

Guide

Expanding Non-Discrimination Policies During Times of Unrest

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Expanding Non-Discrimination Policies During Times of Unrest

This quick guide provides links to articles and resources related to policies designed to prevent racism and discrimination and steps employers can take to make sure those policies are effective.

This article by [Open Access Government](#) provides a good overview of the importance of revisiting policies to ensure they are effective in preventing racism and discrimination. Often, what an employer can, should or cannot do is not always clear. While employees are legally protected from being fired based on discrimination, employers are now grappling with broader issues. Can I terminate an employee based on statements made on social media? Can I discipline an employee for attending a rally? Can I demote a manager because of his or her actions outside the workplace? These are all difficult questions. Often the response will depend on an employer's policies, consistency in discipline and the facts of each situation. The article provides specific actions employers should consider and includes considerations for dealing with outside of work actions. It also provides a few examples of actions companies have taken.

The article encourages employers to revisit the wording and content of the company's anti-discrimination/harassment policy and procedure. Ensure that the company's prohibition of racial harassment and discrimination is emphasized. The policy can include specific examples of actions that could be considered racial harassment in the workplace, including brandishing Confederate flags and symbols, swastikas, nooses (yes, there have been cases in this century where nooses were left at the work stations of African American employees), and 'friendly banter that could be perceived as having racial undertones.

It is important to outline the company's recognition of employees' rights to discuss workplace issues, while underscoring the fact that discussions regarding non-workplace issues such as politics, religion or current events are not productive workplace time, can lead to unnecessary disagreements that impact productivity and morale, and are discouraged. Include a clearly written statement that employees who violate the company's anti-discrimination/harassment policy will be subject to discipline, up to and including termination. Reiterate the company's anti-discrimination/harassment policy and require all employees to acknowledge their understanding and agreement to abide by the terms included therein. To deal with behaviors outside of work, employers are encouraged to consider the following:

- Do you have a social media policy or a policy regarding off duty conduct?
- Is the employee being critical of working conditions that could be protected under the National Labor Relations Act?
- Is the employee's speech overly offensive or would it impede the company's ability to comply with its anti-discrimination/harassment policy or prevailing law?
- Is the employee engaged in or advocating violence?
- Does the conduct or speech cause disruption in the workplace?
- Is the employee representing the company when making the statement (i.e., wearing a company uniform, stating they are employees of the company, etc.)?
- What position does the employee hold?
- How have you treated other employees who engaged in similar conduct?

Link to article:

<https://www.openaccessgovernment.org/racism-in-the-workplace-united-states/89151/>

This article by [Koley Jessen](#) provides important tips for revisiting non-discrimination policies and updating EAP processes and the company's employee handbook. In June 2020, the United States Supreme Court ruled that those same nondiscrimination laws at the federal level that protect women from sexual harassment and discrimination in the workplace, protect "anyone" affected by discrimination or harassment, if such action is based on the person's gender, gender identity, or sexual orientation. This decision will affect employers across the United States. At the same time, the Black Lives Matter movement is sparking change and activism across the country following the death of George Floyd, who died at the hands of the police in Minneapolis Minnesota on May 25, 2020. Businesses across the United States are taking this time to reevaluate their internal and external presence as it relates to acceptance, acquiescence, or rejection of discriminatory or harassment of individuals for any reason.

Link to article:

<https://www.koleyjessen.com/newsroom-publications-black-lives-matter-adjusting-workplace-policies-and-practices>

Law firm [Foley and Lardner](#) provides a good high level overview of legal implications associated with policies designed to prevent non-discriminatory behaviors – both in and outside the workplace. A number of outlets have reported that social media use has significantly increased during the COVID-19 pandemic, as many are quarantined at home with time to kill. Meanwhile, just as social media use has spiked, the circumstances of George Floyd's death have led to daily protests throughout the nation. In the midst of this perfect storm – as Americans take to their smartphones, tablets, and laptops to argue their views on complex societal concerns, a tricky issue has presented itself to employers – what to do if an employee posts racist or other objectionable content on his or her social media feed? For example, in [some states](#), "political affiliation" is a protected class, and thus, employers must be careful that the offensive post is not directly tied to an employee's political affiliation. Likewise, some states prohibit terminating an employee for [lawful off-duty conduct](#).

