D03 - Drafting and Implementing LGBTQ+ Inclusive Policies and Procedures for Law Firms and Companies (2024CLC-D03)

Monday, June 10, 2024

3:45 p.m. to 5:15 p.m.

Connecticut Convention Center

Hartford, CT

CT Bar Institute, Inc.

CT: 1.5 CLE Credits (Ethics)
NY: 1.5 CLE Credit (D&I)

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Approved by the House of Delegates October 19, 2020

LAWYERS' PRINCIPLES OF PROFESSIONALISM

As a lawyer, I have dedicated myself to making our system of justice work fairly and efficiently for all. I am an officer of this Court and recognize the obligation I have to advance the rule of law and preserve and foster the integrity of the legal system. To this end, I commit myself not only to observe the Connecticut Rules of Professional Conduct, but also conduct myself in accordance with the following Principles of Professionalism when dealing with my clients, opposing parties, fellow counsel, self-represented parties, the Courts, and the general public.

Civility:

Civility and courtesy are the hallmarks of professionalism. As such,

- I will be courteous, polite, respectful, and civil, both in oral and in written communications;
- I will refrain from using litigation or any other legal procedure to harass an opposing party;
- I will not impute improper motives to my adversary unless clearly justified by the facts and essential to resolution of the issue;
- I will treat the representation of a client as the client's transaction or dispute and not as a dispute with my adversary;
- I will respond to all communications timely and respectfully and allow my adversary a reasonable time to respond;
- I will avoid making groundless objections in the discovery process and work cooperatively to resolve those that are asserted with merit;
- I will agree to reasonable requests for extensions of time and for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;
- I will try to consult with my adversary before scheduling depositions, meetings, or hearings, and I will cooperate with her when schedule changes are requested;
- When scheduled meetings, hearings, or depositions have to be canceled, I will notify my adversary and, if appropriate, the Court (or other tribunal) as early as possible and enlist their involvement in rescheduling; and
- I will not serve motions and pleadings at such time or in such manner as will unfairly limit the other party's opportunity to respond.

Honesty:

Honesty and truthfulness are critical to the integrity of the legal profession – they are core values that must be observed at all times and they go hand in hand with my fiduciary duty. As such,

- I will not knowingly make untrue statements of fact or of law to my client, adversary or the Court;
- I will honor my word;
- I will not maintain or assist in maintaining any cause of action or advancing any position that is false or unlawful;

- I will withdraw voluntarily claims, defenses, or arguments when it becomes apparent that they do not have merit or are superfluous;
- I will not file frivolous motions or advance frivolous positions;
- When engaged in a transaction, I will make sure all involved are aware of changes I make to documents and not conceal changes.

Competency:

Having the necessary ability, knowledge, and skill to effectively advise and advocate for a client's interests is critical to the lawyer's function in their community. As such,

- I will keep myself current in the areas in which I practice, and, will associate with, or refer my client to, counsel knowledgeable in another field of practice when necessary;
- I will maintain proficiency in those technological advances that are necessary for me to competently represent my clients.
- I will seek mentoring and guidance throughout my career in order to ensure that I act with diligence and competency.

Responsibility:

I recognize that my client's interests and the administration of justice in general are best served when I work responsibly, effectively, and cooperatively with those with whom I interact. As such,

- Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the Court (or other tribunal) and my adversary of any likely problem;
- I will make every effort to agree with my adversary, as early as possible, on a voluntary exchange of information and on a plan for discovery;
- I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;
- I will be punctual in attending Court hearings, conferences, meetings, and depositions;
- I will refrain from excessive and abusive discovery, and I will comply with all reasonable discovery requests;
- In civil matters, I will stipulate to facts as to which there is no genuine dispute;
- I will refrain from causing unreasonable delays;
- Where consistent with my client's interests, I will communicate with my adversary in an effort to avoid needless controversial litigation and to resolve litigation that has actually commenced;
- While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation.

