum will thank you (and respect you more).
6. Review your external website for image and language inequities. Does imaging include diversity of race, gender, family structure, ability *and* age? If the faces are diverse but all under 30, what message does that send potential talent? Your customers? Your stakeholders? Current employees?
7. Conduct anonymous employee surveys to measure employee beliefs about age and aging in your workplace. Culture change requires awareness building. Create a safe space to talk about these beliefs, question their validity and create opportunities to disrupt the bias through mutual mentoring and intergenerational teamwork.
8. Actively create and measure the results of age-equitable teams.
9. Sponsor an Age Equity ERG: Provide a safe place to discuss age-related concerns. Partner with leaders in the organization who can investigate and address these concerns. Is there a pattern of passing up older workers for promotions? Are younger employees dismissed for challenging development assignments or given an unfair share of tedious work?
10. It's a given that leaders should lead by example, and age equity is no exception. But even leaders don't know what they don't know, which is why leadership must understand the urgency in creating diverse, age-equitable organizations. That's the only way they will survive in the future of work given demographic shifts. It's up to HR and DEI leaders to make sure they have the understanding they need.

COVID-19 has demonstrated that workplace change can happen overnight. Waking up to the importance of age equity has been painfully slow. However, the increase in dialogue addressing the issue is reassuring.

The truth is, age equity is not about people over 40 staying relevant—that's a given for anyone seeking employment, regardless of age.

What people are counting on are leaders ensuring their organizations remain relevant. And that means understanding how to attract, develop and retain a diverse, all-aged workplace.

<https://www.forbes.com/sites/sheilacallaham/2021/11/29/workplace-ageism-requires-leadership-action-10-steps-to-proactively-address-the-problem/?sh=2cd8541f374c>

What Is Employment Discrimination?

We are all familiar with the word discrimination, but not everyone knows the real meaning of it and how it applies in the context of a workplace. To “discriminate” someone means treating that someone less favorably or differently for a specific reason.

Discrimination can occur at work, at school, in public spaces such as subways or malls, or in other words, basically everywhere. Meaning that it is important for people to be educated about it, to be able to protect themselves. Students are being taught about it from the beginning of their education until they graduate from college or university. They are constantly having discussions and are given assignments such as a prejudice and discrimination essay. Writing those essays or reading some essay examples on this topic teaches students how to deal with it and prepares them, and teaches them how to protect themselves from workplace discrimination in their jobs after graduation.

There are agencies such as the Equal Employment Opportunity Commission that is responsible for protecting employment discrimination cases when it involves the following

- Unfair treatment because of religion, national origin, race, age, etc.
- Harassment by co-workers, managers, or basically anyone at your work.
- Improper questions about your medical or genetic information's
- Refusal for a change of workplace you need because of your disability or religious beliefs.

Race Discrimination

Racial discrimination is very common, in the overall society, including the workplace. The claims to the EEOC about racial unfairness are more than a third from all the other ones. Most of the time, certain groups of people don't get hired, they are not getting promotions, they are not mentored, and they are just subject to unfair security, and when they decide to complain about it, they are often wrongfully terminated. Therefore, even though minorities have been protected from race discrimination with the Civil Rights Act since 1960, it is still a big problem at many modern workplaces.

Religious Discrimination

In addition, it is completely illegal to discriminate against someone for their religion and their beliefs. This discrimination is a form of harassment at the workplace. It involves not allowing individuals to take days off for religious holidays or observances or hiding them from facing the public because of their religious clothing.

Age Discrimination

Age discrimination in employment can be easily explained as unfairness against someone over 40 years old. As the years go by, more and more claims about age discrimination are made in the EEOC. This type doesn't have just one pattern. Firstly, it is way harder for older people to find jobs or to get hired. They will have to apply for various jobs and remain unemployed for longer than the younger people. They also have to deal with harassment from younger bosses, so they end up resigning or retiring. Also, they are wrongfully treated, and people over fifty years and older end up losing their long-term jobs before it is time for them to retire.

