



## *Fox Rothschild Podcast*

### **Legally EmpowHERed Podcast**

#### **Episode Three**

#### *Featuring Partner Sahara Pynes with Gray I. Mateo-Harris*

**Sahara Pynes:** Welcome to Legally EmpowHERed. I'm your host Sahara Pynes, and I'm really excited to bring this podcast to you. As an attorney and former business owner myself, I'm passionate about drawing on my own experience and insight to set my female clients up for success. I know my guest today feels the same.

I'm so excited to welcome today's guest to the show because she brings such an experienced perspective to our conversation today as we'll talk about diversity, equity, and inclusion, particularly as it relates to workplace culture and other important workplace issues.

Gray Matteo-Harris is a partner in our Chicago Office and a strong advocate for diversity and inclusion in all aspects of her life. She has more than a decade of experience representing employers in workplace litigation, handling labor relations disputes and providing strategic counsel on labor and employment issues. Gray is a valuable resource to all of our clients seeking to elevate their workplace culture with respect to diversity and inclusion, implicit bias, gender discrimination and sexual harassment. As someone who believes deeply in the importance of giving back to her community, Gray's list of volunteer efforts is too voluminous to mention on this show, but it's safe to say that this is one impressive woman. Welcome, Gray.

**Gray Mateo-Harris:** Thank you so much. It's my pleasure to be here. I'm excited to discuss diversity and inclusion issues, as well as freedom of speech, and really get to talking with you some more.

**Sahara Pynes:** Awesome. So, you and I did a webinar a few months back—gosh, so much has changed since then, right?—about so called free speech at work in the wake of the Black Lives Matter movement, as well as the insurrection of the Capitol. What can you share with us about employee free speech rights at work?

**Gray Mateo-Harris:** That's a great question, and certainly so much has changed, but so much has stayed the same. The analysis really hasn't evolved tremendously over the years, but it has resulted in different political influences, and different expectations of what the EEOC will do, and what a court would do, given a particular set of facts.

You're absolutely right, political speech, and freedom of speech, and topics around Black Lives Matter and other such concerns have become quite the center of attention across the country. The coverage has pretty much elucidated that public opinion is easy to change on some issues that perhaps previously were more subtle. So, the First Amendment certainly applied to government actors when we're talking about public employees and federal contractors, but for the most part if we're talking about private employees, or employees of private companies, they're going to have different rights. You're looking more at federal, state, and local laws that govern either political speech, or provide rules around anti-discrimination.

**Sahara Pynes:** So, there is really not a right to free speech, per se, in a private workplace, right?

**Gray Mateo-Harris:** Correct, yes. I think that's pretty jarring to a lot of employees and people generally who just assume that anything they say is freedom of speech, and that their employers have to tolerate really any kind of language, or conduct, or behavior as if they were the government, and they're not. I think a lot of employers are quite hesitant as to how to handle issues and how to act because there is a general perception that there is freedom of speech.

Now, depending on the state you're in, again there might be specific rules that do govern an employee's right, certainly during non-working time and during spaces that are for private use that are non-working spaces. There is going to be a lot of regulations around that in different states. So, you're going to have different rules depending on the space in which it's happening. Whether it is something that crosses the line and violates your policies, that is generally going to be a place where as an employer you can step in, and in fact you should step in to ensure you're enforcing your rules and you're doing so non-discriminatorily across the board.

**Sahara Pynes:** Talking about policies, that's a really good point. So, what about a company policy on dress code, or office décor? Could a private company prevent an employee from, let's say, hanging a confederate flag in her office?

**Gray Mateo-Harris:** Yeah, that is obviously a great question and one that seems more complicated than, at the end of the day, it is. And it is one where the answer to which has changed over time. Back ten years ago there would have been a lot more argument, and in fact there is case law to that effect, that hanging a confederate flag in your office could be protected and certainly insufficient grounds to discipline or terminate an employee. Fast forward to the present and, given the backdrop of what we have seen, the EEOC has been quite clear and vocal, and in fact has pursued actions where the only allegation is that there were confederate flags displayed in the office. Without any additional information, that was considered, for the EEOC, sufficient and again there is case law supporting the position that displaying confederate flags in the office could possibly be sufficient evidence of racial animus.

