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Unconscious Bias and Social Movements in the Workplace

How Do Employers Respond?

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Agenda

- **Unconscious Bias** – What is it?
- **How does Bias Manifest in the Workplace?** – Learning Opportunities, Social Movements, and Calls to “Cancel”
- **Corporate Responses** – How Should A Company Respond to a Call to “Cancel” An Employee Because of His or Her Biases? Social Media? Off-duty conduct?

Part I: Unconscious Bias

Unconscious Bias

- The brain takes in 11 million pieces of information at any one point in time, BUT
- The brain can process only 40 pieces at once
- We need filters
- Unconscious bias: automatic filters to process information



WHAT IS UNCONSCIOUS BIAS?

- Unconscious biases are the automatic mental shortcuts used to process information and make decisions quickly
- These mental shortcuts and quick decisions are based on past experiences and may be based on cultural stereotypes

Filling In the Blanks

- **What might we use to fill in the blanks?**
 - Family history
 - Personal experiences
 - Personal values
 - Educational experiences
 - Historical influences
 - Cultural influences – *e.g.*, in media

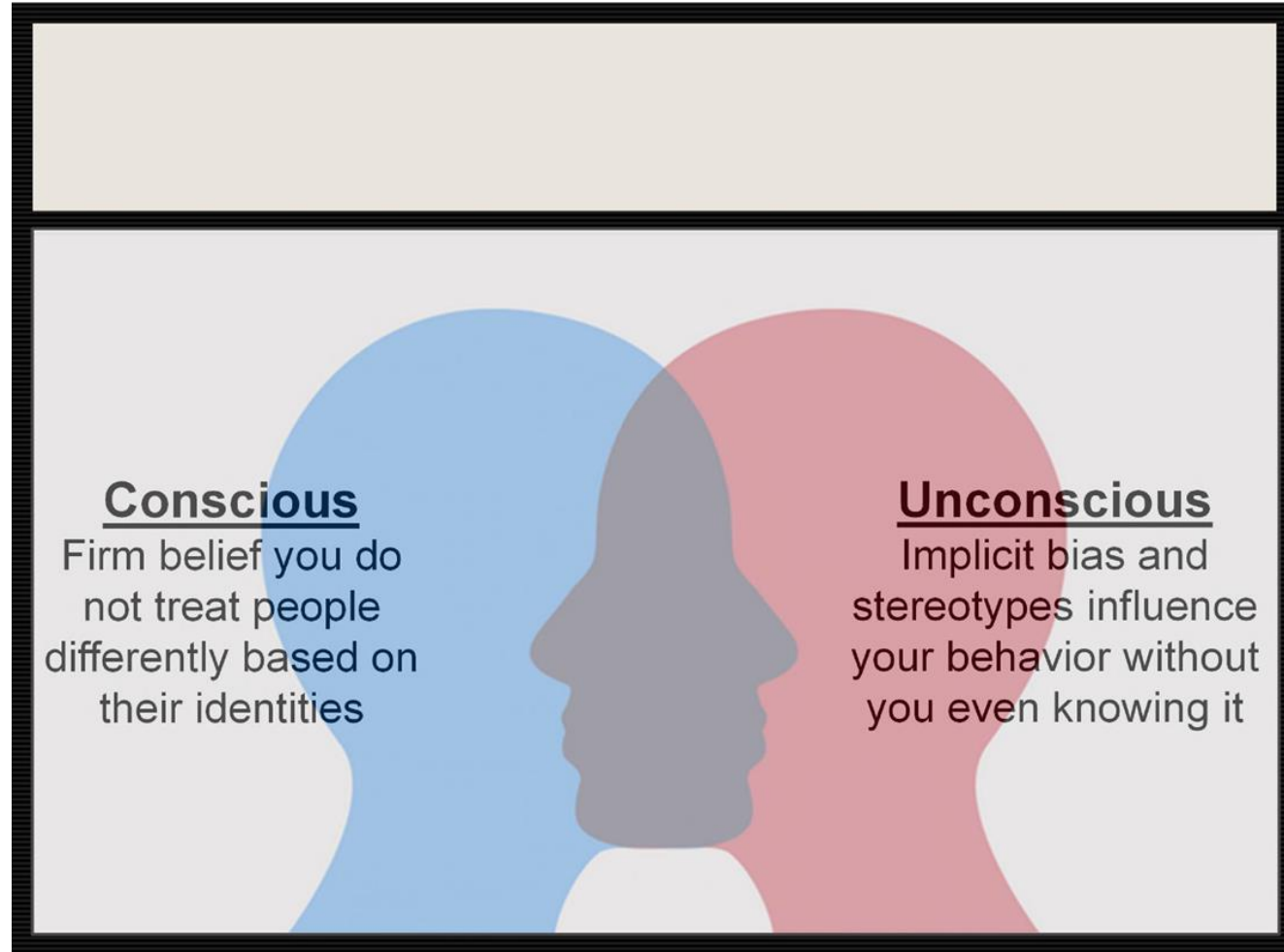


Unconscious Thought Can Be Valuable

- Shortcuts and categorizing
 - Save time and energy
 - Help us make sense of the world
- Can come at the price of accuracy



Two Things Can Be True At Once



Cognitive Biases

A cognitive bias is a systematic error in thinking that affects the decisions and judgments people make.

Examples:



Availability



Attribution



Anchoring



Confirmation



Affinity



Availability Bias

- Top of mind - estimating what's more likely based on availability in memory.
- E.g., work assignments, who do you go to for help?



Attribution Bias

- Judge In-Group Better than Out-Group:
- Infer causes of events or behaviors
 - In-group judged as individuals (you make excuses for your in-group)
 - Out-group judged by group stereotypes (no excuses)



Anchoring Bias

- Initial valuation influences final valuation without your realizing – e.g., prior pay of candidates or newly hired employees



Confirmation Bias

- Seeing that which you expect to see . . . And not seeing what you don't



Affinity Bias

