Legal Traps Associated with Affinity Groups

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Introduction

Affinity groups are useful tools for employers seeking to attract and retain a diverse workforce.[1] But before diving head first, employers must be aware of the pitfalls to be avoided.

An affinity group is an association of people organized to advance the interests of a specific demographic.[2] For example, employees interested in promoting lesbian, gay, bisexual, transgender, queer or questioning, intersex, and asexual or allied (LGBTQIA) interests can unite

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1. Stacy L. Hawkins, *The Long Arc of Diversity Bends Towards Equality: Deconstructing the Progressive Critique of Workplace Diversity Efforts*, 17 U. Md. L.J. Race, Religion, Gender & Class 61, 74 (2016). Many employers also promote the availability of affinity groups in recruiting employees. *See, e.g.*, *MetLife Strengthens Affinity and Specialty Markets Distribution Group*, BusinessWire (Feb. 23, 2009), https://www.businesswire.com/news/home/20090223005932/en/MetLife-Strengthens-Affinity-Specialty-Markets-Distribution-Group; *Affinity Groups*, Yale U., https://your.yale.edu/community/diversity-inclusion/affinity-groups (last visited Mar. 1, 2018).

2. *See Affinity Group*, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/affinity%20group (last visited Aug. 23, 2018); *see also* Moranski v. Gen. Motors Corp., 433 F.3d 537, 538 (7th Cir. 2005) ("Affinity Groups are typically created around an aspect of common social identity that influences how others see them . . . ." (internal quotations omitted)).

and form an affinity group that promotes LGBTQIA interests in their workplace. The group might organize events or programs in the workplace such as celebratory luncheons, training sessions (e.g., implicit bias training), or meetings; or engage in other activities that advance their interests or give them a forum to discuss issues important to them.

Many employers have established programs permitting and encouraging employees to form affinity groups.[3] Fostering affinity groups may attract more diverse employees, create a better work environment for such employees, and signal to customers and potential customers that the employer is progressive and inclusive.[4]

As a part of such a program, an employer might allow groups to meet on its premises and use its facilities to hold discussions, meetings, or events.[5] An employer might even provide monetary support for approved groups.[6] Such support could include paid time-off to attend group meetings; provision of, or reimbursement for, meeting refreshments; and sponsorship of events.

Because affinity groups are often based on protected characteristics such as race, sex, age, or disability, employers must proceed with caution. Dealing with affinity groups brings an inherent risk of violating laws that prohibit discrimination on the basis of protected characteristics.[7] The case law addressing how anti-discrimination laws affect affinity groups is sparse, potentially exposing employers to unforeseen and unpredictable liability.

This Article addresses employers' legal hazards in regulating affinity groups and their members. Part I identifies how treating affinity groups and their members disparately from non-member employees can create legal risks for employers. Part II highlights the types of discrimination that affinity groups themselves may cause and potential employer liability for that discrimination. Part III explores risks that arise when employees' protected activity and speech rights intersect with employers' regulation of affinity-group activity.

3. *See* Hawkins, *supra* note 1, at 74.

4. *Id*.

5. *See* PRACTICAL LAW LABOR & EMPLOYMENT, AFFINITY GROUPS IN THE WORKPLACE, WestlawNext Practical Law Practice Note w-002-2144, https://us.practicallaw.thomsonreuters.com/w-002-2144 (last visited Aug. 23, 2018) [hereinafter AFFINITY GROUPS].

6. *See id.*

7. Even if no formal affinity groups exist in a workplace, decisions concerning groups of employees who promote common interests can create legal risk for employers.

I. The Risks of Unequal Treatment

A. Unequal Treatment of a Group as a Whole

Deciding which affinity groups will be officially sanctioned and which will be denied affinity-group status is a dangerous but necessary undertaking, fraught with legal risk. An employer that grants a group of deaf employees affinity-group status but rejects a group of diabetic employees could be, depending on the facts, liable for unlawful discrimination. Articulating and following a process to treat affinity groups equally will greatly reduce this risk.[8]

