



Avoiding Claims of Race, Religious, or National Origin Discrimination in the Current Political Climate

Insights

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Unless you have been living under a rock, you know that the United States has had a new president for about six months: Mr. Donald J. Trump. Many suggest (and I do not take a position on this) that President Trump was catapulted to success by certain attitudes on race, religion, and immigration. An important disclaimer – this is not a blog post about politics (there are plenty of those already). Instead, it is a blog post about how you, an employer, can avoid claims of race, national origin or religious discrimination in this new Trump Era. Because, regardless of how President Trump was elected, the reality is that there are ongoing national conversations about certain attitudes on race, religion and immigration. These conversations may adversely impact your workplace.

Let's touch on the basics for a moment. Title VII prohibits employers from discriminating against an individual based on the person's race, color, sex, national origin, or religion. The anti-discrimination prohibitions extend to differential treatment, offensive comments or other forms of harassment, and retaliation. Employers are also required to reasonably accommodate the religious practices of their employees. While charges based on race discrimination are filed at a higher rate than for any other protected characteristic, charges based on religious or national origin discrimination are filed at relatively low rates. For instance, in 2015, charges based on race accounted for 34.7% of the total charges filed, while charges based on religion and national origin accounted for 10.6% and 3.9%, respectively.

Earlier this year, the EEOC released its statistics on charges filed in 2016. Race, religion, and national origin all saw increases, albeit modest ones. While these statistics do not capture EEOC activity in the months since President Trump was elected, they may serve as evidence of the actual consequences that these increased conversations are having on the American workplace. If nothing else, they should serve as a warning for employers across the country to get their proverbial houses in order.

In view of these trends and actual cases, employers should act now to take certain basic steps to avoid liability. First, make sure you have a non-discrimination policy that prohibits discrimination based on race, national origin and religion (among other protected characteristics), and that provides your company will attempt to reasonably accommodate an employee's religious beliefs and practices. This policy statement should be placed in your employee handbook, on your application for employment and employee bulletin boards.

Second, make sure that references to race, religion and national origin are contained in your anti-harassment policy. The policy itself must be thorough enough to inform employees of the types of prohibited conduct. For example, all employees need to be aware that derogatory comments about another employee's religious attire, appearance or practices, perceived ethnic origin, and prayer are examples of improper conduct. They should also understand that employees who engage in this sort of conduct will be subject to disciplinary action, up to and including immediate termination.

Third, include language in your electronic communications and social media policies that prohibits communications that may violate your non-discrimination and anti-harassment policies. Examples include offensive or controversial screen savers, or e-mail and Facebook communications that are harassing or offensive. Keep in mind that the National Labor Relations Board has maintained a keen focus on employer handbooks over the past several years. So, you will want to be careful that your policy modifications do not run afoul with the National Labor Relations Act.

Fourth, develop and implement an effective problem solving procedure that allows an employee to make a complaint or request an accommodation. Effective reporting procedures direct employees to a member of management who is trained, empowered and competent to resolve and/or appropriately direct complaints of discrimination, harassment and requests for accommodation.

Fifth, you must enforce your non-discrimination, anti-harassment and related policies. If employees know that management is serious about enforcing these policies, they are more likely to comply with them and to utilize the problem solving procedure when needed.

Sixth, train your employees and managers on your policies and problem solving procedures to ensure they are understood. Among other things, manager training must include how to recognize and respond to possible policy violations. Manager training should also address the employer's prohibition of retaliation and its commitment to correct promptly any violations.

Lastly, remember to follow consistently your internal procedures to avoid claims of differential treatment by persons in the protected categories. For example, you cannot subject applicants who are or who are perceived to be Hispanic or Muslim to any additional pre-employment checks that you do not require of similarly situated applicants of other national origins and religions. Additionally, to the extent your company interviews or gives examinations to applicants, you should attempt to accommodate applicants whose religious practices or observances conflict with the date and times of the interviews or examinations.

While it is impossible to totally eliminate risk, taking these steps now, while the national conversation continues to heat up, can avoid liability down the line. If you have any questions about these suggestions, please contact the author at JWrigley@fisherphillips.com or your Fisher Phillips attorney.