

Data, Data, Data...and the Risks of “More” Data

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Outline of Discussion

- Collecting Demographic Information
- Artificial Intelligence
- Employee Engagement Surveys
- 360-Degree Reviews
- I-9 Audit
- Medical Records
- Pay Equity Audit
- Data Retention Policies

Collecting Demographic Information

- EEO-1 Requirements
- Affirmative Action Obligations
 - State
 - Federal (do we even have these obligations any more)?
- General obligation/commitment to maintain a diverse work environment
 - If you are putting time and energy into diversity, how can you legally tell if it is moving the needle?

Artificial Intelligence

- When zoom (or any other application) automatically transcribes your meetings, what are you doing with that data?
 - Are you reviewing it for accuracy?
 - Who is responsible for ensuring accuracy of the data?
 - How long are transcriptions held (see document retention slide).
- Logged searches using AI tools

Employee Engagement Surveys

- Understanding you will receive good and bad feedback.
- How will you highlight the good?
- How will you make changes to address the bad?
 - This will result in needed commitment to change—do you have a team that is willing to change?
 - Do your team members have capacity to make change from a time perspective?
 - Change often times costs money, do you have the financial capacity?
- What to do if survey identifies legal risk?
 - Can that evidence be used against the company in future litigation?

360-Degree Reviews

- Very similar to Employee Engagement Surveys – You will get the good and the bad.
- Does the employee have the capacity to change/amend their behavior?
 - Often times employers will say, “the person is not perfect, but we are okay with their behavior, and know they won’t change.”
 - Can the failure to change, if the behavior is hostile, but not discriminatory, be used against us in the future?
 - “Equal Opportunity Jerk” Defense (hint, it’s not a great one).
- Do employees feel safe to be honest?
- Understanding the source—is all feedback created equal?

I-9 Audit

- These can be extensive time-intensive processes.
- You may determine that your processes previously in place have not appropriately tracked when additional documents should be reviewed or collected for purposes of reverification.
- Errors need to be corrected with transparency.

Pay Equity Audit

- We highly recommend that this be done in a privileged environment with oversight from counsel.
- If data shows pay inequities, immediate steps need to be taken to create equity between individuals.
- Does the organization have the financial wherewithal to complete the process?
- This can involve very sensitive conversations and a larger communication plan if there are inequities.

Medical Records

- Must be kept separate from other personnel records.
- Understanding who “needs to know.”
- Documentation relating to reasonable accommodations.
- Implementing work restrictions while respecting employee privacy

Data Retention Policies

- This is a document that should be created with insight from your operations, finance, safety, and HR team.
- Whether data is good or bad, there are risks and rewards to maintaining it.
- Maintaining data (both physical and electronic) carries a cost.
- Understanding litigation hold obligations and their interaction with Data Retention Policies.
- See handout.

Recap

- More information is not always better.
 - Consider capacity to respond to the information received.
 - Consider financial ability to make the changes that are necessary to reduce risk associated with the data.
 - You will not be able to put the data “back in the lamp,” so how will you respond if the data evidences risk.
- Some information, if collected, should be collected with counsel’s involvement to decrease risk in the future.
- Data and document retention policies are important to explain what data does and does not exist.

Verrill

Values. Value. Valued.

Thank You!

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