



# Working Nine to Five – Well, Not Really

Employment Law in 2021 and  
Beyond

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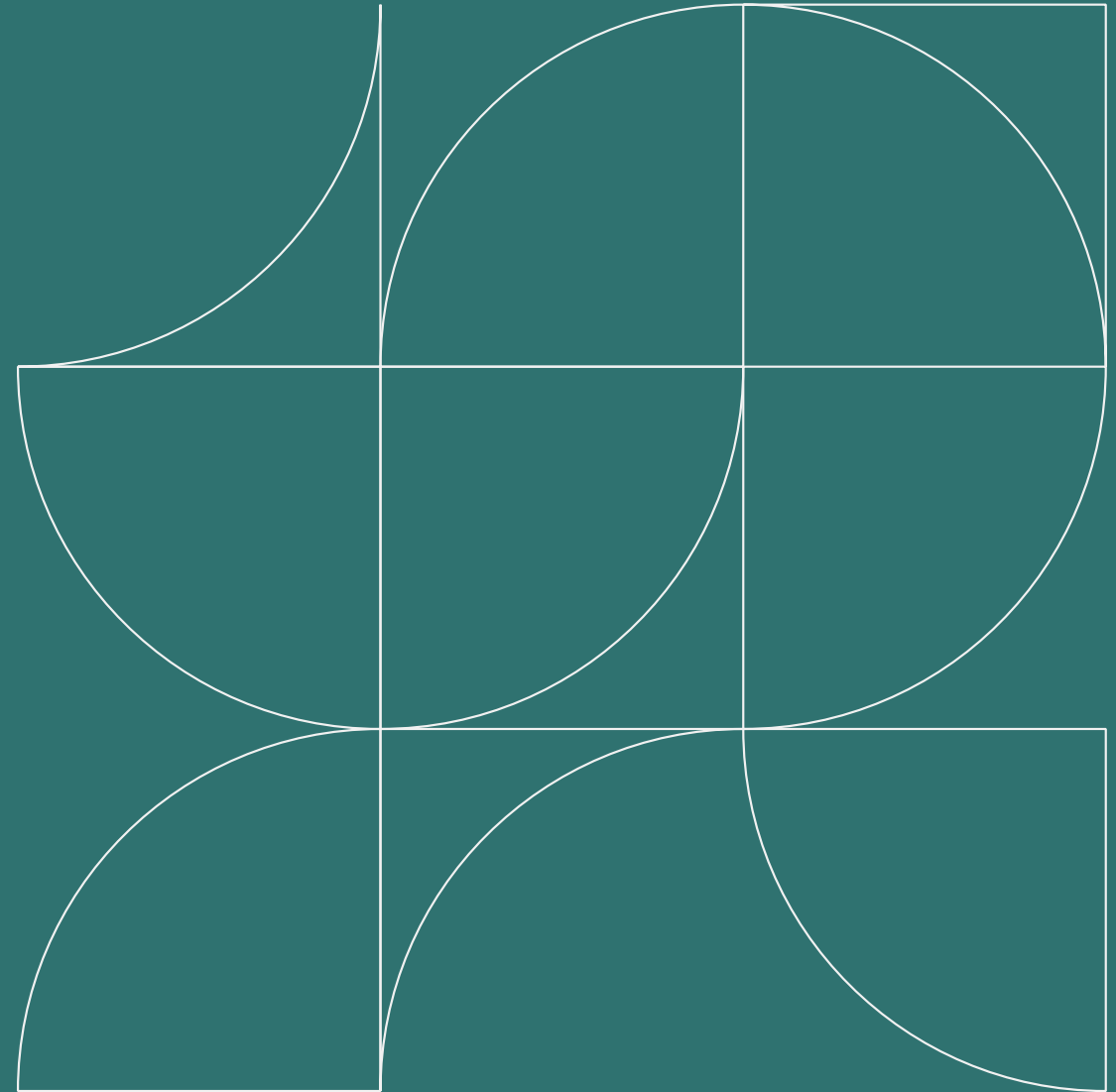
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# **INTRODUCTION: WELCOME TO OUR NEW WORLD**



