

TOPICS IN THE NEWS:

Affirmative Action and Workplace Violence



WYATT

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A photograph of three stacked wooden blocks. The top block is blue and has the word "DIVERSITY" written in white. The middle block is green and has the word "INCLUSION" written in white. The bottom block is red and has the word "EQUITY" written in white. The blocks are resting on a wooden base.

DIVERSITY

INCLUSION

EQUITY

Affirmative Action

In the News





Culture Wars

War on Woke

- **Attacks on DEI Programs**
 - Legislation
 - Customer Boycotts
- **Impact of Pending Supreme Court Affirmative Action Decisions to be Determined**



Mass Killings

Including Workplace Shootings

- 2022 – Second most killings in a single year since tracking began.*
- Current or former workplaces of perpetrators were the most common sites for mass shootings. **
- Mass shootings are taking place at a record pace in 2023.

*Associated Press and Northeastern University database

**The Violence Project





Anti-DEI Initiatives

Proposed or Passed in Several States

- Restrictions on subjects that can be taught in schools
- Defunding DEI programs in higher education
- Prohibiting the use of DEI policies in hiring decisions



EEO vs. DEI vs. Affirmative Action

Federal, state, and local **anti-discrimination and equal employment opportunity laws** prohibit discrimination in employment based on protected classes and require employers to provide equal employment opportunities to employees, applicants, and other covered individuals

Diversity programs are typically broader and go beyond legal requirements

Affirmative action is a policy or practice of proactively hiring, promoting, or increasing representation of certain protected classes of people who have historically been subjected to past employment discrimination





Pending Supreme Court Cases

- United States Supreme Court will rule on two cases revisiting the issue of when and whether race can be used in college admissions decisions.
- *Students for Fair Admissions v. University of North Carolina and Students for Fair Admissions v. President and Fellows of Harvard College*
- Decision could end or limit the use of affirmative action in student selection.



Students for Fair Admissions Cases

- Students for Fair Admissions sued Harvard University and the University of North Carolina (UNC) alleging that Harvard and UNC unfairly prefer black, Hispanic, and Native American applicants over white and Asian-American applicants.
- The issue is whether the Equal Protection Clause of the United States Constitution (for public schools) or Title VI of the Civil Rights Act (for private schools) prohibits consideration of race in college admissions.



Current Law

- Previously, in *Grutter v. Bollinger* and again in *Fisher v. University of Texas*, the Supreme Court held that the use of an applicant's race as one factor in an admissions policy of a public educational institution does not violate the Equal Protection Clause of the Fourteenth Amendment if:
 - the policy is narrowly tailored to the compelling interest of promoting a diverse student body, and
 - uses a holistic process to evaluate each applicant, as opposed to a quota system.
- The Supreme Court appears ready to abandon that position and prohibit the consideration of race in admissions decisions.



What Does This Mean For Employers?

- **Court's ruling could have significant ramifications for the diversity initiatives of employers.**
- **Equal Protection**
If race can't be considered in student admissions under the Equal Protection Clause, it likely can't be considered by public employers in the employment context.
- **Title VI language is similar to language used in Title VII.**
If race can't be considered in student admissions under Title VI, it is possible that it cannot be considered by private employers under Title VII.



Diversity as a Legitimate Goal?

May be more difficult for employers to enforce racial diversity as a lawful workplace objective without risking being found liable for unlawful discrimination.

Voluntary affirmative action programs designed to remedy under-representation in job groups could also be questioned (currently OK if remedial and temporary).



Diversity as a Legitimate Goal?

Some workforce diversity initiatives designed to improve diversity, like goals of hiring more women or minorities or requiring certain number of finalists from protected groups, may face scrutiny.

Diversity-focused recruitment, training, and mentoring programs designed to support diverse talent still likely permissible.





COMPLIANCE

REGULATION

GUIDELINE

STANDARD

AFFIRMATIVE ACTION?

The Office of Federal Contract Compliance Programs (OFCCP) has attempted to anticipate the issue raised by the pending cases.



OFCCP FAQs State:

"The obligations it enforces are wholly distinct from the concept of affirmative action as implemented by some post-secondary educational institutions in their admissions processes. In contrast to the affirmative action implemented by many post-secondary institutions, OFCCP does not permit the use of race to be weighed as one factor among many in an individual's application when rendering hiring, employment, or personnel decisions, as racial preferences of any kind are prohibited under the authorities administered by OFCCP."

<https://www.dol.gov/agencies/ofccp/faqs/AAFAQs#Q6>





Impact of Supreme Court's Decision?