- Favoring people who are like you and/or have similar backgrounds.
- *E.g.*, easier candidate interviews; go-to employees for work assignments



Unlawful Discrimination & Bias

Disparate Treatment

- Disparate Treatment based on “protected characteristic”:
- Adverse Action
- Protected Characteristic
- Legitimate Business Reason
- Pretext

Disparate Impact

- Neutral policy
- Disparate impact on a group

Straight Up Othering

- Behaviors/Actions that exclude, single out, separate
- May or may not amount to “unlawful” discrimination

Race Discrimination

- **Ancestry** (i.e., bias against Chinese-American related to Asian ancestry, not country of origin)

- **Physical characteristics** (skin color, facial features, hair color or texture)

- **Race-linked characteristics** (genetic predispositions, i.e., sickle cell anemia)

- **Perception** (assuming an individual is a member of a particular racial group)

- **Culture** (speech pattern, accent, holiday celebration, dress)

- **Association** (associating with someone of a protected race)

- **Subgroup or “Race plus”**
(Intersectionality- bias against more than one protected group))

Part II: How Does Unconscious Bias Manifest In The Workplace?

Unconscious Bias Can Create Hidden Barriers

- Networking opportunities
- Information access/internal networks
- Work assignments/projects
- Mentors and sponsors
- Training and development
- Substantive contact with clients/customers
- Access to information/decision-makers/stake-holders
- Inadequate feedback/soft or bare evaluations
- Advancement opportunities

Small Acts of Disrespect

- Names mistakenly left off a list
- Failing to introduce someone during meetings
- Failure to include some in work-related social engagements
- Invitations that implicitly exclude some (i.e., company holiday party is not wheelchair accessible)
- Taking calls or texting while some are speaking, but not others.
- Greeting some but not others
- Interruptions, inside jokes, sighing, eye-rolling with some

Micro-Inequities and Microaggression

- Micro-Inequity: short, small event, often covert, hard to prove, often unintentional
- Microaggression: act that stereotypes or denigrates



Social Movements

Certain social movements have permeated the workplace and have brought to light issues of unconscious bias that employers should be aware of.

