

# Insight

IN-DEPTH DISCUSSION

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## Addressing Post-Election Tensions in the Workplace

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As the extreme rhetoric of the 2016 presidential campaign slowly wanes, the divisions it exposed remain raw. Many Americans celebrate the election of President-elect Trump, while many others continue to express concern about both his substantive policies and the tone he set during his campaign. Many fear that his election has encouraged, or at least failed to discourage, an environment unfriendly to women, minorities, and immigrants.<sup>1</sup> Amid this uncertainty, the calls for healing and unity come from all sides. In his 60 Minutes interview earlier this week, President-elect Trump instructed potential harassers or vandals to “stop it”—that is, to stop any further intimidation of minorities, as he hopes to bring the country together.<sup>2</sup>

If they have not already, employers will likely see these tensions play out in the workplace. Employers may be forced to address arguments among employees with different political opinions, conflicts with clients or vendors, or perhaps an increase in complaints of discrimination or harassment. Without question, the stakes are high for employers tackling these charged situations.

As a practical matter, employers normally strive to maintain civility in the workplace because it is good for morale and good for business. At the very least, political talk can become a major distraction, pulling employees away from the work at hand. Heated political disagreements can easily alienate employees who need to work together, stifling productivity and innovation. Arguments based on the election results or the ensuing protests may increase employee anxiety or anger, leading to interpersonal

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1 An uptick in reports of incidents of harassment and intimidation has been observed, particularly in schools and public places. See, e.g., Caitlin Dickerson, *Reports of Bias-Based Attacks on Rise After Presidential Vote*, N.Y. Times, Nov. 12, 2016, at A21.

2 Mr. Trump's wife, Melania, echoed that sentiment, and she intends to devote her time in the White House to curbing bullying on social media. A script of the 60 Minutes interview with the President-elect and his family is available at: <http://www.cbsnews.com/news/60-minutes-donald-trump-family-melania-ivanka-lesley-stahl/>.

conflicts, violent outbursts, absenteeism, or turnover. Such disruptions may also damage client services or relations, particularly if clients are drawn into the controversy. While it is impossible to guarantee cordiality, employers may find it is in their best interests to neutrally address “the elephant in the room,” rather than let disharmony fester or undermine operations.

And beyond the commonsense notion that “it is nice to be nice,” ongoing legal obligations provide another reason that employers may want to foster non-hostile working environments. The election may have stirred up emotions for many concerning the roles of women, minorities, and immigrants in American society—but the law is still the law. Employers remain subject to fair employment practices laws, and President-elect Trump’s inauguration will not alter those legal mandates. The federal equal opportunity statutes (Title VII of the Civil Rights Act, the Americans with Disabilities Act, Pregnancy Discrimination Act, Equal Pay Act, and the Age Discrimination in Employment Act), and the U.S. Constitution remain unchanged. Even if the Equal Employment Opportunity Commission under the Trump Administration scales back its enforcement efforts, employers must comply with these laws as usual.<sup>3</sup>

Employers must continue to abide by state and local employment laws, some of which offer broader protections than their federal counterparts. For example, Title VII does not explicitly prohibit discrimination on the basis of sexual orientation or gender identity—but laws in twenty states do.<sup>4</sup> Over 200 cities and counties also include gender identity as a protected class in municipal ordinances.<sup>5</sup> These laws carry full force and effect, regardless of the election’s outcome. Employers with operations in more progressive jurisdictions may see an increase in employee protections at the local level.

Given the legal and practical importance of avoiding discrimination in the workplace, employers should consider being proactive. Employers may want to assess their existing fair employment policies and procedures, and any diversity initiatives, updating them as needed. Besides measuring the sufficiency of anti-discrimination and related workplace policies, employers might wish to schedule a brief meeting or other training to refresh employees on those expectations and protocols.<sup>6</sup> Depending on the organization, perhaps a communication from leadership would suffice to reiterate these principles and to emphasize why they matter to the employer.<sup>7</sup>

Employers might also consider implementing, or scrutinizing, social media policies. Social media presents a realm where employees can express strong opinions, which employers may not want attributed to