General Motors (GM) instituted an affinity-group program in 1999 that made company resources available to groups it officially recognized.[9] GM sanctioned nine affinity groups: "People with Disabilities, the General Motors African Ancestry Network, GM Plus (for gay and lesbian persons), the North American Women's Advisory Council, the GM Hispanic Initiative Team, the GM Asian Indian Affinity Group, the GM Chinese Affinity Group, the GM Mid-East/South-East Asian Affinity Group, and the Veterans Affinity Group."[10] GM required that membership in a group be voluntary and open to all current salaried full-time employees sharing a group's goals.[11] In 2002, an employee submitted an application requesting that GM recognize the "Christian Employee Network" as an affinity group.[12] GM denied the request. The employee sued, claiming unlawful religious discrimination.[13] The Seventh Circuit rejected the claim because GM had a policy prohibiting any affinity group promoting or advocating a religious position.[14] The court found that GM's affinity-group program treated all groups with a religious position equally by rejecting them all.[15] The claim of unlawful discrimination failed.[16] If GM did not have a written policy, however, the outcome might have been different.[17]

B. Unequal Treatment of Individual Group Members

Treating one affinity-group member less favorably than others can also expose employers to liability for unlawful discrimination. In a First Circuit case,[18] a customer service worker claimed that the employer discriminated against her because of her bisexuality in violation of the

8. *See* AFFINITY GROUPS, *supra* note 5.
9. Moranski v. Gen. Motors Corp., 433 F.3d 537, 538 (7th Cir. 2005).
10. *Id.* at 539.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 540.
15. *Id.* at 541–42 (affirming the district court's grant of summary judgment).
16. *Id.* at 542.
17. *Id.* at 541.
18. Flood v. Bank of America Corp., 780 F.3d 1 (1st Cir. 2015).

Maine Human Rights Act.[19] She alleged that other customer service workers were allowed to take breaks to attend affinity-group meetings, but that she was not allowed to attend meetings of the employer's Lesbian, Gay, Bisexual, and Transgender affinity group.[20] The First Circuit found that the fact that the plaintiff was not allowed "to take time away from the phone to attend [Lesbian, Gay, Bisexual, and Transgender] affinity-group meetings, even though other employees were allowed to attend similar types of meetings" was a relevant factor in proving existence of a hostile work environment.[21]

II. The Risk of Discrimination by the Affinity Group Itself

Unlike employers, affinity groups are unlikely to have access to legal counsel or human resources professionals to educate them about anti-discrimination laws. The issue is whether this duty then falls to the employer. In *Sinio v. McDonald's Corp.*,[22] all of the African-American employees in the employer's corporate Real Estate Franchise (REF) account group were members of an African-American networking organization "designed to help African-American employees achieve promotions."[23] An Asian-American employee in the REF group sued the employer, alleging that it violated Title VII of the Civil Rights Act of 1964[24] when members of the networking group received better treatment from African-American managers than nonmembers.[25] The claim survived summary judgment.[26]

Focusing on a particular demographic does not mean an affinity group can discriminate in accepting members.[27] This is not always obvious to affinity groups. This lack of understanding by employer-sanctioned affinity groups could expose the employer to liability for the group's unlawful discrimination.[28]

Sanctioned affinity groups might also engage in unlawful discrimination by promoting discrimination against others, again exposing employers to liability.[29] For example, an employer might endorse an affinity group created to support single fathers. In practice, however, the group might promote discrimination against divorced women.

19. Maine Human Rights Act, ME. REV. STAT. ANN. tit. 5, § 4572(1)(A) (2018); *see also Flood*, 780 F.3d at 8.

20. *Flood*, 780 F.3d at 5.

21. *Id.* at 12–13 (vacating the district court's grant of summary judgment to employer as to employee's Maine Human Rights Act claim and remanding).

22. Sinio v. McDonald's Corp., No. 04 C 4161, 2007 WL 869553 (N.D. Ill. Mar. 19, 2007).

23. *Id.* at *1.

24. 42 U.S.C. §§ 2000e–2000e-17 (2012).

25. *Sinio*, 2007 WL 869553, at *16.

26. *Id.* at *1.

27. AFFINITY GROUPS, *supra* note 5.

28. *See id.*

29. *Id*.

