Legal Update Article

How Companies Can Best Benefit from Employee Resource Groups (ERGs)

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Two oft-asked questions by companies seeking to enhance their diversity, equity, and inclusion (DEI) efforts and performance are: (1) Should we create employee resource groups (ERGs)? and (2) How do we make ERGs most effective?

The answers differ greatly depending on the unique situation of the company. Below, we offer a few basic guidelines to raise concerns that require careful consideration by company leadership. The individual corporate culture and situation will dictate how best to apply these guidelines to help find an answer.

DEI Essential to Modern Workforce

Fostering diversity, equity, and inclusion is essential to obtaining the best efforts and productivity from a modern workforce. In recent years, companies across America have implemented a variety of DEI strategies, seeking to achieve competitive advantages through more engaged diverse workforces that bring their best efforts to bear toward achieving corporate objectives.

Most companies begin with a focus on recruiting and hiring diverse candidates. Even those that are successful in this effort often find themselves losing employees from underrepresented groups at a higher rate than they lose white male employees. This “leaky pipeline” negatively affects morale, results in the loss of institutional knowledge, and absorbs an inordinate amount of management time to continually recruit and train new employees, only to repeat the turnover cycle.

Thus, retention of talented diverse employees is critical to long-term corporate success.

Guidelines for ERGs

One regularly utilized mechanism for engaging and retaining employees is ERGs. ERGs are networks of employees formed around common interests. In addition to giving employees an opportunity to connect with like-minded people, ERGs can assist management to achieve the company’s business and DEI objectives. Often, the common interest is the retention, development, and advancement of employees from underrepresented groups.

When considering implementing ERGs or modifying current ERGs to make them more valuable to the company and employees, make ERGs more effective and avoid legal and policy vulnerabilities by keeping the following in mind:

1. *Define what an ERG is to the company.*Effective ERGs are voluntary, employee-led groups, and formed around common interests, including supporting members of groups that are underrepresented in the workforce. Participation in ERGs is open to *all* employees, regardless of whether they are part of the underrepresented group the ERG is formed to support.

2. *Describe ERGs as business groups.* Use the term employee resource group. Business resource group or diversity business group also are frequently used. However, do *not* use the word "affinity" to describe the groups because, for many people, "affinity" connotes a "social" purpose, rather than a business purpose and is missing a key element, *i.e.*, the group is intended to be a "resource" to the company and employee-members.

3. *Require all ERGs be approved by management.* Employers should define standards and a process to approve or reject new ERGs, including identifying bases around which ERGs may and may not be formed. For example, in general, employers should not permit ERGs to be formed around political or religious affiliations. These groups, by definition, are exclusionary and often create conflicts or other problems in the workplace.

4. *Adopt a policy statement and operating guidelines for ERGs.* Companies should adopt an ERG policy statement that defines ERGs for the company's purposes, identifies appropriate criteria around which employees may form an ERG, and provides employees instructions for seeking company approval of ERGs. Most companies seek to avoid problems associated with ERGs by also adopting operating guidelines with more specific information and guidelines to ensure that ERGs are operated consistently and fairly.

5. *Create the role of executive sponsor.* Each ERG should have an executive sponsor who serves as the liaison between the ERG and company senior management. The executive sponsor is responsible for ensuring that the ERG stays focused on its mission, does not delve into areas in which ERGs should *not* be involved (such as complaint intake and complaint resolution), and key insights from the ERG are shared with HR and senior management, as appropriate.

6. *Be clear about the types of support the company will provide ERGs.* Companies typically provide various non-financial support to ERGs, including use of firm email and phone systems, meeting rooms, copiers, and printers. Many companies provide financial support to ERGs to be used to fund activities and events or provide honoraria to external speakers. If the company elects to make funding available, there are a wide range of questions that must be addressed, including the overall funding for all approved ERGs, the allocation of funding among ERGs, the types of costs that may appropriately be funded, and the approval process for ERGs expenses. Anticipate that whatever level of financial support is provided to one ERG, it ultimately will be demanded by all. Thus, it is important to establish clear and consistent rules by which funding will be allocated.

7. *Establish clear controls over ERG communications.* There should be clear guidelines about the types of communications ERGs may make and who must approve such communications. Depending on corporate culture and the maturity of the ERGs, some companies permit ERGs to publish certain communications, such as internal event announcements, without prior approval; most require prior approval from HR or the corporate communications department for all external communications. Communications strategies should be tailored to the company's organizational structure and general communications policies.

8. *ERGs should be encouraged to collaborate.* ERGs should co-sponsor events of

interest to both sets of members and ERGs should share "best practices." Some companies schedule periodic meetings of ERG leaders to foster this collaboration, development, and use of successful best practices.

9. *There should be clear reporting and accountability mechanisms.* Most companies require regular (*e.g.,* quarterly or annual) reports to company management about ERG objectives, plans, achievements, and challenges. Success should be measured against stated objectives, for example, measurably enhanced recruitment, hiring, and retention.

10. *Seek to avoid or mitigate legal risks.* While ERGs can be a significant contributor to corporate success, poorly designed or implemented ERGs can create legal vulnerability. Topics for which safeguards should be developed, include:

a. *Violation of company policies.* ERG leaders and members should be periodically reminded that all company policies, such as on non-discrimination and anti-harassment, apply to ERG activities. HR and the executive sponsor should monitor compliance with company policies.

b. *Avoiding ERG intrusion on complaint processes.* ERGs should not be involved in complaint intake or complaint resolution. ERG leaders may advise management about general concerns raised by members of their group, but ERG leaders should be directed to advise group members to report personal complaints directly to the company. Specific complaints of discrimination, harassment, or other behaviors that trigger a legal obligation to investigate should be referred, as soon as possible, to HR for action. ERG leaders should receive training and periodic reminders that they always remain company managers.

c. *National Labor Relations Act (NLRA) and Labor Management Relations Act (LMRA).* ERG approval criteria and operating guidelines should expressly prohibit any ERG from "negotiating" or addressing the "terms and conditions" of employment. ERGs are not unions and employers should have rules prohibiting ERGs from behaving like unions. ERG operating guidelines should be reviewed by knowledgeable counsel since this is a complex area of law.

d. *Wage and hour laws.* The federal Fair Labor Standards Act (FLSA) and state counterparts establish rules for minimum wages and for when overtime pay must be provided. ERG activities can trigger these statutes in ways that are not obvious, including by creating ambiguity about whether certain activities are compensable work time or non-compensable volunteer time. ERG operating guidelines and practices should be reviewed by knowledgeable counsel.

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If designed and implemented appropriately, employee resource groups can significantly enhance achievement of both DEI and general business objectives. Poorly designed or implemented ERGs can hurt morale, create other internal problems, and even generate legal complaints. ERG policies and operating guidelines should be reviewed by knowledgeable legal counsel. Executive sponsors, ERG leaders, and responsible HR or diversity office staff should receive ERG-specific training to reduce the risk of legal vulnerability.