



The Social Justice Movement and its Growing Impact on Workplace Culture



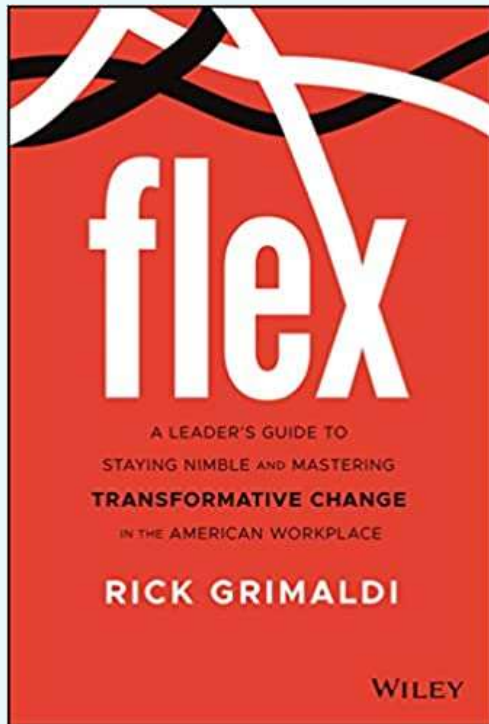
Presented by:

Sarah K. Biran (sbiran@fisherphillips.com) and
Margaret J. Scheele (mscheele@fisherphillips.com)



FLEX

A Leader's Guide to Staying Nimble and Mastering Transformative Change in the American Workplace



"A must read for HR Pros and Business leaders."

"Expect to get a full helping of how to navigate the modern workplace and new/upcoming workplace trends."

"Regardless of your profession or industry- this is a must read!"

"FLEX is a must read for anyone in the workforce, whether you're recently graduated or have 30+ years of work experience."

"Useful for employers and entrepreneurs alike"

"A highly readable book that is a great primer by a recognized expert in the industry."

Roadmap

- › What is the Social Justice Movement?
- › Immediate Impacts on the Workplace (Speech, On and Off Duty Conduct, and Social Media)
- › Corporate Reactions to Social Justice Issues
- › Developing an Inclusive Culture: Action Steps



Defining Social Justice

- › What is the Social Justice Movement?
 - › Broad definition - promote just societies and fair treatment of all individuals regardless of race, status, wealth, etc.
 - › Can include many issues: voting rights, access to healthcare, refugee crisis, gun violence, etc.
 - › Focus on racial justice

A Movement Surges

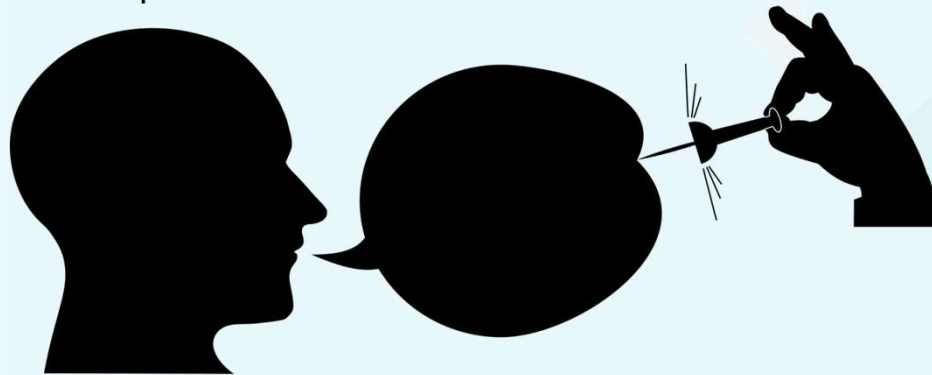
- According to the New York Times, “Black Lives Matter May Be the Largest Movement in U.S. History.”
<https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>
 - George Floyd’s killing on May 25, 2020
 - By June 6, 2020, an estimated 15 - 26 million people in the U.S. participated in demonstrations.

The New York Times

I. IMMEDIATE IMPACT: WORKPLACE SPEECH

Many employees believe they have “free speech rights” to speak their minds at work. They are wrong.

- › The First Amendment protects **citizens** against **government** action limiting speech
- › Employees of non-government employers do **not** have a “constitutional” right to speak their minds about politics in the workplace
- › Employers **can** generally regulate political expression as they would other forms of disruptive workplace communication



Free Speech: What Can An Employer Limit?

- › Harassing or Discriminatory Speech
- › Disruptive Speech
- › Insubordinate Speech
- › Political Speech in a private workplace
 - › Political campaigning
 - › Use of facilities and equipment (and time)
 - › Political displays
 - › Attire and display standards
- › Speech that Violates Company Policy

Free Speech: What Can An Employer Limit?

