

July 1, 2020

Summer of Workplace Unrest: Disease, Diversity and Democracy

Presented by:

Shelley Ericsson

Kansas City



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- London
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- Mexico City
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- Minneapolis
- Montréal
- Morristown
- Nashville
- New Orleans
- New York City
- Oklahoma City
- Orange County
- Paris
- Philadelphia
- Phoenix
- Pittsburgh
- Portland (ME)
- Portland (OR)
- Raleigh
- Richmond
- Sacramento
- San Antonio
- San Diego
- San Francisco
- Seattle
- St. Louis
- St. Thomas
- Stamford
- Tampa
- Toronto
- Torrance
- Tucson
- Washington D.C.

Speaker



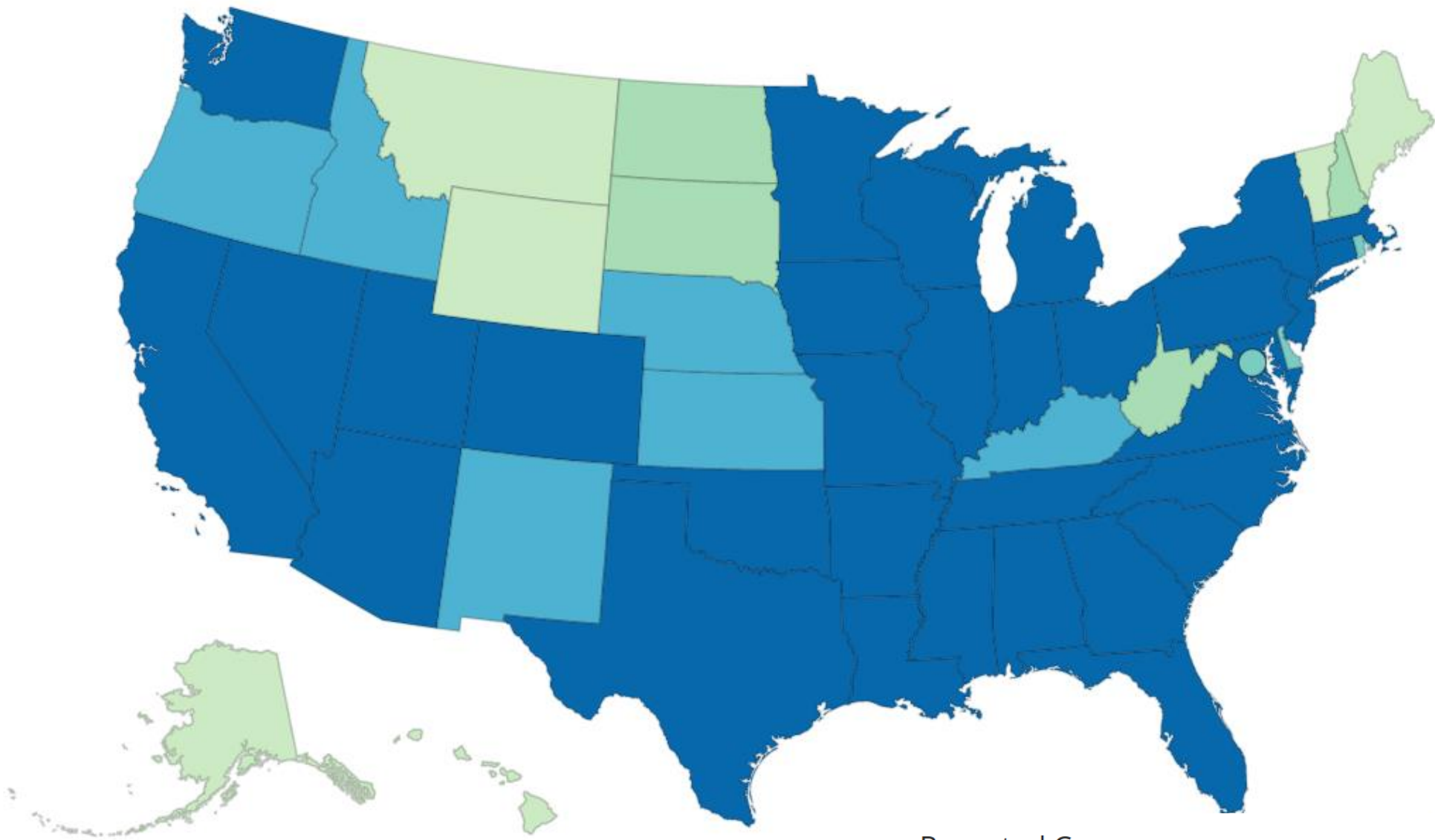
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Our Agenda Today