- Court's decision could indicate that race-conscious decisions aimed at remedying historical imbalances are no longer necessary.
- Plaintiffs may use the court's reasoning to challenge voluntary workplace affirmative action programs or DEI initiatives on the ground that these programs place too much emphasis on protected class membership.
- Eighty-two corporations and businesses submitted amicus briefs in the Supreme Court supporting affirmative action and stating that a diverse educational environment benefits the economy and the workforce.



To Do List

Review existing DEI programs and look for potentially unlawful preferences or quotas.

Review written DEI training materials and descriptions of DEI programs and justify DEI efforts.

Train managers involved in hiring and promotions.

Monitor state law developments.





Workplace Violence Prevention



Overview



- What is workplace violence?
- Warning signs of violent behavior
- Practices and Policies
- Resources for employees





What Is Workplace Violence?

Workplace violence is violence, a threat of violence, or abuse directed toward a person at work or on duty. It can include:

- Bullying (abusive conduct), intimidation, or harassment.
- Verbal, written, or indirect threats.
- Aggressive or hostile acts.
- Behavior that causes another person emotional distress or creates a reasonable fear of injury.
- Physical assault or the threat of assault.





Examples of Workplace Violence

- **Domestic Violence**

Emotional, physical, or sexual abuse that spills into the workplace.

- **Stalking**

Repeated, unwanted contact that makes the employee feel afraid or distressed. This includes cyberstalking behavior.



Perpetrators of Workplace Violence

- Strangers
- Someone with a relationship with the business
- Current or former employees
- Someone who has had or has a personal relationship with a current or former employee



Types of Workplace Violence

NIOSH

Criminal intent

Customer/client

Worker-on-worker

Personal relationship, which overwhelmingly targets women





Active Shooters

- **Deadliest situations**
- **U.S. Department of Homeland Security advises: Run, hide or fight.**
 - If there is an accessible escape route, leave your belongings and get out
 - If evacuation is not possible, find a hiding place where you won't be trapped should the shooter find you, lock and blockade the door, and silence your phone
 - As a last resort and only when your life is in imminent danger, attempt to incapacitate the shooter by throwing items, improvising weapons and yelling





Can It Happen Here?

While violence in the workplace is not always preventable, employers can take steps to increase employee safety and to prepare to provide employee support should an act of violence occur.





HELP
WANTED

Conduct

Pre-Employment Screening

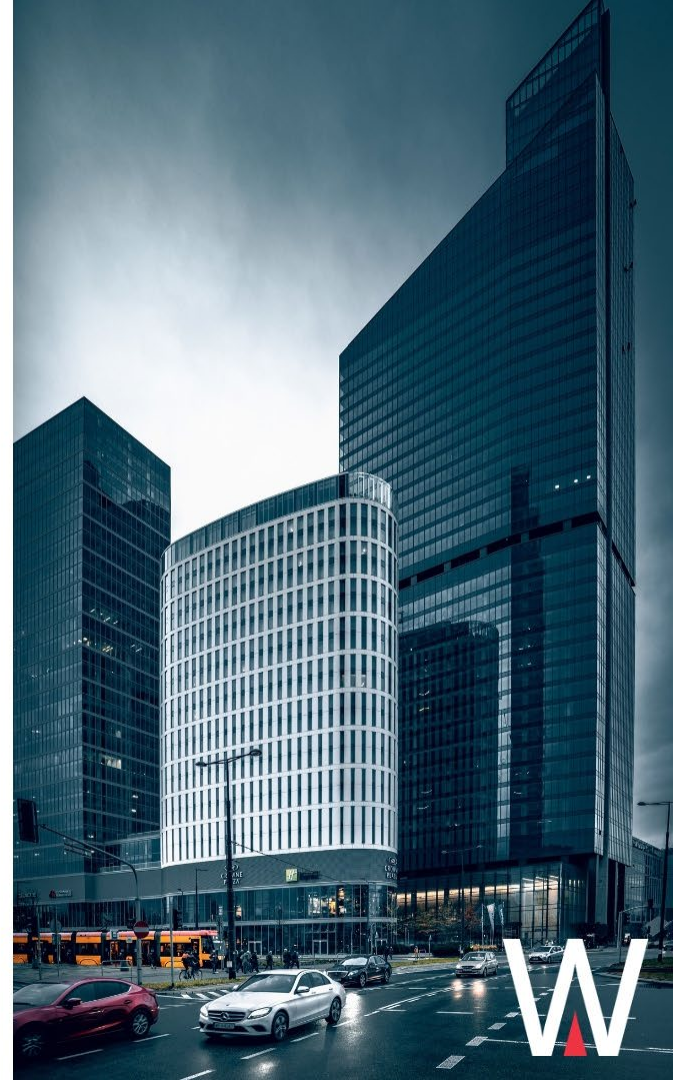
If you are involved in the hiring process:

- Check references and former employers.
- Keep an eye out for previous histories of violence or excessive performance problems.