- › So, what do you do about the:
 - › MAGA Hat
 - › Black Lives Matter T-shirt
 - › Confederate Flag belt buckle
 - › An LGBTQ+ video call virtual background
 - › Blue lives matter screen saver
 - › Tear Down the Wall tank top
 - › An "I believe in Science" sticker
- › Can you limit some and not others?



II. IMMEDIATE IMPACT: On Duty Conduct

- > **Whole Foods BLM attire case (Frith v. Whole Foods Market, Inc., No. 20-cv-11358-ADB, D. Mass. Feb. 5, 2021)**
 - > The dress code prohibited employees from wearing clothing with "visible slogans, messages, logos, and/or advertising that are not Whole Foods-related" which was rarely enforced.
 - > Employees disciplined for wearing BLM face masks and other apparel.
 - > Court dismissed race discrimination, associational discrimination, and retaliation claims
- > **What about public employers? (Amalgamated Transit Union Local 85 v. Port Authority of Allegheny County, 2:20-cv-1471-NR, W.D. Pa. Jan. 19, 2021)**
 - > First Amendment rights at play – government employer ban on employees wearing BLM face masks enjoined where government failed to show that wearing the face masks was likely to be disruptive of the workplace

Off Duty Conduct

- › Should an employer take action against an employee based on his/her off duty conduct? What about attending/participating in protests?
- › Factors to consider:
 - › Extent/nature of the activity
 - › Private company or government employer
 - › CBA (union or nonunion employee)
 - › NLRA
 - › Employment contract or at-will
 - › State law (legal off-duty conduct laws)

Legal Off Duty Conduct Laws

Many states have Legal Off Duty Conduct Laws that prohibit employers from taking adverse action against an employee for **lawful conduct** occurring during *nonworking hours* away from the employer's premises

Protections under these laws vary from a single activity (such as smoking) to broader activities (“legal recreational activities” or “lawful activities”)

Many of those states provide a private right of action for violation of legal off duty conduct laws

Off Duty Conduct - Protests and Riots

- › Can employees be disciplined or terminated for participating in off duty activity like the January 6 Capitol Hill riot? Or a BLM protest?
- › Should an employer take action for this type of off duty conduct?

National Labor Relations Act (NLRA)

- › NLRA protection extends to taking time off work to attend rallies or protesting “for the purposes of collective bargaining or other mutual aid or protection”
- › Are employee protests for political reasons for employees’ “mutual aid or protection?”
- › Is there a nexus between these protests and other activity at the Capitol and a specific employment-related interest or working condition?

III. IMMEDIATE IMPACT: Social Media

> **Basic principles:**

- > Behavior outside of work can intrude on the workplace
- > Employee's personal use of social media can have adverse consequences for an employer
- > Employer right to take action v. overreaching
- > Limits: state laws (e.g., MD social media law), NLRA (cannot prohibit chats or posts that can be construed as an attempt to improve working conditions)



Social Media Policies: Recent Guidance

- > Recent NLRB guidance:
 - > *The Boeing Company*, 365 NLRB No. 154 (2017) balancing test, weighing:
 - > Nature and extent of a policy's potential impact and interference on workers' rights, and
 - > Legitimate business justification for the policy
 - > Sept. 5, 2018 Advice Memo from the NLRB GC evaluating CVS' social media policy in detail - found the majority of the policy lawful
 - > *Brighton Rehabilitation and Wellness Services*, July 2019 NLRB advice memo - Board approves fairly broad employer social media language
 - > *Medic Ambulance Service, Inc.*, 370 NLRB No. 65 (Jan. 4, 2021) - Board holds that the employer's social media policies do not violate the NLRA.

Social Media and Off Duty Conduct - A Few Recent Cases

- > **Koslosky v. American Airlines, Inc., 456 F. Supp. 3d 681 (E.D. Pa. 2020)** - Plaintiff made several posts on her Facebook account containing inflammatory and racially insensitive sentiments that went viral. American's employees complained, as did some of its customers. American fired her. Court granted MSJ on plaintiff's gender discrimination, disability discrimination, and retaliation claims.
- > **Hayes v. Express Scripts, No. 4:19CV1664 JCH (E.D. Mo. Feb. 5, 2021)** - Plaintiff was one of three employees fired for engaging in a social media conversation involving vulgar language and derogatory statements about an African-American supervisor. Defendant's MSJ granted on disability discrimination, race discrimination and retaliation claims.

Revisiting Your Social Media Policy: Sodexo Example



- > Sodexo's policies apply to off-duty personal use of Social Media when the employee either:
- > (1) identifies himself/herself as a Sodexo employee (either explicitly in his/her posting, or generally on his/her Social Media page); (2) discusses the Company or co-workers in any manner, or discusses customers, clients, vendors, and/or suppliers as related to their association with Sodexo; (3) engages in Social Media communications or interactions with coworkers, customers, clients (including employees of clients), vendors, or suppliers; and/or (4) engages in Social Media communications that reasonably could be thought by another employee, client, customer or vendor as causing or contributing to an intimidating, uncomfortable, humiliating, hostile or offensive workplace. Anything posted in Social Media can go viral. Even if you do not identify yourself as a Sodexo employee, you may be identified by others as a Sodexo employee, which may lead the Company to take disciplinary action.