- COVID-19 Update: Return to Work Issues
- Workplace Diversity:
 - Race and Racism in the Workplace
 - Title VII and LGBTQ+ Employees
- Politics in the Workplace



- AS
- GU
- MH
- FM
- MP
- PW
- PR**
- VI

Reported Cases

- 0 to 1,000
- 5,001 to 10,000
- 20,001 to 40,000
- 1,001 to 5,000
- 10,001 to 20,000
- 40,001 or more

Open Up & Recover Safely Plan



- Kansas is currently in Phase 3
- Governor Kelly signed an Executive Order requiring most Kansans wear a mask in public spaces beginning 12:01am on Friday, July 3
- Onsite staffing is unrestricted and nonessential travel may resume

Phase 3 Guidance for Employers

- **Telework:** Employers may begin reducing telework and start bringing employees back to work in an office setting
- **On-site Operations:** Avoid large gatherings of employees in groups of more than 45 where social distancing protocols cannot be maintained except for infrequent or incidental moments of closer proximity AND phase in employees on-site as possible while maintaining 6 feet of distancing between employee work stations
- **Potentially Sick Employees:** Any employees exhibiting symptoms should be required to stay home and asked to call their health care provider

Phase 3 Guidance for Employers

- **Business Travel:** Engage in nonessential travel but follow KDHE travel and quarantine guidelines for travel to high-risk areas
 - **Current KDHE quarantine guidelines:** Those who have traveled to the following locations need to quarantine for 14 days after arrival in Kansas. This applies to both Kansas residents and those visiting Kansas:
 - **Florida**
 - Cruise Ships or river cruise passengers
 - International travel to countries with CDC Level 3 Travel Health Notice with Restrictions
 - Anyone who traveled to **Arizona** between June 17 and July 27
 - International travel to Bahrain or French Guiana between July 14-27.
- **Visit to Long-term Care Facilities or Correctional Facilities:** In person visits to these facilities may be gradually reinstated. Screening measures for all visitors can be continued. Those who must interact with residents must adhere to strict protocols regarding hygiene and screening.

Open Up & Recover Safely Plan



- Missouri is currently fully reopened
- Governor Parson announced on June 11 that in Phase 2, there are no statewide public health orders
- Local officials were granted the ability to put further measures or regulations in place, but statewide, all restrictions were lifted

General Guidelines for Business

- **Prepare to implement basic infection measures informed by industry best practices, regarding:**
 - Protective equipment;
 - Temperature checks;
 - Testing, isolating, and contact tracing; and
 - Sanitation, including disinfection of common and high-traffic areas
- **Modify physical workspaces to maximize social distancing**
- **Develop an infectious disease preparedness plan**, including policies and procedures for workforce contact tracing where an employee tests positive for COVID-19

General Guidelines for Business

- **Monitor workforce for indicative symptoms. Do not allow symptomatic people to physically return to work until they are cleared by a medical provider.**
- **Develop, implement, and communicate about workplace flexibilities and protections, including:**
 - Encouraging telework whenever possible and feasible with business operations;
 - Returning to work in phases and/or split shifts, if possible;
 - Limiting access to common areas where personnel are likely to congregate and interact; and
 - Ensuring that sick leave policies are flexible and consistent with public health guidance