Now whether it rises to the level required for a claim of discrimination, that's another thing. It might not be sufficiently pervasive or severe to end up in support of a harassment case, but it is enough to make it to the courts, so it's enough for an employer to be wary of failing to act. If you are seeing confederate flags in your workplace, or if it is an issue that is raised as a complaint, not taking that seriously would certainly be a possibility of liability on the employer for failing to act.

**Sahara Pynes:** Could a company then have a preemptive policy that says you can't wear political clothing, or can't hang political posters in your office to sort of prevent on the backend potentially having a lawsuit that it's a hostile work environment?

**Gray Mateo-Harris:** Sure, employers can, and many employers have, developed policies around prohibiting political speech in terms of displaying Black Lives Matter signs, or whatever kinds of information on an employee's shirt or mask—we saw a lot of cases around that, employees wearing masks with messages during COVID.

Here is what I say to that: sure, you can have policies to that end. I won't mention the companies, but there was some very public and very unpleasant backlash faced by companies that had such rules and had such neutral dress code policies that prohibited anything of that kind. In the end it turned into calls to boycott that company, calls to cancel the company. So, I think a wiser path is to prohibit any offensive, racially insensitive, derogatory, anything that you can do to be clear that you are prohibiting offensive, violent messaging. That kind of language I think it going to put a company in a better position to make wise decisions as to when they're enforcing the policy fully, when they need a little bit of flexibility depending on the content and the context. So you saw companies turning around and handing out Black Lives Matter paraphernalia to their employees, taking the opposite path, so that it's more in line with their key demographics and their company messages and what they want to be perceived as.

At the end of the day, I think it's difficult and that's why you want to seek legal counsel and be really careful and strategic about the language in those policies, but doing nothing at all is certainly not desirable either because then you're leaving decisions to managers who are going to use their own bias, and their own thoughts on what is or is not offensive to determine what is or is not allowed.

**Sahara Pynes:** Right. You mentioned the enforcement piece of this, but you want to make sure that if you do have a policy, just having a policy in place isn't good enough. It's all about how you say this is offensive vs. this is not offensive, or I believe in this politically so this shirt is OK, yet another one might not be.

**Gray Mateo-Harris:** Exactly.

**Sahara Pynes:** OK, so what are some of the best practices for business owners, or their HR teams, to respond to these social or political expressions?

**Gray Mateo-Harris:** Sure, so I think the most important best practices are to annually review your policies and procedures and make sure they're up to date; they're in line with whatever state laws, federal laws and local laws exist that apply to your workplace; that they are relevant and intuitive given the particular workplace and what your employees do on a day to day basis; they're easy to understand, depending on your workforce if it's professional or different. Also, that it is tailored to the specific business needs and circumstances that an employer is anticipating. You should have a legitimate business reason ready to go for any policy that you have written or implemented. You should not be having to recreate the reason for a policy once you're faced with a lawsuit or once you're faced with a claim.

Again, you want to make sure that you are disseminating your policies, that you're training employees on the policy and also training your managers and your HR and businesspeople on how to comply with it. You want to make sure you're being respectful of protected activities, so under the National Labor Relations Act there is some activity that might really straddle both political speech and protected concerted activities, so you want to be careful there.

You want to make sure you're being respectful of lawful off duty conduct if there are off duty conduct laws in your state. You want to make sure again, as we've repeated several times, that your policies are being enforced consistently to avoid discrimination claims. Then, again, mentioning a topic I already eluded to, you want to balance between fair implementation and zero tolerance so that it makes sense for the way you're running your business, and that you're not landing in hot water from a public perception standpoint, depending on what area you're in.

**Sahara Pynes:** Yeah, and you mentioned lawful off duty conduct. I just want to clarify that for our listeners. If an employee takes time off to go march in a protest or something like that, that's what you're referring to when you're saying you cannot prohibit, in certain states, that employee's activity?