CORPORATE REACTIONS TO THE SOCIAL JUSTICE MOVEMENT

POLL

Did your company leadership issue any statement to employees, either public or private, following George Floyd's death in 2020?

- > YES
- > NO

POLL RESULT

Did your company leadership issue any statement to employees, either public or private, following George Floyd's death in 2020?

- > YES - _____
- > NO - _____

BLM AND BEYOND

New political/social issues continue to arise:

- › How did companies respond to George Floyd's killing? Should they have responded?
- › How should companies respond to other social and political issues? What are the considerations in taking a stand?
- › There's building pressure on companies to take a stand on issues/events such as the Atlanta spa shootings/rise in violence against Asian-Americans, and voting laws (Delta, Coca Cola, etc.).
- › Deciding when to step in, how far to go, whether to follow up with additional action is a challenge.

POLL

Did your company leadership receive any negative feedback from employees in response to any statement made by the company following George Floyd's death in 2020?

- > YES - _____
- > NO - _____



POLL RESULT

Did your company leadership receive any negative feedback from employees in response to any statement made by the company following George Floyd's death in 2020?

- > YES - _____
- > NO - _____



CONVERSATION TOPICS:

- › Did your companies issue public statements after George Floyd's killing? Any challenges to doing so?
- › How has your company addressed social (racial) justice issues in your workplace since last summer in particular?
- › How vocal has corporate leadership been?
- › What are the challenges and legal risks to engaging in dialogue about diversity and social justice?
- › What impact have corporations seen from actions taken in 2020?

CONVERSATION TOPICS:

- › Did your companies issue public statements after the Capitol Hill rioting? What about the Atlanta spa shootings?
- › What challenges to you see going forward for your companies regarding responding to political and social debates? (i.e., voting laws, etc.)

EXCERPTS FROM SODEXO LEADERSHIP MESSAGE ON INCLUSION - JUNE 1, 2020



The first half of this year has been challenging for all us—the health and safety threats presented by the pandemic have been unprecedented. Sadly—adding to an already difficult time—in recent weeks, the United States has once again been shaken by the dehumanization and senseless killing of black people. The murders of George Floyd, Breonna Taylor and Ahmaud Arbery—among others—weigh heavily on every member of our team, especially African Americans, and the communities we serve.

We will continue to find opportunities for humanity and kindness. Harder will be our efforts to move the dial and effect real change in race relations, but we will strive. We will continue to model inclusion and refuse to be bystanders.

We will not be neutral in situations of injustice; we will speak and stand up for one another.

SODEXO LEADERSHIP EXTERNAL STATEMENTS FOLLOWING THE DEATH OF GEORGE FLOYD

- > <https://www.linkedin.com/pulse/world-which-i-want-my-children-raised-stephanie-hertzog/>
- > <https://www.linkedin.com/pulse/what-comes-next-george-floyd-emotional-toll-racism-mia-mends/?trackingId=4joNz4bTSPCKlLfEh3HtTA%3D%3D>

DEVELOPING AN INCLUSIVE CULTURE: ACTION STEPS

Action Item - Robust DEI Programs

Where to start?

- Assess where your organization's DEI program is.
- Assess what your organization's culture is.
- Assess what your goals are.

Action Item - Robust DEI Programs

Basics:

- Anti-discrimination policies
- Training to mitigate biases and increase cultural competency
- Remove bias from evaluation and promotion decisions

Ongoing:

- Set diversity targets and track against them
- Get employee input via surveys and/or focus groups about the state of DEI

Moving forward:

- Sponsorship/mentoring
- Resource groups
- Structural changes - flexible work, child care, non-binary gender designations

Action Item - Anti-Discrimination

- › Not just a compliance requirement
- › Make sure you have multiple avenues for expressing concern and that managers clearly describe them and employees know of them.
- › Managers should know to pay attention to the atmosphere and tension around them, and act proactively
- › Encourage employees who feel uncomfortable to speak up
- › Consider using town halls or other mechanisms for employees to voice concerns





Action Item - Recruitment and Retention

What can employers do?

- Review hiring procedures.
 - Even if you have a diverse slate of candidates, are hiring managers being trained about unconscious bias?
 - Do you have diverse interview panels?
 - Do you use uniform interview questionnaires for all candidates?
 - Are you setting hiring goals and tracking to them?

Action Item - Recruitment and Retention

What can employers do?

Partner with organizations whose mission is to increase representation.