Perhaps, at group meetings, members regularly verbally bash their ex-wives. If a supervisor belonging to the single fathers' affinity group takes an adverse employment action against a woman he knows to be divorced, the employer could find itself liable for unlawful discrimination on the basis of sex or marital status.[30] Likewise, if in-group rhetoric escapes the single fathers' group meetings and enters the broader workplace, the employer could be liable for creating a hostile work environment.[31]

III. Potential Employer Violations for Interference with Protected Rights Under the National Labor Relations Act and Other Laws

Along with the growing popularity of affinity groups created to attract and retain diverse talent and project progressivity, employers are increasingly involved in regulating the conduct of workers while off-duty and off the premises.[32] Specifically, many employers have disciplined employees for participating in controversial affinity groups. For example, several employers in 2017 faced public pressure to discharge employees photographed with torches at the Unite the Right rally in Charlottesville, Virginia.[33] Disciplining employees for participating in affinity-group activities, however, can be unlawful depending on the circumstances.

Disciplining employees for certain affinity-group activity can violate the National Labor Relations Act (NLRA). Section 7 of the NLRA (which applies to unionized and non-unionized private sector employers) makes it unlawful for employers to prevent employees from joining together to advance their interests or engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[34] Thus, if affinity-group activity is a discussion or protest of working conditions or terms of employment, disciplining employees for participating might violate Section 7. For example, the NLRA likely

30. *Id.* ("Like any other employment action, decisions made by employers regarding affinity groups are susceptible to disparate treatment claims by employees who claim they were treated differently based on membership in a protected class.").

31. *See id*. ("Employers may also face harassment or hostile work environment claims based on conduct or comments made in the context of affinity groups, particularly because affinity-group discussions often involve sensitive topics.").

32. *See* Coker v. Whittington, 169 F. Supp. 3d 677 (W.D. La. 2016) (regulating off-duty "immoral" conduct); Bibolet v. Emp't Dep't., 407 P.3d 831 (Or. App. 2017) (regulating off-duty drug use); *see also* Lisa Nagele-Piazza, *Can Employees Be Fired for Off-Duty Conduct?*, Soc'y for Hum. Resource Mgmt. (Oct. 24, 2017), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/can-employees-be-fired-for-off-duty-conduct.aspx (discussing employer regulations of social media, moonlighting, alcohol and drug use).

33. Rebecca Greenfield, *Can You Fire Someone for Being a White Supremacist?*, Bloomberg (Aug. 21, 2017), https://www.bloomberg.com/news/articles/2017-08-21/can-you-fire-someone-for-being-a-white-supremacist.

34. 29 U.S.C. § 157 (2012).

covers non-unionized fast-food workers participating in "Fight for Fifteen" demonstrations because they are advocating for higher wages and better working conditions.[35] The NLRA does not require that worker advocacy be limited to working conditions at one's own workplace in order to constitute protected concerted activity.[36] Accordingly, employers must consider the group's objectives before disciplining or taking adverse action against employees for group activities whether inside or outside the workplace.

The National Labor Relations Board (NLRB) has held that an employer presumptively may not prohibit employees from using the company's electronic systems, such as e-mail, to send statutorily protected communications during nonworking time.[37] An employer can rebut that presumption if special circumstances make its restrictions necessary to maintain production and discipline.[38] In *Purple Communications*, the NLRB held that the employer's policies restricting employee use of Internet, voicemail, and e-mail systems to engage in activity or communication with non-employer-affiliated organizations or persons and to send personal e-mails were presumptively overbroad and remanded to the administrative law judge to determine if special circumstances justify any of the restrictions.[39] The Board determined that to impose restrictions on business e-mail use, employers "must demonstrate the connection between the interest it asserts and the restriction."[40] Mere assertion of an interest theoretically supporting a restriction will not suffice.[41]

Further, before imposing discipline or taking adverse action, an employer should consider whether the employee's participation in an affinity group affects the employer's reputation. If the employee is not high-ranking within the company, participates in activities only outside of work, and the participation causes no workplace disruption, adverse action against the employee might not be advisable even if the employer finds the participation distasteful. However, when the employee is affiliated with groups known to promote violence or hateful rhetoric, employers may have more legal support in

35. *See About Us*, FIGHT FOR $15, https://fightfor15.org/about-us (last visited Aug. 24, 2018) (purpose of "Fight for Fifteen" movement is to advocate for a fifteen-dollar minimum wage by organizing protests in major cities across the United States).

36. Eastex Inc. v. NLRB, 437 U.S. 556, 573–74 (1978).

37. *See* Purple Commc'ns, Inc., 361 N.L.R.B. 1050, 1063 (2014). *But see Caesars Entm't Corp.*, 28-CA-060841 (Aug. 1, 2018) (NLRB inviting the public to submit briefs on whether it should overrule *Purple Communications*).