**Gray Mateo-Harris:** Absolutely right. In certain states, you can't consider, in making an employment decision one way or another, what that employee is doing with their lawful off duty activity and time. We saw this a lot with the Capitol riots and all the coverage there. Employees that were just in attendance and perhaps were not involved in any unlawful activity, were not storming the Capitol, were not entering, employees that were not wearing their badges or otherwise identifying with a particular company – those individuals, you would probably be in a hard position to terminate unless again you're looking at activity that they could have likely been in support of that would be illegal.

**Sahara Pynes:** Right. Is it actually “lawful” off duty conduct when you’re talking about the Capitol insurrection? But that’s a whole other can of worms, right?

**Gray Mateo-Harris:** It is. It is.

**Sahara Pynes:** I think like peaceful protests, right?

**Gray Mateo-Harris:** Think peaceful protest, think not throwing bottles at police officers. You can just put yourself in a position where you’re thinking about whether any of the conduct that they engaged in truly does violate your policies. Even if you didn’t like the message, you didn’t like generally the fact that an employee had a maybe very public role in a protest. As long as their conduct was peaceful, nonviolent, nondiscriminatory, not hateful, it’s really best not to take any action in such a situation, even if it’s raised to you by other employees.

**Sahara Pynes:** So, in terms of this off duty conduct, how does online activity factor into the “lawful” off duty conduct? Posting on Facebook some racially charged post, or maybe even hate speech or political speech. How does that factor into an employer’s ability to look at that, or maybe have an employee raise that speech to their attention and say “hey look at what my coworker did. I’m not really comfortable working with that person anymore based off of what they posted on their private Facebook page during their off duty time.”

**Gray Mateo-Harris:** Yeah, that is a great question and that is a thorny one. It’s going to depend so much on the circumstances. What it is, what role that employee has – is that employee a supervisor, do they have a heightened duty to the company beyond their regular loyalty duties? Is the message itself violent, hateful, or otherwise prohibited, or inconsistent even, with the company’s policies and positions?

Most employees are at will, so in most places as long as you’re not discriminating based on a protected category, you are pretty much free to use information that is legally available to you in making a decision. So while we never encourage employers to go out searching for information, or go out looking for an employees online activity, which is private and unique to them and almost always likely to be lawful, when it is brought to your attention and it is conduct where you clearly see – if this was an email, or if this was something stated at work would get someone terminated or disciplined, then you need to think about it in that same perspective. Sometimes it’s going to treat it in a progressive discipline manner, but if you have a manager making a hateful comment against a particular category of employees, it’s really going to be a difficult situation for you to be in as an employer if you don’t discipline that manager or ensure you’re protecting employees reporting to that individual.

**Sahara Pynes:** Sure, so there might be recourse then. There might be recourse for an employer, just depending on the content, so that probably is an area you should seek some counseling guidance.

**Gray Mateo-Harris:** Exactly.

**Sahara Pynes:** I want to pivot a little bit as another thing that came out of the Black Lives Matter movement is an increased focus on Diversity, Equity and Inclusion, or DEI, initiatives in the workplace. Can you explain the premise of DEI?

**Gray Mateo-Harris:** By DEI we're referring to Diversity, Equity and Inclusion and we're talk about the fact that all three are different pillars that matter in improving workplace culture. Certainly, a lot of employers have always had some degree of focus on diversity and increasing retention numbers and diversifying their workforce. Not always have employers really focused on the equity aspect—are we paying employees equally under the law and in a way that is fair to their respective experience and contributions at work? Then inclusion, are our employees of color and of different background being brought into decision making roles? Are their opinions actually being weighed and considered in company policy and activity?

It's really a more complex look at the traditional diversity focus, and I think it is one of the most exciting things to come out of all the social upheaval is this real interest in companies of all different sizes in having a reckoning with their past, their hiring practices, the leadership make up and whether it's reflective of the general population, or certainly of the communities in which they operate and serve. That's really lead to a lot more vocal and public commitment from different employers, what they want to see happen with their demographics and with their leadership. I think that's encouraging in a lot of ways. We would like to see, of course, employers continue to adhere to their public commitments. I always tell my clients, if you're not willing to put the work behind it, making the statement can often land you in hot water later. When you're acknowledging to the public that you have work to do and that you're going to do xyz to remedy these issues, and then you don't back it up with conduct, that can also be used and has been used as evidence of racial animus.