#MeToo



Black Lives Matter v. All Lives Matter



Black Lives Matter

- “I grieve because when I am out in the community some white people and other non-Black communities of color seem surprised that I actually have command of the English language.”
- “I grieve because I can’t take my parents to an upscale restaurant without being asked if I can afford it by the greeter.”
- “I grieve because Black lives are only valued in this country if the life is used to entertain and make money.”
- “I grieve because it took the world to watch a death conducted in such an extreme, heinous, and egregious way for people to finally be utterly outraged.”



Source: I am NOT OK: A Grief Stricken Confession from a D&I Professional by Mandisadiggs

<https://medium.com/@mandisadiggs/i-am-not-ok-a-grief-stricken-confession-from-a-d-i-professional-de560d313144>

CANCEL CULTURE – What is it?

- Simple Definition
 - People in digital space using platforms to express dissent for people, ideas, or products.
- Elaborate Definition
 - “Cancel Culture” refers to a public, mass withdraw of support, typically in response to perceived poor behavior or wrong doings, of a person, a product, a brand or an organization. Individuals who take part in a “Cancel Culture” demonstration typically broadcast their views and reasoning for “cancelling” someone or something online.
- Competing Points of View
 - Cancel Culture is the oldest form of consumer advocacy. It is a case where consumers let their feet, or in this case, their wallets do the talking.” - Vijayaratnam Tharumartnam, Director, Group Corporate Communications, PROTON.
 - Cancel Culture is "a virus in our society." It is a mob mentality by people behind their keyboards that are ruining the lives of people who don't fit their narrative. – Ashvin Anamalai, Chief Strategist, Be Strategic.
 - “It is a reflexive jerk of the knee by the powerful, a demonstration of institutions’ unwillingness to tolerate any controversy, whether those complaining are liberal or conservative.” – Helen Lewis, Author, Difficult Women: A History of Feminism in 11 Fights.

Cancel Culture, Social Media, and the Workplace

Cancel Culture Typically Permeates the Workplace Because of Social Media:

- Calls from the public to “cancel” an employee because of her past statements on social media;
 - These statements can be wholly unrelated to the work the employee performs for the employer
- Calls to “cancel” a company because of its decision to not terminate an employee because of her past statements on social media;

Remember:

- Social media is designed for engagement, and conflict creates engagement.
- Even if people don’t get mad about what a company is doing, they might get mad about what the company is not doing.

Executive Order on Combating Race and Sex Stereotyping

Many people are pushing a ... vision of America that is grounded in hierarchies based on collective social and political identities rather than in the inherent and equal dignity of every person as an individual. ***This ideology is rooted in the pernicious and false belief that America is an irredeemably racist and sexist country; that some people, simply on account of their race or sex, are oppressors; and that racial and sexual identities are more important than our common status as human beings and Americans.***

Executive Order 13950 (2020)

