

LGBT+ Hot Topics: Protection, Inclusion, & Engagement

Our New Virtual Reality

About Us



John R. Richards



Lily McNulty



Nick Corsano



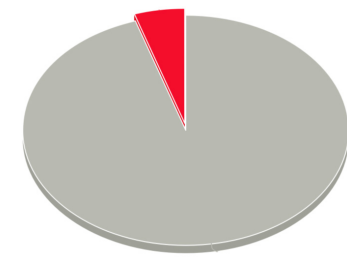
HAPPY PRIDE!

Diverse by design.
Embracing the authentic you — it's a core principle for us, worldwide. From the start, we've welcomed people regardless of sexual or gender identity. Because it's only when people are free to be themselves that they're free to share the full measure of their talents. For us, that's a source of real pride.

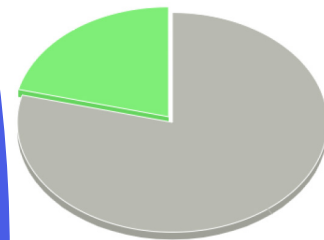
Common Ways LGBT+ Individuals Experience Discrimination in the Workplace

- Discrimination- Failure to hire/other barriers to accessing employment, denials of promotions, firing, pay disparities
- Harassment, biases, and mistreatment on the job
- Retaliation
- Unequal employee benefits (family leave policies, health benefits, sick leave, bereavement leave, etc.)

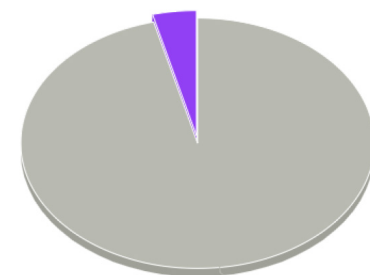
GBT+ Statistics for Perspective



5% of the U.S. workforce identifies as lesbian, gay, bisexual, or transgender



21% of LGBT+ employees report having been discriminated against in hiring, promotions, and pay



1 out of every 25 complaints made about workplace discrimination comes from LGBT+ employees

Harassment in Our New Virtual Workplace

- What do you do if an employee complains that they are uncomfortable with another employee's background on their work Zoom call because it is "flaunting their homosexuality"?
- What do you do if an employee continues to call a transgender female employee by her former "male name" on a work Zoom call and everyone laughs?



Road Map for Today

1. The Business, Legal, and Cultural Case for LGBT+ Equality
2. Understanding LGBT+ terms and state/local laws
3. Legal Landscape: Practical Overview of Relevant Laws; Implications of Supreme Court Decision & Pandemic
4. From Policy to Practice: Ensuring LGBT+ Inclusion and Engagement in Actual/Virtual Workplace



LGBT+ 101: Understanding Gender & Sexuality Terminology

- **Sexual Orientation:** To whom are you attracted?
- **Gender Identity:** Who you identify as internally
 - **Transgender:** A person whose gender identity differs from the sex assigned at birth
 - **Cisgender:** A person whose gender identity aligns with the sex assigned at birth
- **Gender Expression:** How you express yourself on the outside often through behavior, clothing, hairstyle, voice, mannerisms, or body characteristics
- **Gender Stereotypes:** Stereotypical notions of masculinity and femininity, including expectations of how people represent or communicate their gender to others through behavior, clothing, hairstyles, activities, voice or mannerisms

**LGBT+ WORKPLACE
PROTECTION & INCLUSION:
the Business, Cultural, and
Legal Case**

Business Case for an LGBT+ Inclusive Workplace: The Economic Affects of Anti-LGBT Work Culture



INCREASED:

- Turnover
- Absenteeism
- Leave requests
- Medical and Workers' Compensation claims
- Employee complaints
- Lawsuits and legal fees
- Depletion of company resources



DECREASED:

- Engagement
- Productivity
- Morale
- Job satisfaction
- Teamwork
- Concentration
- Company reputation and image

The Business Case for an LGBT+ Inclusive Workforce

- Authenticity translates into productivity, happiness, and better work/profitability
- The Global LGBT+ Market Opportunity is Valued at Over \$5 Trillion
- Employee recruitment and retention of both LGBT+ employees and allies
- Diverse Team = Diverse Solutions
- Positive public and corporate image, brand, and positive impact on morale

The Cultural Case for LGBT+ Inclusive Workforces

- Ask yourself – what kind of company do we want to be?
- Do you want your employees to be reflective of the customers you are trying to reach?
- It is the company's responsibility to ensure that employees have equal opportunity to enjoy a safe and productive work environment free of discriminatory policies or practices