Mentoring:

I owe a duty to the legal profession to counsel less experienced lawyers on the practice of the law and these Principles, and to seek mentoring myself. As such:

- I will exemplify through my behavior and teach through my words the importance of collegiality and ethical and civil behavior;
- I will emphasize the importance of providing clients with a high standard of representation through competency and the exercise of sound judgment;
- I will stress the role of our profession as a public service, to building and fostering the rule of law;
- I will welcome requests for guidance and advice.

Honor:

I recognize the honor of the legal profession and will always act in a manner consistent with the respect, courtesy, and weight that it deserves. As such,

- I will be guided by what is best for my client and the interests of justice, not what advances my own financial interests;
- I will be a vigorous and zealous advocate on behalf of my client, but I recognize that, as an officer of the Court, excessive zeal may be detrimental to the interests of a properly functioning system of justice;
- I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;
- I will, as a member of a self-regulating profession, report violations of the Rules of Professional Conduct as required by those rules;
- I will protect the image of the legal profession in my daily activities and in the ways I communicate with the public;
- I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance; and
- I will support and advocate for fair and equal treatment under the law for all persons, regardless of race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, gender identity, gender expression or marital status, sexual orientation, or creed and will always conduct myself in such a way as to promote equality and justice for all.

Nothing in these Principles shall supersede, supplement, or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which a lawyer’s conduct might be judged, or become a basis for the imposition of any civil, criminal, or professional liability.

Faculty Biographies

Tanya A. Bovée

Tanya A. Bovée is a principal in the Hartford, Connecticut, office of Jackson Lewis P.C. and a member of the firm's Board of Directors. Tanya represents employers in a wide range of issues related to employment law, bringing a practical approach that is focused on achieving clients' goals and based on over 20 years of employment law experience. Tanya's practice also includes working with employers to comply with their affirmative action obligations, oversee the preparation of affirmative action plans, and defend compliance reviews. She also defends employers in federal and state courts and administrative agencies. Tanya has been a board member for the Connecticut Asian Pacific American Bar Association for over 20 years and is a past president and current co-president. She regularly speaks about advancing diversity in the legal profession.

Miriam Elisa Hasbún

Miriam Elisa Hasbún is a bilingual field attorney in Region 01, Subregion 34 in the Hartford, Connecticut office of the National Labor Relations Board. Miriam investigates, mediates, and prosecutes unfair labor practice charges as Counsel for the National Labor Relations Board's General Counsel. Miriam also serves as the Equal Employment Opportunity Counselor for Region 01, Subregion 34. Miriam is a 2023-2025 Presidential Fellow with the LGBT Section of the Connecticut Bar Association.

Spencer Hill

Spencer Hill works for the Connecticut Commission on Human Rights and Opportunities as a Human Rights Attorney specializing in Diversity, Equity, and Inclusion efforts, contract compliance and affirmative action, as well as the intersection of technology and discrimination. Spencer received his B.A. from McGill University in Montreal, Quebec and his J.D. from the University of Connecticut School of Law. He currently resides in Simsbury, CT.

Hugh T. Sokolski, Jr.

Hugh Sokolski is a practicing Labor and Employment associate attorney in the Hartford, Connecticut, office of Jackson Lewis P.C. In the employment law realm, Hugh's litigation experience includes defending clients against allegations of discrimination, whistleblower retaliation, wrongful termination, failure to accommodate, and harassment. Hugh also focuses his practice on traditional labor law and has experience in collective bargaining negotiations, labor arbitrations, and unfair labor practice proceedings before the National Labor Relations Board. Hugh currently serves on the executive committee for the LGBT Section of the Connecticut Bar Association and will also be serving as the LGBT Committee Chair for the Young Lawyers Section of the Connecticut Bar Association for the 2024-2025 term.