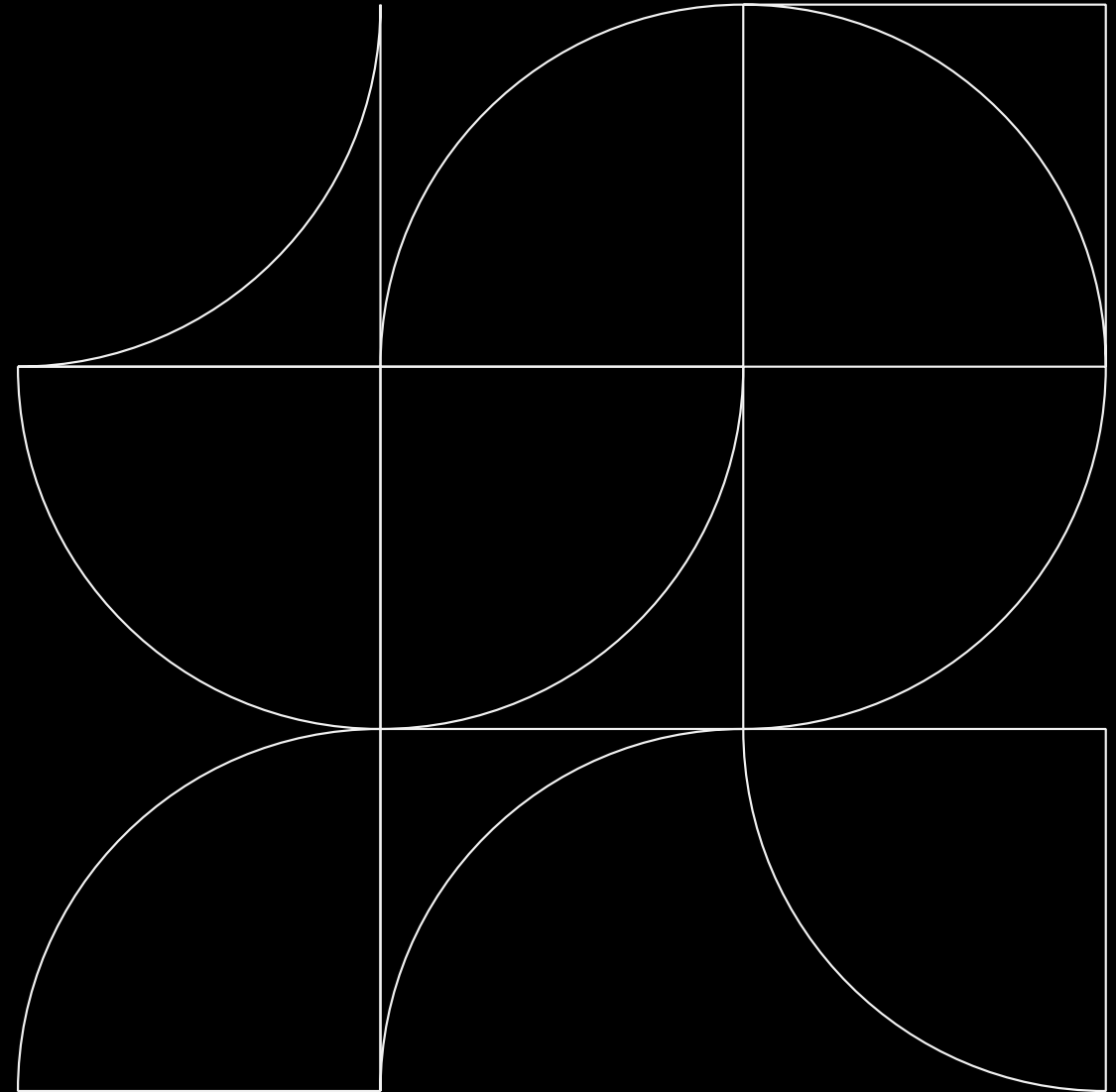
# Welcome to Our New World

- Leadership is critical to success
- #MeToo issues, Black Lives Matter, social activism and a Step Up culture are prevalent
- Unconscious bias and cultural sensitivities dominate
- Generational issues
- Social media and the world of sharing

# Hot Topics for 2021 & Beyond

- **The Great Resignation – What does it mean for you and your organization?**
  - **Diversity, Equity, Inclusion & Belonging (DEI&B): The Basics & Your Role**
  - **Anti-harassment: Reminders and Key Concepts for 2021**
  - **Workplace Bullying**
  - **Managing in the New “Work from Home (WFH)” and Hybrid World**
  - **Social Media: The New World Order**
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# The Great Resignation



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***“Forget going back to the office – people are just quitting instead.”***

Wall Street Journal, June 2021

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# The Great Resignation

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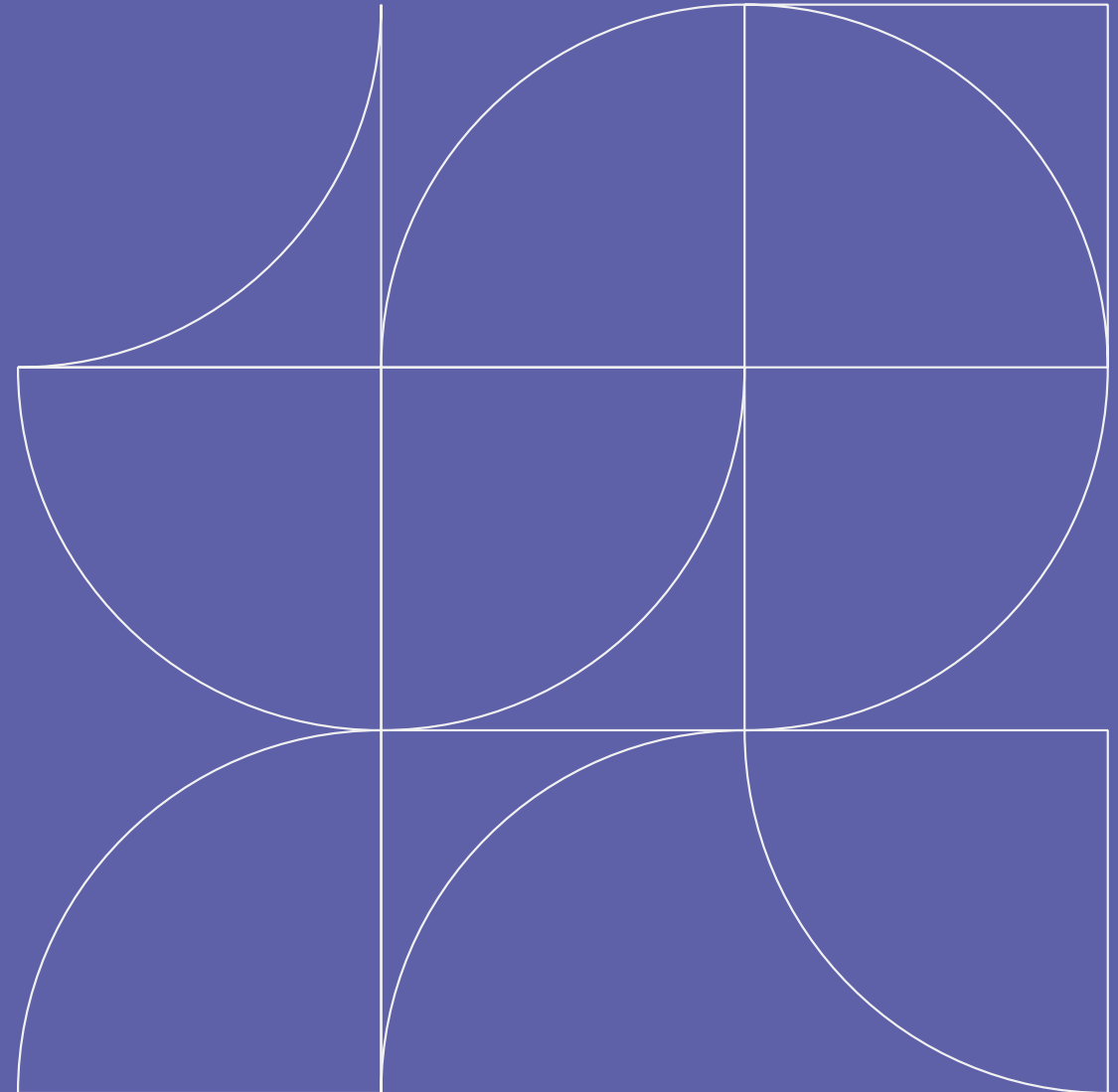
- **Statistics are staggering:**
  - 4 million Americans quit their jobs in April; 3.9 million in June; and 4 million in July 2021 and the trend continues
  - Gallup poll found that 48% of employees are actively searching for a new job; the number jumps to 54% when Gen-Z is considered alone
- **Harvard Business Review looked at data and root causes:**
  - Mid-career employees have the highest resignation rates
    - More flexibility and discontent in this group
    - Issues around pay, workplace environment and flexibility dominate
- **Employees who are resigning** echo that they have reached a “breaking point” after months of high workloads, hiring freezes, internal work pressures and issues around return to work