The Legal Case for LGBT+ Inclusive Workforces

- Discrimination and harassment based on sexual orientation and/or gender identity is unlawful in some states irrespective of the Supreme Court's ruling
- An exclusive workforce may be evidence of discrimination/harassment

EEOC's Statistics

- The EEOC has recovered over **\$6.4 million** in LGBT+ discrimination charges
- In FY 2019, the EEOC received **1,868** LGBT+-based sex discrimination charges
 - This is over **1,000** more charges alleging LGBT+ discrimination in FY 2019 than were filed in 2013, when the EEOC began tracking these charges

Increased Litigation and Cautionary Settlements

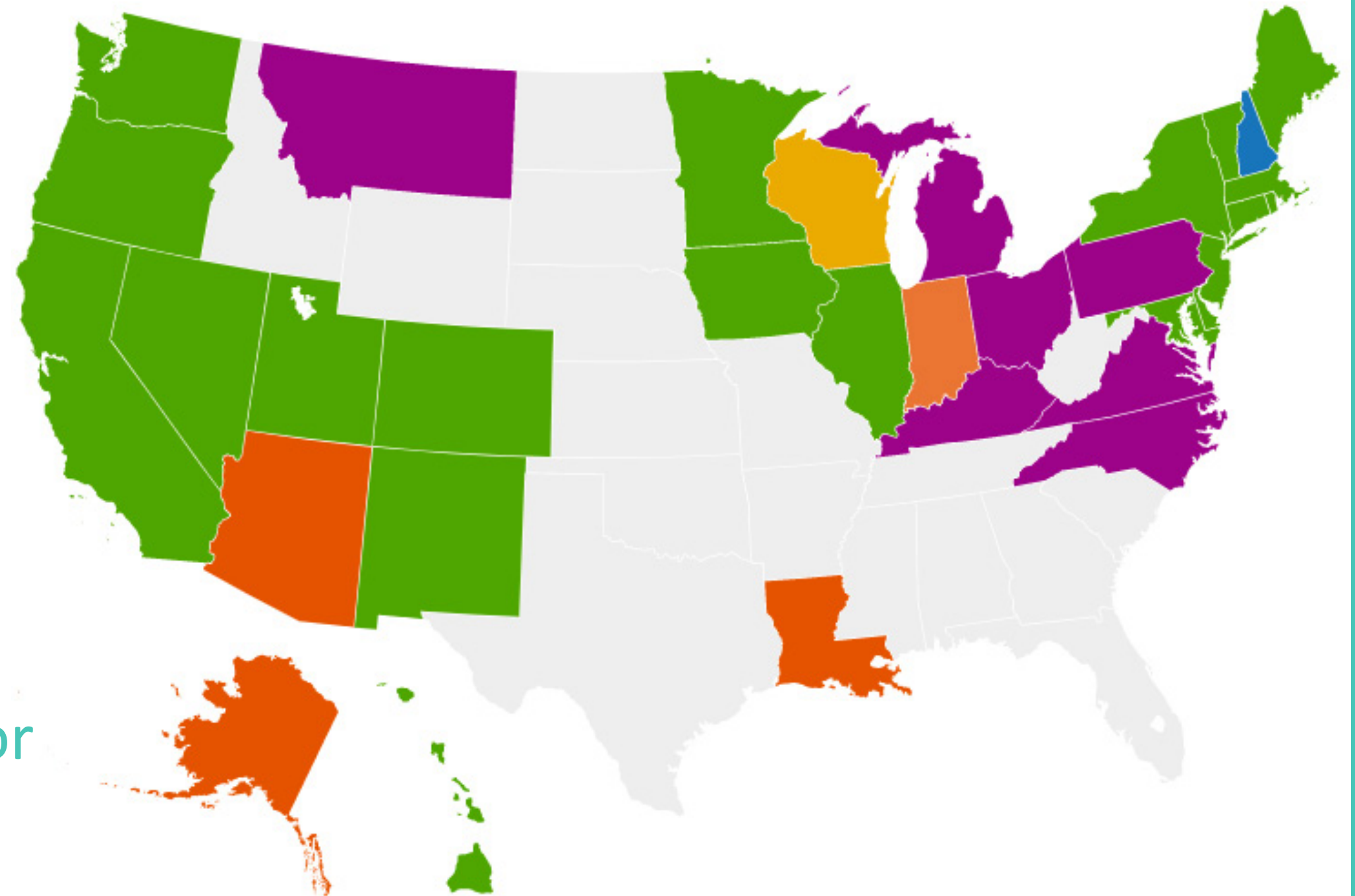
- Employer ordered to pay **\$202,200** in sexual orientation discrimination lawsuit
- Employer ordered to pay **\$140,000** to resolve transgender discrimination allegations
- Employer ordered to pay **\$2.6 million** in perceived sexual orientation discrimination lawsuit
- Employer ordered to pay **\$17,394,972** in hostile work environment/harassment case based on perceived sexual orientation

