Understanding Workplace Affinity/BRG/ERG Groups

Jimmy F. Robinson, Jr.

I. What is an Affinity/BRG/ERG Group?

Employers typically seek to increase and promote the inclusion of diverse groups within their organizations through a number of different initiatives, including employee affinity groups. An affinity group, which is also referred to as an employee or business resource group, is an employer-recognized group of employees that supports employees of diverse backgrounds. These groups are typically organized based on or around social identities, shared characteristics or life experiences and often involve or implicate protected characteristics such as ethnicity, race, disability, gender, and sexual orientation. Affinity groups are often supported financially and in other non-monetary ways by employers. Affinity groups usually have distinct business purposes such as facilitating recruitment, professional development, increasing retention, generating business development, improving company policies, promoting diversity, expanding cultural awareness, and improving the company's public image.

Employers believe employees and employers themselves may receive a myriad of benefits from affinity groups. At its most simplest, membership in these groups can provide employees with potentially valuable professional development and networking opportunities, mentoring, camaraderie, communication of volunteer opportunities and facilitate the exchange of information. Just as important, affinity groups can increase employee morale and give employees an important social support network. Further, from a business resource perspective, affinity groups can provide valuable guidance to companies that are seeking to expand into diverse consumer markets or otherwise yet-untapped communities.

II. Are Affinity Groups Legal?

Absolutely. However, they are not without legal risks. Before implementing an affinity group program, employers should be familiar with the laws and regulations that are implicated by the formation of employer-sponsored affinity groups, as follows:

- Title VII of the Civil Rights Act of 1964 (Title VII) and similar state laws prohibiting discrimination, harassment, and retaliation in the workplace.
- The National Labor Relations Act's (NLRA), which prohibits employer's involvement in "labor organizations."
- The Fair Labor Standards Act (FLSA) and similar state laws that require compensation to non-exempt employees for hours worked.

A. Discrimination, Harassment, and Retaliation.

Title VII prohibits a discrimination and harassment in the workplace based on certain protected characteristics, such as race, gender, religion and national origin. It also prohibits retaliation for engaging in activities protected by Title VII, such as raising complaints of discrimination and harassment. The rule of thumb is that affinity groups do not violate Title VII and similar state laws

so long as the employer provides the same rights and support all affinity groups and does not discriminate against one particular group within a protected classification.

Very few courts have dealt with discrimination, harassment and retaliation claims related to affinity groups. Below are the seminal cases and the lessons learned from each case.

1. Discrimination.

Moranski v. General Motors Corp.

In *Moranski*, the 7th Circuit held that an employer is permitted to prohibit religious affinity groups notwithstanding that other affinity groups were sponsored by the company.[1] A General Motors (GM) employee, John Moranksi, who identified as a "born-again Christian," sued GM for religious discrimination based on GM's policy of refusing to recognize affinity groups "promoting or advocating a religious position." As part of its support for employee affinity groups, GM had established Affinity Group Guidelines that management followed when deciding whether proposed groups would become GM recognized affinity groups. GM's Guidelines explicitly prohibited employees from forming affinity groups based on any religion. Not to be deterred, Moranski submitted an application requesting affinity group recognition for the "GM Christian Employee Network." Citing its Affinity Group Guidelines, GM denied the application. Moranski then filed an EEOC charge, alleging that GM discriminated against him on the basis of his religion when it denied his application.

The district court dismissed Moranski's religious discrimination claim. On appeal, he argued that GM's blanket refusal to recognize religious affinity groups violated Title VII's prohibition on religious discrimination because it resulted in GM treating non-religious employees more favorably than religious employees. He also argued that GM's refusal to recognize religious groups was discriminatory in light of its recognition of groups such as the GM Hispanic Initiative Team and the General Motors African Ancestry Network. The Seventh Circuit affirmed dismissal of Moranski's claim, holding that GM did not discriminate against Moranski on the basis of his religion because GM did not permit <u>any</u> religious affinity groups to be formed:

> The Affinity Group guidelines treat employees with all religious positions identically: any employee with any religious position may join any of the recognized Affinity Groups, but the company will not recognize as an Affinity Group a group organized on the basis of a religious position. This is not discrimination "because of" religion.[2]

<u>Lesson(s) Learned from *Moranski*:</u> Employers should establish objective, non-discriminatory criteria for determining whether they should recognize or sponsor a proposed affinity group.