# What is an employer to do?

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- Many theories but some common themes:
  - Care for your employees
    - Employees will no longer tolerate what they perceive as lack of fair treatment, having to deal with a bad boss or an inequitable work-life balance
      - Employers who take steps to create a environment where employees feel safe, valued and more empowered will have a greater chance of keeping their best
      - Surveys tell us that employees want transparency and to be trusted. Employees are clear that their leaders need different training and skills
        - Employees want bosses who stop being skeptical whether they are actually working when they are at home. They want leaders who do not see flexibility as an invitation and excuse for micromanagement.
        - Employees want to work for organizations they can be proud of
        - They want organizations that take time to invest in training and education
        - Employees want leaders who take the time to ASK their employees regularly and formally what is going well and what is not going well and then ACT

# DEI&B: The Basics and Your Role



# Diversity, Equity, Inclusion & Belonging

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- How is “diversity” defined?
  - The attributes that make us unique
  - Usually a broad concept - beyond race/ethnicity and sex
- How is “equity” defined?
  - An approach that ensures everyone has access to the same opportunities, recognizing that advantages/barriers exist but accepting that we don’t start from the same place
- The concept of “inclusion”
  - Being invited to the right meetings, access to opportunities, generally have a seat at the table
- Evolution towards “belonging”
  - A work environment in which workers feel secure, supported, accepted, and included

# Common Components of a DEI&B Program

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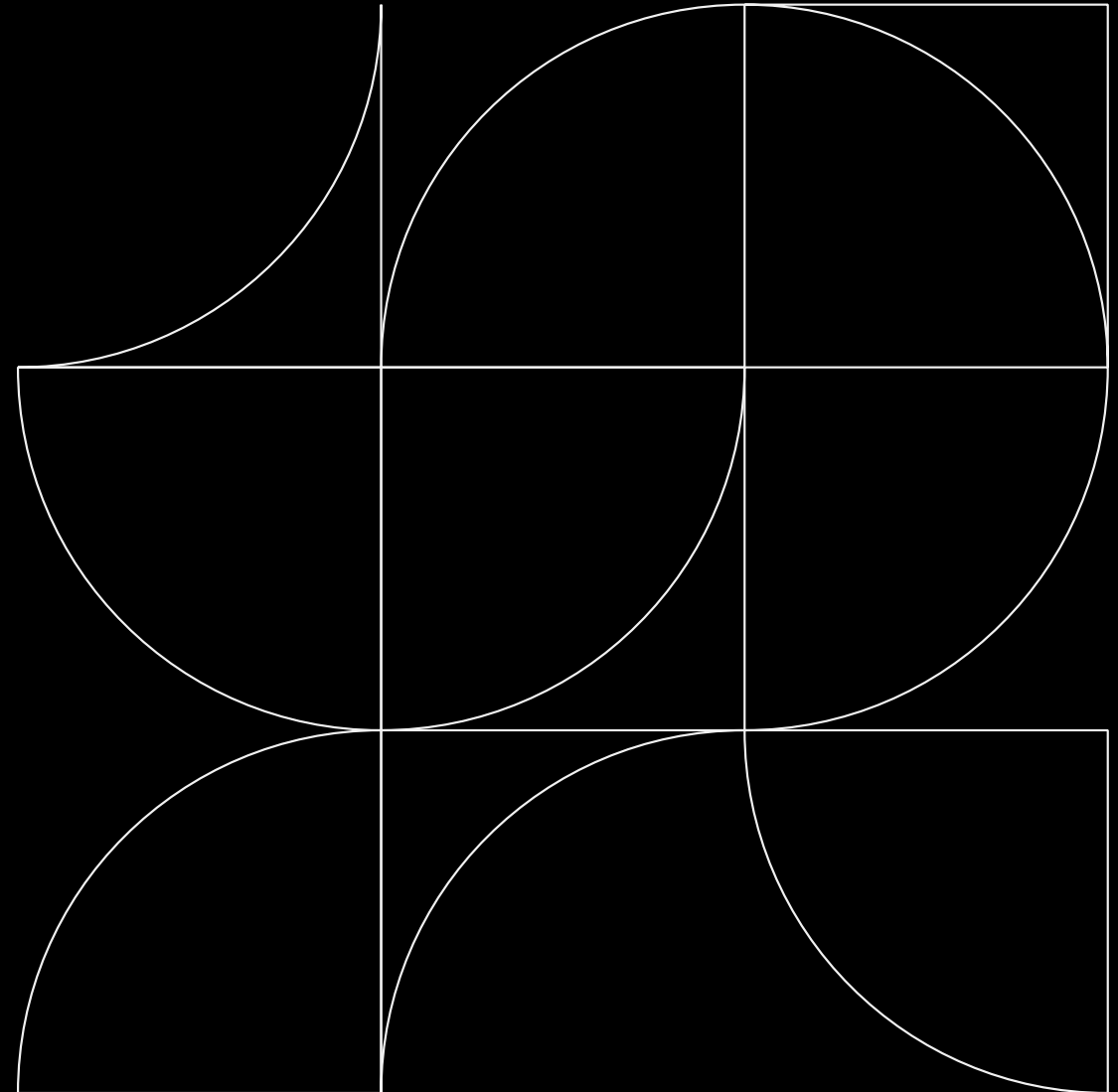


