

TIPS FOR BUILDING AN ANTI-RACIST WORKPLACE WHILE PREVENTING EMPLOYMENT LIABILITY IN THE AGE OF #BLACKLIVESMATTER

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CONVERSATIONS WITH COUNSEL: EMPLOYMENT EDITION

Agenda

- ❑ Recognizing Racism At Work In 2020
- ❑ Employment Laws Implicated In The Age Of #BlackLivesMatter
- ❑ Preventing Employment Liability
- ❑ Creating An Anti-Racist Workplace

POLL QUESTION NUMBER ONE

Answer: No. This statement fails to acknowledge white privilege.

RECOGNIZING RACISM IN 2020

OVERT RACISM

- Racial epithets, slurs or “jokes”
 - Wonder Bread case
 - EEOC/Laquila case
- Racist objects at work
 - Noose in workplace
- Discrimination in firing
- Discrimination in hiring
- Race-based pay disparity
- Racist grooming policies
 - No locks, braids or beards



COVERT OR PASSIVE RACISM

- Implicit bias
- Micro-aggression
- Lack of mentoring or training
- Tokenism
- Inconsistent standards or enforcement of policies for Black employees
- All white decision-makers
- Denial of racism or white privilege
- White-centric policies and practices



OVERT RACISM



WHAT'S WRONG WITH "ALL LIVES MATTER"?

WE SAID → BLACK LIVES MATTER

WE NEVER SAID → ONLY BLACK LIVES MATTER

WE KNOW → ALL LIVES MATTER

**WE JUST NEED YOUR HELP WITH #BLACKLIVESMATTER
FOR BLACK LIVES ARE IN DANGER!**

Ask Siri →

All lives matter

Tap to Edit >

'All Lives Matter' is often used in response to the phrase 'Black Lives Matter', but it does not represent the same concerns.

To learn more about the Black Lives Matter human rights movement, visit BlackLivesMatter.com.

[Go to BlackLivesMatter.com](https://BlackLivesMatter.com)

POLL QUESTION NUMBER TWO

Answer: (B) Not okay. This is a common racial microaggression.

COVERT RACISM

RACIST MICRO AGGRESSIONS



Relevant Employment Laws

- Title VII of the Civil Rights Act of 1964 (“Title VII”)
- California Fair Employment & Housing Act (“FEHA”)
 - Includes → The California Crown Act
- California Constitution
 - Right To Free Speech
 - Right To Privacy
- California Labor Code Sections 1101 and 1102
 - Protection Of Political Activities

**EMPLOYMENT
LAWS AND BLACK
LIVES MATTER**

More Employment Laws

- California Labor Code Sections 96(k) and 98.6
 - Lawful conduct during non-working hours
- California Labor Code Section 432.7
 - Prohibits termination for being arrested
- California Labor Code Section 232.5
 - Prohibits employer from restricting employees in discussing terms and conditions of work
- National Labor Relations Act
 - Protects concerted activity by employees

**EMPLOYMENT
LAWS AND BLACK
LIVES MATTER**

PREVENTING EMPLOYMENT LIABILITY: LESSONS FROM #BLACKLIVESMATTERS IN THE NEWS



THE EMPLOYER DID WHAT?

- **Taco Bell Employee Fired For BLM Mask:** After sharing online how he was fired for wearing a BLM mask, angry customers are calling for a boycott with hashtags #RIPTacoBell and #TacoBellsOverParty.
- **Employee Sent Home For Wearing BLM Mask:** After attending his first BLM protest, a young black employee scribbled BLM on his surgical mask but was not allowed to work.
- **100,000 Reasons Why “Blue Lives Matter” Is A Problem:** A black government employee sued for race harassment after her employer refused to make a co-worker remove a “Blue Lives Matter” flag at the office.



OTHER EMPLOYER ACTIONS

- **Philadelphia Whole Foods Employee Fired:** After criticizing her employer on social media for providing free food to police during anti-police brutality protests.
- **FaceBook Engineer Fired:** After publicly criticizing a coworker on Twitter for not adding a statement of support for BLM to documentation for an open-source project.
 - In 2016, Zuckerberg scolded employees for crossing-out “Black Lives Matter” on signature walls.



THE COACH



- **High School Wrestling Coach Fired After Posting Photo Mimicking George Floyd Death:** In a claimed attempt to demonstrate that placing a knee against a suspect's knee does not necessarily "kill them," the coach posted this photo and statement.
 - Members of the public disagreed voicing concern about what the coach was teaching high school students and demanding the school take action.
 - **The School agreed** stating "His behavior was not consistent with our equity initiatives and nondiscrimination policies."
- After being fired, the coach said "I am not racist" – All I did was show that "I was OK from a knee on my neck."

