



Cultural Flashpoints Litigation and Investigations – Strategies for Employers

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Seyfarth Shaw LLP

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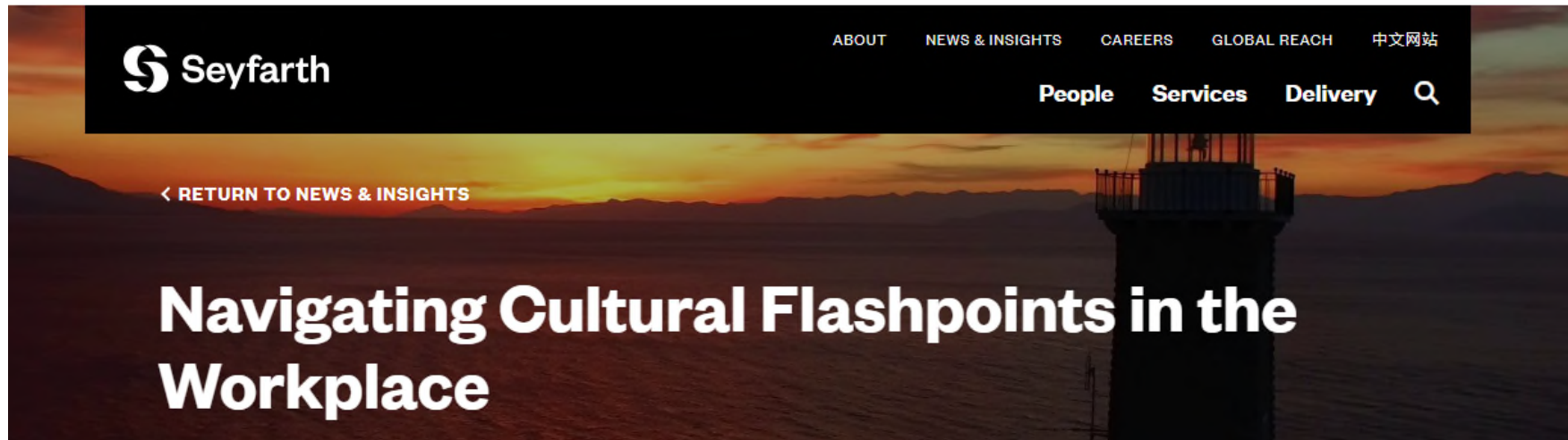
Agenda

- 1 | Key Flashpoints Issues
- 2 | Flashpoints Litigation Overview
- 3 | Flashpoints Investigations Overview
- 4 | How Flashpoints Issues Appear – A Hypothetical