- Sodexo is partnering with Women Back to Work.
- Bill and Melinda Gates Foundation and many other companies have partnered with Management Leadership for Tomorrow.
- Other groups include INROADs, National Black MBA Association, Out & Equal Workplace Advocates.



Action Item - Recruitment and Retention

What can employers do?

Create/reinvigorate internal resource groups for employees for networking and support.

- Talk to your employees - what would help them?
- Employee/workplace surveys

Active mentorship and sponsorship.

- Mentors can provide support and guidance.
- Sponsors can champion employees through their careers and help push them forward.



Action Item - Career Development

- Review the process for work assignments. Does work just go to the person who volunteers first? Is that equitable?
- Review the process for evaluation. As with hiring, are managers trained on unconscious bias and working to eliminate it? Are you monitoring potential group differences in ratings every year?

Action Item - Career Development



- › Review compensation processes and conduct a pay audit. Are you monitoring pay equity? Are there gaps to be addressed?
- › Consider pay transparency.
- › Focus on opportunity gaps.
- › Review processes for succession planning. Are you monitoring potential group differences in who is targeted for succession?

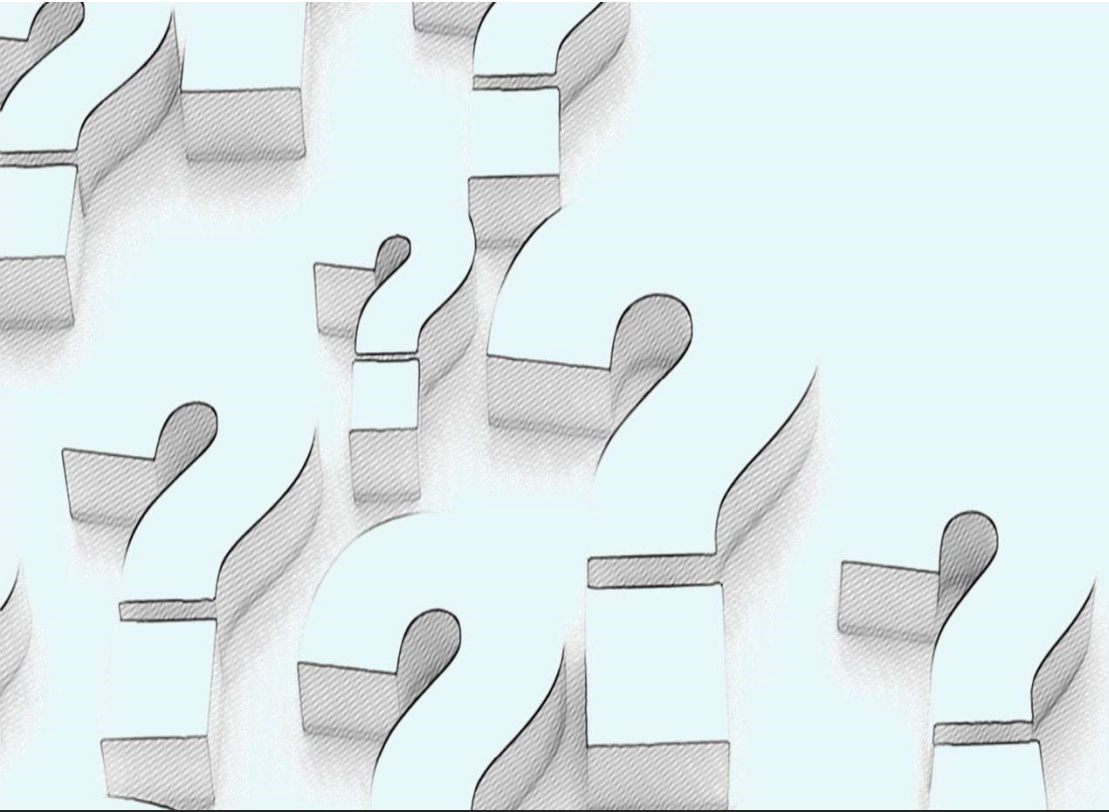
Action Item - Enforcement of Anti-Discrimination

Policies, Expectations, and Culture:

- › Remind everyone who you are as a company, and of the consequences of disrespectful behavior
- › Require anti-discrimination training be completed every year
- › Follow through with consistent counseling and discipline
 - › Hold managers accountable for enforcing the policies
 - › Hold employees to the policies

Advancing Equity and Inclusion

- › How can employers advance equity and inclusion externally?
 - Take a stand in public square.
 - Ask vendors about their own DEI programs and demand diversity.
 - For example, in deciding which outside counsel to use, ask law firms how they staff their matters and to provide evidence of a diverse workforce
 - Put money where your mouth is.
 - In the wake of the January 6, 2021 insurrection, many large companies paused their employee-funded PACs. Now is a good time to reassess giving priorities.



fisherphillips.com

© 2021 Fisher & Phillips LLP