National Origin Discrimination

This type of discrimination involves treating the employees not equal to others. Just because of their country of origin, place of birth, ancestry, accent, language, or because simply they look foreign. Although, it is not allowed to treat people differently and deny them equal work opportunities because they or their families are from another country, because they participate in certain costumes associated with a specific national group, because they have a name or accent associated with a different national origin group, or because they are married to a person from a different national origin. But besides the fact that it is illegal and forbidden, it still happens even when making promotions, job training, assignments, referrals, pay, etc. National origin discrimination is not limited to employers. It can also happen from non-supervisory employees and customers or clients.

Conclusion

Discrimination in the workplace has been illegal for decades, but sadly it still happens. The only way to stop it is to speak up! Bringing lawsuits, talking about the incidents, and shining a light on discriminatory practices. Many companies worry about the bottom line, so they will do everything to stop it when settlements and big verdicts make it too costly to be allowed.

<https://swordstoday.ie/what-is-employment-discrimination/>

EEOC Issues Updated Guidance to Employers for COVID-19 Related Issues

In the wake of the new Emergency Temporary Standard (ETS) published by OSHA on Nov. 5, 2021, employers have been left with a number of practical questions regarding enforcement and employee exemptions. The EEOC updated its technical guidance on Nov. 17 to address the most common questions related to COVID-19 in the workplace.

Religious Objections to Vaccinations

Employers may require all employees entering the workplace to be vaccinated against COVID-19, subject to the reasonable accommodations provisions of Title VII, the ADA, and other equal employment opportunity (EEO) considerations. As COVID-19 vaccinations become mandatory, employers are increasingly faced with requests for reasonable accommodations, often based on religious beliefs.

Title VII prohibits religious discrimination in employment and permits employees to request a religious accommodation from job requirements conflicting with their sincerely held religious beliefs. An employer who is able to reasonably accommodate the employee's religious beliefs without undue hardship must do so.

An employee must inform their employer that they are seeking to be exempt from the vaccination requirement because it conflicts with a sincerely held religious belief. Providing an easily accessible accommodation request form to employees can alleviate confusion and complaints in the workplace. An example of a religious accommodation request form that complies with the EEOC's guidance may be found [here](#).

Although an employer should generally assume the employee's religious belief is sincere, a limited factual inquiry is permitted if an objective basis exists for doubting the sincerity or religious nature of the belief. An employer may also request an explanation as to why the employee's beliefs conflict with receiving the COVID-19 vaccination. In determining the

credibility of an employee's sincerely held belief, an employer may consider factors such as whether the employee seeks an accommodation conferring a benefit most likely sought for nonreligious reasons, whether the timing is suspect, and whether the employee previously acted in a manner inconsistent with the professed belief.

Undue Hardships

An employer may demonstrate undue hardship if required to bear more than a "de minimis" cost to accommodate the employee's religious belief. Undue hardship may also be based on a decrease in workplace efficiency and safety, whether other employees must shoulder the accommodated employee's job responsibilities, or whether the number of employees requesting an accommodation is burdensome in the aggregate.

Additionally, an employer may choose to grant some religious accommodations while denying others, provided the denial is based on a factual consideration of each case, or may offer an alternative accommodation to the one requested. The employer should provide an explanation to the employee if the preferred accommodation is not granted.

Retaliation

Job applicants, current, and former employees may not be retaliated against for exercising rights related to workplace discrimination or engaging in "protected activity." Requesting an accommodation is considered a protected activity, even if the employee is not legally entitled to the accommodation.

Other examples of protected employee activity related to COVID-19 include filing an EEOC charge alleging an employer unlawfully disclosed a COVID-19 diagnosis or reporting workplace harassment stemming from an employee's religious reasons for remaining unvaccinated.