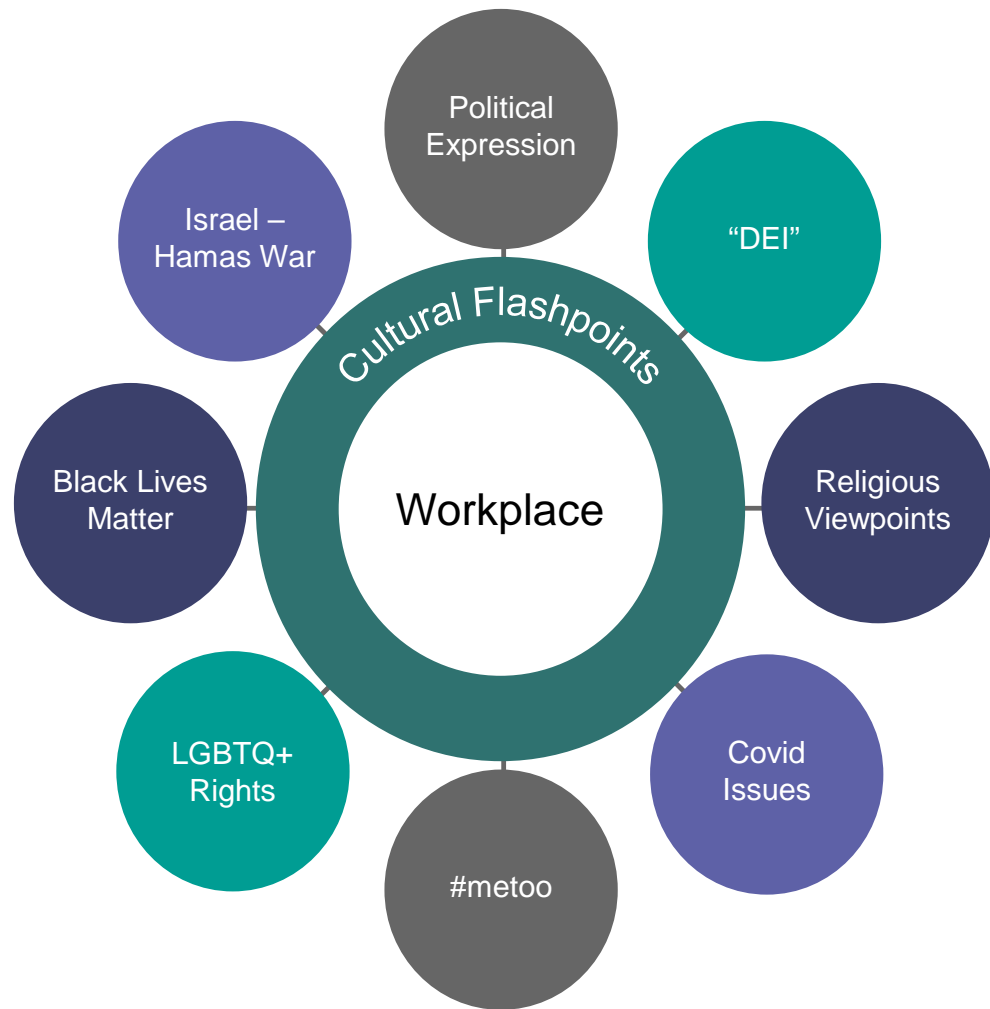
A note about this webinar

- Even talking about cultural flashpoints can be tricky
- Please know that we approach these issues today as neutral legal advisors and business partners in order to help our clients
- The viewpoints we discuss today are examples only and not those of Seyfarth Shaw or the presenters

Cultural Flashpoints Task Force



What Do We Mean by Cultural Flashpoints?





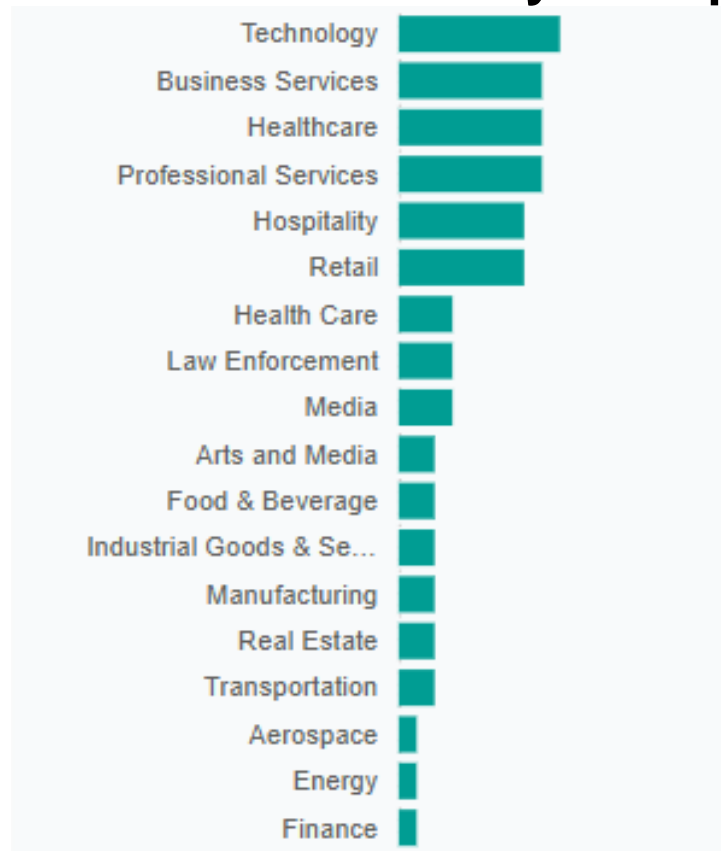
What Is Cultural Flashpoints Litigation

Where are Flashpoints Happening?