# Best Practices to Consider

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- Establish a senior-level diversity commitment with management/executive participation
- Enhance inclusion programs by leveraging existing compliance framework
- Ensure organizational policies and practices consider DEI&B perspectives
- Implement flexible workplace solutions
- Establish mentoring or sponsorship programs
- Consider increased systematic career guidance and planning programs
- Consider training and education programs
- Consider employee resource groups (ERGs)

# Quick Refresher: Unconscious Bias & Microaggressions



# Microaggressions

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- **Microaggressions** are verbal, non-verbal exchanges whether intentional or unintentional, that communicate hostile, derogatory, or negative messages to target persons based on their membership in a protected class.
- **Some examples:**
  - 'You're so articulate'
  - “You are transgender? You don’t look like it at all.”
  - “You don’t look like I thought you would.”
  - 'My boss is crazy'
  - 'Where are you actually from?’
  - “Do you think he is on the spectrum?”
  - 'Do you even know what Snapchat is?'

# Many Examples of Bias

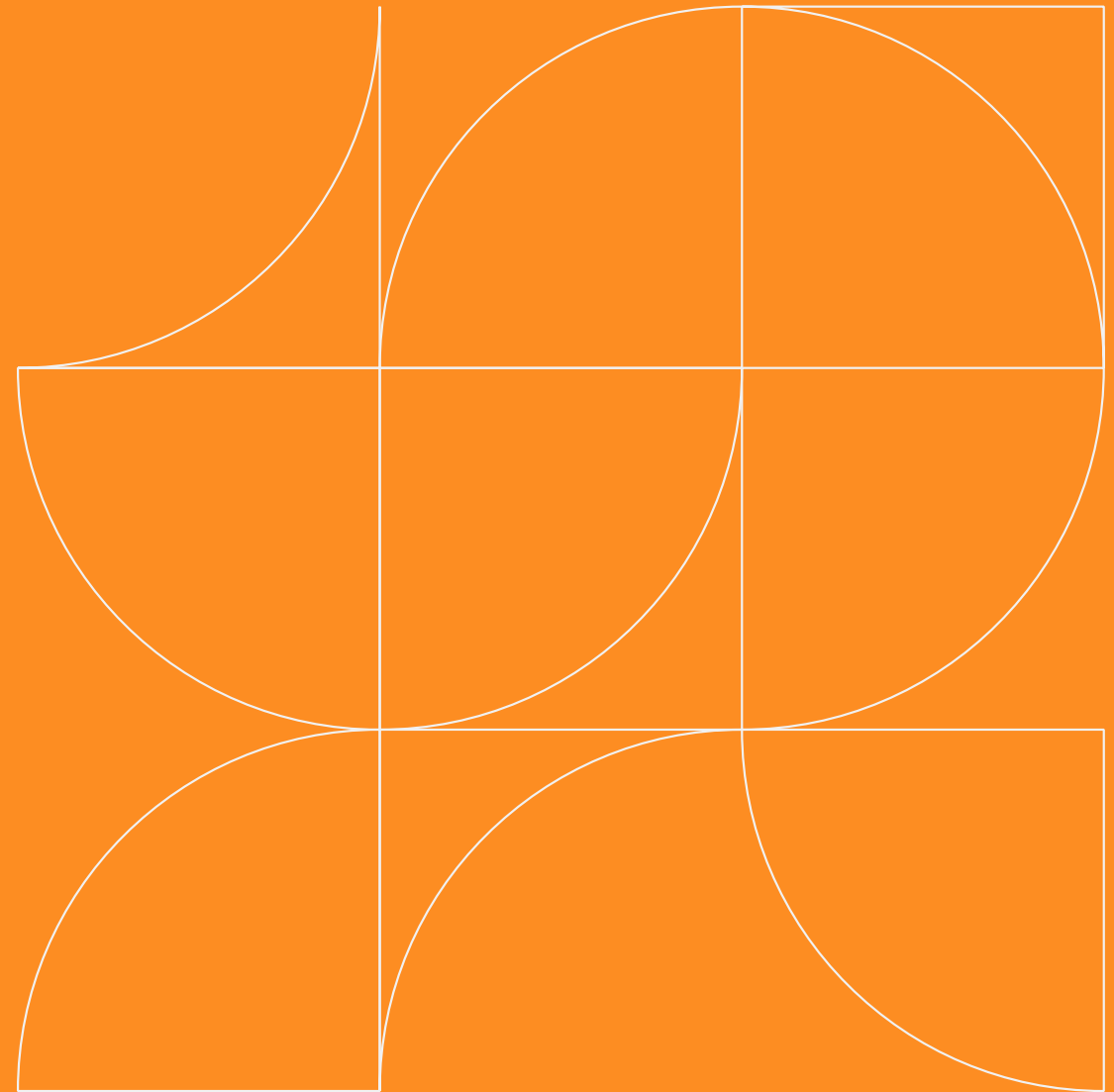
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- Affinity Bias
- Confirmation Bias
- Attribution Bias
- Conformity Bias
- The Halo Effect
- The Horns Effect
- Contrast Effect
- Gender Bias
- Ageism
- Name Bias
- Beauty Bias
- Height Bias
- Anchor Bias
- Nonverbal Bias
- Authority Bias
- Overconfidence Bias

# Your Role?

- **Speak up** – bystander intervention is crucial
- **Constantly challenge your own assumptions** (and those of others)
- **Think before you speak** – your “inner dialogue” can be very helpful
- **Pay close attention to stereotypes** – they can signal to you that you are operating from bias