Link to article:

<https://www.foley.com/en/insights/publications/2020/06/employee-online-activity-in-a-time-of-turmoil>

Some employers have terminated employees for participating in protests; others have terminated employees for making racist comments on personal social media accounts. Is it legal to terminate employees for engaging in political activity? This article by [HR Defense](#) also addresses the legal aspects related to non-discrimination and anti-harassment policies designed to enforce certain types of behaviors in the workplace and on social media. While many people mistakenly believe that the First Amendment of the Constitution protects them from discrimination based on their politics, it does not prohibit employers from taking action against private sector employees for their political beliefs. With limited exceptions, the Constitution's guarantee of "freedom of speech" applies to government action and does not restrict what non-governmental employers can do. However, some states do offer some protection for off-duty activities such as activist involvement, including California, Colorado, North Dakota, and New York.

Link to article:

<https://www.hrdefenseblog.com/2020/06/the-black-lives-matter-movement-and-the-workplace/>

This article by law firm [Shawe Rosenthal](#) provides some additional tips on preventing discriminatory behaviors in the workplace, from reviewing hiring practices to revisiting policies. In the wake of George Floyd's death, many high-profile figures, from politicians to stars to professional athletes, have been vocal about their condemnation of racial bias. They have further indicated in no uncertain terms that any individual, company, or organization that remains *silent* on issues of racial inequality is in fact complacent and part of the problem. This call to denounce racism has prompted companies in all industries and of all sizes to reaffirm publicly – to their customers, patrons, clients, and employees – that they condemn racism.

Link to article:

<https://www.laboremploymentreport.com/2020/06/15/the-important-role-employers-play-in-addressing-racism-in-light-of-the-george-floyd-tragedy/>

This article by [CNBC](#) examines the hit companies take when they don't have good policies in place. It provides a good contextual framework for promoting tighter policies. Companies have spent years reacting to reports of racial discrimination or bias that thrust them into the spotlight. For example, employees at both [General Motors](#) and [Fiat Chrysler](#) have reported multiple instances of nooses hanging in at least two plants since 2017, according to lawsuits and media reports. In response, GM met with national, state and local civil rights leaders and Ohio's attorney general's office following racial harassment issues at its Toledo plant. It said it added mandatory training at the plant on inclusion and zero tolerance for discrimination and now requires all North American workers to take it.

JPMorgan is also covered in the article. Like other banks, it has perpetuated policies that have made it harder for Black Americans to get lower interest rates, qualify for mortgages or access capital. As recently as last year, a Black client and Black employee said the company discriminated against them. Former NFL player Jimmy Kennedy recorded conversations with a bank employee who referred to his race when explaining why he couldn't sign up as a "private client," a designation that would have given him access to loans and travel benefits, according to a report by The New York Times. The takeaway: look at all of the companies policies to ensure that discriminatory practices are not being perpetuated.

Link to article:

<https://www.cnbc.com/2020/06/12/action-wanted-corporate-america-faces-a-higher-bar-on-rhttpsocial-inequality.html>

Below is an article by SHRM that provides some legal guidance about whether to fire an employee for any discriminatory tweets or posts. The key today is that with social media, word will get out about what your employees are posting and what your organization is doing about it.

Link to article:

<https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/stupid-tweets.aspx>

A few additional resources:

“[Protests, Pandemic Create Workplace Stress](#)” from SHRM.org includes links to other SHRM resources such as [Taking Steps to Eliminate racism in the workplace](#), [7 Practical Ways to Reduce Bias in Your Hiring Process](#), [Nondiscrimination/Anti-Harassment Policy and Complaint Procedure](#), [Toxic Workplace Cultures Are Costing Employers Billions](#), and [Video: Inclusive Hiring and Civility at Work](#).