38. *See Purple Commc'ns, Inc.*, 361 N.L.R.B. at 1063.

39. *See id*. at 1051–52, 1063.

40. *Id.* at 1063.

41. *See id*.

taking adverse action against employee activity that jeopardizes the company's reputation.[42]

Some states, including California, have laws limiting employers' ability to regulate off-duty conduct.[43] In addition, some employment agreements and collective bargaining agreements explicitly or implicitly limit an employer's ability to regulate such conduct.[44] Also, public employers risk violating employees' constitutional right to free speech by regulating participation in affinity-group activities.[45]

Notably, if an employee's affinity-group activity, whether on- or off-duty, threatens or intimidates other employees, employers should be able to defeat a discrimination claim for disciplining members. For example, in *Mahon v. American Airlines, Inc.*,[46] as a part of its diversity program, American Airlines encouraged formation of affinity groups, called Employee Resource Groups (ERG).[47] American Airlines also hosted a diversity fair for its employee groups.[48] At the fair, members of the Caucasian ERG distributed a member's pamphlet alleged to include white supremacist rhetoric.[49] American Airlines investigated the member's creation and distribution of the pamphlet (along with his wearing of a T-shirt promoting a novel containing white supremacist rhetoric) and terminated his employment, stating that he violated a company policy prohibiting "threatening or intimidating behavior toward other employees and conduct detrimental to other employees and American Airlines."[50] The member filed a § 1981[51] claim alleging his termination was unlawful discrimination on the basis of his race.[52] The District Court for the District of Oklahoma dismissed his complaint for failure to state a claim, and the Tenth Circuit affirmed.[53]

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42. *See* Greenfield, *supra* note 33 (even public sector employers may terminate employees involved with such groups if they can show that the speech is an "issue of public concern").

43. *See* CAL. LAB. CODE § 96(k) (West 2018) (claims may be brought on behalf of workers disciplined for conduct during non-working hours); *see also id.* § 1101 (protecting employee rights to free political affiliation).

44. *See* Nagele-Piazza, *supra* note 32 (employment agreements and collective bargaining agreements may limit employers' ability to discipline employees for off-duty activity).

45. *See* Greenfield, *supra* note 33 ("If a government employer can prove that an employee's actions are an issue of public concern, there may be a case for termination" (internal quotations omitted).).

46. Mahon v. Am. Airlines, Inc., 145 F. App'x 634 (10th Cir. 2005), *aff'g* 71 F. App'x 32 (10th. Cir. 2003).

47. *Mahon*, 71 F. App'x at 33, *aff'd after remand*, 145 F. App'x 634.

48. *Id.*

49. *Id.*

50. *Id.*

51. 42 U.S.C. § 1981 (2012).

52. *Mahon*, 71 F. App'x at 33–34.

53. *Mahon*, 145 F. App'x at 634; *cf.* Ervington v. LTD Commodities, LLC, 555 F. App'x 615, 618 (7th Cir. 2014) ("[Employer] was not required to accommodate [employee's] religion by permitting her to distribute pamphlets offensive to other employees.").

Another legal risk for employers can arise from employer sponsorship and promotion of workplace affinity-group activity. Over-involvement and promotion of affinity groups could result in an NLRB charge that the employer is violating the NLRA's prohibitions against company domination of a labor organization in violation of Section 8(a)(2).[54] Section 5 of the NLRA broadly defines a labor organization as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."[55]

Section 8(a)(2) makes it unlawful for employers "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."[56] In *Electromation, Inc.*,[57] the NLRB held that employer-organized "Action Committees" established to make recommendations on specified employee issues were labor organizations created by and unlawfully dominated by the company.[58] The Board stated: "Any group, including an employee representation committee, may meet the statutory definition of 'labor organization' even if it lacks a formal structure, has no elected officers, constitution or bylaws, does not meet regularly, and does not require the payment of initiation fees or dues."[59] The Board distinguished between organizations for which (1) employees determine structure and function and thus are not unlawfully employer-dominated "even if the employer has the potential ability to influence the structure or effectiveness of the organization" versus (2) those "whose structure and function are essentially determined by management . . . and whose continued existence depends on the fiat of management."[60] The NLRB concluded that

> when the impetus behind the formation of an organization of employees emanates from an employer and the organization has no effective existence independent of the employer's active involvement, a finding of domination is appropriate if the purpose of the organization is to deal with the employer concerning conditions of employment.[61]

54. 29 U.S.C. § 158 (2012).
55. *Id.* § 152(5).
56. *Id.* § 158(a)(2). The National Labor Relations Act provides an exception permitting employees to confer with the employer during working hours without loss of time or pay. *Id.*
57. Electromation, Inc., 309 N.L.R.B. 990 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994).
58. *Id*. at 990.
59. *Id*. at 994.
60. *Id*. at 995.
61. *Id*. at 996.