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- <sup>3</sup> President-elect Trump did not campaign on promises to amend the above-noted statutes, although it is expected that he will rescind executive orders affecting federal contractor employers and will not encourage federal agencies to heavily regulate. Littler previously published a thorough, initial assessment of what employers can expect from the Trump Administration. Michael J. Lotito et al., *With the Election (Mercifully) Behind Us, What Will a Trump Administration Mean for Employers?*, Littler Report (Nov. 2016), <http://www.littler.com/publication-press/publication/election-mercifully-behind-us-what-will-trump-administration-mean>.
- <sup>4</sup> Am. Civil Liberties Union, *Non-Discrimination Laws: State by State Information–Map*, <https://www.aclu.org/map/non-discrimination-laws-state-state-information-map> (last visited Nov. 14, 2016). The EEOC has taken the position that discrimination on these bases is actionable under Title VII, and that question is winding its way through the courts.
- <sup>5</sup> Human Rights Campaign, *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity*, <http://www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender> (last visited Nov. 14, 2016) (identifying municipalities from Anchorage, Alaska to Orlando, Florida as protecting workers from discrimination on the basis of gender identity).
- <sup>6</sup> Relatedly, earlier this year the EEOC issued a report detailing its recommendations for workplace harassment training. Kevin O’Neill et al., *Taking Workplace Training to the Next Level: EEOC Task Force Recommends Live, Interactive Harassment Prevention Training*, Littler Insight (June 29, 2016), <http://www.littler.com/publication-press/publication/taking-workplace-training-next-level-eec-task-force-recommends-live>.
- <sup>7</sup> Employers, schools, and municipalities nationwide have made announcements, or sent emails, reaffirming their commitments to equality and inclusion. Officials in Seattle and Minneapolis, for example, have issued statements condemning discrimination and vowing to promote public safety and tolerance. The mayor of Chicago promised that the city would continue to be a “sanctuary city” for immigrants, where city officials do not inquire about immigration status when providing services. Richard Gonzales, Mayor Rahm Emanuel: ‘Chicago Always Will Be A Sanctuary City’, NPR.org, <http://www.npr.org/sections/thetwo-way/2016/11/14/502066703/mayor-rahm-emanuel-chicago-always-will-be-a-sanctuary-city> (last visited Nov. 16, 2016). See also Heidi Stevens, *Why Evanston Superintendent’s Post-election Morning Announcement Went Viral*, Chicago Tribune, <http://www.chicagotribune.com/lifestyles/stevens/ct-evanston-superintendent-morning-announcement-balancing-1114-20161114-column.html> (last visited Nov. 14, 2016) (asking students to “[r]edouble [their] support for one another” and to “define [their] own community” despite “what is going on in the larger world around us”).

their organizations. Employers might explore or reevaluate policies concerning issues such as: employee posting while on company time or equipment, improper use of corporate logos, or online harassment or discrimination. Such policies can be complicated, because they cannot unlawfully restrict employee speech that constitutes protected activity under Section 7 of the National Labor Relations Act.<sup>8</sup> Employers are encouraged to consult counsel as they weigh the utility and complexity of social media rules.

Going forward, employers that receive internal complaints of alleged discrimination or retaliation should simply follow their usual procedures. Employers should not deviate from their normal investigatory process if the complaint appears to stem from a political disagreement. Managers may be tempted to downplay the alleged misconduct as a mere misunderstanding, or the complaint as an overreaction, but such an approach could raise concerns. As always, employers should take seriously all allegations of unlawful conduct and undertake appropriate investigations. Investigations should be consistent, timely, thorough, fully compliant with employer policies, and well-documented.<sup>9</sup> Even if employers anticipate no complaints based on the continuing political and social debate, they might want to seize this opportunity to revisit and optimize internal investigation policies and techniques.

The divisive climate in the larger world surely has created challenges for employers in maintaining civil workplaces. The current discord will not be easily or quickly resolved. But these challenges offer employers a chance to reinforce their anti-discrimination policies, recommit to a corporate culture or message, and reemphasize the need for focus and teamwork.

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8 See Ilyse W. Schuman & William E. Trachman, *Election 2016: Political Speech and Activity in the Workplace*, Littler Insight (Sept. 29, 2016), <http://www.littler.com/publication-press/publication/election-2016-political-speech-and-activity-workplace>; Philip L. Gordon & Kwabena A. Appenteng, *NLRB Ruling in Social Media Case Provides Useful Guidance for Employers*, Littler Insight (Aug. 29, 2016), <http://www.littler.com/publication-press/publication/nlrp-ruling-social-media-case-provides-useful-guidance-employers>.

9 Littler shared general guidance on internal EEO investigations in a podcast earlier this year. Katherine C. Franklin & Kevin P. O'Neill, *Conducting Internal Workplace Investigations—Are You Prepared?*, Littler Podcast (Sept. 6, 2016), <http://www.littler.com/publication-press/publication/conducting-internal-workplace-investigations-are-you-prepared>.