**Sahara Pynes:** Yeah, and there are so many more companies now who are going beyond the check the box DEI training, right? That might be mandatory training that they have had in their workplaces, to actually start doing more and to start thinking about it at a deeper level.

So, for founders who this is of value for and who want to incorporate DEI initiatives into their workplace culture, where best to start?

**Gray Mateo-Harris:** This is really an area that is going to be unique to each company depending on the history, their goals, and their size. I think an internal audit, an assessment of

where they're at, is going to be the most important first step. Determining do we have a problem with a particular issue, have we been doing something about it, and has it been effective or not? If it has not been effective, what can we do differently to try to address those issues?

Sometimes that is a full audit that is rolled out to the entire workforce where you're seeking input on different initiatives the company may have taken, to see if it's working, how it's resonating with your workforce. It could be something where you hire a consultant to come in and run this analysis, or perhaps look at your data and your year over year retention to identify problem areas. But certainly, dedicating that internal assessment as your first step, in my opinion, is the best way to proceed.

Then you want to really focus on getting buy in from the top and buy in across the board for your leadership, because obviously anything that you do if you haven't made it sufficiently clear to your leadership as to why you're doing it and where you're hoping to go, you're going to have a lot more intervention, a lot more issues along the way. I think once you've made a message very clear to your leadership and you have everyone behind it, any activity that you determine based on such an analysis is going to be more easily embraced.

You want to implement whatever that initiative is, and for some companies that has been listening sessions with workers of different backgrounds where folks are getting an opportunity to share the floor and talk about their experience both at work and elsewhere. It could look like a hire of a chief officer that is going to be dedicated solely to DEI work. It could be, as I said, engaging a professional to do training on implicit bias and on other issues that are affecting your workforce. So, whatever that looks like, having a plan on how you're going to roll it out and implement it so that it lands properly is going to be key.

Then, of course, determining how to measure your success. Are you going to look at hiring metrics? Your rate of retention? Are you looking at leadership – a certain number of leaders you're looking at? Are you going to consider a certain number of individuals that are diverse for every open position? It can take a lot of different formats for a company, but as long as you know what you're looking to do, you've identified what success is going to look like for you, what your accounting is going to look like, how you're going to ensure your team is actually meeting expectations, that is what you're going to want to be focused on. So many companies do the beginning work of assessing, and the middle work of announcing some change or initiative, but not enough tracking and verifying that what they want to do and what they are putting their good faith efforts behind is actually working for their workforce.

**Sahara Pynes:** Thank you, Gray. There was so much great information there, I just want to break some of it down a little further. You mentioned recruiting and retention, which I think is a key element in these DEI initiatives in terms of integrating into your culture a way to increase your diversity at all different levels of the organization. I've had clients ask me about a quota, saying

“well, we need to fill x number of positions with somehow diverse candidates – racially diverse, socioeconomically diverse, whatever it is.” How does that factor into the EEO laws? People are trying to do a good thing, but there are laws that also apply to private companies.

**Gray Mateo-Harris:** Absolutely. If an employer wants to have an affirmative action plan, that is a very particular process, that is something they should certainly look at and investigate and adhere to. In terms of independent “self-help,” the focus on a quota is really not ideal. You want to make sure you’re looking at generally diversifying, prioritizing the most qualified candidate, and ensuring a diverse slate at every level. Making sure your interviewers are diverse and that the people going out into their network to locate diverse candidates themselves are diverse, or at least well-qualified to bring you the best and the brightest from all different backgrounds. That should be your focus because there is such a thing as reverse discrimination and you certainly cannot discriminate against people because of their belonging to majority groups, but you can select the most qualified candidate and you can make diversity and inclusion considerations a key component of who is the most qualified.

So, a candidate who has demonstrated commitment and history supporting a diverse and inclusive workplace should be given some additional weight than a candidate who has no track record of being engaged in that space. A candidate who has training that is missing—background, skillset that is missing—from your workforce, that is perhaps someone with a degree involving corporate communications to diverse audiences, that person may be more qualified than someone who doesn’t have such detailed and tailored experience given whatever you’re looking to do. If you’re a media company, there could be relevance to someone’s experience working with diverse populations that you’re going to want to weigh and build into your process.