Top 3 industries seeing Flashpoints Litigation:

- 1. Education*
- 2. Government*
- 3. Non-Profit*

All Industries Are Affected by Flashpoints:



Today's Hypothetical





How Flashpoints Litigation Is Different

Flashpoints Litigation Raises Novel Legal Issues



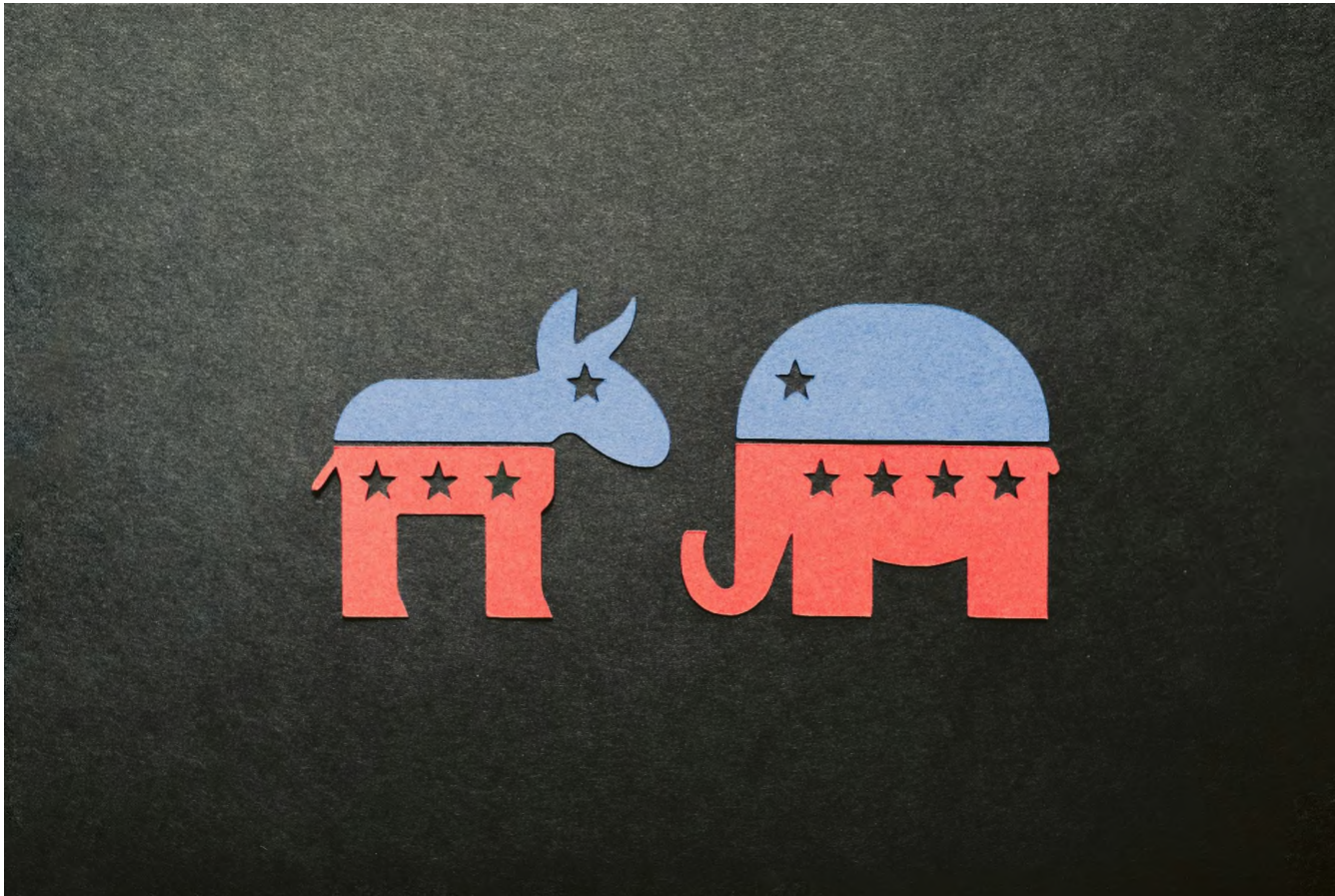
Flashpoints Litigation Involves Passionate, Diverse Viewpoints