Part III: Corporate Responses

Intertwining Social Activism with the Workplace



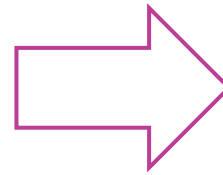
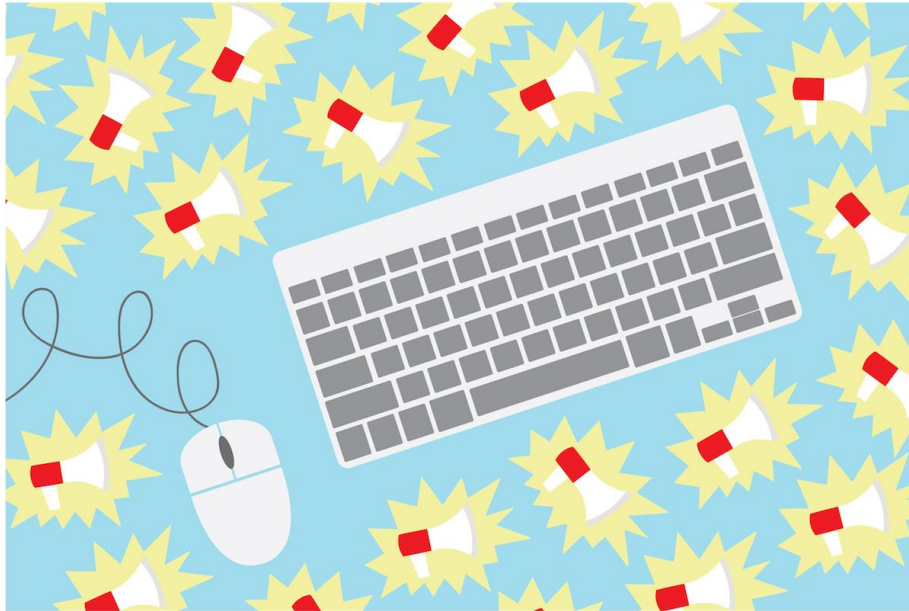
Your Corporate Statement

How To Minimize Exposure/Public Criticism

- Should be from CEO.
- Identify primary audience (e.g., employees, customers) and focus on them
- Be precise about what the company condemns and what it supports
- Recognize potential adverse impact on the group at issue, while acknowledging impact on other people of color or minority groups - and keep all employees or consumers in mind
- State support for employees and specify the available resources (e.g., Employee Assistance Program, paid leave)
- Promise at least some action. Statements without action are generating criticism.

Responding to Public Allegations of Racism/Sexism

What should I do when the firm receives emails and/or Facebook postings where **former** employees call out the company for a lack of diversity and/or for alleged racist comments by current employees?

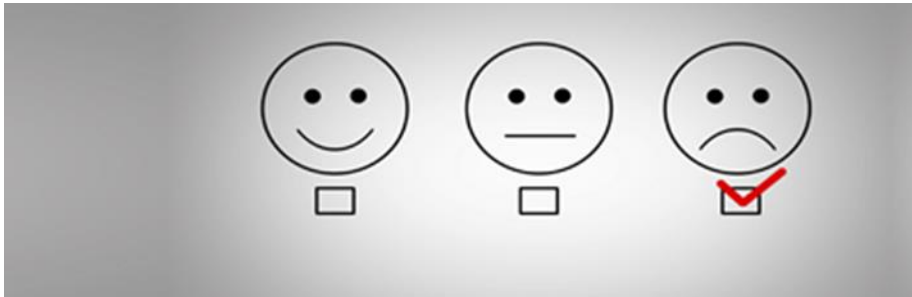


Responding to Public Allegations of Racism/Sexism

- Be aware of multiple audiences (e.g., the employee, all employees, clients, Social Media, judge/jury).
- Keep responses High Road.
- Thank former employee for speaking up; acknowledge it may have been difficult.
- Remind former employee of company's diversity and inclusion policies and actions, as well as anti-discrimination policies.
- Provide “sketch” of additional actions to which the company commits.
- Possibly, invite input from this former and other employees.
- Consider an audit of the claim.

Responding to Allegations of Racism/Sexism - Current Employees

How do I address old complaints that **current** employees are bringing back up, or bringing up for the first time, feeling emboldened by recent events?



- Thank employee for speaking up; acknowledge it may have been difficult to re-assert a prior complaint.
- Be mindful of retaliation (real or perceived)
- Do not automatically dismiss an untimely complaint
 - Involve a current policy
 - Involve a current supervisor
- Critically review the initial complaint and the response, then determine if a new investigation needs to happen.
- If necessary, investigate new complaint.
 - Interview complainant, witnesses
 - Require specificity
 - Take appropriate action
- Consider a third party investigator.

Watercooler vs. First Amendment

Am I required to allow my employees to express their political or social justice beliefs in the workplace or can I restrict such speech?