States Requiring Visitors from KS/MO to Quarantine for 14 Days Upon Arrival

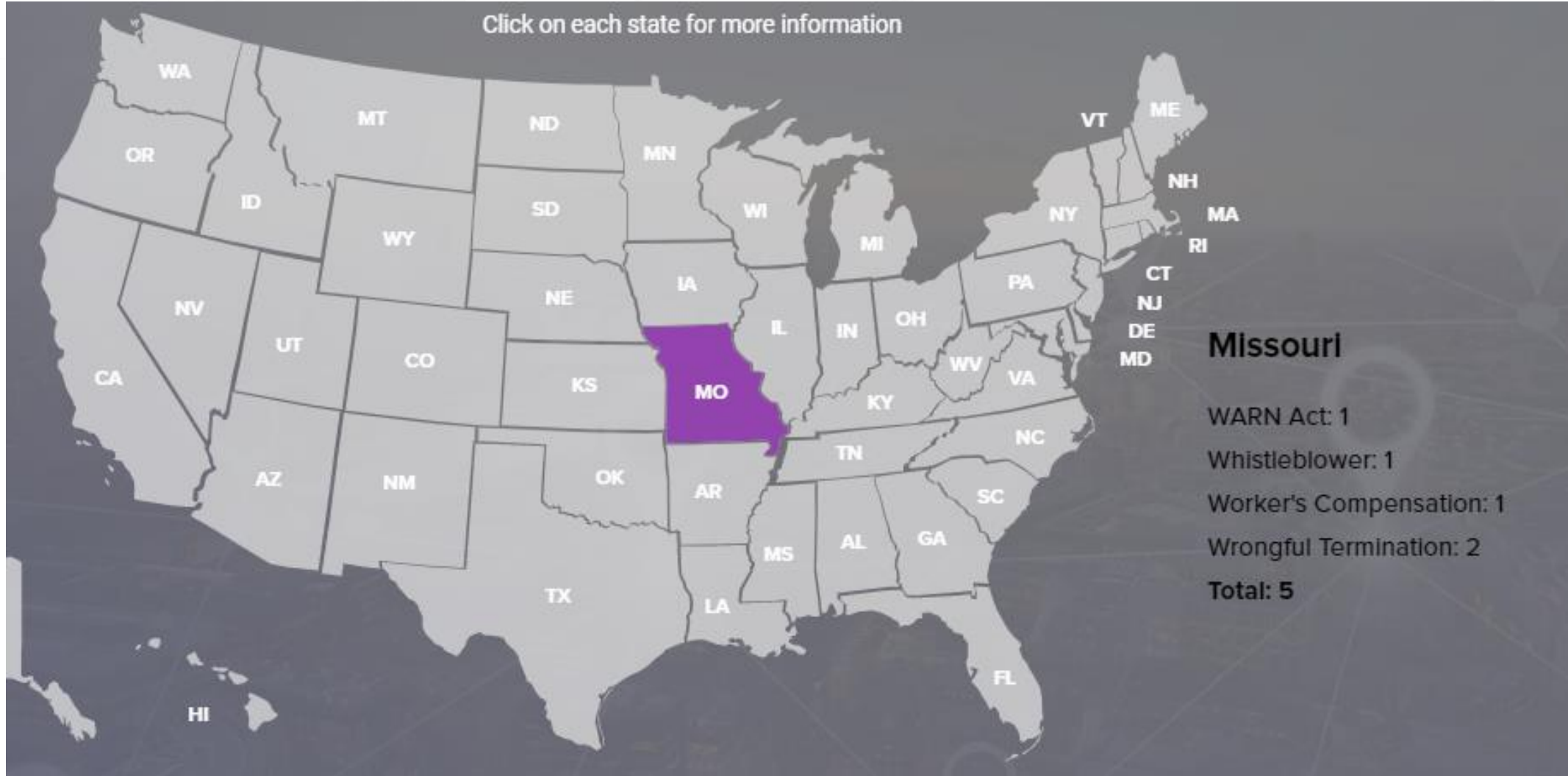
- Alaska
- Connecticut
- District of Columbia
- Hawaii
- City of Chicago (rest of IL no statewide mandate)
- Maine
- Massachusetts
- New Jersey
- New Mexico
- New York
- Rhode Island
- Vermont

A light gray world map is centered in the background of the slide, showing the outlines of continents and oceans.

ATTENDANCE CODE

670

Missouri COVID-19 Related Litigation



Source: <https://btlaw.com/insights/publications/covid-19-related-workplace-litigation-tracker>

New/Revised Policies

- Leave
- Workplace safety (including OSHA considerations)
- Layoff/furlough/recall
- Complaint reporting
- Attendance
- Working from home
- Employment agreements

COVID-19 Claims - Unsafe Workplace

- “Unsafe Workplace” and OSHA issues
 - Cause/fear of illness
 - Failure to close
 - Failure to provide PPE
 - Failure to clean/sanitize/protect workers
 - Failure to comply with state and local orders
- “Public Nuisance” Claims
 - Workplace nuisance claims seeking injunctive relief/damages

COVID-19 and...