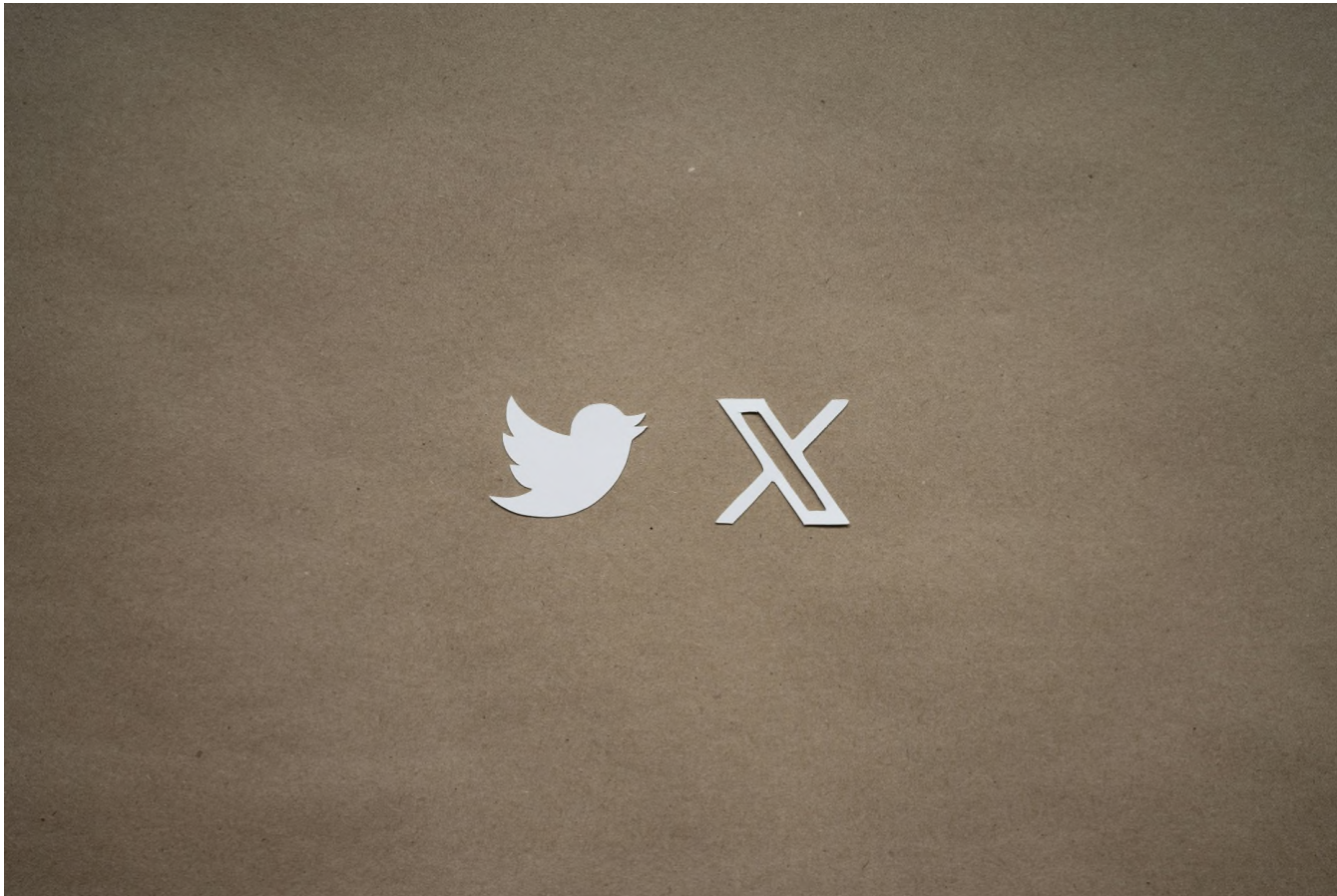
Flashpoints Litigation Carries Increased Risk for Explosive Verdicts



Flashpoints Litigation May Have Non-Traditional Plaintiffs' Counsel



Flashpoints Litigation Risks Reputational Harm for the Company



Flashpoints Litigation Risks Reputational Harm for Individual Defendants and Witnesses



How Flashpoints Litigation Is Different (Revisiting Hypothetical)