[U.S. Businesses Must Take Meaningful Action Against Racism](#)” from Harvard Business Review. The authors discuss ways to avoid missteps, take meaningful action, acknowledge any harm that your coworkers have endured, affirm their right to safety and personhood and help them feel protected, and think critically about how you can use your power to effect change.

A few examples of responses related to discriminatory employee social media posts

A starting point is making sure that company has clear policies on social media use and that these policies are well communicated to employees. Restate these policies when you reach out to the employees in question. If you don't have policies in place, here are some examples from top companies (below link)

In particular, look at Best Buy's. It states that its policy goes beyond the time you're clocked in at work.

“Remember, your responsibility to Best Buy doesn't end when you are off the clock. For that reason, this policy applies to both company sponsored social media and personal use as it relates to Best Buy.”

As the article points out, employees can get caught up with First Amendment rights, believing it gives them the right to say whatever they want without consequence. Best Buy sets expectations for its employees. Remind employees of the company's position on discrimination.

“Honor Our Differences: Live the values. Best Buy will not tolerate discrimination (including age, sex, race, color, creed, religion, ethnicity, sexual orientation, gender identity, national origin, citizenship, disability, or marital status or any other legally recognized protected basis under federal, state, or local laws, regulations or ordinances).”

<https://everyonesocial.com/blog/need-sample-social-media-policies-here-are-7-to-inspire-yours/>

Below is another link to some examples of different organization's social media policies, with tips from **Walmart and Ford Motor Company** reminding employees to be courteous and use good judgement.

<https://blog.hubspot.com/blog/tabid/6307/bid/29441/5-noteworthy-examples-of-corporate-social-media-policies.aspx>

The blog below relates to Delta's CEO response to discriminatory statements of one of its employees that went public. I thought he did a good job stating what Delta stands for and what the company will not tolerate. The employee was fired. Bastian (CEO) wrote:

"I want to make it clear that Delta's workplace must remain safe and welcoming for all Delta people. We will not tolerate racist, bigoted or hateful acts or statements in our workspaces or directed at our people. This includes racial and other bigoted, hateful and offensive comments on social media by Delta people, which hurts our culture and our people."

Bastian sent an internal memo asking employees to report any [racism or discrimination](#) against Delta employees. It "broke my heart," he added, to read comments about racism that people had experienced. "Above all we need to ensure a workplace where all employees can feel safe — both physically and psychologically." Bastian has [said in public forums](#) that "our values are not for sale."

<https://www.ajc.com/business/delta-flight-attendant-leaves-airline-after-probe-into-tweets-race/gfcyWSJ8ZqnemHWaA7NDKP>

Below is a link to some research by Elon University on corporate communications during crisis. In particular, **look at pages 58-60**. It is powerful that Facebook / Zuckerberg tells employees to stop replacing Black Lives Matter with All Lives Matter. Bold stand but stock / reputation were not negatively affected. **Also powerful that Nike started including #BlackLivesMatter under the CEO's tagline.**

The paper also captured the risk / benefits well: "The current research also raised the question of risk when corporations take stances on polarizing social movements. While companies would be unlikely to receive negative responses from stakeholder groups when supporting a less polarizing movement like cancer research, those issuing public stances on Black Lives Matter have faced hateful social media comments and threats from consumers who want to stop buying company products or services. Ultimately, though, the majority of these companies did not suffer major financial repercussions after publicly supporting Black Lives Matter. In fact, many of them received some appreciation from their target markets: young consumer audiences."

Link to article:

https://www.elon.edu/docs/e-web/academics/communications/research/vol8no1/06_MaryClaire_Schulz.pdf