# **Anti-Harassment: Reminders and Key Concepts for 2021**



# Reminders

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- **Your policies may be broader than the law**
    - “Mutual respect” is often a key component of the policy
    - A “toxic” environment claim is often coupled with harassment
  - **No such thing as confidentiality** – if a complaint is made to you, you must act
  - **You are the Leader** – your knowledge is the knowledge of the organization
  - **There are many protected classes** – don’t be rigid in your interpretation of a complaint
  - **Retaliation is easy to fall into and hard to prevent**
  - **Harassment and discrimination are toxic**
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# “Gotcha” Concepts for Leaders

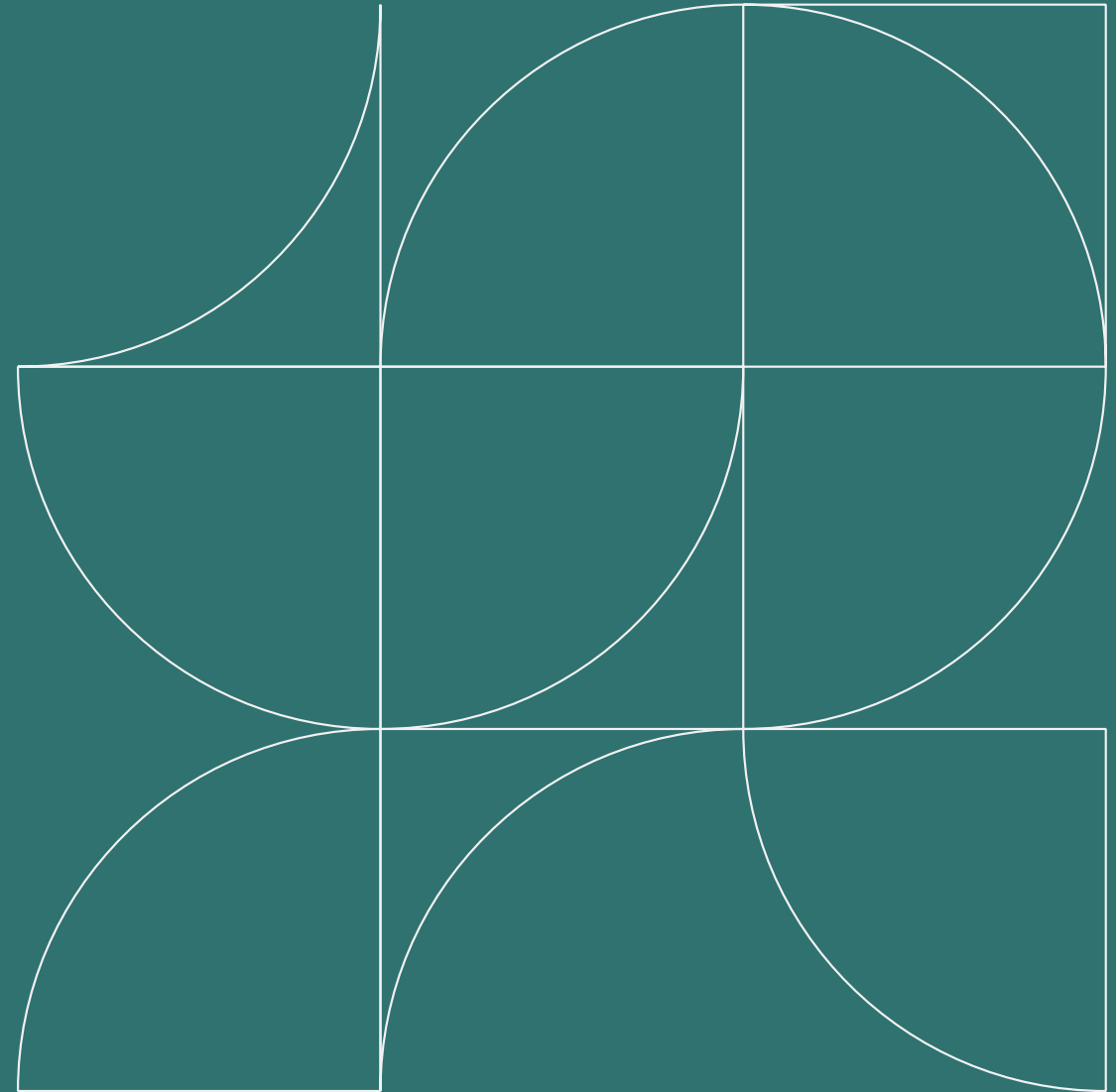
- Intent does not matter (Your intent is irrelevant!)
- No obligation for others to object to your conduct
- Power dynamic matters
- Bystanders count
- Rumors Matter

# The Dangers of “Oversharing” Information

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- Even something as seemingly harmless as oversharing confidential and/or personal information can lead to the creation of a toxic or “pervasive” workplace environment.
- Confidential and/or personal information should never be discussed casually, and everyone should be mindful of comments/rumors on confidential matters.
  - Such matters are shared on a **need to know** basis only.
- Hot button issues like **politics, religion, or sex** can offend others, and should not be discussed in the workplace.

# Workplace Bullying



# Growing trend against workplace bullying ...

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Entirely separate from “harassment,” there is an increasing focus on preventing bullying or “abusive conduct” at the workplace.

- The goal is to prevent bullying at the workplace.
- Bullying includes abusive conduct that is hostile and offensive
- Examples include threatening conduct, intimidation, or humiliation.
- Other examples include derogatory remarks, insults, and epithets.