[1] *Moranski v. General Motors Corp.*, 433 F.3d 537 (7th Cir. 2005).
[2] *Id.* at 541-42.

Schwartzberg v. Mellon Bank, N.A

The mere fact that an employer is recognizing diverse groups in the workplace may result in claims of discrimination by employees who disagree with beliefs of a particular diverse group. In *Schwartzberg v. Mellon Bank, N.A.,* the plaintiff claimed that his religious belief did not condone sexual relations between members of the same sex and that the employer discriminated by failing to accommodate his religious belief by requiring that he accept and support homosexual activity by having an LGBT affinity group.[3] The court found that the plaintiff was never required to attend any activities that supported the LGBT affinity group. Because his participation was strictly voluntary, there was no conflict between the employer's policy of permitting an LGBT affinity group and plaintiff's religious belief.

Lesson(s) Learned from *Schwartzberg*: Employers should clearly communicate that participation in affinity groups is voluntary and that employees do not experience, or lead to believe that they will experience, any adverse employment action for non-participation.

Pilgrim v. McGraw-Hill Companies, Inc.

In *Pilgrim v. McGraw-Hill Companies, Inc.*,[4] the employee claimed that she was not selected for a promotion because she was African American and belonged to the company's African American affinity group. The court allowed plaintiff's race discrimination claim to proceed past summary judgment, in part, due to plaintiff's claim that the hiring manager did not approve of the African American affinity group or plaintiff's participation in it.

Lesson(s) Learned from *Pilgrim*: Managers should not express negative opinions about affinity groups or an employee's participation in such groups, as such statements could form the basis for an employee's claim that an adverse employment action (e.g., failure to promote) was motivated by discriminatory intent.

Sinio v. McDonald's Corp.

In *Sinio v. McDonald's Corp*.,[5] the employee, who is Asian American, claimed that her supervisors, who were members of the company's networking organization designed to help African-American employees achieve promotions, treated her less favorably than her African American co-workers, who were also members of the same networking organization. The court allowed plaintiff to proceed past summary judgment because it found that she provided facts sufficient to create a jury issue as to whether she was treated less favorably than her similarly situated co-workers.

Lesson(s) Learned from *Sinio*: Just like managers should not express negative opinions about affinity groups or an employee's participation in such groups, they should not favor members of such affinity groups with respect to workload, performance reviews, or other terms and conditions of employment merely because of the employee's participation in those groups. Any

[3] *Schwartzberg v. Mellon Bank, N.A.*, 2008 WL 111984 (W.D. Pa Jan. 8, 2008).
[4] *Pilgrim v. McGraw-Hill Companies, Inc*., 599 F. Supp. 2d 462 (S.D.N.Y Feb. 18, 2009).
[5] *Sinio v. McDonald's Corp*., 2007 WL 869553 (N.D. Ill. March. 19, 2007).

different treatment, whether positive or negative, of similarly situated employees must be based on legitimate, business reasons.

2. Harassment.

Flood v. Bank of Am. Corp.

In *Flood v. Bank of Am. Corp.*,[6] 780 F.3d 1, 12 (1st Cir. 2015), the court allowed a bisexual plaintiff's harassment claim brought under state law to proceed past summary judgment in part because her supervisor "did not allow [her] to take time away from the phone to attend LGBT affinity group meetings, even though other employees were allowed to attend similar types of meetings."

Lesson(s) Learned from *Flood*: Unequal treatment by managers in connection with an employee's participation in affinity groups may form a basis for a claim of harassment, as well as be the basis for a claim of discrimination.