Notwithstanding these protections, an employer may still discipline an employee who engages in protected activity, provided the action taken is based on legitimate reasons such as poor job performance or misconduct. Likewise, an employer may enforce COVID-19 protocols in a non-discriminatory and non-retaliatory manner, even if enforcement follows a request for accommodation that would be considered protected EEO activity.

<https://www.jdsupra.com/legalnews/eec-issues-updated-guidance-to-9782221/>

LGBTQ+ AND MINORITY ETHNIC GROUPS WORST EFFECTED BY DISCRIMINATION

Indeed surveyed more than 1,000 employees, 500 senior managers and 250 HR managers to analyze attitudes and experiences of diversity in the workplace.

Nearly a quarter (23%) of workers say they have experienced some form of discrimination in the workplace.

This increases to nearly half (49%) for employees from a minority ethnic background and 47% for employees who identify as LGBTQ+. A third (33%) of workers with disabilities say they have also experienced discrimination at work.

Most workers believe the employee experience has been relatively the same over the past five years, however 22% said things have improved for LGBTQ+ employees, and 20% for female workers and employees from a minority ethnic background.

Bullying most common discrimination

The two most common forms of discrimination are being bullied by colleagues and not feeling opinions are valued, experienced by 36% of those who have faced prejudice at work.

Meanwhile, more than a third (35%) of those discriminated against said they had been overlooked for a promotion or pay rise.

Workers with disabilities are the most likely to say they have been denied the same opportunities as their colleagues, experienced by over half (53%) of staff with a disability.

Meanwhile, LGBTQ+ staff are most likely to experience bullying from their colleagues, with almost three quarters (72%) reporting they have faced this kind of discrimination.

Employees not in management roles are not alone in having faced discrimination at work, however, with 28% of senior managers and 31% of HR directors saying they have had similar experiences.

Employer (in)action

When asked if their company has a diversity policy, only half (51%) of the companies have one in place and a quarter (25%) are not aware of the plans to implement a diversity policy.

The level of employees experiencing discrimination is despite the vast majority (79%) of managers saying they are satisfied with their organizations approach to diversity, inclusion and wellbeing.

The majority of managers say they feel comfortable with addressing discrimination and taking action to resolve issues in the workplace. However, the level of comfort depends on the group and there are variances in the responses.

For example, 70% of managers said they feel comfortable tackling discrimination against female workers but this declines to (63%) with LGBTQ+ employees.

Encouragingly, workplaces have a wide range of initiatives in place to tackle discrimination with the most common being unconscious bias training (24%), mentorship programmes (24%) and a dedicated diversity, inclusion and belonging lead (22%).

There are also signs that global events and movements have jolted organizations into proactive steps. Of those with a diversity, inclusion and belonging lead, nearly half (49%) of managers said their company had adopted the role in the past two years.

Misty Gaither, Senior Director, Global Head of Diversity, Inclusion and Belonging at Indeed, commented:

“Millions of people have experienced various forms of discrimination at work from bullying to not being valued or left out altogether because of their identity. This research should be the realization to many employers that now is the time to clearly define and evolve the culture and to no longer accept the status quo. Employees expect and are inspecting how organizations are prioritizing diversity, inclusion, and belonging as well as how the company shows up in the world.

“While Covid-19 and social justice campaigns have been the catalyst for many organizations to re-evaluate their commitment to diversity and inclusion, our research lays bare how far there is to go before employers can say the commitment has been realized with tangible, structural, and systemic changes. We have quite the path before we can truly say ‘mission accomplished’.

“Education and awareness are the first steps in driving change so it is encouraging to see employers implement a range of policies, processes and initiatives to help move the needle forward. There’s also optimism in the recent rise of inclusion specific roles across businesses. This momentum will need to continue for employers to truly evolve into psychologically safe organizations that are inclusive and everyone feels they belong.

