

Blog Post

The Black Lives Matter Movement and the Workplace

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The Black Lives Matter movement, protesting racism, police brutality, and the deaths of George Floyd and other Black Americans, has not only been seen and heard in streets around the world; it has found a new voice in corporate boardrooms as well. The 8-minute, 46-second video of a police officer indifferently kneeling on the neck of Floyd, an unarmed Black man, as he pleaded “I can’t breathe” has prompted a wave of statements from CEOs and business leaders expressing solidarity and a commitment to address the problem of systemic racism. But how?

One thing is clear: companies should acknowledge what is happening in this tumultuous time. Failing to do so may be viewed as complicit by employees and clients alike. But the acknowledgment of support is not enough if the company’s deeds do not match its words. Beyond condemning racism and police brutality, what might an employer do? It is confusing to know how to respond given the issues and varying industries, but the confusion should not lead to paralysis. Here is a sampling of what companies around the country are doing:

1) Speak Out and Address

The sheer number of corporate statements following Floyd’s death may indicate a turning point in corporate culture. With the rising demand for conscious capitalism, whether and how a company

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responds makes a difference both to the company's workforce and to its customer base. Good corporate statements acknowledge the problem, express solidarity with the Black community, and commit to take concrete steps to do more.

Yet, with employees from all kinds of backgrounds, not everyone will share the same views and opinions. Some employees may disapprove of the BLM movement or simply be oblivious to the underlying issues. What happens when an employee responds to Black colleague's remark that "Black Lives Matter" with "All Lives Matter"? On the surface, the phrase "All Lives Matter" is true, and seems well intentioned. However, as a rebuttal to the phrase "Black Lives Matter," it acts to diminish and suppress the voice of Black people challenging systemic racism, serves to further defend the current state of inequality, and demonstrates extreme insensitivity and a fundamental lack of appreciation for the Black worker's suffering.

Employers should acknowledge that comments diminishing the Black experience can create an antagonistic work environment or even a culture of silence where victims of discrimination or harassment may choose to stay silent for fear of retaliation or management inaction. Ultimately, employers have a duty to eliminate discrimination in the workplace, including the duty to identify and investigate potentially discriminatory behavior. Now is a particularly good time to take a close look at the company's policies prohibiting harassment and discrimination. Do they go far enough? Do they prohibit so-called "gateway conduct"—conduct, which by itself may not rise to the level of harassment, but if not stopped can lead to it? Does the company's harassment training include a module on bystander intervention, which can provide employees with specific strategies to be an ally and stop such conduct? If not, maybe it's time for an update.

2) Create Space, Listen, and Learn

Employers should make space for discussion and find ways to give people of color a voice in the workplace. Many companies have hosted town halls with their Black workers or a mix of workers, guest speakers, and experts. Companies going this route should allow people of color from different levels in the company volunteer to talk about their work and life experiences of being part of underrepresented groups in America. Other companies may prefer to avoid the town hall concept in favor of encouraging small groups or individuals to have open dialogues. Listen to what your employees need.

It is also important to understand that the Black community may be feeling overwhelmed at this time. The role of dismantling and addressing systemic racism must not be placed solely on Black employees. Now is the time to take responsibility for the education of organization leaders on racial issues. Many companies have circulated lists of books to read, films to watch, and TED Talks to listen to, to help employees understand.

For example, the American Bar Association (ABA) Labor and Employment Section is currently in the midst of the “21 Day Racial Equity Habit Building Challenge.” Participants are invited to complete a 15-30 minute daily assignment from a curated list of articles, videos, audio clips, and exercises addressing racial inequity, which has been adopted by companies outside of the ABA. Other companies are urging reflection through storytelling. For example, one media giant CEO suggested his staff read four stories with different perspectives on racism, including Bobby Kennedy’s speech the night of Martin Luther King Jr.’s assassination and “Maintaining Professionalism in the Age of Black Death Is...A Lot,” an article by Shenequa Golding.

Remember, while Black staff members may have specific suggestions for how to expand the perspectives of their colleagues and how to improve the workplace, companies should extend specific

support to Black workers, as well as provide a space for listening and learning.

