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No Good Deed Goes Unpunished: When Employers' Good Intentions Inadvertently Create Increased Risk

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Employment lawsuits typically involve allegations of an employer's wrongdoing – claims that the employer or its agents intended to and did mistreat, discriminate, or retaliate against employees. However, these "bad actor" situations are not the only ways that organizations can get into legal trouble. The three examples discussed below vividly illustrate the risks that can be created when a well-intentioned organization tries to do the right thing but does so in a way that inadvertently creates legal risk.

Affirmative Action Policies

The Supreme Court's recent decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 20-1199 (June 29, 2023) is a classic example of admirable intentions falling short of current legal requirements.

In *Harvard*, the Supreme Court considered whether the affirmative action policies of Harvard College and the University of North Carolina – which took "an applicant's race into account" – violated the Equal Protection Clause of the Fourteenth Amendment and (as a result) Title VI of the Civil Rights Act of 1964. In a 6-3 decision, the Court held that the "race-based" admission systems used by the universities were unlawful.

In describing the rationale for their affirmative action policies, the universities articulated goals that included "training future leaders, acquiring new knowledge based on diverse outlooks, promoting a robust marketplace of ideas, and preparing engaged and productive citizens." Although the Court found that these were "commendable goals," it went on to explain that "they are not sufficiently coherent for purposes of strict scrutiny" because it was "unclear how courts are supposed to measure any of these goals, or if they could, to know when they have been reached so that racial preferences can end."

The Court held that the universities' race-conscious admissions processes were unlawful because under the Court's prior decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), they: (i) did not have "sufficiently focused and measurable objectives warranting the use of race," (ii) used race as a "negative" or a "stereotype," and (iii) did not have clear durational endpoints. This unfocused view, which was premised on the belief that individuals were "in need" simply because of their race, did not pass the Court's strict scrutiny muster, and was accordingly found unconstitutional. The Court cautioned that "[m]any universities have for too long wrongly concluded that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned, but the color of their skin. This Nation's constitutional history does not tolerate that choice." The Court made clear, however, that "nothing prohibits universities from considering an applicant's discussion of *how* race affected the applicant's life, so long as that discussion is concretely tied to a quality of character or unique ability that the particular applicant can contribute to the university."

While *Harvard* arose in the context of Title VI of the Civil Rights Act of 1964 (which applies to educational institutions that receive federal funding) and the Fourteenth Amendment (which applies to government actors), and therefore does not explicitly affect private employers, many employers have begun to review and evaluate their DEI and affirmative action programs – and how they characterize and advertise these programs – in the wake of *Harvard*. As well-intentioned as such programs may be, the specter of courts extending the reasoning in *Harvard* to the workplace serves as a cautionary tale for employers. It would behoove employers to think creatively when implementing well-meaning policies designed to increase diversity to ensure that they do not create unnecessary legal risk for the organization.

Internal Investigations

When employers conduct internal investigations into allegations of workplace misconduct, the investigator, who is frequently a member of human resources or management, may be tempted to promise strict confidentiality to encourage candid dialogue. While well-intentioned, such promises cannot be kept without creating unacceptable risk for the employer.

Applying principles of agency law, courts will impute knowledge of alleged wrongdoing (such as sexual harassment or discrimination) to an employer where the investigator has supervisory authority or is charged with a duty to inform the employer. *See*, *e.g.*, *Duch v. Jakubek*, 588 F.3d 757, 763 (2d Cir. 2009); *Huston v. Procter & Gamble Paper Prod. Corp.*, 568 F.3d 100, 107–08 (3d Cir. 2009). A promise of strict confidentiality therefore runs the risk that the investigator will learn of misconduct and that knowledge will then be imputed to the employer, which can create liability if the employer fails to take corrective action in response to that information.

Rather than promising absolute confidentiality, investigators should instead assure those participating in the investigation that any information they provide will be shared on a need-to-know basis only consistent with the need to conduct a thorough investigation. Investigators should also emphasize that the employer will not tolerate any retaliation, which may alleviate concerns about confidentiality.

Human Capital Disclosures

In 2020, the U.S. Securities and Exchange Commission (SEC) adopted a new rule requiring public companies to disclose "any human capital measures or objectives" that the company focuses on in managing its business. *See* 17 C.F.R. § 229.101(c)(2)(ii). One way that companies often endeavored to satisfy this SEC requirement was by discussing their efforts to attract and retain talent in their public disclosures, but making such disclosures is not without risk if the disclosures are not sufficiently specific. A recent $35 million settlement of an enforcement action brought by the SEC against video game developer Activision Blizzard (Activision) presents a cautionary tale for employers who, with the best of intent, may disclose their efforts to attract and retain talent without sufficiently describing the issues that may negatively impact their ability to attract and retain talent.

Between 2018 and 2021, Activision identified certain risk factors relating to its workforce in its quarterly and annual public SEC filings. Among other things, Activision disclosed that the company's success depended on its ability to attract, retain, and motivate employees. The disclosures then went on to state that Activision "may have difficulties in attracting and retaining skilled personnel or may incur significant costs to do so," which "could have a negative impact on our business."

Although these disclosures referenced potential challenges in attracting and retaining employees, the SEC found them to be insufficient. Under Exchange Act Rule 13a-15(a), publicly traded companies are required to "maintain disclosure controls and procedures." According to the SEC's order, while Activision disclosed the risk factors related to its ability to attract and retain employees, it found that it lacked controls and procedures designed to collect or analyze employee complaints of workplace misconduct for disclosure purposes.

The SEC's order is notable because, as noted in a vigorous dissent, "[t]he Order nowhere claims that this disclosure was misleading, either by affirmative misstatement or by omission …" or that "workplace misconduct was in fact affecting worker retention during the relevant time period."

In short, the Activision matter is an interesting case study, as it not only reflects the intersection of securities law, corporate governance, and employment law, but it also highlights the importance of developing a multi-disciplinary approach to minimizing risk for publicly traded employers. It also highlights the importance of implementing proactive controls and procedures to detect (and therefore timely address) risk areas, including, but not limited to, the following:

- Systemic discrimination issues, including, but not limited to, pay equity and sexual harassment/#MeToo issues;
- Failures to modernize human resources policies and practices and provide related training;
- Failures to adapt to the modern workforce in order to attract and retain talent through, for example, providing remote or hybrid work arrangements;
- Failures to provide competitive compensation packages and benefits;
- Mis-designation of workers as independent contractors or exempt from overtime pay; and
- Labor-management issues.

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