# What could a reasonable employee find offensive?

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*While impossible to predict everything, you should avoid the following, even if said in a “joking” or “light hearted” manner.*

- Curse Words
- Referring to or making stereotypes based on protected class
- Thinking of (and referring to) a group as a monolithic bloc (“the blacks,” “the gays,” “the transgender”)
- Disparaging the importance of diversity, including organizations or clubs dedicated to advocacy or heritage.
- Threatening others for getting in your way or opposing you
- Insulting an employee’s performance (versus helpful constructive criticism)
- Referring to work product as “garbage” or other hyperboles

# Common “bully” tactics cited by employees

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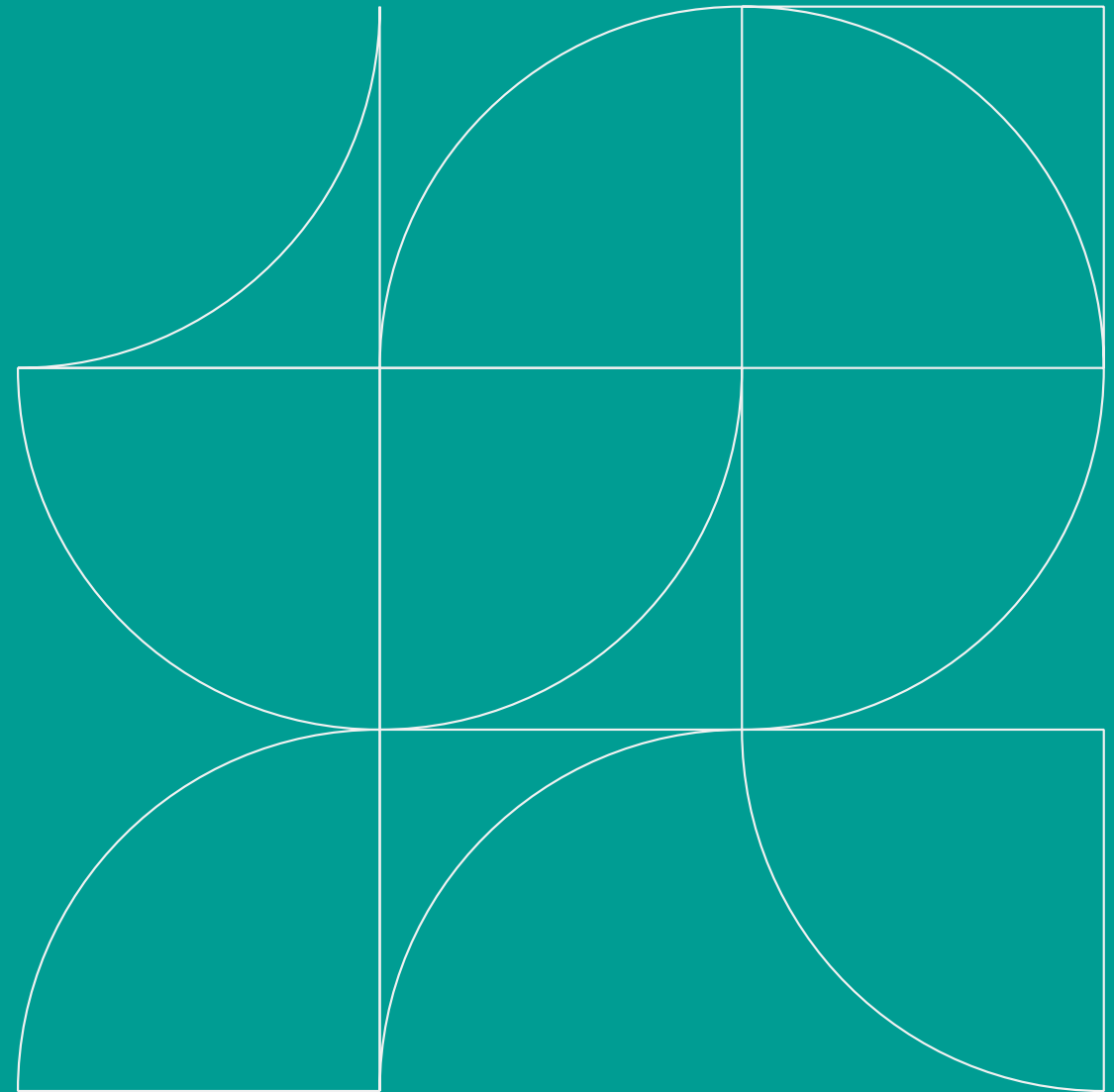
- Yelling, screaming, or shouting at someone for any reason
- Harshly and constantly criticizing someone’s performance
- Staring, glaring, or other nonverbal intimidation tactics designed to show hostility
- Discounting the person's thoughts or feelings ("oh, that's silly") in meetings
- Having a different standard of performance for one individual compared to others
- Starting, or failing to stop, destructive rumors or gossip about an individual, or otherwise encouraging people to turn against an individual

# Sensitivity to these issues is paramount

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- Be sensitive to inappropriate comments and treatment in the workplace
- **Bullying** breeds **bullying**
  - Leaders that look the other way when bullying behavior occurs, or fail to investigate reports of bullying behavior, create a breeding ground for the behavior to spread among other employees
- You are setting an example for employees

# Managing in the New “WFH” and Hybrid World



# Managing in a New “Work From Home” / Hybrid World

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- **42%** of the United States workforce now works from home (WFH) full-time.
- Most companies say that the “**mindset shift**” is permanent and the “**stigma**” attached to WFH is gone.
- Moving forward, approximately **60%** of employees want to be remote three days a week.
- Given the WFH/Hybrid environment managers have to adjust to a **new reality**:
  - Increase in policy violations (adherence to a work schedule, following leave guidelines, use of technology and social media issues)
  - Increase in “bullying,” offensive language and harassment complaints (online and “Zoom” issues)
  - New issues around wages, hours and working conditions

# Managing in a New “Work From Home” World

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## Trends in Litigation

- **Discrimination** – claims related to disability, age, and pregnancy
  - Don't make assumptions about what an employee needs because they are in a protected class
  - Do engage in an interactive process if an employee requests an accommodation (e.g., reduced or flexible schedule, ergonomic equipment, etc.)
- **Leave** – employees working from home maintain their rights under the FMLA and other state laws; some states have passed emergency laws allowing for COVID-19 related leave
- **Retaliation and whistleblower activity** – these claims focus on an employers not providing a safe workplace – less of an issue when working from home, but employer still has a duty to ensure a safe work environment
- **Wage and Hour** – claims related to work schedules (not being paid for lunch or breaks) and overtime
- **Expense Reimbursement** – myriad of state laws related to what expenses are reimbursable (office supplies, equipment, phone, internet, etc.)

