



Feature

3 Tips For Employers Looking To Back Worker Affinity Groups

By [Vin Gurrieri](#)

Law360 (June 22, 2018, 9:54 PM EDT) -- Although workplace affinity groups — caucus groups of employees who share common traits or concerns, like LGBT individuals or parents — can give businesses a way of boosting morale and brainstorming ideas to improve diversity, they still may pose legal risks if employers aren't careful.

Affinity groups have become popular elements of many workplaces in recent years largely because of the wide range of benefits they provide for businesses and employees alike. As a result, many employers choose to sponsor such groups, affording them a budget or allotting time for workers to meet, for example.

For employees, the benefits of such groups can include external benefits, such as collaborating on ways to reach out to clients, as well as the internal benefit of finding ways to ensure that participants "feel supported in the workplace," according to Adam Pankratz of [Ogletree Deakins Nash Smoak & Stewart PC](#), who is one of the leaders of the firm's LGBTQ+ affinity group, which the firm calls a business resource group.

Jay P. Holland of [Joseph Greenwald & Laake PA](#) said the benefits of such groups can also be wide-ranging and significant for businesses: an increased ability to attract individuals from diverse backgrounds, creating understanding between management and individuals from those backgrounds, improving retention, and creating pathways for group members to move into leadership positions.

"One of the concerns, like anything else it has to be done right," Holland said.

Here, attorneys offer three do's and don'ts for employers considering whether to sponsor such groups.



Set Clear Goals

Nonnie Shivers of Ogletree said an important first step for an employer who sponsors affinity groups is to develop a clear outline that describes what business purpose the group will serve, such as improving company policies, promoting diversity, expanding cultural awareness and bettering the company's public image.

"Employers need to establish objective nondiscriminatory criteria for determining whether they should recognize or sponsor a proposed group," preferably in writing and applied consistently, Shivers said.

"This shouldn't be an ad hoc decision. You should probably have some parameters set up — preferably in writing — that would show what you're looking to accomplish and what you will sponsor or recognize," Shivers said.

Moreover, Shivers said that setting clear goals should include how the proposed group will help its members achieve the company's goals, including core objectives such as business development and inclusion, which can help employers avoid situations where the groups essentially morph into venues for workers' gripes.

"If you form an affinity group you ... should give very clear guidelines to group members or leadership of that group and the sponsors of that group within the company about how to channel concerns about discrimination or harassment or other concerns about the company," Shivers said. "You don't want it to go off the proverbial rails and turn things into group complaint sessions."

So Shivers said it's important that members of affinity groups know upfront that they still should use existing company processes for resolving equal employment opportunity allegations, such as grievances and internal hotlines.

Pankratz, her colleague at Ogletree, said the same approach should also apply for workers who want to ask that a group be approved, that the first thing an organizer should have is "a



clear goal in mind of what is the purpose of this group, what are we going to do with it, and how do we as a potential organization within our company pitch this so that it has a return on whatever investment you put into it?"

"If you're going to start one up, you better start there and make sure you have a way to sell it to the powers that be, if you will, that are going to allow you create and run this organization," he said.

All-or-Nothing Policy

Once the initial boundaries are in place, attorneys said the most important thing employers can do to avoid landing in legal hot water is make sure they aren't acting in a discriminatory way when deciding what groups to approve.

"The state of the law is pretty simplistic at least initially, which is if you're going to allow one you have to allow others," Shivers said. "It's not that you have to allow all affinity groups, but you can't discriminate against one particular group within a protected classification."

"It's an all-or-none within a characteristic," she added.

For example, employers must allow an affinity group for men if they allow a group for women since the protected characteristic under anti-discrimination laws is sex or gender, Shivers said. But allowing groups that fall under the gender category doesn't mean that the employer would also have to open the door to groups involving other characteristics such as religion.

While cases involving affinity groups don't come up often, one notable example is a 2005 case in which the Seventh Circuit held that [General Motors](#) didn't discriminate against an employee under Title VII when it denied his request to create an affinity group for born-again Christian workers. The court said GM's policy didn't allow for any religion-oriented affinity groups, meaning the policy wasn't biased against any particular religion.



"You can have approval of affinity groups based on ethnicity or gender or [other protected categories], and as long as you allow people to formulate affinity groups and treat them the same within the protected classification, the state of the law is you don't have to expand that to all classifications," Shivers said.

Don't Let Intentions Cloud Judgment

Although the basic ideas underlying most affinity groups — like promoting inclusive practices and giving worker groups a voice — are laudable, employers still have to be careful that good intentions don't prompt them to take unlawful steps.

Holland, for one, noted that employers should be cautious to not run afoul of anti-discrimination laws when they discuss diversity with an affinity group's members, particularly if the parties brainstorm proposals for hiring a more diverse workforce.

"While the affinity group can certainly take ideas and adopt programs in response to suggestions from the affinity groups, [employers] have to be careful about stepping over the Title VII line," Holland said. "While it's perfectly appropriate to encourage a more diverse workforce and reach out to different communities to make sure you have a diverse workforce ... they can't step over the line into saying, 'We now have to hire 25 individuals of a particular race or a particular sexual orientation.' Then you are indeed discriminating upon a prohibited classification under Title VII."

But while most of the focus when it comes to the legal risk around affinity groups is from the Title VII perspective, Shivers noted that an employer could also be accused of running afoul of the National Labor Relations Act if an affinity group or diversity council is deemed to have been converted into an entity that essentially functions as a bargaining group once it starts making concrete proposals to management.

Shivers was careful to note that such a situation has never come up and she knows of no [National Labor Relations Board](#) rule governing a group that claims it converted into a labor organization by making proposals to a company. But she said it could theoretically be



an issue if the right set of factors present themselves, another reason employers should be clear up front about a group's purpose.

"Is it an official bargaining group? No. But in practical terms, if an affinity group starts making proposals concerning about actual terms and conditions of employment to which an employer responds, there's actually a risk of that group becoming a labor organization," Shivers said. "With all the changes at the board, it's certainly a possibility depending on what the facts are of a particular circumstance."

--Editing by Brian Baresch and Breda Lund.