Drafting and Implementing LGBTQ+ Inclusive Policies and Procedures for Law Firms and Companies (2024CLC-D03)

2024 Connecticut Legal Conference
Connecticut Convention Center
June 10, 2024
3:45 p.m. – 5:15 p.m.

Agenda

Presenters:
Tanya A. Bovée, Jackson Lewis PC, Hartford
Spencer Hill, Commission on Human Rights and Opportunities, Hartford
Miriam Elisa Hasbún, NLRB, Hartford
Hugh T. Sokolski, Jr., Jackson Lewis PC, Hartford

3:45 p.m. – 5:15 p.m.:

Learning, understanding and successful use of LGBT terminology to foster a welcoming and inclusive space for queer employees

Understanding the intersection of LGBTQ+ rights and religious freedom presents a complex challenge in corporate America.

Embracing certain principles of inclusivity and being mindful of recommended best practices

Federal and State Protections

Civil Rights & Religious Liberty

Creating an LGBTQ+ Inclusive Workplace: Best Practices

Workplace Appearances

Comprehensive anti-discrimination and harassment policies

Transitioning Employees

Drafting and Implementing LGBTQ+ Inclusive Policies and Procedures for Law Firms and Companies

Monday, June 10, 2024

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Facilitators



Hugh Sokolski
Jackson Lewis P.C.
Hartford, CT



Miriam Hasbún
National Labor Relations Board
Hartford, CT

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Panelists



Tanya A. Bovée
Jackson Lewis P.C.
Hartford, CT



Spencer Hill
Commission on Human Rights and Opportunities
Hartford, CT

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Session Goals



- Learning, understanding and successful use of LGBT terminology to foster a welcoming and inclusive space for queer employees
- Understanding the intersection of LGBTQ+ rights and religious freedom presents a complex challenge in corporate America.
- Embracing certain principles of inclusivity and being mindful of recommended best practices.

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Federal and State Protections



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Federal Protections

U.S. Supreme Court

- *Obergefell v. Hodges*, 576 U.S. 644, 711 (2015)
  - The majority of Supreme Court justices recognized the fundamental right to marriage for non-heterosexual couples
  - In a dissent, Chief Justice John Robert hinted at legal challenges on the horizon and warned that hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage
- *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)
  - The Supreme Court interpreted Title VII's ban on sex-based discrimination to prohibit:
    - Discrimination based on sexual orientation
    - Discrimination based on transgender status

EEOC Guidance:

- "It is unlawful to subject an employee to workplace harassment that creates a hostile work environment based on sexual orientation or gender identity"
- "Although accidental misuse of a transgender employee's name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment"
- "Prohibiting a transgender person from dressing or presenting consistent with that person's gender identity would constitute sex discrimination"
- "Employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender identity"

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State-Level Protections



- Prohibits discrimination in employment based on sexual orientation and gender identity (23 states & DC)
  - California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Virginia, Washington, Washington, D.C
- Prohibits discrimination in employment based on sexual orientation only
  - Wisconsin
- Prohibits discrimination against **public employees** based on sexual orientation and gender identity
  - Arizona, Indiana, Montana, North Carolina, Ohio
- Prohibits discrimination against **public employees** based on sexual orientation only
  - Missouri
- Does not prohibit employment discrimination based on sexual orientation or gender identity by statute, but has adopted the Bostock rational to expand existing state laws (8 states)
  - Alaska, Florida, Kansas, Kentucky, Nebraska, North Dakota, Pennsylvania, Texas
- No state-level statutory protections (12 states)
  - Alabama, Arkansas, Georgia, Idaho, Louisiana, Mississippi, Oklahoma, South Carolina, South Dakota, Tennessee, West Virginia, Wyoming

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Connecticut Protections for LGBT Individuals in Employment

- CT nondiscrimination law applies to both public and private employers and covers significant job actions, such as hiring, firing, failure to promote, demotion, excessive discipline, harassment, and different treatment of the employee and similarly situated co-workers.
- Employers in CT are forbidden from refusing to hire a person, discharging them, or discriminating against them "in compensation, or in terms, conditions or privileges of employment" because of:
  - sexual orientation (Conn. Gen. Stat. sec. 46a-81c(1)); **OR**
  - gender identity (Conn. Gen. Stat. sec. 46a-60(a); **OR**
  - gender expression (Conn. Gen. Stat. sec. 46a-60(a).