She added: “For organizations in the early phases of becoming more diverse and inclusive it’s ok to feel uncomfortable. Change is uncomfortable and this is a fundamental shift in how businesses operate. Trying new things often means feeling vulnerable but focusing on the culture helps to create an environment where all employees can thrive and your organisation will benefit in the long run.”

<https://www.thehrdirector.com/business-news/diversity-and-equality-inclusion/one-quarter-of-workers-have-experienced-discrimination-lgbtq-and-minority-ethnic-groups-worst-affected/>

Hybrid-working may cause workplace discrimination

Figures from the ‘Mind the Gap 2021’ report, commissioned by employer and health and safety advisory service, WorkNest, magnifies differences in employer and employee opinion among key business elements, such as the effects of hybrid working.

WorkNest recommends that employers address the difference in trust and happiness highlighted by employees in the report to avoid potential action being brought against them. By keeping health and safety as a priority, businesses will have a competitive advantage in what WorkNest believes will undoubtedly be another challenging year ahead for all organizations.

Workplace discrimination

The report revealed a mounting risk of discrimination in the world of hybrid working, as only 52 per cent of the 491 employers surveyed were confident that office-based and home-based workers would be treated in a fair and even way.

Likewise, employees are equally bleak in their outlook as just 40 per cent of the 1,061 employees believed that office and home-based workers would receive equal treatment.

Staff relations

Almost a third (28 per cent) of employees stated they wouldn’t hesitate to take formal action against their employer, despite a high proportion of employers reporting that they would be reluctant to return the favors — the majority (64 per cent) said that they would put off taking action.

The pandemic has been highlighted as the cause of the shift in the power dynamic, as almost a third of employees cited that they are now more likely to act against their employer as a direct result.

Health and safety at work

Unsurprisingly, there was one key element of the report that both employers and employees agreed upon, which was the high standards for health and safety at work — especially through the lens of a post-COVID society.

Over half of employers said that the pandemic has fundamentally changed the way they view health and safety at work, with most saying that they work 'reactively'. The research also revealed that there was an overall greater commitment to health and safety in the workplace because of lessons learned during the pandemic.

<https://www.propertymark.co.uk/resource/hybrid-working-may-cause-workplace-discrimination.html>

What Are The Effects Of Workplace Gender Discrimination?

Gender discrimination in the workplace can have extensive and long-term effects on an employee's emotional, and physical well-being. How discrimination affects an individual varies, depending on the employee's perception and their response to the situation. Regardless, being discriminated against at work can be a very emotional and devastating experience and can impact an employee's life in many ways.

No one likes to visit places that make them feel afraid, vulnerable, or uncomfortable. When that place is your work, it can be incredibly stressful. Some emotional effects of workplace discrimination include:

- Feeling fearful, bullied, and unsafe.
- Having low self-esteem, indecisiveness, and unable to trust your own judgement.
- Feeling conflict, tension, and/or isolation with your coworkers.
- Experiencing low-productivity or an inability to do your job.
- Developing mental health issues, such as depression, anxiety, or substance abuse issues.

What Is Gender Discrimination?

Gender discrimination exists when a person is treated unfairly or differently based on their gender. Federal law prohibits discrimination based on sex, race, religion, and national origin under the Civil Rights Act of 1964, however, there are currently no federal laws regarding gender identity and sexual orientation. Recently, some states have begun to adopt their own interpretation of the Civil Rights Act in order to include discrimination protection based on sexual orientation and gender identity.

While discrimination based on race, sex, religion, and national origin has been illegal in the U.S. for decades, gender discrimination continues to exist, particularly for women of color and transgender women. Women continue to lag in salary compared to their male counterparts and not receive equal pay for equal work.

Although overwhelmingly experienced more by women, men can also be subject to gender discrimination in the workplace. It should also be noted that both men and women can perpetrate discrimination against coworkers.

What Are Some Examples of Gender Discrimination in the Workplace?

