CUT AND PASTE POST
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The Future of Diversity

In a recent Wall Street Journal article, Te-Ping Chen and Lauren Weber discuss how, two years ago, Chief Diversity Officers (CDOs) were some of the "hottest hires", but are now increasingly feeling left out in the cold.

The article describes the history of diversity/equity initiatives (DEI), what has recently led to many DEI jobs being put "in the crosshairs" for layoffs, and the events which have made DEI a political football.

The article describes the challenges current and former CDO's face, including a lack of support from top management, 'push back' from employees, and the expansion of duties for CDO's. Despite studies showing that companies that are more diverse are more innovative and, in turn, more profitable, CDO's have been more vulnerable to layoffs than their human resources counterparts, and there is a decline in the number of companies recruiting to fill CDO positions.

> ***Companies that are more diverse are more innovative and, in turn, more profitable.***

According to Tina Shah Paikeday, global leader of Russell Reynold's DEI practice, "Since the Supreme Court overturned affirmative action in June, companies are anticipating spillover legal action could have an impact on them. Those that are still hiring CDOs want people who can help the board navigate the political and legal landscape of diversity work and figure out how to take defensive moves to shield them from litigation."

Read the article: https://www.wsj.com/articles/chief-diversity-officer-cdo-business-corporations-e110a82F

Professional Pointer: Don't miss GVHRA's "***Strategies for Fostering Inclusion***" presentation on August 8th. At this presentation, Mary Augustin, SHRM-SCP will discuss strategies for fostering inclusion, such as promoting a sense of belonging, valuing diverse perspectives, and providing equal opportunities for all. **Register for this FREE event here!**

AI in Employment Decisions

Artificial Intelligence (AI) and automated employment decision tools (AEDT) can be useful for employers in the hiring process. They may be used for a variety of tasks, from screening employment applications to predicting applicant or employee honesty. However, if human bias is (intentionally or unintentionally) coded into AI systems, their use comes with legal risk.

Various discrimination laws forbid an employer from using selection procedures which, while facially neutral, disproportionately exclude or

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negatively affect protected classes (e.g., race, religion, sexual orientation, disability, etc.); a phenomenon known as "disparate impact." If a selection tool has a disparate impact on any group, the employer may be liable even without an intent to discriminate. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

In May of 2023, the Equal Employment Opportunity Commission (EEOC) issued guidance concerning AI in the workplace. The guidance holds employers responsible for using an AI selection tool which has an adverse or disparate impact against a person in a protected class. This is true even if the tool was designed or administered by an outside party, such as the software developer.

Some states and localities have passed legislation to address similar issues with AI. Montana is not one of them. However, bills have been introduced, with varying levels of success, in Maryland, Washington D.C, Texas, New York City, and California. If you do business in any of these places and use or are considering the use of AI, check their laws!

Professional Pointer: If you use AI to make employment decisions, make sure your vendors are preventing implicit bias and discrimination. And, in the same manner you do for "human employees" implement a policy requiring an annual performance review of AEDT technology and AI decision-making tools.

What's Happening inside the Beltway?

In case you missed it:

Information about the new I-9 be found here.

- Child Labor Update. In late July, Senator Bob Casey (D-PA), Ranking Member Bobby Scott, and Representative Daniel Kildee (D-PA) sent a letter to the Government Accountability Office asking it to assess "the capacity of government agencies to monitor, research, and conduct enforcement of our child labor laws, and the effectiveness of current efforts to address the employment of illegal child labor." Additionally, Congressman Kildee and Congresswoman Hillary Scholten, both House Democrats representing Michigan, launched a Child Labor Prevention Task Force which will:
  - Advance legislation to fight illegal child labor, including increasing penalties for child labor violations.
  - Ensure that Congress takes steps to more urgently address illegal child labor.
  - Make sure the federal government takes strong enforcement actions to address the "supply chains of child labor".

- Introduced, but probably DOA:
  - Raise the Wage Act of 2023 - Bernie Sanders, Chair of the Senate HELP Committee and House Education and the Workforce Committee Ranking Member Bobby Scott have introduced S. 2488. which would gradually increase the minimum wage until it hits $17 per hour (five years after the effective date), after which the wage would increase "by the annual percentage increase, if any, in the median hourly wage of all employees as determined by the Bureau of Labor Statistics." The bill would also phase out the tipped minimum wage and eliminate the subminimum wage for young workers and workers with disabilities. Despite some initial support among Democrats the bill is unlikely to make it through the Senate and stands no chance in the House.
  - In late July, Democrats in the Senate and House reintroduced the Asunción Valdivia Heat Illness, Injury, and Fatality Prevention Act of 2023. It's unlikely Democrats will get the support needed to pass this bill. However, according to the latest regulatory agenda, OSHA will propose a Heat Standard in March of 2024.