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Exempt Employers

The following employers are exempt from the CT non-discrimination law:

- Certain religious employers are exempt. See *Religious Exemption to the Prohibitions on Sexual Orientation And Gender Identity Discrimination.*
- Any employer, agency, or labor organization may defend against a discrimination claim by arguing that it is a "bona fide occupational qualification" of the particular job to have a non-LGBTQ+ employee fill it (Conn. Gen. Stat. secs. 46a-81c; 46a-60 *generally)*. This is, however, a heavy burden to prove. *Conn. Institute for the Blind v. CHRO,* 176 Conn. 88 (1978) ("The standard for a BFOQ purposely imposes a heavy burden on an employer whose refusal to hire is prima facie discriminatory")).

- <u>*NOTE*</u>: As of October 1, 2022, the Connecticut Fair Employment Practices Act applies to all employers, so long as they have one employee. Previously, CFEPA only applied to employers with 3 or more employees.

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Civil Rights & Religious Liberty



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Religious Liberty

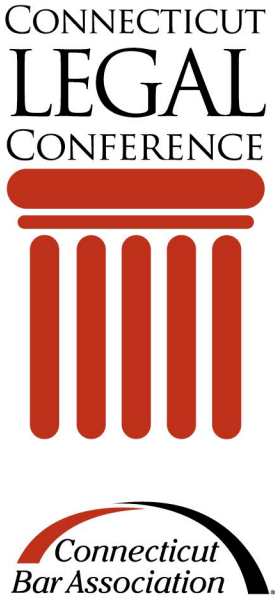
- First Amendment of the U.S. Constitution's free exercise clause
  - Establishes the concept of "freedom of religion" and prohibits government hostility towards a religious group or practice
- Rational basis review
  - Courts evaluate whether the government had a "rational basis" for enacting legislation that incidentally burdens religious practices
- Religious Freedom and Restoration Act of 1993 (RFRA)
  - Mandates that courts strictly scrutinize any law that "substantially burdens religious exercise"
- 26 states have similar state-level laws

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Courts' Approach to Competing Rights

- *Kennedy v. Bremerton School District*
  - Supreme Court held that a school district infringed on an assistant football coach's rights under the
    Free Exercise Clause of the First Amendment when it suspended him for continuing to publicly pray after football games in violation of its policy
  - Demonstrates the Court's ongoing support of religious liberty when pitted against other competing rights
- *Groff v. DeJoy*, No. 22-174 (June 29, 2023)
  - Heightens burden of proving undue hardship for employers
  - Title VII: Employers must reasonably accommodate employees whose sincerely held religious beliefs or observances conflict with work requirements, unless doing so would create an undue hardship for the employer
  - Court overturned precedent on which employers have relied for years to define "undue hardship" as "shown when a burden is substantial in the overall context of an employer's business"



An Introduction to Connecticut's Free Speech Law: Conn. Gen. Stat. 31-51q

- Traditionally, employees could only sue their public-sector employers for purported violations of their First Amendment free speech rights via 42 U.S.C. § 1983.
- In Connecticut, this changed with the passage of Conn. Gen. Stat. § 31-51q in 1983.
  - Significance: This is the **only** statute in the country that allows employees to sue their private-sector employers for purported violations of their First Amendment free speech rights.
- Employers may liable for lost wages, costs, punitive damages, and attorney's fees if they subject or threaten to subject any employee to discipline or discharge on account of
  - (1) the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4 or 14 of article first of the Constitution of the state, provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer;
  - (2) such employee's refusal to (A) attend an employer-sponsored meeting with the employer or its agent, representative or designee, the primary purpose of which is to communicate the employer's opinion concerning religious or political matters, or (B) listen to speech or view communications, the primary purpose of which is to communicate the employer's opinion concerning religious or political matters.