There could be many types of discrimination in a work environment, from unequal salaries to sexual harassment and feeling afraid at work. Here are a few examples of workplace gender discrimination:

- Not being offered a position or being fired based on your gender.
- Being paid less than a coworker of the other sex with the same job.
- Being passed over for a promotion based on your gender and not your qualifications.
- Denied employee benefits, including sick days and maternity or paternity leave based on your gender.
- Being disciplined for a specific action, but a coworker of the other sex is not for the same action.
- Receiving unwanted sexual harassment, sexual advances or requests, and inappropriate touching.
- What if I Experienced Gender Discrimination?
- Experiencing gender discrimination at work can be emotional and traumatic, and no one should feel that they must tolerate such conditions. As an employee, you are entitled to certain rights in the workplace.

If you think you are experiencing gender discrimination at work, there are steps you can take to protect yourself, including:

- Reporting the incident to your supervisor, management, or the Human Resources (HR) department.
- Documenting the discrimination, including where and when it happened. Be detailed and specific, including how it affected you and your ability to perform your job or how it affected your personal life.

<https://blogs.lawyers.com/attorney/labor-and-employment/what-are-the-effects-of-workplace-gender-discrimination-71094/>

Why Do Many Successful Asian Americans Face Workplace Discrimination?

Asian Americans are among the best-educated per capita of any racial or ethnic demographic in the United States. That is especially true in the tech industry, where Asian Americans generally do well in finding and holding jobs but are disproportionately overlooked.

Due to Coronavirus (COVID-19) reportedly originating from China, the Asian Americans and Pacific Islander (AAPI) community has been targeted by more than 3,000 hate crimes since the beginning of the pandemic, according to the group Stop AAPI Hate. That is a great rise in hate crimes targeting the AAPI community since the outbreak of the global pandemic. The sudden rise in violence targeting members of the AAPI community outside of the workplace suggests that they also experience frequent discrimination in the workplace.

Studies Affirm Qualified AAPI Candidates Mostly Overlooked

A 2013 study compiled by the Equal Employment Opportunity Commission (EEOC) showed it is nearly four times harder for AAPI employees to achieve managerial positions, despite being fully qualified for internal promotions. U.S. citizens identifying as AAPI comprise about 5.6 percent of the nation's population, but they account for 12 percent of its licensed professionals.

Additionally, AAPI students comprise more than 10 percent of the annual graduation classes at the top 30 law schools across the nation. However, those same graduates have the highest attrition rate and smallest ratio of partners-to-associates when compared to all other racial and ethnic groups.

Making matters worse is the impression that Asian Americans are generally highly successful and do not need governmental programs. The AAPI community consistently is left out of affirmative action hiring and admissions due to the perceived success in both.

Closer scrutiny reveals that AAPI members generally obtain jobs at relatively high rates when compared to other demographics. However, when it comes to long-term success and the ability to earn promotion to leadership levels, opportunities for AAPI members mostly do not exist. The EEOC says that this is a sign of workplace discrimination.

<https://blogs.lawyers.com/attorney/labor-and-employment/why-do-many-successful-asian-americans-face-workplace-discrimination-71067/>

No, I will not help your company that's actively hurting employees of color

We can't pretend the workplace exists in a bubble and continue with business as usual when employees are in pain.

A recruiter emailed me recently about an open Chief Information Security Officer (CISO) position at a well-known tech company. They asked if anyone in my network would be a fit. In a tight-knit industry like cybersecurity, finding talented candidates often relies on referrals. I normally bend over backward to help organizations find CISOs. What's better than helping someone I know and respect get a job at a company where they'll do great work?

This time, though, I told them I would not help.

The CISO position was at a company that's been very vocal about its stance on political and social discussions at work. While this company has promised to "democratize" finance, they have repeatedly betrayed that mission through public statements and actions. Reports of discriminatory treatment against employees of color at this company are also well documented. Tokenization, unequal pay, lack of career advancement, bullying—all of this has been described in articles from major news outlets. Helping them is not something I'm willing to do.

