

Five tips for building an inclusive workplace

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US employment law is rapidly developing in the areas of LGBTQ+, religious, and disability non-discrimination and accommodation requirements as an increasing number of US companies embrace diversity, equity, and inclusion (DEI) ideals. How can organisations show their commitment to DEI efforts through compliance with anti-discrimination laws? How can organisations go “above and beyond”? Can DEI go too far and swing into legal hot water?

The following five strategies can be incorporated by businesses to foster inclusive, non-discriminatory workplaces:

1. Create a clear reporting process for harassment and discrimination concerns, and communicate broadly that the organisation has zero tolerance for these behaviours.

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Why?

A report by the EEOC found that only 30% of employees experiencing harassment on the basis of gender, race, national origin, disability and other protected classes make internal complaints, and less than 15% file formal legal charges (Zheng, Lily. “Do Your Employees Feel Safe Reporting Abuse and Discrimination?” *Harvard Business Review*. 08 October 2020). Studies have consistently found that fear of retaliation keeps individuals from reporting incidents of harassment.

Those who don't report these incidents often respond by leaving the organisation. The cost of losing an employee is upwards of 1.5 times their individual salary. For those who do take legal action, the cost to organisations is exponentially higher. In a world where Glassdoor and other social platforms create greater transparency, these issues can easily see the light of day and severely impact the employer's brand.

In defending discrimination and harassment claims in court, employers can assert the *Faragher-Ellerth* affirmative defence if they can demonstrate that they took steps to prevent the discrimination/harassment, investigated the

complaints when made, then took reasonable remedial steps, and that the employee unreasonably failed to take advantage of preventative opportunities. By having a robust reporting process, employers add more ammunition to their defence arsenal. The process should include: 1) ensuring that complaints are reported in writing to an appropriate department, 2) addressing “gateway” conduct that is not yet actionable but is nevertheless inappropriate, and 3) investigating thoroughly and promptly.

2. Review and revise your employee handbook.

Employee handbooks set the tone and expectations for new hires, simplify onboarding, make training easier, and protect employers from compliance violations. As employees return to the office, now is the perfect time to revise the handbook. Some principles to keep in mind:

- Policies should be neutral to all protected classes, including gender, especially with respect to dress codes and parental leave.
- Harassment and discrimination reporting procedures should be clearly outlined and include examples of prohibited conduct.



- The process for requesting accommodation should be clearly delineated.

Remember: Your handbook represents your organisation.

3. Take requests for reasonable accommodation seriously.

When an employee makes a request, the request should be taken seriously, not brushed off, and it should be well-documented. If the requested accommodation cannot be provided, the employer should work with the employee to try to find a reasonable solution – this is called “the interactive process”. It is important to remember that employees should not have to use “magic words” to request reasonable accommodation of their disability or religion.

4. Train your employees and supervisors on non-discrimination laws, employer policies, and the reporting process.

The human resources department is not everywhere and cannot see everything. All employees and supervisors should know what discrimination and harassment look like so they can be stopped, and supervisors should know how to

assist their staff in writing a complaint to HR if needed. Supervisors must be well-trained in when and what to report – not just allegations, but also observations, and they must do so immediately, even if the complaining party is reticent. Supervisors should also know what sort of statements to pay attention to, such as subtle requests for reasonable accommodation.

5. Work with an inclusion consultant to identify and assess areas of growth needed to increase belonging in your workplace.

Why? How can a consultant be helpful?

Creating a more diverse, equitable, and inclusive culture is the most difficult and complex change initiative an organisation will undertake. It involves addressing centuries of history, beliefs and biases that are not easily changed. Often the organisation doesn't recognise challenges experienced by traditionally marginalised groups. It is critical that organisations understand their starting point so they can identify the changes necessary to create a workplace where individuals can bring their full and best selves.

Creating a desired culture begins with a thorough assessment of current workplace conditions and culture to understand the challenges that exist within systems and the behaviours exhibited that propagate inequity and exclusion. It is this baseline data that allows the consultant to tailor a plan to address the challenges identified in the assessment. This includes, but is not limited to:

- talent management audits to identify bias in processes;
- training and development to address exclusionary behaviours;
- development of a diversity, equity and inclusion strategy;
- creation of a structure to support the execution of the strategy; and
- metrics to chart progress.

Keep in mind, though, that employees and applicants who do not bring diversity to the table are not to be excluded. Exclusion based on protected characteristics, even against those in the social majority, can generate legal claims. Be careful of quotas and preferences; relying on diversity to “break a tie” when deciding who to hire or promote may violate EEO laws.