

DIVERSITY

Expanding Your Definition of Diversity

Having a working diversity program is good for business. Employers benefit from a workforce whose different races and cultural backgrounds bring fresh perspectives borne of unique life experiences and viewpoints that advance problem solving and can effectuate a "yin/yang" harmony within its walls. Overall, the organization has better morale, higher productivity and is more financially viable.

Employers who make efforts to diversify their workplace often tend to limit their definition to race, gender, and national origin. Diversity becomes a murkier idea when employers are tasked with determining broader interpretations of the concept, such as appearance and physical characteristics, voice and speech impediments, and varying lifestyle choices and beliefs. Unless these traits fit the legal definition of disability (which otherwise could lead to repercussions for the failure to integrate), there may be little thought or effort dedicated to affirmatively adding diversity in these respects to the workforce.

To fully embrace the true intent and spirit of diversity is to promote an inclusive environment that accepts individuals who fall outside the bounds of community set standards. It means refocusing to recognize the talent of individuals who may not display the outward manifestation of the "successful" businessperson, the stereotype of which is relentlessly repeated in movies and television but is not a performance guarantee in reality. It means concerted attempts to put aside preconceived notions that can cloud an employer's ability to view the employee's potential capabilities and actual accomplishments.

Just as it is much more accepted today that women and racial minorities can head companies and become profit generators, the same rationale can be applied to dispel societal disparagements about physical appearance or peculiar mannerisms. Tattoos or body piercings are not a definitive sign of lesser intellect and education. Speech impediments do not correlate with memory recall or impairment. Physical unattractiveness does not correspond with limited job capacity and performance. For the reasons that a diverse workforce based on race, gender or national origin is important, declining to accept a broader definition of the concept creates missed opportunities to tap into, and benefit from, another pool of talent. More importantly, an expanded definition of diversity helps to break down assumptions that perpetuate bias, reverses the effects of rigid thinking, and teaches appreciation and value in differences.

For individuals with mannerisms or physical characteristics that qualify as a disability, employers risk violating federal, state and local laws by refusing to consider employment or promotion otherwise deserved on the merits. As to other traits that may simply distinguish an individual, federal and state law do not truly offer much legal protection to employees. Yet an employer's sincerity can be measured by the extent to which its internal policies reflect a level of sensitivity to certain appearances and preferences and by whether its practices do not result in alienating the diversity candidate.

Obesity: Obesity generally is not regarded as a disability under the Americans with Disabilities Act and the Rehabilitation Act of 1973, nor would extremely overweight individuals necessarily want to be consid-

ered disabled so as to suggest they are incapable of performing at the same job level and responsibility as their slimmer counterparts. The ADA and the Rehabilitation Act consider a person to be disabled if he or she has "a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment...." "Working" is a major life activity.

Under California's own, expanded version of the ADA (California Government Code Section 12940, et seq.) a person may be "regarded as having such an impairment" if he or she experiences an adverse reaction "because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." Thus, while successful claims brought under the ADA are uncommon, an employer still must be wary of any internal actions which treat an obese employee (or an employee with a physical disfigurement) as if he or she has a substantially limiting impairment to suggest that person is "regarded as" being impaired.

California's Fair Employment and Housing Act (California Government Code Section 12900, et seq.), provides stronger protection due to the state Legislature's passage of Assembly Bill 2222, the Prudence Kay Popnick Act, which amends FEHA's disability definition. Now, an individual who is "regarded or treated" as having a condition that "makes achievement of a major life activity more difficult" may successfully assert a discrimination claim. Additionally, the individual need only show an impairment limits, rather than substantially limits, the "major life activity." An employer who limits an employee's work activities based on the assumption that the employee's physical condition makes working more difficult could face allegations of discrimination.