Overview of Laws Affecting LGBT+ Rights and Protections in the Workplace

- State and Local Anti-Discrimination Statutes
- Title VII of the Civil Rights Act of 1964
- EEOC Enforcement
- DOJ Guidance
- Case Law & SCOTUS

Protections by State

- **20 states (plus D.C.)** prohibit discrimination based on **sexual orientation and gender identity**
- **1 state** prohibits discrimination based on **sexual orientation only**
- **7 states** prohibit discrimination based on **sexual orientation and/or gender identity against public employees only**
- **4 states** prohibit discrimination based on **sexual orientation against public employees only**



- State law protects employees in both the private and public sector from discrimination on the basis of sexual orientation.
- State law protects employees in both the private and public sector from discrimination on the basis of sexual orientation, as well as gender identity and/or gender expression.
- State law/executive order protects public employees but NOT private sector employees on the basis of sexual orientation.
- State law/executive order protects public employees but NOT private sector employees on the basis of sexual orientation or gender identity/expression.
- State protects public and private employees on the basis of sexual orientation but only public employees on the basis of gender identity/expression.

Local Laws

- Over 300 cities and counties have passed laws affording some protection based on “sexual orientation” and/or “gender identity and expression”

For example:

- Birmingham, Alabama
- Montevallo, Alabama
- Anchorage City-Borough, Alaska
- Juneau City-Borough, Alaska
- Sitka City-Borough, Alaska
- Phoenix, Arizona
- Tucson, Arizona
- Los Angeles, California
- Oakland, California
- Denver, Colorado
- Miami-Dade County, Florida
- Gainesville, Florida
- Atlanta, Georgia
- Decatur, Georgia
- Boise, Idaho
- Chicago, Illinois
- Indianapolis, Indiana
- Kansas City, Kansas
- Cold Spring, Kentucky*
- Lexington-Fayette County, Kentucky
- New Orleans, Louisiana
- Ann Arbor, Michigan
- Kalamazoo, Michigan
- Jackson, Mississippi
- Ferguson, Missouri
- Helena, Montana
- Omaha, Nebraska
- Albany, New York
- Fargo, North Dakota
- Akron, Ohio
- Cleveland, Ohio
- Oklahoma City, Oklahoma
- Pittsburgh, Pennsylvania
- Austin, Texas
- Dallas, Texas
- Milwaukee, Wisconsin

Federal Law: Title VII

- Prohibits sex discrimination and same-sex harassment
- Certain Circuits have extended Title VII to read “sex” as also prohibiting discrimination based on sexual orientation and gender identity discrimination/harassment
- DOJ & EEOC - evolving positions
- SCOTUS: Does “sex” mean sexual orientation and/or gender identity for purposes of prohibiting sex discrimination/harassment under Title VII?

The DOJ

- **DOJ's current position:** Title VII does **NOT** protect gender identity discrimination or sexual orientation
 - In 2017, the DOJ rescinded a 2014 memo saying Title VII applies to gender identity
 - Also in 2017, the DOJ argued in a brief that Title VII does NOT apply to sexual orientation

The EEOC

- EEOC takes the position that Title VII Covers:
 1. It literally involves treating an applicant or employee differently based on their sex;
 2. It takes sex into account by treating the employee differently for associating with a person of the same sex, and
 3. It involves discrimination based on gender stereotypes-employer beliefs about the person to whom the employee should be attracted because of the employee's sex
- It is the EEOC's position that it is unlawful to harass/take an adverse action because:
 1. A woman does not dress or talk in a feminine manner
 2. A man that enjoys a pastime associated with women
 3. Employees date, love, or marry someone of the same sex
 4. An employee transitions from female to male or male to female

Does the Federal Law Prohibit Discrimination Based on Sexual Orientation?