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Creating an LGBTQ+ Inclusive Workplace: Best Practices



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Topic 1: Workplace Appearances



Scan here for relevant LGBT terminology

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Connecticut Legislation Surrounding Appearances

- **An Act Creating a Respectful and Open World for Natural Hair (CROWN)** - Prohibits workplace discrimination based on hairstyles that are commonly associated with people of color, such as wigs, headwraps, individual braids, cornrows, locs, twists, Bantu knots, afros and afro puffs (Public Act 21-2).
- Connecticut law also protects individuals **perceived** to be in the LGBT community:
  - Connecticut non-discrimination law defines "sexual orientation" as either "having a preference for heterosexuality, homosexuality or bisexuality, having a history of such preference or *being identified with* such preference…" (Conn. Gen. Stat. sec. 46a-81a).
    - For example, if a person is fired because they are perceived to be gay, they may invoke the protection of the anti-discrimination law regardless of their actual orientation.
  - Similarly, the law defines "gender identity or expression" as: "[A] person's gender-related identity, appearance or behavior, *whether or not* that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth…" (Conn. Gen. Stat. sec. 46a-51(21).

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Topic 2: Comprehensive anti-discrimination and harassment policies

Scan here for relevant LGBT terminology

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Preventing Unlawful Discrimination: Employees who have HIV or AIDS

- HIV-Positive or employees who have AIDS are protected from discrimination under both:
  - Connecticut Human Rights Law (Conn. Gen. Stat. sec. 46a-60)
  - Federal Americans with Disabilities Act (ADA) (only covers employers with fifteen or more employees)

- Employers, under this law, may not:
  - refuse to hire a person with HIV based on fear that HIV will be transmitted to other employees or to customers.
  - refuse to hire or make an employment decision based on the possibility, or even probability, that a person will become sick and will not be able to do the job in the future
  - refuse to hire a person because it will increase health or workers' compensation insurance premiums.

- Prevent unlawful discrimination in the pre-employment process – do **not** ask:
  - *Have you ever been hospitalized or under the care of a physician?*
  - *Have you ever been on workers' compensation or received disability benefits?*
  - *What medications do you take?*



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Topic 3: Transitioning Employees

Scan here for relevant LGBT terminology

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The Human Rights Campaign Foundation Corporate Equality Index Scoring Criteria

Criteria 1	**Workforce Protections (30 points possible)**	
	a. Policy includes sexual orientation for all operations	**15 points**
	b. Policy includes gender identity or expression for all operations	**15 points**
Criteria 2	**Inclusive Benefits (30 points possible)**	
	To secure full credit for benefits criteria, each benefit must be available to all benefits-eligible U.S. employees. In areas where more than one health insurance plan is available, at least one inclusive plan must be available.	
	a. Equivalency in same- and different-sex spousal medical and soft benefits	**10 points**
	b. Equivalency in same- and different-sex domestic partner medical and soft benefits	**10 points**
	c. Equal health coverage for transgender individuals without exclusion for medically necessary care	**10 points**

	• Equal health coverage for transgender individuals without exclusions for medically necessary care
	  • Insurance contract explicitly affirms coverage and contains no blanket exclusions for coverage
	  • Insurance contract and/or policy documentation is based on the World Professional Association for Transgender Health (WPATH) Standards of Care
	  • Plan documentation must be readily available to employees and must clearly communicate inclusive insurance options to employees and their eligible dependents.
	  • Other benefits available for other medical conditions are also available to transgender individuals. Specifically, where available for employees, the following benefits should all extend to transgender individuals, including for transition-related services:
	  • Short term medical leave
	  • Mental health benefits
	  • Pharmaceutical coverage (e.g., for hormone replacement therapies)
	  • Coverage for medical visits or laboratory services
	  • Coverage for reconstructive surgical procedures related to sex reassignment	