I explained to the recruiter that, as a Black person, I couldn't in good conscience help a company that is actively hurting its minority employees. It would be a great betrayal of my values and a great betrayal to other Black people to help in this instance.

Let's be clear—this is not a critique of the recruiter or just a single company. Rather, it's a wake-up call to all companies: If your actions and treatment of employees don't align with your stated values, prepare for the consequences—from the public, from customers, and from job candidates.

The power dynamic in hiring has shifted. Candidates can pick from a number of companies that want to hire them, and many are using that power to hold companies accountable. Lofty commitments on a well-designed company values page are no longer enough. There is no faking your way through good culture or corporate social responsibility. Information asymmetry has ebbed, making the actions of a business and its leaders more visible than ever. For example, Stanford grads are dismissing Silicon Valley job offers over ethics and diversity concerns. In October, Netflix employees staged a walkout to protest Dave Chapelle's recent stand-up special, which has been accused of promoting transphobia. And most recently, allegations of a hostile, bigoted workplace within the Phoenix Sunshave caused a widespread backlash.

Candidates talk to one another. Marginalized groups are empowering each other with information. Black people, women, and LGBTQ+ folks in tech swap stories about company culture and how marginalized groups are treated in the workplace. I am a Black man before

anything else, and that fact informs how I decide where to work and which companies to support.

Company values are meaningless unless they lead to impact. This may be different for each organization, but it should begin with a company's own people and their communities to be genuine. For example, start by admitting where there is room for improvement. Be up-front about the gaps between current values and current impact. And when terrible, unjust things happen in the world, don't pretend the workplace exists in a bubble. Create space for employees who are in pain instead of continuing with business as usual.

In my experience, most people understand that this is a journey. No organization is expected to be perfect. But getting the foundational things right is important.

Stress testing your values is one of those foundational areas. No person or organization truly knows what their values are until they are challenged. Many social media companies vocally committed to freedom of speech early on in their history. That value has been routinely challenged by hate speech and harassment, and many of these sites have reassessed their commitment. When social media companies committed to free speech, their leaders may not have understood the impact on vulnerable groups who could be targets for harassment. Every value has consequences. Pretending otherwise is shortsighted.

The most authentic values have personal meaning to leadership. Every employee at a company should understand why certain values were chosen and what they mean to executives both professionally and personally. It creates trust. If I see that a CEO lives a value like mentorship, advocacy, or community investment even when they're not getting paid, I can trust them to hold that value when they are getting paid.

These things are not trivial. If values are just lip service, if employees are treated poorly, if product development betrays a company's stated mission, people will find out. Candidates will turn down job offers, and people like me will decline to aid recruiting efforts.

<https://fortune.com/2021/11/19/racism-discrimination-workplace-employees-of-color/>

Three Ways To Support And Empower Underrepresented Women In The Workplace

Growing up as a Black girl in the 70s and 80s, I rarely saw myself reflected in books, magazines or movies. When I did see Black women on screen, they often played support roles rather than the lead, and their characters often experienced tragic conditions that were almost never overcome over the course of the story.

False racial narratives — like the ever-popular trope of Black women as sidekicks or downtrodden figures — become part of everyone's unconscious bias. Even more unfortunate, these stories can also be pervasive for those who are being discriminated against. Certainly, we're not immune from internalizing the narratives people talk about us, and over time, their bias can become a part of how we see ourselves.

As a result of these destructive narratives surrounding Black women and what they can (or can't) accomplish, even the most successful of us seem to question our achievements or ambition to aspire for more. For instance, in preparation for this season of my podcast, *Diversity: Beyond the Checkbox*, I had the opportunity to speak with a number of highly successful, well-respected, culturally diverse women professionals. There was a consistent thread of imposter syndrome that they shared having to overcome, despite everything they accomplished. I suspected that, like me, they had felt the sting of microaggressions or the disappointment of being passed over for promotions or major projects in their professional pasts.