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DEALING WITH RACIST BEHAVIOR OUTSIDE OF WORK

- **Jersey Men Fired And Suspended:** After mimicking George's death (one kneeling on the neck of the other) during a BLM protest, one man was fired (FedEx) and the other suspended from his job as a corrections officer.
- **Philadelphia White Employee Fired:** After being caught on camera ripping down BLM signs and telling someone "not to me, they don't" – Philadelphia employee was fired by family court.
- **NYC HR Employee Removed:** After re-posting this "I proudly oppose the Black Lives Matter movement. You should too. "



MORE BEHAVIOR OUTSIDE OF WORK

- **CA Man Fired For His Wife's Public Racism:** After a video of his wife questioning a man for writing Black Lives Matter in chalk on his property went viral, the husband was fired.



- Note: The husband was seen on video joining in the questioning.
- **White Employee Claimed Reverse Discrimination:** After he was fired for posting a message on Facebook criticizing the Black Lives Matter movement.

COMPANY RESPONSES TO BLM



- **Ben & Jerry's Bold Statement Against Racial Injustice:** ““All of us at Ben & Jerry's are outraged by the murder of another Black person by Minneapolis police officers.” “We Must Dismantle White Supremacy.”
- **LinkedIn's Virtual Town Hall On Race Did Not Go Well:** Employees posted anonymous comments criticizing LinkedIn's diversity hiring calling it “racism against white people,” the BLM movement, and claiming white people experience “racial injustice too.”



COMPANY RESPONSES TO BLM

- **Starbucks Flip-Flops On Employees Wearing BLM Attire:** After banning BLM attire because “it could amplify divisiveness,” the Company reversed the policy and provided 250,000 Starbucks-branded BLM shirts to employees who want to wear them.
- **CEO Warns Minority Employees Against BLM Strike:** After learning of a potential walkout, the CEO warned minority employees not to use threats to disrupt work.



Prevention
is better
than cure!

Preventing Employment Liability

- Audit key areas for workplace racism
 - Recruiting and hiring
 - Benefits, pay and working conditions
 - Performance reviews and advancement
 - Training and development
 - Mentoring, meetings and social connection
- Reiterate policies of zero tolerance for racial harassment and discrimination
- Revise policies to define “race” to include
 - historically associated traits, such as hair styles and protective hair styles such as braids, locks, and twists
- Revise policies to include specific examples of unacceptable racism
 - Overt (slurs, epithets, racist objects)
 - Covert (micro-aggression)
- Establish a flexible complaint procedure
 - Do not require “chain of command”
- Openly encourage employees to report racism
 - Conduct training for all employees
 - Provide tools for employees to respond to racism in the workplace (rehearsal)
 - Consider an anonymous hotline to facilitate reporting

Preventing Employment Liability

- Train supervisors on how to properly respond to all complaints
 - Overt, implicit or vague complaints
 - Promptly investigate complaints
 - Use a neutral investigator
 - Consider all California applicable laws
 - Labor code protections (political activities, terms/conditions, NLRA etc)
 - Take corrective action
 - Action that will stop the behavior
 - And prevent it from repeating
 - Keep personnel information private
- Understand “why” employees sue
 - Hire and train strong leaders
 - Employees often sue because of a bad boss
 - Treat employees with dignity and respect
 - Communicate effectively
 - Empathy and active listening
 - When in doubt ...
 - Provide coaching and mentoring
 - Provide job skills support
 - Use diverse decision-makers
 - Consider disparate impact in layoffs
 - Release agreements

CREATING AN ANTI-RACIST WORKPLACE

- Understand the importance of being “anti-racist”
- Have leadership acknowledge white privilege and systemic racism
 - And how it affects the workforce (e.g. 2% black lawyers or 7% black engineers)
- Get educated and use reliable information
 - Understand how/why “all lives matter” and other similar statements offend
- Stop and assess before taking action
 - Or end up making it worse (i.e. the LinkedIn problem)
- But don’t wait too long
 - Silence can be interpreted as complicity
 - There are some action steps that are “no brainers”
 - Unequivocal statements of support
- Think beyond diversity to inclusivity
 - All voices should be heard, valued, and recognized
 - Facilitate difficult conversations about racial inequality



CREATING AN ANTI-RACIST WORKPLACE



- ❖ Establish an effective Diversity and Inclusion Committee
 - ❖ Include a Racial Equality task force or sub-committee
- ❖ Develop a proactive plan for increasing diversity and redressing racism with input from affected employees
 - ❖ Have measurable and achievable goals
- ❖ Take consistent and effective action on the plan
 - ❖ Don't lose momentum
- ❖ Retain an expert or consultant if needed
- ❖ Conduct implicit bias and anti-racism training
 - ❖ <https://implicit.harvard.edu/implicit/takeatest.html>
- ❖ Increase diversity hiring, training and advancement
 - ❖ Engage in internal and community outreach
 - Mentoring, scholarships and internships
- Increase diversity leadership

THANK YOU!



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