So, you can do what you want to do, which is prioritizing hiring diverse candidates, but do it in a way that does not run afoul of existing Title Seven and other laws. That is why we recommend getting engaged with outside counsel or another expert that can help you navigate that tightrope so that you are always in compliance but still moving forward and advancing all of your efforts.

**Sahara Pynes:** That’s really helpful. Thank you. What about on the retention and pay equity side? How do you ensure that people are being treated fairly? I know, I hear prior compensation is justification for a lower salary sometimes, which affects women adversely as well as certain diverse populations.

**Gray Mateo-Harris:** Absolutely. That is a great point and it’s almost low hanging fruit. So many states have already made it unlawful to inquire about prior compensation data until there is an actual offer in hand of employment, a conditional offer of employment. It is likewise important to think about whether you want to have such a wide range of compensation for a new hire role or for a promotion into a position. If you have done the work of doing a compensation analysis

and of organizing or having some sort of range associated with each position, you won't have outliers who are getting compensated significantly above or below merely because of how good they are at advocating for themselves, or how good they looked to someone else, or how much they reminded someone of themselves, or whatever internal advocacy method they might have developed.

If you really focus on what does the job descriptions say, what do they actually need—do they need a masters degree, do they need a PHD, do they need 20 years or is ten years enough, do they need five years, is it necessarily to have a particular type of experience, or not? Make sure your job description isn't in and of itself excluding so many candidates because it is requiring such advanced and senior skills that data has shown is going to end up excluding your younger, more likely to be college educated, individuals.

If you're thinking about that, did you make your analysis clear, did you really give reasoning and thought as to the range of compensation, then when you're bringing on someone and you're hiring them, you don't ask about their last compensation. You can ask about their goals, their compensation goals, if it's something that becomes necessary and it's allowed in your state. It always makes sense to say, here is the range of compensation for this position, and have an answer as to why this individual falls in the lower end, high end or middle range, so that you're keeping yourself honest and keeping your recruiters and your team honest as to why they are assessing someone as worthy of higher or lower compensation.

**Sahara Pynes:** Sure. So, any other thoughts or other questions that I haven't asked that I should? Or topics?

**Gray Mateo-Harris:** One thing I'll say is that a lot of clients want to rush to do a compensation analysis, or a pay equity analysis, but they're not really prepared to do anything about it. That is a real critical, in my opinion, mistake, it's a misstep. Going out there and gathering the data, having knowledge and becoming aware of serious problems, and then not having any action is a nightmare from a litigation standpoint, from a class action standpoint, if you ever are in a position where you have to disclose non-privileged pay audit information that you never took any action about.

So again, if you're going to go that route and you are interested in seeking out more information about how your compensation is doing and how well, or poorly, it reflects your focus on diversity and inclusion, then you need to be prepared to back it up with some action so that you can show you understood the issue and that you developed practices and policies to address it.

**Sahara Pynes:** So, you mentioned privilege, is there a way to perform the pay equity analysis with counsel so that it's all privileged and you don't have to disclose it in future litigation?

**Gray Mateo-Harris:** Absolutely. We have a lot of experience running pay equity audits as counsel, as outside counsel, and I think it is the best way to proceed so that you have a privileged, protected analysis that allows you to determine what you need to do differently without worrying about what it means if you discover something unpleasant, or something that surprises you. I think your outside counsel will also be able to help you navigate what is an appropriate reaction. Again, your outside counsel will have you navigate what is an appropriate result, what is the best way to fix or otherwise address the issue that you might discover, and also how to best communicate it internally up the chain in manner that protects you and will get the most buy in.

**Sahara Pynes:** Thank you so much, Gray, for joining me on this episode of Legally EmpowHERed. DEI in the workplace is such an important issue to be discussing right now, and I'm so grateful that you've been able to share your unique perspective with us and provide our listeners with the pointed advice on how they can be advocates for DEI in their own way and in their own workplaces.