Retaliation/Whistleblower

- Complaints regarding unsafe work conditions
 - Failure to protect workers
 - Failure to enforce work rules
 - Failure to follow guidance
 - Refusals to return to work
- Other protected activity
 - Leave requests
 - Misappropriation/misuse of funds received from CARES Act

COVID-19 and...

Discrimination

- Disability
 - Failure to accommodate
 - Preexisting conditions/increased risk
 - Title III access claims
 - EEOC released updated guidance on June 17, 2020, saying that requiring antibody testing before allowing employees to reenter the workplace is not allowed under the ADA
- Other Protected Categories
- Disparate impact (age)

COVID-19 and...

Wage and Hour

- Unpaid wages for work performed before closure
- Unpaid hazard pay and overtime
- Unpaid sick leave claims under FFCRA or similar state/local statutes/ordinances
- Unpaid compensation due to remote work arrangements
- Unreimbursed business expenses (PPE)
- Uncompensated time for completing health screenings, temperature checks, etc.
- Misclassification

COVID-19 and...

FMLA/FFCRA

- Failure to provide COVID-19 related leave
- Interference with ability to take leave
- Failure to provide sick leave benefit under FFCRA or similar state and local laws

COVID-19 and...

RIF/WARN

- Failure to provide and/or comply with notice requirements

COBRA/ERISA

- Improper COBRA notification
- Failure to grant and/or administer short and long term disability claims

Labor/NLRA

- ULPs arising out of work conditions, reductions in force, reassignments
- Protected concerted activity

Preempting Litigation



- Pretext proof decisions
- Evaluate your evaluation process – beware COVID-19 excuses for non-performance and differential treatment claims

Legislative Trends - Federal Level

- CARES Act
 - Be prepared for more oversight, rules, and guidance on a rolling basis as implementation continues for the Paycheck Protection Program (PPP) and other provisions
 - For example: additional PPP guidance released on June 19, 2020
- Next round of stimulus (proposed)
 - Details of possible second round are unknown
 - Proposals range from second wave of individual checks, to infrastructure spending and extension of unemployment benefits



Race and Racism in the Workplace

Social Movements are Widespread



Race in the Workplace – What are you Doing for your Employees?

- Do you practice what you preach?
- Do you focus on more than just overt racism?
- Do you have internal employee resource groups?
- Do you conduct training?
- Do you follow up on training?
- Has your organization contributed to charitable causes that focus on these issues?
- Did your organization celebrate Juneteenth?

Overt White Supremacy (Socially Unacceptable)

Lynching
Hate Crimes
Blackface The N-word
Swastikas Neo-Nazis Burning Crosses
Racist Jokes Racial Slurs KKK

Calling the Police on Black People White Silence Colorblindness
White Parents Self-Segregating Neighborhoods & Schools
Eurocentric Curriculum White Savior Complex Spiritual Bypassing
Education Funding from Property Taxes Discriminatory Lending
Mass Incarceration Respectability Politics Tone Policing
Racist Mascots Not Believing Experiences of BIPOC Paternalism
"Make America Great Again" Blaming the Victim Hiring Discrimination
"You don't sound Black" "Don't Blame Me, I Never Owned Slaves" Bootstrap Theory
School-to-Prison Pipeline Police Murdering BIPOC Virtuous Victim Narrative
Higher Infant & Maternal Mortality Rate for BIPOC "But What About Me?" "All Lives Matter"
BIPOC as Halloween Costumes Racial Profiling Denial of White Privilege
Prioritizing White Voices as Experts Treating Kids of Color as Adults Inequitable Healthcare
Assuming Good Intentions Are Enough Not Challenging Racist Jokes Cultural Appropriation
Eurocentric Beauty Standards Anti-Immigration Policies Considering AAVE "Uneducated"
Denial of Racism Tokenism English-Only Initiatives Self-Appointed White Ally
Exceptionalism Fearing People of Color Police Brutality Fetishizing BIPOC Meritocracy Myth
"You're So Articulate" Celebration of Columbus Day Claiming Reverse-Racism Paternalism
Weaponized Whiteness Expecting BIPOC to Teach White People Believing We Are "Post-Racial"
"But We're All One Big Human Family" / "There's Only One Human Race" Housing Discrimination