Do private-sector employees have free speech rights to make anti-Semitic, racist, or other inflammatory statements

- Unless you are a government employer, your employees generally do NOT have a First Amendment right to say whatever they want in the workplace.
- The First Amendment right to free speech is particular to government actors, not private employers.
- An employer may enforce its anti-harassment, non-discrimination, and social media policies and practices



- Consider tensions between business interests and expressions
- Consider other risks
 - National Labor Relations Act
 - California Whistleblower Statutes
 - Public policy i.e. Discrimination Claims

Protected Concerted Activity

- **What is Protected?**
 - Section 7 of the National Labor Relations Act provides: “Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to ***engage in other concerted activities*** for the purpose of collective bargaining or other mutual aid or protection.”
 - Essentially, the law protects employees who work together to try to improve their pay and other working conditions.
 - Speech protected by public policy and whistle blower laws
- **What is Not Protected?**
 - Reckless or malicious behavior, such as sabotaging equipment, spreading lies about a product, or revealing trade secrets.
 - Harassing, hate speech, and threats of violence.
 - Personal gripes.

Social Justice Speech: T-Shirts, Masks, and Buttons

- Employers can enforce dress code or uniform policies.
- Employer can enforce anti-harassment, non-discrimination, and social media policies and practices.
- “Customer-focused” branding v. consistency with social justice messaging
- NLRA Considerations



Managing Off Duty Conduct

- What if I learn my employee engaged in actions that I did not like or agree with while off the clock. Can I take actions based on employee off duty conduct?



Can employers discharge employees who participate in protests?

- **It Depends:**
- **What is Protected?**
 - Engaging in peaceful, lawful political protest.
- **What is Not Protected?**
 - Illegal conduct i.e. illegally storming the Capital.
 - *Leah Snyder v. Alight Solutions LLC, 3:20-cv-04439 (Central District- California).*
 - Protests or behavior during a protest that involves threats and expressions of violence or racial harassment are not political speech.

Disciplinary Action & Social Media

- **Can Employers Base Disciplinary Action or Termination Decisions on a social media?**
 - Typically, yes, if it does not violate discrimination or other employment laws, **BUT**, employers should do so cautiously.
 - Article 1, Section 1 of the California Constitution (privacy) and Labor Code Section 980 (social media protections) provide employees some privacy protections.
 - Some questions to ask, for example:
 - How was the information obtained (public v. private post)?
 - Was the social media search performed consistently?
 - Is the source reputable?
 - Are there NLRA issues?
 - During or outside of working hours?
 - How is the workplace impacted?



Examples of Social Media Discussions

- **Protected:**

- A group of employees who sets up their own web page to complain about:
 - Company actions
 - Supervisor's attitude or performance
 - Shared concerns about terms and conditions of employment
- Employees participating in email discussions are also protected so long as the discussions relate to employment.