# Continuing WFH/Hybrid Hot Topics

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- Wage and Hour Best Practices
- Absence Management
- Performance Management
- Harassment/Discrimination

# Wage & Hour - Setting Expectations Regarding Working Hours

Working remotely **creates numerous opportunities for employees to work without their manager's knowledge**

**Set clear expectations** for when an employee will work and be available by phone and email (i.e., what are the employee's core hours)

**Balance** an employee's need for flexibility (because of child care or other issues) **verses** the employer's need to have employees available during certain time periods.

Inform non-exempt employees that they **may not work "off-the-clock"**

Non-exempt employees remain **eligible for overtime** if they work over 40 hours in a workweek (or 8 hr/day in CA) – managers should require prior approval of all overtime

# Wage & Hour - Working Time

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## • Non-exempt employees

- Remind employees regularly that they must record **all hours worked**
- Instruct employees that they **should not perform work outside scheduled hours** without written approval from manager in advance
- If employees are making phone calls or emailing **outside of regular hours**, address immediately (but must pay for all time worked)
- Employees should schedule, **take and record meal and rest breaks** as if they were at work

## • Exempt Employees

- If an exempt employee works **any part of a week**, they must receive their full salary
  - this can be a **combination** of wages and PTO/vacation or sick time
- Remind exempt employees to **record all time off** in accordance with policies

# Performance Management

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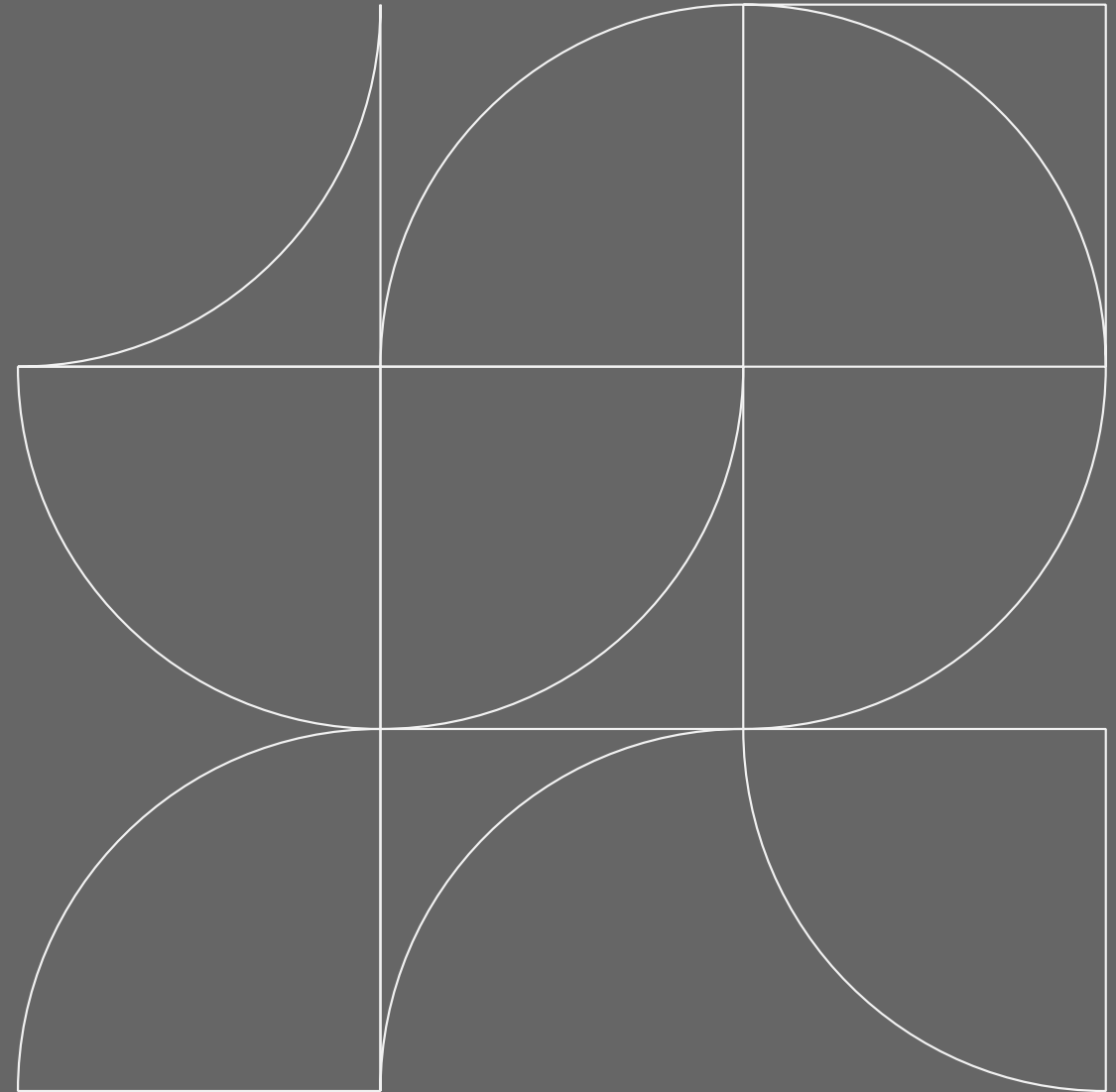
- It is critical that managers **provide clear expectations and feedback** to employees who are working remotely
- Managers will need to **increase their communication** with employees
- **Schedule regular check-ins** with employees (more frequent, shorter check-ins may be more useful than less frequent, longer check-ins)
- Provide **written expectations** regarding work product/deliverables that include **deadlines**
- Identify **how employee should be communicating** with you and their co-workers
- **Address any issues** as soon as they arise and make a concrete plan about your expectations moving forward

