



Human and Civil Rights Association of New Jersey

*The Changing Dynamics and Interrelationships of
EEO and HR in both the Private and Public Sectors*

*Aligning Culture & Compliance • Organizational
Culture • Social Media • Successes & Failures • Transgender-Related Issues*

Thursday, June 23, 2016
The College of New Jersey—Ewing, NJ

Q&A SESSION

QUESTION: *What is the difference between affirmative action and diversity?*

ANSWER: *EEO (equal employment opportunity) is the Law, affirmative action is steps taken to comply with the law, and diversity is promoting the law as well as the result of successful affirmative action or legal compliance.*

- **Affirmative action**
 - Steps to obtain and retain a diverse workforce and/or to remedy past discrimination.
 - Usually a plan to determine the existence of diversity in the workforce and how to retain it or how to obtain diversity in needed areas, as well as ensuring working relationships in a diverse environment.
 - Affirmative Action is known as **employment equity** in Canada, **reservation** in India and Nepal, and **positive discrimination** in the UK. [www.wikipedia.org]
- **Diversity**
 - Opening the doors of all Americans by enforcing the law.
 - Obtaining and managing a diverse workforce.
 - Equal employment is a roadmap to diversity.
 - Diversity is more than just a politically correct word that people toss around. It's about inclusiveness. It's also about examining the barriers that keep some people out and allow others in – and diversity affects your bottom line. [https://www.eeoc.gov/eeoc/initiatives/lead/presentation_usda.cfm]

Resources – Affirmative Action

Executive Order 11246, as amended, prohibits job discrimination on the basis of race, color, religion, sex or national origin, and requires **affirmative action** to ensure equality of opportunity in all aspects of employment. [www.dol.gov/ofccp/regs/statues/eo11246.htm]

Since 1965, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has been committed to ensuring that Government contractors comply with the equal employment opportunity (EE) and the affirmative action provisions of their contracts. [<https://www.dol.gov/ofccp/regs/compliance/fs11246.htm>]

Federal contractors will take affirmative action to ensure that applicants are employed. [www.dol.gov/ofccp/regs/compliance/fs11246.htm]

The Civil Rights Act of 1964. Enforcement Provisions – Sec. 2000e-5 [Section 706] (g) injunctions – appropriate affirmative action...” the court may enjoin...”

If a respondent has been found to have intentionally engaged in an

Unlawful employment practice charged in a complaint, “the court

May... order such affirmative action as may be appropriate...”

[www.eeoc.gov. In the Search Box, type “title vii.”]

EEOC Milestones: 1979

In *United Steel Workers of America v. Weber*, the Supreme Court holds that private sector employers and unions may lawfully implement voluntary affirmative action plans to remedy past discrimination.

EEOC Milestones: 1987

In *Johnson v. Transportation Agency, Santa Clara County*, the Supreme Court explains the requirements for a lawful voluntary affirmative action plan.

Resources – Diversity

OFCCP Brochure – OFCCP Protecting Workers. Promoting Diversity. Enforcing the Law. Since 1965. [www.dol.gov/ofccp/]

EEOC Lead Initiative – Presentation at USDA October 3, 2007, paragraph “Embrace Diversity.” [www.eeoc.gov]

Diversity. Sociology, politics and law and Business. [www.wikipedia.org – search Diversity.]

QUESTION: *What are some of the major employer and employee social media lawsuit risks?*

ANSWER: *Below are just a few.*

- ***Social media laws by state: Rules employers need to know.*** Seyfarth Shaw LLP created a social media guide that HR Morning believes is so good, they share it on their website. The guide is called “Social Media Privacy Legislation Desktop Reference: What Employers Need to Know” and can be accessed at www.hrmorning.com.
- ***Social Media and The Law*** by BG Bowman Gilfillan PowerPoint presentation also available on HCRA website at <http://hcra.homestead.com>. BG Bowman Gilfillan shares that there is no current legislation dealing explicitly with Social Media. One only needs to look to other statutes and to Common Law to determine Social Media Law – The Constitution, Employment Laws, Consumer Protection, Intellectual Property, and Case Law.
- ***Top 10 Legal Issues in Social Media*** by Neal & McDevitt. Electronic discovery, issue 5, advises *Today, “tweets” on Twitter, status postings in Facebook, and discussion forum postings on LinkedIn are all discoverable information to the same extent as emails and text messages.* [www.nealmcdevitt.com] While this may be useful for internal and external workplace investigations, it may not fare well for the employer or employee.
- ***EEOC Lawsuits/Sanctions – Social media is influencing discrimination cases says EEOC.***
 - 101 EEOC v Simply Storage Mgmt., LLC, 270 F.R.D430 (S.D. Ind. 2010) (requiring all information from plaintiffs’ social networking profiles and postings related to the plaintiffs’ general emotions, feelings, and mental states to be produced in discovery where plaintiffs allege severe emotional trauma against their employer)...
 - EEOC files suit against two employers for use of criminal background checks. BMW fired and denied hire to class of employees who worked successfully for years [under their previous contractor for BMW’s blanket exclusion]; Dollar General disproportionately excluded African Americans from hire.
 - EEOC Sanctioned for Social Media Delays in HoneyBaked Suit. [Law360, New York (February 28, 2013, 1:36 PM ET)]. A federal judge in Colorado sanctioned EEOC for delaying the discovery of text messages and social media account information from a group of female HoneyBaked Ham Co. employees who allege they were sexually harassed. The case is EEOC v. The Original HoneyBaked Ham Co. of Georgia Inc., case number 1:11-cv-02560 in the U.S. District Court for the District of Colorado.
- ***Social Media and Employment Law Summary of Key Cases and Legal Issues.*** Heather A. Morgan and Felicia A. Davis, Paul Hastings LLP, March 2013. Includes EEOC lawsuits. www.paulhastings.com.