U.S. Supreme Court:
Potential Employment-Related Impacts of *303 Creative LLC v. Elenis*

On the last day of its 2022-23 term, in *303 Creative LLC v. Elenis*, the Supreme Court held that forcing a self-employed person to design websites for weddings of same-sex couples would violate the First Amendment's Free Speech Clause.

Even though this was not an employment case, the decision raises serious questions for employers who provide public accommodations and have adopted related anti-discrimination policies.

In this case, Lorie Smith brought a lawsuit against the Colorado Civil Rights Commission and Colorado Attorney General. In the lawsuit, Smith sought an injunction preventing Colorado from using the Colorado Anti-Discrimination Act to require her to create websites for weddings of same-sex couples. Ms. Smith claimed that forcing her to create websites for same-sex weddings would defy her religious beliefs and compel speech from her that she did not believe. The Tenth Circuit Court of Appeal denied Smith's request for the injunction.

Smith appealed to the U.S. Supreme Court who, in a 6-3 decision, reversed the Tenth Circuit and held that forcing Smith to create websites expressing views inconsistent with her own religious beliefs would be inappropriate and would violate the Free Speech Clause of the First Amendment. However, the Court also recognized that states have a "compelling interest" in eliminating discrimination in places of public accommodation, and allowed those states to public accommodations laws to protect persons based on sexual orientation.

The Potential Impacts of *303 Creative* in the Employment Context

The Court's decision provides more questions than answers regarding the interaction between free speech protections and public accommodations laws, and raises less obvious questions related to employment:

- Some HR attorneys are concerned that *303 Creative* might increase the threat of political retaliation claims and further constrain an employer's ability to discharge or otherwise discipline an employee for denying services to certain customers.
- Because many state laws prohibit or constrain an employer from discriminating against an employee based on the employee's political or voting activities, employers could potentially face greater exposure to retaliation claims under these types of statutes. For example, if an employer threatens to discharge an employee for refusing to work on certain projects based on a First Amendment objection, the employee may try to claim that the employer's threat is motivated by the employer's opposition to the employee's political beliefs.

So, while employers may still enforce public anti-discrimination policies and may discharge employees for failing to comply with those policies, they may face additional exposure to political retaliation claims for doing so.

Professional Pointer: Between this and the Court's recent *Groff v. DeJoy* decision regarding religious accommodations at United Parcel Service, time -- and the courts -- will sort this out. For now, train your staff to evaluate whether ALL requests for accommodation (disability, religious, political, etc.,) are "reasonable". (The EEOC's Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA provides a great roadmap for this analysis.) And, continue to make sure that all adverse employment decisions are based on well documented, legitimate business reasons.

For the "*What Were They Thinking?*" File

What century is this anyway? The owners of Parris Pizza Company, where white managers regularly used racial slurs such as the N-word and engaged in other harassment of Black workers, will pay $150,000 to affected employees and will send an apology letter to all former employees. In addition, if the now-closed company opens any new companies, it is required to "institute robust anti-discrimination policies" and provide employee training on anti-discrimination laws.

According to the EEOC, as early as 2019, workers repeatedly complained to the company's owners about racial harassment, but Parris Pizza Co. took no action. Instead, one manager was given a promotion and the other was given a pay increase. In addition to the use of racial slurs and other incidents, managers mimicked the voice of a slave owner and regularly called one worker "boy," while another manager watched and laughed.

Jeffrey Burstein, regional attorney for the EEOC's New York District Office said in a statement, "We are pleased Parris Pizza has agreed to provide relief to the Black employees who had to go to work every day and endure incessant use of racial slurs."

$140K paid for bringing in 'priest' to hear workplace confessions – Following an investigation by the U. S. Department of Labor, owners of Che Garibaldi, Inc., which operates the Taqueria Garibaldi Mexican Restaurant ("Taqueria"), are paying approximately $140,000 in back wages and damages to 35 employees after trying to use a (supposed) priest to have them confess their workplace sins.

Many of Taqueria's employees were of the Catholic faith. During its investigation, the DOL learned that Taqueria suspected employee theft and brought in a supposed priest to hear the employees confessions, and that a Taqueria manager falsely told the employees that immigration issues would be raised if employees participated in the DOL's investigation.

The DOL also learned that Taqueria illegally paid managers from the employee tip pool, deprived employees of their overtime wages, threatened employees with retaliation and adverse immigration consequences for cooperating with the DOL, and fired one worker who they believed had complained to the DOL.

Taqueria agreed to pay $70,000 in back wages, $70,000 in damages and $5,000 in civil penalties "due to the willful nature of their violations." Taqueria's owners were also ordered to not retaliate in any away against any employee who asserted their rights or participated in the investigation.

Read the DOL press release.

A reminder to HR Professionals burning the candle at both ends…

How to Reduce Your Self Esteem in 8 Easy Steps