# Harassment and Discrimination

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- There is **increased awareness and sensitivity** around discrimination issues which manager's need to take into account
- Of course, your **policies prohibiting harassment and discrimination** remain in effect
  - These policies apply to email, as well as more informal communication such as instant messaging, texting, etc.
  - Ensure that video conferences (e.g., Teams, Zoom, WebEx) remain professional in terms of conversation, dress, location, etc.
- Issues related to **COVID-19**
  - Should not single out particular group who are in higher risk group (e.g., older employees, employees with underlying medical condition)

# **Social Media: The New World Order**



# Social Media – Benefits & Risks

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- Social media is everywhere and has many **positive aspects**
  - builds bonds
  - shared experiences
  - promotes stronger working relationships
  - allows Court/employers to communicate with employees and for employees to provide feedback
- Social media also poses **certain risks**
  - negative co-worker or supervisor/employee interactions
    - actual or potential harassment issues
    - discrimination
    - defamation

# Social Media – Managing Risks

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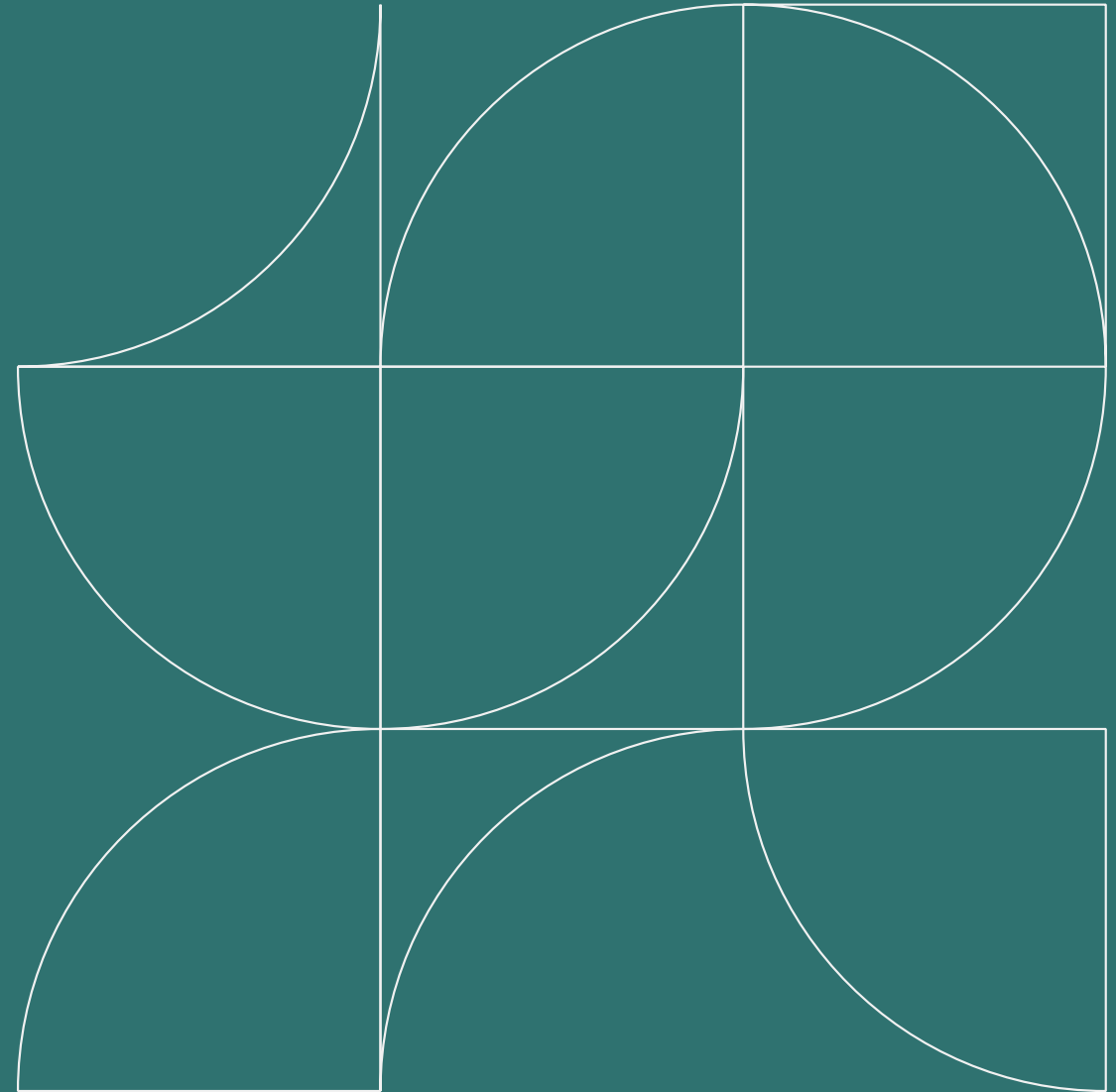
- Consider a **social media policy** that contains guidelines for employees, including:
  - Must follow the company's conduct standards and its policies (e.g., anti-harassment/non-discrimination)
  - Should not defame anyone or damage their reputation
  - No disclosure of confidential information
  - No expectation of privacy in social media activities done at work, on work time, or using company equipment or systems

# Social Media – Managing Risks

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- Courts have an interest in use of social media that affects the employer whether that activity occurs on or off work time
  - Company acknowledges that social media may be a personal activity
  - Employees need to realize that their social media use may affect workplace
  - Employee posts can raise issues related to sexual or other workplace harassment
    - Employee posts regarding current events such as Black Lives Matter or #Me Too Movement may lead to claims of hostile work environment

# Your Role



# Your Role:

## Affirmative Responsibilities:

- **Help to create, model & support your Court's culture**
  - Living the anti-harassment policies and the culture of support
  - You are the Court in the employee's eyes
- **Establishing culture**
- **Be a good, consistent manager** – performance feedback is key
- **Understand the boundaries between work and life**
- **Understand policies** – be informed, educate yourselves
- **Take action** – ensure consistency
- **Intervene & step up** – open lines of communication
- **Understand where you can get help** – HR/legal