Yes No Undecided



Note: Significant decisions by federal circuit courts and the EEOC; the position of the Trump administration's Justice Department

Does the Federal Law Prohibit Discrimination Based on Gender Identity?

Yes No Undecided



Note: Significant decisions by federal circuit courts and the EEOC;
the position of the Trump administration's Justice Department

U.S. Supreme Court Heard a Trio of Cases in 2019, Testing the Scope of Title VII

Is sexual orientation protected under Title VII?

- (2nd Circuit) - *Altitude Express, Inc. v. Zarda, U.S.*, No. 17-1623, review granted 1/18/19, of the decision in favor of the plaintiff, holding discrimination based on sexual orientation violates Title VII
- (11th Circuit) - *Bostock v. Clayton County, Georgia, U.S.*, No. 17-1618, review granted 1/18/19, of the decision affirming dismissal of plaintiff's claim that discrimination based on sexual orientation violates Title VII

under Title VII?

- (6th Circuit) *R.G. & G.R. Harris Funeral Homes, Inc., v. EEOC, U.S.*, No. 18-107, review granted 1/18/18, of the decision affirming the decision in favor of the plaintiff, holding Title VII prohibits discrimination based on gender identity



**FROM POLICY TO PRACTICE:
ENSURING LGBT+ INCLUSION AND
ENGAGEMENT**



How #MeToo Has Affected Company Actions and Responses

#MeToo: Legal Defenses vs. Reality

Company's internal action & external response

Before #MeToo

- SOL Issue: This happened 15 years ago...
- Accused is a former employee
- Not severe or pervasive enough to investigate, or...
- Informal/in-house investigation
- Alleged conduct was consensual/welcomed

Now

- Need to act formally, promptly, but correctly, regardless of:
 - When it allegedly occurred
 - Whether accused still employed
 - Severity of allegations
 - Conduct was consensual/welcomed

Inclusive Workplace: Policies

○ Inclusive & Gender Neutral Policies

- Expansive Anti- Discrimination, Harassment, Retaliation & Accommodation policies include sexual orientation and gender identity/expression, Dress Codes

○ Gender Neutral/Equal Leave Policies

- Do company leave policies apply consistently to same/opposite sex partners?
- Do company benefits apply equally for same-sex partners/parents (i.e. paid parental leave)?
- Do company policies include leave for transition-related procedures and other related treatment?

Inclusive Workplace: Policies

- Revise **dress codes** to make them **gender neutral**, recognizing an employees' right to dress in a manner consistent with their sexual orientation and/or gender identity and expression
- **DO NOT** impose specific dress or appearance requirements for men versus women or based on a stereotype of how you think a man/woman should look, act, appear or who to love, date, or marry

Translate Policy to Practice – What's in Writing Matters

- Written handbook policies must be reflective of culture, practice, and legally compliant. Budget for annual legal reviews
- We translate handbooks into manager guides that explain your policies in a way managers truly understand and enforce them
- We create handbook training guides and train managers on the content
- Review your executive agreements that tie cause to findings of key policy violations and/or executive compensation to certifications and agreeable metrics in the organization which are within their control

○ Inclusive Practices:

- LGBT+ inclusive Respectful Workforce Training
- Open Door Culture & Address Complaints
- Guidelines for managing gender transition & restroom/facility access
- Affinity Groups

**Inclusive
Workplace:
From Policy
to Practice**

Respectful Workforce Training

- Trainings help mitigate legal risk, reduce financial exposure, and appropriately empower management and employees
- **Fosters an environment where there's no room for harassment**
- **Builds a culture based on collaboration, teamwork, and respect**
- Trains employees and managers so they understand the company's commitment to diversity and equal treatment and to promote tolerance and respect
- Creates and reinforces a culture of inclusion

Anti-Harassment training is required in many locations:

CT, CA, DE, ME, IL, NY/NYC, UT, WA

What is Great Training?