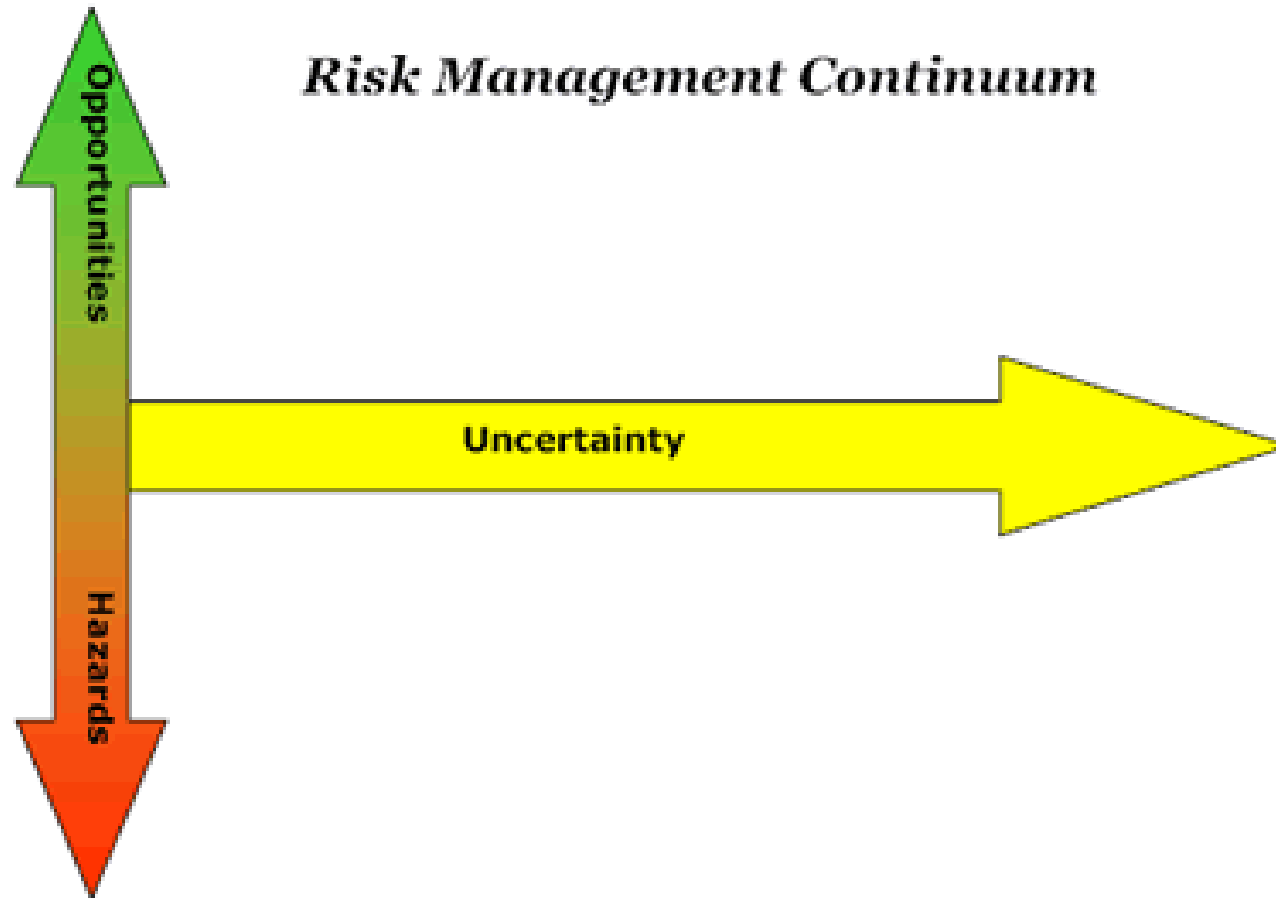
- **Not Protected:**

- Employee derogatory comments about protected groups;
- Employees may not harass other employees through, emails, skype or platforms for video or chat communication.
- Employee posts considered a threat of violence.
- An employee's own individual gripe.

What Can Employers Do to Limit Employees' Comments about the Company

- Employees do not have an unfettered right to publish or say anything.
- Remarks that are violent, libelous or just plain false are not protected whether they are about the company or its managers.
- Employers may still discipline or discharge employees who do such things regardless of the forum for the comments.
 - Expressions of individual gripes
 - An employee acting **solely** on his/her behalf or posting comments on an individual Facebook page
 - Comments sent to non-employees

What's Your Risk Profile?



Structural Changes

- Hiring processes
- Work assignment processes
- Mentorship programs
- Performance review oversight
- Promotion criteria
- Pay audits
- TRAINING

The Power of Workplace Trainings

- Hosting trainings for management-level employees on how to recognize their own unconscious biases
 - Harvard's Project Implicit, Implicit Association Test (<https://implicit.harvard.edu/implicit/takeatest.html>)
- Consider implementing bystander training for all employees
- Train employees on their rights

TAKE AWAYS

- Don't Be Deterred, But Don't Do Nothing
 - Understand your risk profile
- Review Corporate Policies to Ensure They Align with the Position the Company Chooses to Take.
- Review Training Materials, Especially for Government Contractors.
- You have the ability to limit some but not all speech and regulate some but not all off-duty conduct

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Thank **you.**