

Pandemic discrimination: remind staff of policies

A website tracking harassment of Asian-Americans documented 650 incidents in the first eight days it operated. Asian-Americans have become the target of harassment and racist vitriol as the COVID-19 pandemic has swept across the country. The wave mirrors the discrimination Middle Easterners experienced following the September 11, 2001 attacks. As during that period, employers may face similar episodes in the workplace.

Some critics have alleged that President Trump's use of the term 'Chinese virus' to describe the coronavirus was a dog whistle to racists. Although the President has since tweeted, "It is very important that we totally protect our Asian American community in the United States, and all around the world. They are amazing people, and the spreading of the Virus is NOT their fault in any way, shape, or form. They are working closely with us to get rid of it. WE WILL PREVAIL TOGETHER!"

EEOC responds: Enough incidents have occurred that Equal Employment Opportunity Commission (EEOC) chairwoman Janet Dhillon felt compelled to issue a statement reminding employers that discrimination against Asian-Americans or people of Asian descent in the workplace potentially violates Title VII of the Civil Rights Act. The incidents may cause employer liability as either national origin discrimination or racial discrimination.

Employees or applicants may allege national origin discrimination if they are treated "unfavorably because they are from a particular country or part of the world, because of ethnicity or accent, or because they appear to be of a certain ethnic background (even if they are not)" according to the EEOC's website.

Race and national origin discrimination take several forms including harassment or discrimination in pay, benefits, or other employer policies. Employers can justify a policy that impacts a race or ethnicity badly if it can show the policy is of business necessity. For example, employers may not impose an "English only" rule in the workplace without showing how it is necessary for business purposes.

What employers can do: In the current climate, employers will most likely have to address harassment issues. A statement from the employer reiterating the company's anti-discrimination policy and explaining that this includes harassment including jokes, insults, or barbs communicated to employees based on their national origin or ancestry.

As with sexual harassment in the #MeToo era, employers should encourage bystander training that urges employees who witness race or national origin discrimination to intervene if they see it and report the incident. While some employees may be reluctant to do so, managers and supervisors are required to. When management looks the other way, harassment victims assume the employer doesn't care or won't investigate. It really means the employer doesn't find out about the harassment and it continues. Then the employer is blindsided by the EEOC complaint and by then legal costs are starting to mount. Intervention at the earliest stage saves employers thousands in legal costs.

Under current conditions, employees may be working remotely. Employers must reiterate that e-mail correspondence between employees should not include harassing language. The bar against harassment should

extend to social media as well, but of course, there are limits.

Telecommuting, by its nature, blurs the lines between work and personal actions. An employee retweeting a presidential tweet calling the virus the “Chinese virus” on their own time is not harassment per se. Blaming a co-worker of Asian descent for spreading the virus is. While employers do not want to spend time monitoring social media posts, complaints of workers who feel they are being harassed because of their ancestry or national origin should be taken seriously. Employers should make it clear how employees report harassment and what response they can expect. Then follow through with an investigation.