Covert White Supremacy (Socially Acceptable)

Implementing a D&I Program

- Step 1: Plan the Program
 - Before designing the D&I program, assess the organization's needs and goals
 - Identify timelines, deliverables, and budget and create a D&I Plan
 - Consider how leadership and management will be engaged at every step of the D&I initiative process



Implementing a D&I Program (cont'd)

- Step 2: Make a Compliant Program
 - Incorporate legal compliance and risk-reduction measures at the outset



Implementing a D&I Program (cont'd)

- Step 3: Design & Implement Program
 - Address the specific need
 - Define the purpose
 - Decide who leads
 - Ensure open participation





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Resources to Address Racism in the Workplace

Insights and Podcasts

The screenshot shows the Ogletree Deakins Podcasts website. The page title is "Podcasts". There is a search bar with the placeholder text "Search by keyword or speaker" and a "SEARCH" button. Below the search bar, there are two podcast episodes listed. The first episode is titled "Third Thursdays with Ruthie: Strategies for Effective Responses to Discussions About Race" and is dated "18 Jun 2020". The second episode is titled "Allyship: How to Support Your Black Colleagues During This Racial Pandemic" and is also dated "18 Jun 2020". To the right of the episodes, there is a logo for "Ogletree Deakins podcasts" and a "Subscribe" button with the text "Register to receive newsletters and email alerts about upcoming programs." and a "REGISTER" button.

Ogletree's Diversity and Inclusion Practice Group Services

- Assessment, Metric Analysis, and Strategy
- Program Development and Implementation
- Legal Advice, Counseling, and Risk-Reduction Audits
- Learning, Training, and Leadership Development
- Crisis Mitigation, Management, and Communications

At the Intersection of a Pandemic and Mass Social Movements

- Legal implications of employee's ability to protest v. employer's efforts to mitigate COVID
 - Title VII (retaliation)
 - NLRA (protected concerted activities)
- Consider practical factors
 - Can Black Lives Matter or other politically-oriented clothing or accessories be incorporated into work uniforms or dress codes?
 - Think about PR implications



Title VII and LGBTQ+ Employees

Bostock v. Clayton County

Cite as: 590 U. S. ____ (2020)

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Opinion of the Court

before us. So while other employers in other cases may raise free exercise arguments that merit careful consideration, none of the employers before us today represent in this Court that compliance with Title VII will infringe their own religious liberties in any way.

*

Some of those who supported adding language to Title VII to ban sex discrimination may have hoped it would derail the entire Civil Rights Act. Yet, contrary to those intentions, the bill became law. Since then, Title VII's effects have unfolded with far-reaching consequences, some likely beyond what many in Congress or elsewhere expected.

But none of this helps decide today's cases. Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations. In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: **An employer who fires an individual merely for being gay or transgender defies the law.**

The judgments of the Second and Sixth Circuits in Nos. 17–1623 and 18–107 are affirmed. The judgment of the Eleventh Circuit in No. 17–1618 is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

What does the Decision Mean?

- Employers covered by Title VII cannot discriminate against their employees on the basis that their employee is either gay or transgender.
- Sexual orientation/transgender discrimination = sex discrimination.
- Sex need not be the sole or primary cause of the employer's adverse action.



Politics in the Workplace

Politics in the Workplace



BIDEN
PRESIDENT

The logo features the name "BIDEN" in a large, bold, blue sans-serif font. The letter "E" is stylized with three horizontal red stripes. Below "BIDEN", the word "PRESIDENT" is written in a smaller, blue, all-caps sans-serif font.

TRUMP
2020
KEEP AMERICA GREAT!

The logo is contained within a dark blue rectangular box with a thin red border. At the top and bottom of the box are five white stars. The text "TRUMP" and "2020" is in a large, bold, white sans-serif font. Below that, "KEEP AMERICA GREAT!" is written in a smaller, bold, white sans-serif font.

Employee Speech Considerations

- There is a difference between state & private employers.
- Speech cannot be racist or harassing in nature.
- Train employees to be respectful.
- Document instances of aggressive or unprofessional behavior.