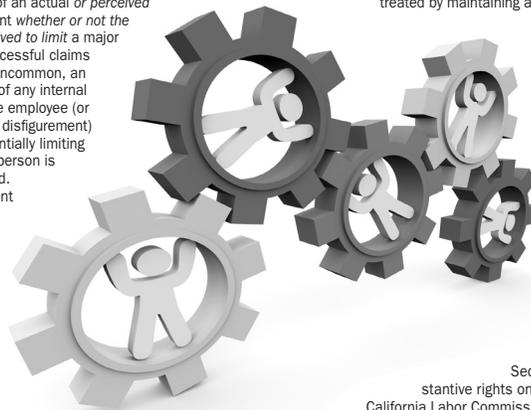
California currently does not have a specific law prohibiting "weight discrimination." However, San Francisco has a municipal ordinance that ensures accessibility to programs, services, and facilities, and Santa Cruz's municipal code includes "height, weight or physical characteristics" as protected categories.

Grooming/Appearance: California's Government Code Section 12949 generally allows an employer to enforce "reasonable workplace appearance, grooming, and dress standards." However, it must allow an employee to "appear or dress consistently with the employee's gender identity." Employers also may not impose grooming standards that do discriminate on a prohibited basis or "significantly burdens the individual in his or her employment." (California Code of Regulations Title 2, Section 7287.6(c))

The California courts have not truly provided guidance as to how employers should apply these provisions, although most federal courts allow employers to distinguish between genders in their grooming and dress codes. Moreover, an objection based solely on a personal desire to maintain a particular self-image is not likely to constitute discrimination if the policy does not place a greater burden on one group or violate any constitutionally protected right. Yet the spirit of existing federal and state law, which share anti-discriminatory objectives to prevent unlawful

employment practices based on gender, suggests that employers should apply its requirements equally to all employees in a given job category to the extent possible.

Employers still must take care that an evenly applied policy may have a discriminatory effect, however unintended, if it adversely affects a protected class or right. For example, employers who refuse to make exceptions to a "no beard" policy may be found to discriminate against men who wear beards for religious reasons or against African-American males suffering from "pseudofolliculitis barbae," a sensitive and incurable skin condition that makes it painful to shave and is best treated by maintaining a quarter inch beard.



Lifestyle: Employers may not take any adverse action against an employee for participating in "lawful conduct occurring during nonworking hours away from the employer's premises." (California Labor Code Section 96(k)) Therefore, employers should reexamine any policies that may act to invade an employee's private lifestyle such as restricting an employee's participation in protected political activity, prohibiting certain social behaviors (smoking, drinking), and dictating "acceptable bounds" of fraternization outside of the workplace.

Section 96(k) does not bestow substantive rights on the employee. Rather, it gives the California Labor Commission the authority to exercise jurisdiction over an employee's claim that he or she has been deprived of constitutionally guaranteed civil liberties. Section 96(k) has been used to find a company's non-fraternization policy between employees and their supervisors does not violate privacy rights when the policy is reasonably related to the employer's legitimate interest in avoiding conflicts of interest and potential sexual harassment claims.

The employee also must assert a constitutional right to afford protection under Section 96(k). In one California case, an employee was fired for unauthorized use of the company's e-mail system. The employee sued for wrongful termination, claiming the true reason she was fired was because of her membership in an investment group that the employer believed was an illegal pyramid scheme. Labor Code Section 98.6 prevents the discharge or discrimination of any employee or applicant for employment for conduct including that described in Section 96(k). Because the employee did not have a right protecting her against private acts implicating her employment under the First Amendment, and because she did not allege her termination was due to a government act violating the First Amendment, the court held she was not discharged for exercising a recognized constitutional right under Section 96(k).

These non-traditional characteristics of "diversity" are less likely to trigger legal issues for an employer. At the margins, however, they do present issues of diversity that could become as nettlesome as more traditional (and codified) notions of what is "diverse." But again, a fully realized diversity program is not achieved merely by avoiding legal liability for discrimination. The genuineness and strength of a diversity program may be measured by how an employer promotes and values how "diverse" its workforce actually is; the extent to which it encourages a more liberal interpretation of the concept; and whether its policies and practices reinforce, rather than contradict, its public proclamation that its diversity program is truly "diverse."



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