In short, employers must ensure that their promotion of affinity groups does not cross the line defining unlawful employer-dominated labor organizations.

Apart from the question of domination, an employer may violate Section 8(a)(2) if it provides financial or other support to an affinity group if the group—even in part—"deals with" the employer about workplace issues.[62] An employer might, as a matter of course, provide various kinds of support to affinity groups such as paying wages of employees while attending meetings, providing meeting space without charge, paying for meeting refreshments, and allowing the group to obtain advice from company professionals. Affinity groups typically include, among their activities, advocating for workplace change. If an employer fails to structure its group interaction carefully, this volatile combination of employer support and group advocacy can result in the employer being considered to have unlawfully "contribut[ed] financial or other support to [a labor organization]."[63]

The breadth of the statutory phrase "dealing with," for example, could give rise to legal liability for as ordinary a circumstance as the employer receiving recommendations from a group concerning working conditions, and then the employer discussing those suggestions with the group to design a new employer policy.[64] Of course, an employer could avoid an NLRA violation by implementing a rule prohibiting affinity groups from making any suggestions, but that would likely undermine the employer's central purpose for creating affinity groups, while also harming office morale and discouraging group membership.[65] More usefully, an employer could make clear when receiving suggestions from affinity groups that group recommendations will be treated no differently than those from any single employee or nonfunded group.[66] Management must maintain the right to review and reject group ideas at its discretion.[67] Employers should also inform affinity groups that they do not represent all employees who share their characteristics, but that all employees speak for themselves regardless of group membership.[68] Although labor law does not clearly define the line between

62. *See* Jonathan A. Segal, *Legal Trends: Affinity Group Danger Zones*, SOC'Y FOR HUM. RESOURCE MGMT. (Sept. 1, 2013), https://www.shrm.org/hr-today/news/hr-magazine/pages/0913-affinity-groups.aspx.

63. 29 U.S.C. § 158(a)(2) (2012); *see also* Segal, *supra* note 62; *supra* note 55 and accompanying text (broadly defining statutory term of "labor organization").

64. *Electromation, Inc.*, 309 N.L.R.B. at 997 (essence of "dealing with" is "address[ing] employees' disaffection concerning conditions of employment through the creation of a bilateral process involving employees and management in order to reach bilateral solutions on the basis of employee-initiated proposals").

65. *See* Segal, *supra* note 62.

66. *See id.*

67. *Id.*

68. *Id.*

permitted and unlawful employer interaction with affinity groups,[69] following these steps can help employers avoid NLRA violations.

Conclusion

Affinity groups can benefit employers' diversity and inclusion initiatives. However, in allowing and regulating such groups, employers must avoid potential legal pitfalls. To reduce the risk of unlawful discrimination, employers that implement an affinity-group program or allow development of workplace affinity groups should draft an affinity-group policy. The policy must apply equally to all affinity groups and ensure that the employer's role does not constitute unlawful domination or support of a labor organization. Further, employers should advise affinity groups of their duties to avoid unlawful discrimination and monitor affinity groups to ensure groups do not themselves discriminate.

In determining their own course of conduct, employers should reduce the risk of unlawful interference with employees' protected rights by affording clear notice of employer expectations and preventing premature employer discipline. Before disciplining an employee for participation in affinity-group activities, employers should (1) thoroughly investigate to avoid inaccurate conclusions and (2) ensure that they have the legal ability to regulate the conduct. Moreover, if an employer desires to regulate off-duty conduct, it should promulgate a written policy on off-duty conduct and ensure its non-discriminatory application. Employers must consider whether employees' on-duty or off-duty conduct is protected by the NLRA before deciding to discipline or terminate. Additionally, public employers should consider whether disciplinary action or otherwise regulating affinity-group activity may infringe upon employees' free speech or other constitutional rights.

69. *Id.*