Building Safety

- Safety technologies such as weapons detection systems, panic buttons, and cameras/video surveillance
- Improve lighting
- Points of entry – limit access
- Security
- Alarm systems
- Keyless door locks
- Lockable safe room
- Prohibit weapons and post signs



Positive Workplace Environment

Close connection
between feelings
of isolation,
resentment, or
hostility and
violence

Promote a healthy
and inclusive work
environment





DOL Recommendations

- Promote open communication between different employment levels Offer professional development opportunities
- Create family-friendly policies
- Maintain a system for employees to submit complaints and concerns
- Incorporate quality of life issues in the workday
- Discipline employees for improper conduct or poor performance in an impartial and consistent way
- Provide appropriate health insurance so employees can access healthcare in the event of a physical or mental illness





Workplace Violence Policies

- Prohibit threats or acts of violence at the workplace.
- Train employees and create an emergency action plan.
- Prohibit weapons in the workplace to the extent permitted by law.
- In Kentucky, private business owners may prohibit persons, including employees, from carrying concealed deadly weapons while on business premises.
- In Kentucky, employers cannot prohibit employees from keeping firearms in their private vehicles even when parked on employer property.
- Employers can require disclosure.



Reporting and Investigation

Train employees to report threats or actual incidents of workplace violence

Follow up on and investigate reported threats or incidents

Discipline or discharge if necessary

Involve law enforcement where appropriate



Potential Warning Signs

Federal Bureau of Investigation

- **Changes in behavior**
 - Significant changes in personal hygiene
 - Unexplained absenteeism
 - Obsessions that affect concentration and productivity
 - Depression or withdrawal
- **Changes in attitude**
 - Continual blame
 - Lowered tolerance for stress
 - Extreme dissatisfaction with some aspect of work
- **Demonstrations of violence**
 - Verbal abuse or threats
 - Physical aggression - pounding on desks, punching walls



Responding to Reports

The presence of any one warning sign does not necessarily indicate a person will engage in violent behavior.

Could indicate that someone is a victim of violence or is suffering from a physical or mental illness.

Be aware of ADA concerns.



Possible Responses

Tailor any response to situation – could include:

- Meeting with the employee privately to discuss the concerns
- Disciplining the employee according to company policies
- Referring the employee to an Employee Assistance Program or other resources
- Alerting building security



Threats of Violence

- If an employee or third-party makes a threat of violence, employers should alert any employees potentially under threat, secure their own safety and the safety of others, and contact law enforcement.
- Regardless of the response, employers should document the initial report, any actions taken in response, and any escalations in behavior.



Discharging Employees

- Avoid giving advance notice of terminations.
- If you anticipate a problem, discharge employees remotely or provide a security escort if the employee is discharged in person.
- Consider who will participate, what will be said, and where discharge will take place.
- Prohibit discharged employees from accessing the premises.
- Alert security of all terminations.



Follow Up After Termination



- Collect keys and access cards.
- Consider packing and forwarding the employee's belongings instead of having the employee collect them from the workspace in front of others.
- Be respectful of the fired employee.
- Answer follow-up questions promptly.
- Offer support. Disarm anger by listening and showing empathy.



Consequences of Workplace Violence

Negative Effects on Employees

Workplace violence can:

- Cause employees mental, physical, and financial harm.
- Make employees feel isolated and humiliated.
- Threaten employees' self-esteem and diminish productivity.
- Result in stress, depression, fear, and anxiety.



Consequences of Workplace Violence

Negative Effects on the Organization

- Reduce productivity and employee morale.
- Increase employee turnover.
- Harm business reputation.
- Cause economic losses from:
 - Lost work time and wages.
 - Medical costs.
 - Workers' compensation payments.
 - Legal and security expenses.



Employer Response to an Incident of Violence

- Employees suffering physical or mental injury may need assistance applying for short- or long-term disability.
- Accommodate time off through FMLA or other available leave.
- Counseling services – in-house or help employees access outside mental health services.
- Other possible ADA accommodations for mental health issues caused by the event.



Questions?

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