Mahon v. American Airlines

In *Mahon v. American Airlines*,[7] the plaintiff, a member of the Caucasian employee resource group, distributed a pamphlet that allegedly contained white supremacist rhetoric and had worn a t-shirt depicting the cover of the Turner Diaries, a book containing white supremacist ideology and scenes of violence toward non-white people and "race traitors." The back of the shirt read: "What will you do if they come and take your guns? Warning: The FBI has labeled this the most dangerous book in America." Plaintiff was terminated for engaging in conduct that violated the company's harassment and workplace violence policies. The court found that so long as the company treated plaintiff the same as other similarly situated employees in its application of its harassment and workplace violence policies, plaintiff's termination was lawful. However, because there was some evidence that other employees were not disciplined or terminated for the same or similar behavior, the court allowed the case to proceed past employer's 12(b)(6) motion.

Lesson(s) Learned from *Mahon*: Affinity groups often bring to the forefront differences among employees, thereby increasing the likelihood that employees engage in conduct that violates anti-harassment laws. Therefore, it is critical that an employer have in place, prior to implementing an affinity group program, robust policies prohibiting discrimination, harassment and retaliation, as well as a robust complaint procedure. In addition, once in place, consistent application of these policies is key to ensuring that any adverse employment actions made pursuant to these policies will withstand claims of discrimination, harassment and retaliation.

3. Retaliation.

Under Title VII makes it unlawful for an employer to retaliate against an individual because the individual has opposed any practice made unlawful by Title VII or because the individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or

[6] *Flood v. Bank of Am. Corp.*,[6] 780 F.3d 1, 12 (1st Cir. 2015).
[7] *Mahon v. American Airlines*, 2003 WL 21733131 (10th Cir. July 28, 2003).

hearing under Title VII. The critical element of a retaliation claim is whether the plaintiff engaged in legally "protected activity."

Harris v. The Vanguard Group, Inc.

In *Harris v. The Vanguard Group, Inc.*,[8] the court dismissed plaintiff's retaliation claim, finding that plaintiff's communications with the company about her desire to create an interfaith employee resource group did not constitute protected activity under Title VII. They found that because her activities did not relate to making a charge, testifying, assisting or participating in any manner in an investigation, proceeding, or hearing under Title VII, she did not engage in any activity protected by Title VII.

Pilgrim v. McGraw-Hill Companies, Inc.

On the other hand, in *Pilgrim v. McGraw-Hill Companies, Inc.*,[9] the court allowed plaintiff's case to proceed past summary judgment on her retaliation claim, in part, due to plaintiff's claim that as a member of the company's African American affinity group, she regularly provided reports to her supervisors, which she claims showed that African–American employees received fewer promotions and had lower grade levels, turnover rates, and salaries than Caucasian employees in similar positions at the company.

Lesson(s) Learned from *Harris and Pilgrim*: It is unlikely that membership or participation in an affinity group alone would be considered protected activity. However, as illustrated in *Pilgrim v. McGraw-Hill Companies, Inc*., certain activities within the context of an affinity group may be protected. Therefore, it is critical to ensure that any adverse employment action taken against employees who are involved in affinity groups be supported by documentary evidence of legitimate business reasons.

4. The National Labor Relations Act (NLRA).

In addition to possible discrimination, harassment and retaliation issues, employers must be mindful, even in non-union environments, that affinity groups can lead to NLRA violations if used as a vehicle to discuss, negotiate or bargain with the employer over terms and conditions of employment. If used in this manner, an affinity group may become a "labor organization."

Under Section 8(a)(2) of the NLRA, it is an unfair labor practice for an employer to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support." 29 U.S.C. § 158(a)(2). Section 2(5) of the NLRA very broadly defines a "labor organization" as "any organization of any kind . . . in which the 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." 29 U.S.C. § 152(5). In practical terms, an employee organization such an affinity group that makes proposals concerning terms and conditions of employment to an employer to which the employer responds is at risk of becoming a labor organization.