Implications of Limiting Employee Political Speech in the Private Sector

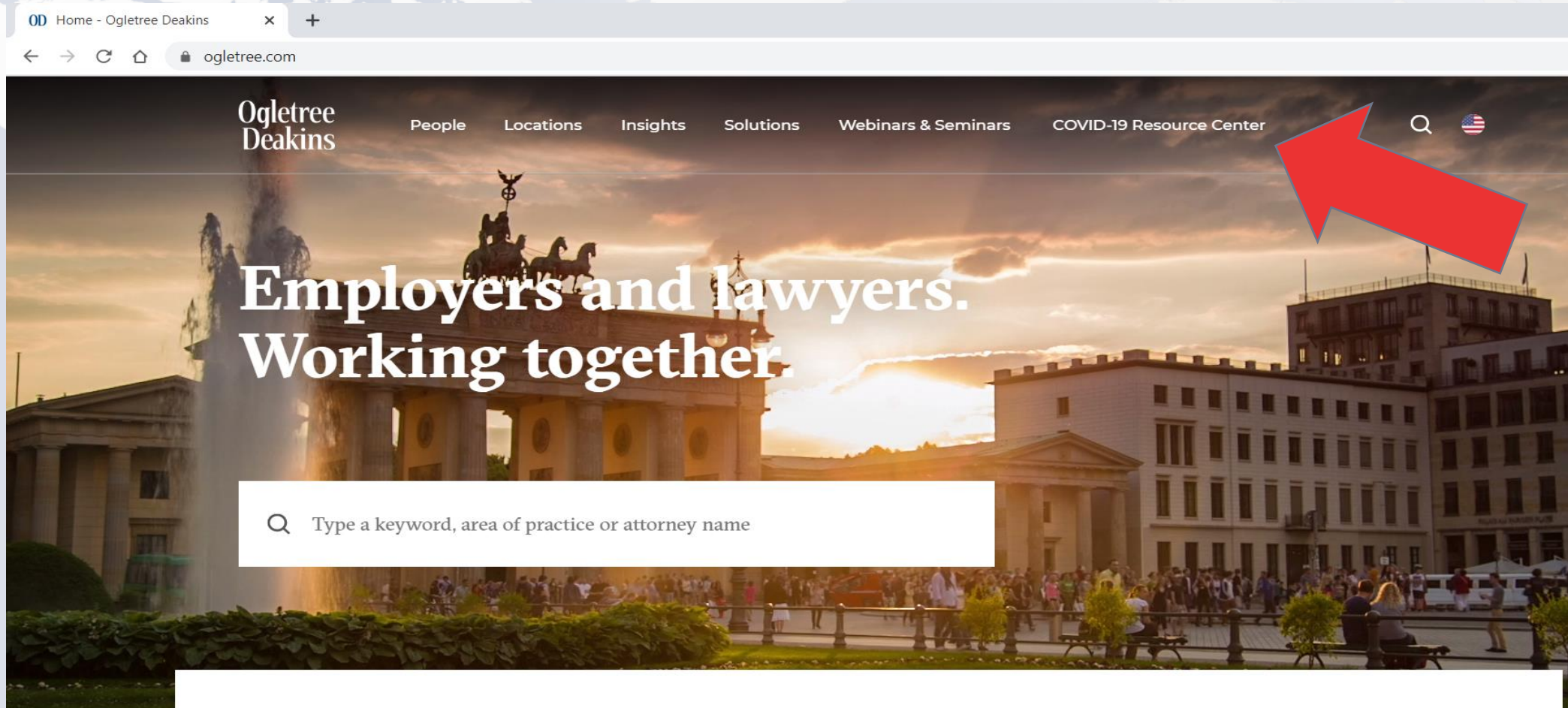
- Things to consider under the NLRA:
 - Is the employee posting or speaking about working conditions?
 - Is the post or speech a protected concerted activity?
 - Does the workplace policy “chill” employee rights under the NLRA?
- Other considerations:
 - Are you intimidating employees to vote a certain way?
 - Are you favoring certain speech over another?
 - What are the social/PR implications?



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GUIDE**

www.ogletree.com

Tools for the Recovery



Thank you!

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