- Complies with all legal requirements: length of time, interactive, substance, attendees, occurrence, etc.
- Tailored to the Audience & presents legal concepts in a digestible, non-legal tone that uses real life hypos that actually reflect your workplace
 - Inclusive-it has a LGBT+ component and explains such issues in a manner in which the audience can understand it and a Company's obligations – irrespective of their own personal or political views – and how LGBT+ issues interact with religion
 - Heavy emphasis on social media (can I get fired for what I post on Instagram), drugs (I thought marijuana was legal in my state), sex/dating (can I sleep with my co-worker; virtual reality (work video calls)

Great Training: Harassment on Social Media & e-Platforms

- Explicit photos/sexual acts:
 - Passive/private engagement v. public/active sharing
 - Drawing the line: consistent enforcement??
- Racial slurs on Instagram vs. making a political statement/endorsement
- Liking a post or status & concerted activity
- Need for a legally vetted, yet digestible social media policy & training on enforcement



Great Training: Remote Working Challenges & Pointers

- Harassment/discrimination can occur through various mediums:
 - Text messages
 - Direct messages
 - Email courtesies
 - Emoji use /Gif use
- Working from home is inherently more relaxed; it is important to remain professional in conduct, communication, and appearance
- Your home is your calling card – keep backgrounds and backdrops neutral when engaging in professional video conferences/work calls
 - LGBT+ Integration

Great Training: Proper Names & Pronouns

- Understand who your employees are and how they identify themselves
 - Shows respect for gender identity and sexual orientation
- When someone is referred to incorrectly it can make them feel disrespected, invalidated, dismissed, and/or alienated

Great Training: Proper Names & Pronouns & Self-ID (cont'd)

- Use the employee's preferred name and pronoun
 - Update personnel records, email addresses, name tags, locker tags, but “legal” name may still be required (IRS)
 - If you make a mistake, apologize, and move forward
- Avoid using gendered language until you are sure of the person's gender identity
- “They/them/theirs” - common gender-neutral pronoun and can be used as singular

Use of Names and Pronouns – Litigation

Complainant v. Department of Veteran's Affairs (EEOC, Apr. 14, 2014)

- A transgender male employee underwent treatment for gender identity disorder and changed his name from Cynthia to Cyrus. The employee submitted a request to change his identification within the company to reflect his new name-he was ignored
- The EEOC held the employee stated a claim of sex discrimination under Title VII

Great Training: Restroom Access

- Allow employees/clients to use the restroom consistent with their gender identity
- Do not require transgender or transitioning employees to use a unisex bathroom (but you may permit them to do so at their own choosing)
- Supervisory or co-worker confusion or anxiety cannot justify discriminatory terms and conditions of employment
- Claimed religious beliefs do not justify discriminatory behavior or unequal terms and conditions of employment

Working with Transitioning Employees

- Let the employee drive the process and keep communication lines open
 - Discuss what name/pronouns the employee prefers
 - Discuss if the employee would like the Company's assistance in communicating changes to employees
- Designate a point of contact for the transitioning employee and to whom co-workers can address any questions
- Maintain confidentiality/respect the employee's wishes to the extent possible

Great Training: Encouraging Internal Reporting & Proper Investigations

- Responding to complaints of discrimination and/or harassment
- Implementing various mechanisms by which employees can report complaints of discrimination, harassment, and/or other policy violations
 - Dedicated Company email address, phone number, mailing address
 - Anonymous reporting/third party hotline
- Training managers on the ground to respond correctly to complaints; ensure complaints are appropriately escalated, that confidentiality is appropriately maintained
- It is especially important that managers/employees understand their obligations given current remote work situations. . .

- Given the majority of employees are working from home, now is the time to strengthen/revitalize the company commitment
- Take advantage of opportunities to bring employees together to collaborate and/or socialize:
 - Monthly virtual business calls = face to face interaction and safe space for employees to raise issues and concerns
 - Monthly Affinity Group meetings with invitations to straight allies and C-Suite/Leadership members
 - Monthly Happy Hour/Virtual Social Events
 - Formalize a mentoring/buddy program- provides regular check-ins and strengthens connectivity within the Affinity Group
 - Virtual quarterly cross-programming between affinity groups to increase awareness of diversity and inclusion initiatives and membership

Showing Support for LGBT+ Employees Remotely

Questions?



 **John R. Richards**
richardsjr@gtlaw.com



 **Lily McNulty**
mcnulty1@gtlaw.com



 **Nick Corsano**
corsanon@gtlaw.com

GT Achievements

- Retail Practice Ranked Band 1 for Chambers 12 years running
- **No. 5, Number of LGBT+ Partners**, *The American Lawyer*, LGBT+ Scorecard, 2019
- **No. 1, Number of Black Attorneys & Partners** Overall, Diversity Scorecard, *The American Lawyer*, 2019
- **No. 1, Number of Hispanic Partners** Overall, Diversity Scorecard, *The American Lawyer*, 2019
- **Top 5, Number of Female Partners**, *The National Law Journal*, Women's Scorecard, 2017