[8] *Harris v. The Vanguard Group, Inc*., 2015 WL 9685565 (W.D. N.C. Nov. 6, 2015).
[9] *Pilgrim v. McGraw-Hill Companies, Inc*., 599 F. Supp. 2d 462 (S.D.N.Y Feb. 18, 2009).

The NLRB has identified several "safe haven" employee groups where it has determined that no "dealing" with the employer takes place. These include "brainstorming" groups that merely develop ideas for the employer's consideration,[10] "information sharing" groups[11] and "screening" groups that forward employee suggestions to management.[12]

The important distinction to make is between groups that share information and suggest different ideas to management, on the one hand, and groups that make specific proposals to management regarding their terms and condition of employment, on the other hand. Accordingly, to minimize legal risk under federal labor law, employers should have a strictly-enforced policy that affinity groups must avoid developing and making concrete proposals to management and, in the event such proposals are nonetheless made, management will not consider the group's proposal. The goal is to avoid the appearance that the employer is in any way "bargaining" with the affinity group.

5. Compensation to Non-Exempt Employees for Time Spent in Affinity Group Activities.

Compliance with federal and state wage and hour laws may also present a legal risk in relation to affinity groups under some circumstances. The Fair Labor Standards Act (FLSA) requires employers to pay at least a specified minimum wage for each hour worked, and overtime compensation for employment in excess of forty hours in a workweek. Although the term "work" is not defined in the statute, the Act defines "employ" to mean "to suffer or permit to work." The Supreme Court has defined work to include any time "controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."[13] Accordingly, time spent attending employer-sponsored lectures, meetings, and training programs is generally considered compensable.[14] However, the Department of Labor (DOL) has promulgated interpretive regulations for defining when employee attendance at "lectures, meetings, and training programs" is not compensable hours worked.[15]

Attendance at employer-sponsored lectures, meetings, training programs and similar activities need not be counted as working time if all four criteria are met:

(a) Attendance is outside of the employee's regular working hours;
(b) Attendance is in fact voluntary;
(c) The course, lecture, or meeting is not directly related to the employee's job; and
(d) The employee does not perform any productive work during such attendance.[16]

In addition, the DOL has also promulgated regulations that allow employers to not compensate employees for voluntary time spent outside of the employee's regular working hours where the

[10] *See E.I. du Pont de Nemours & Co.*, 311 NLRB 893, 894 (1993).
[11] *See id.*
[12] *See EFCO*, 327 NLRB 372 (1998).
[13] *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944) (footnote omitted).
[14] *Chao v. Tradesmen Intern., Inc.*, 310 F.3d 904, 907 (2002).
[15] *Id.*; 29 C.F.R. § 785.27.
[16] *Id.*

activity involves "civil" or "charitable" work, [17] or "developing suggestions" for the workplace[18]. However, if the employer assigns an employee to work on the development of a suggestion, such time, even if spent outside the employee's regular working hours, must be counted as hours worked.[19]

In sum, time spent by a non-exempt employee in activities related to an employer-sponsored affinity group during the employee's regular working hours is most likely compensable time. On the other hand, such activities outside of an employee's regular working hours may not be compensable time if such activity: i) does directly relate to the employee's job, and ii) does not involve productive work, and iii) does not involve an assignment by the employer to work on the development of a suggestion.

III. Best Practices.

1. **Treat Affinity Groups Based On The Same Characteristics Equally.** If an employer permits an affinity group based on a protected characteristic, it cannot prohibit the formation of affinity groups within the same protected class. For example, employers who recognize an African American affinity group, must also permit Caucasians to form an affinity group. But, an employer is free to prohibit affinity groups based on a protected characteristic, so long as that prohibition is applied equally to all groups within that protected characteristic. A policy prohibiting any affinity group that promotes or supports any religious beliefs is lawful. An affinity group policy should include a clear statement as to what groups the company will and will not recognize.

