

Question & Answer Summary

June 17, 2010 Webinar

Discrimination: Trends and Challenges in Today's Workplace

On June 17, 2010, Miller Law Group presented our webinar on "Discrimination: Trends and Challenges in Today's Workplace." We explored the latest trends in federal and California employment discrimination law, including the challenges of managing an aging workforce, increased diversity of religious beliefs, gender issues in the workplace, and more. The following are answers to frequently asked questions by webinar attendees.

Q. FOR RELIGIOUS HOLIDAYS THAT ARE WORK DAYS, CAN EMPLOYERS REQUIRE EMPLOYEES TO USE VACATION TIME?

A. Yes. Employers are required to provide reasonable accommodations for the religious practices of employees, including time off for religious holidays. The time off can be unpaid (unless doing so would violate the salary basis rule for an exempt employee) or the employer can require that the employee use vacation time to observe a religious holiday.

Q. CAN AN EMPLOYER INITIATE A RELIGIOUS ACCOMMODATION, EVEN IF AN EMPLOYEE DOES NOT REQUEST AN ACCOMMODATION?

A. Generally, an employer's obligation to accommodate religious beliefs and practices arises only when the applicant or employee makes the employer aware of the need for accommodation due to a conflict between religion and work. However, no "magic words" are required to place an employer on notice of an applicant's or employee's need for a religion-based accommodation – so there could be circumstances when the employee does not specifically request an accommodation but the employer is nevertheless put on notice that one is needed. In any event, the individual must provide the employer with enough information to make the employer aware that a conflict exists between the individual's religious practice/belief and a requirement for applying for or performing the job.

Q. WOULD IT BE A PROBLEM TO NOTE IN AN INTERVIEW FILE THAT A CANDIDATE IS NOT A "CULTURAL FIT"?

A. Making subjective notes and comments regarding potential hires can be risky. For example, if many of the existing employees are on the younger side, a note or comment that an older job candidate was not a "cultural fit" could indicate age bias. Thus, the best practice is to

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avoid making subjective notes and comments in the hiring process, and to instead focus objectively on the applicant's qualifications and experience for the position.

Q. IS THERE MORE RISK IN TERMINATING A 65-YEAR-OLD WORKER THAN A 40-YEAR-OLD WORKER, EVEN THOUGH THE AGE BIAS LAWS PROTECT WORKERS AGE 40 AND OLDER?

A. The risk involved in terminating workers who are protected by the Age Discrimination in Employment Act (ADEA) and comparable state laws depends on the specifics of each termination. For example, how strong is the evidence of age bias in the decision-making process, or do the statistics demonstrate a disparate impact on older workers? Depending on the circumstances, it is possible that a 42-year-old who is terminated could have a stronger case of age discrimination than a 64-year-old. On the other hand, juries are likely to be more sympathetic to workers on the older end of the spectrum, particularly because it can be harder for such individuals to recover from a problematic job situation and move on to new employment. Note that under the ADEA, it is not illegal to favor an older worker over a younger one, even if both are over age 40; thus, if an employer is choosing between two employees both over age 40, and decides to retain the older employee, the younger employee will be hard pressed to state a claim under the ADEA.

Q. ARE CALIFORNIA EMPLOYERS REQUIRED TO HAVE UNISEX RESTROOMS TO AVOID DISCRIMINATION ON THE BASIS OF GENDER IDENTITY?

A. No. While the California Fair Employment and Housing Act (FEHA) bars discrimination on the basis of gender identity, this provision does not mandate that employers designate a "unisex" restroom that can be used by employees of either gender. However, an employer is required to permit an employee to use the restroom of the gender with which the employee identifies. Note that even if an employer has a unisex restroom, a transgender employee would still be entitled to use the single-sex restroom associated with his or her gender identity.

Q. ARE EMPLOYERS REQUIRED TO PROVIDE TRAINING ON PREVENTING TYPES OF HARASSMENT/DISCRIMINATION OTHER THAN SEXUAL HARASSMENT?

A. Such training is not currently mandated, but it is strongly recommended. In particular, California's manager training law, A.B. 1825, specifies that employers must provide training about sexual harassment and "may" train about other forms of harassment covered by California law. And, the FEHA provides that it is an unlawful employment practice for

employers “to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.” In addition, the U.S. Equal Employment Opportunity Commission (EEOC) strongly encourages periodic harassment and discrimination training covering all protected categories.

Miller Law Group exclusively represents business in all aspects of California employment law, specializing in litigation, risk management, wage and hour class actions, ERISA litigation, and appellate law. If you have questions about your workplace obligations, please contact Michele Ballard Miller (mbm@millerlawgroup.com) or Carolyn Rashby (cr@millerlawgroup.com), or call (415) 464-4300. To learn more about our firm, visit our website at www.millerlawgroup.com.

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