Black women face workplace discrimination for everything from our hairstyles to our names. We're more likely to face everyday discrimination, less likely to be promoted to managerial positions and also less likely to receive support from leadership. McKinsey and Company's 2021 Women in the Workplace report confirms these persistent statistics. After years of enduring these struggles, often in silence, many of us are left with internalized narratives that tell us we're not enough. It's no wonder that we are less likely to put ourselves forward for jobs and promotions, especially when we don't see ourselves as being proficient at every aspect of requirements listed in a job description.

Many underrepresented professionals do not feel empowered to share their goals and ambitions with supervisors, sponsors and mentors or to speak up when they see inequity for fear of career retribution. From the gender pay gap — which is even bigger for underrepresented women — to the lack of equal leadership opportunities or promotions, these hurdles are pushing more and more Black women into entrepreneurship, where they can create their own playing fields for success.

That entrepreneurial spirit and initiative, along with other professional skill sets and character traits, could be and should be better leveraged in the traditional workplace so that underrepresented women are able to scale within corporate environments with equitable opportunity.

However, to provide that confidence, organizations need to commit to creating a culture where people feel hopeful for what they can accomplish and supported in pursuing bigger goals. Here are my recommendations for how your company can create a more supportive and empowering culture.

- Expand diversity in leadership. As the saying goes, “you can’t be what you can’t see.” That means, if there’s no one who looks like you in a leadership role at your company, it’s hard to envision yourself getting that far. Businesses must make a conscious effort to hire more diverse leaders and develop multicultural talent within the company through intentional mentorship, executive sponsorship and clear career paths. Leaders whom underrepresented employees can identify with will make the path to the C-suite seem more achievable.
- Challenge diverse employees. Is everyone at your company getting the same opportunities to grow through new projects and responsibilities? Are you giving your underrepresented colleagues space to reach their full potential, or are you inadvertently holding them back by under-assigning them? Don’t underestimate your diverse employees, and don’t be afraid to throw big projects their way. In fact, you can pay your privilege forward, by opening the door for underrepresented employees to do great work and reap the rewards.
- Support the success of underrepresented individuals. Whether it’s investing in a talent pipeline that prepares diverse candidates for board membership or simply offering free career advice to someone in your network, we can all find ways of supporting underrepresented people’s success. Too many diverse employees are forced to find their own way without that support.

We must begin to recognize and dismantle the false narratives that have made it harder for underrepresented people to achieve their full potential. Why? Because when mainstream narratives tell professionals who are women, culturally diverse, have disabilities, are neurodiverse or any other diverse identity that they aren't good enough to be truly successful and that they don’t deserve the success they’ve achieved, then *everyone* internalizes that message. We consume it, we digest it and it becomes a part of how we move through the world.

Anyone can call themselves an ally, but there is a substantive difference between hoping for the best for people and providing active, intentional support and opportunities. A recent study from McKinsey shared that, while underrepresented women say the single most important action an ally can take is advocating for new opportunities for them, less than half of the survey respondents of all genders confirmed they are even giving credit to those women for their work and ideas.

McKinsey calls this “the allyship gap” and points out that “although White employees recognize that speaking out against discrimination is critical, they are less likely to recognize the importance of more proactive, sustained steps” toward equity.

As it relates to social narratives, allyship means proactively telling new stories — and highlighting hidden parts of our history together — that show the impact, power, fullness and innate capacity for excellence that *all* people have. Yes, it means new perspectives, but it also means giving sustained credit to underrepresented people for their contributions and their greatness in your everyday life. Our personal narratives are always in progress after all, and there is always room to edit what we believe by internalizing new stories about ourselves and about people who are like us.

<https://www.forbes.com/sites/forbesbusinesscouncil/2021/11/19/three-ways-to-support-and-empower-underrepresented-women-in-the-workplace/?sh=dadba2260b5e>