

READY EMPLOYER ONE: WHAT EMPLOYERS NEED TO CONSIDER WHEN “GAMIFYING” THE WORKPLACE

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In recent years, gamification has risen up the leaderboards as a corporate learning technique. Companies across the country are embracing gamification in their employee training, recruitment, and engagement. But as an employer, before you try to unlock an achievement by gamifying your workplaces, you should think critically about whether your designs, implementation, and data collection plans are in compliance with labor and employment laws.

GAMIFICATION, EXPLAINED

At its core, “gamification” refers to adding elements of games into a non-game context. You may already be familiar with some examples of gamification: your coffee shop rewards card entices you to buy nine drinks to get your tenth free; your health insurance website awards you with badges upon completing certain wellness activities; and your LinkedIn profile tracker encourages you to add in your experience to “complete” your profile.

In the workplace, gamification could range from adding a leaderboard to measure and publicize employee productivity, to a full-on virtual escape room in order to assess employees’ abilities to work with others. It does not necessarily mean converting your entire business process into a video game. But gamification can be useful as part of an overall strategy.

Employers have embraced gamification in various contexts. Some other examples include:

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- Converting the weekly employee scheduling process into a puzzle with each employee's availability resembling a puzzle piece;
- Adding leaderboards to foster a sense of competition with monthly quotas;
- Using puzzles and other virtual scenarios to assess applicant potential;
- Awarding badges, avatars, and other visual indicators to recognize employees who timely submit their expense reports; and
- Adding a "swipe left or swipe right" mechanic to approving time-off requests.

Many employers have found gamification useful to make work more "fun" and to appeal to a new wave of workers who were raised with video games. Although there are many benefits to gamification, you need to be mindful of any number of possible "boss battles" against the law.

WAGE AND HOUR ISSUES

At its core, gamification is about breaking monotony and trying to make work fun. But at what point is the employee working or playing? When that line becomes blurred, employers risk possible wage and hour violations.

Consider this example: one of your employees is waiting in line for a sandwich on their lunch break, and they open their phone and start "playing" your gamified swipe-right-to-approve vacation request system, where a manager reviews an employee's time-off request and swipes right to approve, or swipes left to deny. Even if it may not feel like it, that employee could be considered to be working off the clock and could be entitled to wages under the Fair Labor Standards Act and state wage and hour laws.

As many employers know, it is easy to fall into expensive wage and hour pitfalls. In designing your gamifications, you must be mindful of employee access and ensure that employees are only "playing" while on the clock.

AGE DISCRIMINATION

Gamification has surged in popularity because, among other reasons, it attracts and engages that portion of the new workforce who grew up on video games. However, different generations may not be as familiar with video games and associated technology. If this technology is made a part of your recruiting, training, or evaluation efforts, you want to ensure that your process does not have a disparate impact on those employees protected by the Age Discrimination in Employment Act (ADEA) or state age discrimination laws.

For example, consider running your prototype past a sampling of current employees of various backgrounds to gauge their reaction and gather their input. Once you unveil your program, carefully review who is performing well and poorly and see if a pattern against a protected category appears. If so, you must reassess your strategy. If your process does have a disparate impact, you may expose your business to liability.

DISABILITY DISCRIMINATION AND ACCESSIBILITY

As many employers know, accessibility to businesses for individuals with disabilities is a hot-button issue in the country. Perhaps you know of a business that has been sued because its website was not ADA-compliant. In the video game world, game developers are hard at work to make sure all persons can enjoy their games, including individuals who suffer from colorblindness or hearing difficulties. So, too, must gamifying employers consider whether their strategies create a barrier for people with disabilities.

Consider a scenario where your company requires applicants or employees to go through an escape room with others, or participate in an interlocked-arm puzzle, to gauge how they work and communicate with others. If your employee or applicant has a disability, they might not be able to complete your gamified interview process. If you reject or exclude them as a result, you may face an allegation that you discriminated against them because of their disability. You will want to work with your legal counsel to discuss accommodation options before designing any such encounter.

PRIVACY AND CONFIDENTIALITY

Some approaches to gamification may involve the collection and publication of personal information. Consider the

example of a leaderboard in monthly sales quotas. Imagine your manager, excited to share the month's results, takes a screenshot of the month's leaderboard and sends it to an internal, company-wide email address. In doing so, they have also advertised for all to see the identity of the month's lowest performer – who may be subject to discipline for their insufficient performance.

Has your manager violated the low-performing employee's privacy rights by publicizing their performance and announcing indirectly that they will be disciplined? The answer to this question will vary from state to state. California, for example, would meticulously scrutinize such a sharing of employee data. For this reason, you must be mindful of what kind of employee information you are collecting and sharing and cross-check that against the employee's rights.

Now consider a variation. Consider a scenario where the high-scoring employee, so excited by their accomplishment, takes a screenshot of the leaderboard and proudly posts it, externally, on their Instagram or LinkedIn. It is bad enough that they possibly infringed upon a low-performing coworkers' private information. But what if the leaderboard contains confidential company information or trade secrets, such as marketing methods, which have now been made available for all to see? You must carefully assess whether, in using certain gamification methods to encourage employee productivity, you are inviting a risk to employee privacy or company information.

In gamifying a certain work element, it is almost guaranteed that you will amass a large swath of data, such as performance numbers and qualitative methods on how an employee approaches a task. In turn, you could process that data, and maybe even publish it, in a way that risks employee or company information. As all employers know, your data and trade secrets must be protected.

GAMIFICATION DEVELOPMENT CONSIDERATIONS

If you are considering gamifying your workplace, you should investigate and understand the theory and methodologies the gamification platform utilizes to determine what is considered a "win" or a "success." Consider if you use games in the hiring context to determine whether an

applicant will be hired. What factors will you use to determine what constitutes success?

Often, programmers will use the employer's definition of "success" to create the score card. In that instance, you must be careful to ensure that you do not inadvertently impute any implicit biases into the process. You should consider what characteristics and traits you consider to be "successful" and ensure that those traits do not have any indicia of discrimination. If you do not have the ability to customize the "win" and "success" attributes, you should inquire with the developer the criteria it has selected to ensure discrimination is not in the process.

CONCLUSION

Gamification is an exciting avenue for employers to improve their employees' engagement, productivity, and morale. However, hidden in all the fun may be some legal traps if you have not carefully reviewed your strategies in the context of workplace laws. Before you jump straight into the game, make sure you review the rulebook!

For more information, contact the authors [here](#) or [here](#).