3) Walk the Talk

Employers should identify and implement concrete steps to address and fix inequities, and endeavor to create diverse and inclusive workplaces by establishing programs and continually assessing and reworking them to reach their goals. Diversity initiatives come in all shapes and sizes.

For example, over the last decade, many businesses adopted a version of the “Rooney Rule,” a practice started in the NFL to increase the opportunities for minorities to hold coaching and management positions by requiring that teams interview at least one non-white candidate for open positions. Businesses adopting these initiatives often require at least one female and one non-white candidate to be considered among the candidates for every open leadership position.

In something of a spinoff, earlier this year the City of New York adopted *Boardroom Accountability Project 3.0*, which calls on boards of directors to adopt a policy requiring the consideration of both women and people of color for open board seats and CEO appointments. Research suggests a positive correlation between board diversity and performance, and the project seeks to change the status quo of mostly homogeneous boards by broadening the potential pool of candidates.

Although the Rooney Rule and related initiatives were a good first step, there is still much work that needs to be done in this space, and companies are encouraged to try other approaches as well. The pursuit of race equity is a process. A company should be intentional in its efforts and invite its employees of color to participate in identifying and evaluating strategies for creating systemic change, from creating a workspace where people of color

can bring their full selves to work to creating a more diverse leadership team.

Depending on the workforce, pathways to success for people of color include ensuring equitable assignments, implementing a blind performance review process, assigning strong mentors and sponsors, or conducting pay audits that look not only at gender but also race.

4) Encourage Participation in Racial Justice Initiatives

In an effort to bring about change, many companies have instituted racial justice initiatives or encouraged employees to participate in such initiatives. For example, Google has committed to spending millions on racial equity initiatives with a focus on financing Black-owned business and supporting Black entrepreneurs.

Still other companies have joined, and encouraged participation in, some of the dozens of existing organizations involved in such efforts.

The Advancement Project is a justice action group that works in partnership with local communities, using law, public policy, and strategic communications to advance universal opportunity, equity, and access to people of color. Race Forward, founded in 1981, brings systemic analysis and approach to engage community, government, and other institutions to dismantle structural racial inequity. Color of Change is a racial justice organization that works to bring about positive political and social change for Black Americans. Companies should also consider local or regional organizations in their areas.

5) Beware of Off-Duty Conduct Laws

Employers must be aware that not all employees will agree with the position the company chooses to take. Some employers have terminated employees for participating in protests; others have terminated employees for making racist comments on personal

social media accounts. Is it legal to terminate employees for engaging in political activity?

In general, a non-union private sector employer can lawfully terminate an at-will employee for any reason or no reason, as long as it is not an unlawful reason. An unlawful reason would include a termination based on race, color, national origin, religion, sex, age, disability, genetic information, or other category protected under federal or state law. While many people mistakenly believe that the First Amendment of the Constitution protects them from discrimination based on their politics, it does not prohibit employers from taking action against private sector employees for their political beliefs. With limited exceptions, the Constitution's guarantee of "freedom of speech" applies to government action and does not restrict what non-governmental employers can do.

However, some states do offer some protection for off-duty activities such as activist involvement, including California, Colorado, North Dakota, and New York. For example, California prohibits employers from making job decisions based on an employee's lawful off-duty political activities. But the California law does not prohibit employer action in response to political views or activity when that response is based on pragmatic concerns, such as employee performance or violation of company policies. In the context of the current movement, a California employer cannot discipline an employee who participates in a BLM protest because the politics of the protests contradict the political values of the employer, but it can discipline an employee for violating an attendance policy if he or she fails to report to work for a scheduled shift to participate in a BLM protest.

Still, employers should carefully consider the application of disciplinary actions under their policies, as the failure to enforce such policies uniformly may give rise to a claim of unlawful discrimination. For example, if a white employee

violates the same policy for the same reason but does not receive the same discipline, the Black employee may claim his or her discipline was pretext for discrimination.

Regardless of the laws in each state, employers should encourage a workplace culture of respect and support for Black workers. For guidance with these or other workplace issues, contact your Akerman attorney.

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