2. **Membership Should Be Open to All Employees.** Affinity groups must be open to all employees, even those who do not share the particular characteristic on which the group is based. For example, an employer cannot allow a women's affinity group to exclude men or limit men's opportunities for engagement in the group and its activities. Doing so places the employer at risk of discrimination claims. An affinity group policy should include a clear statement that members in any affinity group may not be limited based on the employee's race, gender, religion, or other protected characteristic.

3. **Require Complaints Be Submitted Through Company's Formal Complaint Procedures.** Employees may perceive affinity group meetings to be safe havens to air complaints about the workplace. This can quickly become problematic for employers if the complaints are based on or even arguably related to legally-protected characteristics. If a manager is a member of the affinity group and complaints are raised and not addressed, such knowledge could be imputed on the company. Accordingly, any guidance documents issued to, for or about affinity groups should make clear that complaints of discrimination, harassment, retaliation, etc. should be funneled through normal reporting mechanisms, such as Human Resources, Law Department, Ethics Hotline, etc.

4. **Ensure Affinity Group Activities Are Voluntary.** Do not mandate employee attendance at affinity group activities. Employees who disagree with a particular group's view point

[17] 29 C.F.R. § 785.44.
[18] 29 C.F.R. § 785.45.
[19] *Id.*

or position have the right to decline to participate in activities that foster values that they do not agree with. Mandating participation by an employee who disagrees with a group's values may form a basis for a discrimination complaint. Moreover, mandating participation will also require that the employer compensate the employee for time spent in such activities, even if they are outside of the employee's regular working hours.

5. **Ensure Anti-Harassment Policies Adequately Address Potential Problematic Behaviors That May Result From Formation of Affinity Groups.** The mere existence of affinity groups may prompt an employee who may otherwise would have remained silent to openly share their disagreement with a particular diverse group's mission. For example, an employee with religious beliefs that does not allow them to condone sexual relations between members of the same sex may express their beliefs directly to members of an LBGT affinity group. An effective anti-harassment policy should ensure employees understand the specific conduct and behaviors that violate the company's anti-harassment policy. Employers should also ensure that all employees, including members and non-members of affinity groups, are aware of the company's anti-harassment policy.

6. **Affinity Group's Purpose Should Not Be to Represent Employees Regarding Their Terms and Conditions.** As discussed above, in addition to possible discrimination, harassment and retaliation issues, employers must be mindful, even in non-union environments, that affinity groups can lead to NLRA violations if used as a vehicle to discuss, negotiate or bargain with the employer over terms and conditions of employment. Employers should ensure that affinity group policies contain a specific disclaimer that it is not the purpose of the group, nor is the group is designed to address the terms and conditions of employment, make proposals to the employer, represent other employees, or otherwise "deal with" the employer over terms and conditions of employment. Employers should refrain from engaging in discussions or proposals with affinity groups about the terms and conditions of employment.

7. **Train Managers Regarding Best Practices.** Managers must avoid expressing any negative comments about affinity groups or suggesting that they do not support affinity groups. Managers must also understand the importance of ensuring that they do not engage in any conduct that may be perceived as discriminatory, harassing or retaliatory towards members of affinity groups. For example, employees from women's affinity group should be allowed to take time out of the work day to attend meetings in the same way as a member of the men's affinity group.

8. **Determine Whether To Compensate Non-Exempt Employees for Time Spent Outside Regular Working Hours.** If the company determines that it will not compensate non-exempt employees for time engaged in affinity group activities outside of the employee's regular working hours, this policy should be compliant with both state and federal wage and hour **laws**, and be applied equally to all affinity groups and their members.

9. **Ensure There Is An Affinity Group Structure and Guidelines That All Can Follow.** Sound and consistent implementation of affinity group rules poses challenges for even the most seasoned practitioner. Should a company decide to formalize affinity groups, it would be well served to put in place a structure for managing affinity groups and publish

guidelines or policies that consider the legal and practical issues that arise in execution. For example, creating a guidelines document that describes the purpose, the process for recognition, the leadership structure, and the budget process, among other things, can help ensure clarity and consistency as the affinity groups move forward.