Criteria 3	**Supporting an Inclusive Culture & Corporate Social Responsibility (40 points possible)**	**10 points**
	a. Three LGBTQ+ Internal Training and Education Best Practices Businesses must demonstrate a firm-wide, sustained and accountable commitment to diversity and cultural competency, including at least three of the following elements: • New hire training clearly states that the nondiscrimination policy includes gender identity and sexual orientation and provides definitions or scenarios illustrating the policy for each • Supervisors undergo training that includes gender identity and sexual orientation as discrete topics (maybe part of a broader training) and provides definitions or scenarios illustrating the policy for each • Integration of gender identity and sexual orientation in professional development, skills-based or other leadership training that includes elements of diversity and/or cultural competency • Gender transition guidelines with supportive restroom, dress code and documentation guidance • Anonymous employee engagement or climate surveys conducted on an annual or biennial basis allow employees the option to identify as LGBTQ+. • Data collection forms that include employee race, ethnicity, gender, military and disability status — typically recorded as part of employee records — include optional questions on sexual orientation and gender identity. • Senior management/executive performance measures include LGBTQ+ diversity metrics	**10 points**
	b. Employee group –or– Diversity council	**15 points**
	c. Three Distinct Efforts of Outreach or Engagement to Broader LGBTQ+ Community | Businesses must demonstrate ongoing LGBTQ+ specific engagement that extends across the firm, including at least three of the following: • LGBTQ+ employee recruitment efforts with demonstrated reach of LGBTQ+ applicants (required documentation may include a short summary of the event or an estimation of the number of candidates reached) • Supplier diversity program with demonstrated effort to include certified LGBTQ+ suppliers • Marketing or advertising to LGBTQ+ consumers (e.g.: advertising with LGBTQ+ content, • advertising in LGBTQ+ media or sponsoring LGBTQ+ organizations and events) • Philanthropic support of at least one LGBTQ+ organization or event (e.g.: financial, in kind or pro bono support) • Demonstrated public support for LGBTQ+ equality under the law through local, state or federal legislation or initiatives	**5 points**
	d. LGBTQ+ Corporate Social Responsibility • Contractor/supplier non-discrimination standards AND Philanthropic Giving Guidelines	
Criteria 4	**Responsible citizenship (-25)** Employers will have 25 points deducted from their score for a large-scale official or public anti-LGBTQ+ blemish on their recent records. Scores on this criterion are based on information that has come to HRC's attention related to topics including but not limited to: undue influence by a significant shareholder calculated to undermine a business's employment policies or practices related to its LGBTQ+ employees; directing corporate charitable contributions to organizations whose primary mission includes advocacy against LGBTQ+ equality; opposing shareholder resolutions reasonably aimed at encouraging the adoption of inclusive workplace policies; revoking inclusive LGBTQ+ policies or practices; or engaging in proven practices that are contrary to the business's written LGBTQ+ employment policies.	**-25 points**
	CEI 2019 Perfect Score	**100 points**

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Questions?

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Just Don't ESCAPE It!

E – **Establish** a gender transition plan and a transgender/gender non-conforming policy

S – **Strive** to conduct sensitivity training to eliminate unconscious and conscious bias

C – **Create** an LGBTQ+ affirming office (encourage all employees to feel comfortable bringing their whole selves/"best selves" to the workplace)

A – **Avoid** micro-/macro-aggressions and micro-/macro-inequities

P – **Promote** awareness of sex stereotyping, misgenderings, LGBTQ+ and gender non-conforming terminology, and uncover the ways in which LGBTQ+ staff are diminished, isolated and treated differently than other cisgender and straight staff members

E – **Encourage** a safe and inclusive workplace honoring personal pronouns, gender transitions, facilities usage, and privacy and leave accommodations

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Thank you!



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