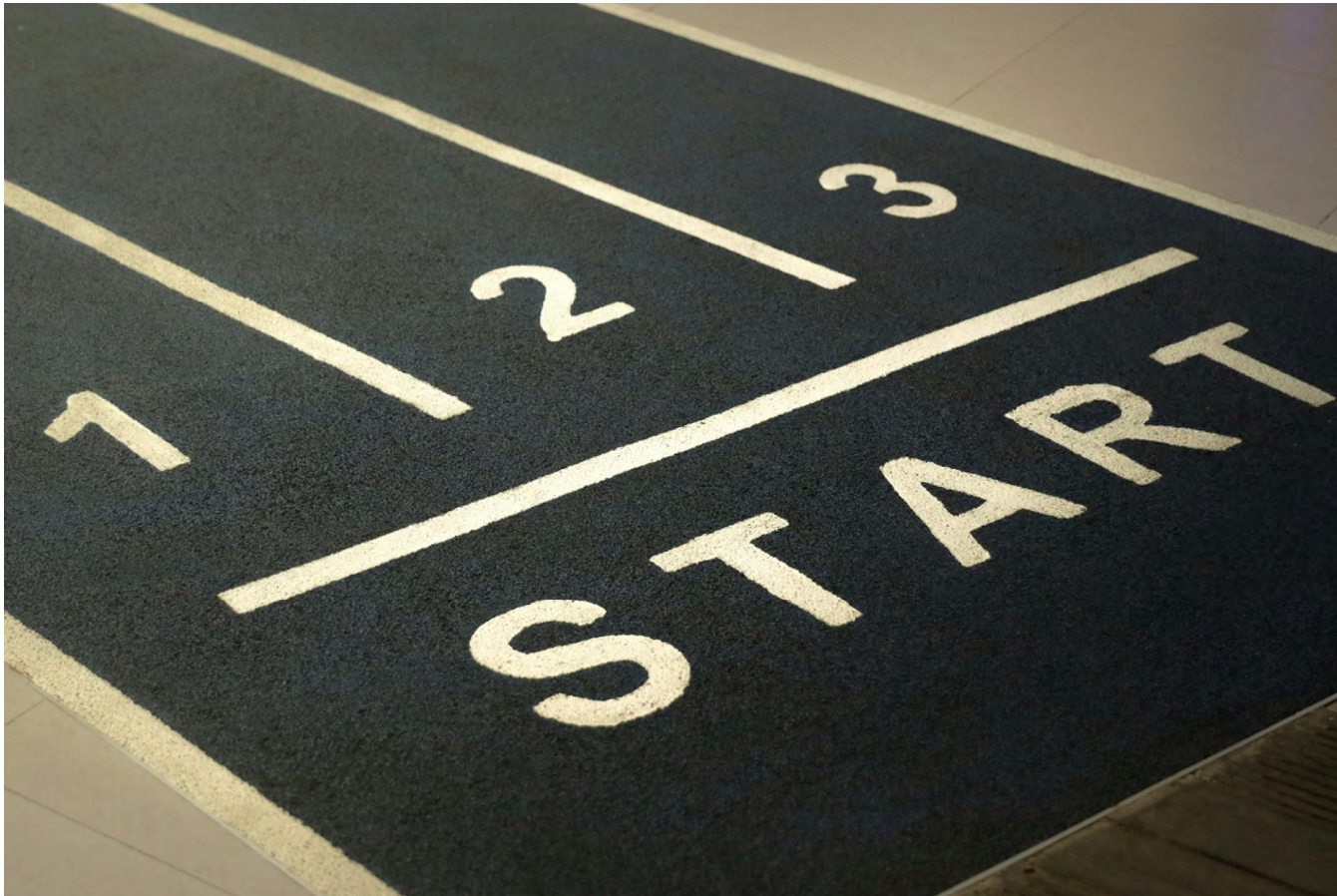
The background features a dark grey field with numerous glowing, semi-transparent spheres of varying sizes. Some spheres are in sharp focus, while others are blurred. A network of thin, light-colored lines connects some of the spheres, creating a web-like structure. On the right side, there is a white geometric diagram consisting of a square divided into four quadrants by a horizontal and a vertical line. Each quadrant contains a semi-circle that fits perfectly between the quadrant's corners and the central lines. The overall aesthetic is modern and technical.

Strategies for Flashpoints Litigation

Flashpoints Strategy Starts Pre-Litigation



Flashpoints Defense Starts on Day One



Think Long and Broad



Keep It Boring (Strategically)



Stay Nimble



Invest in Deposition Preparation



Pay Attention to Cultural Literacy



Leverage Jury Studies and Jury Selection

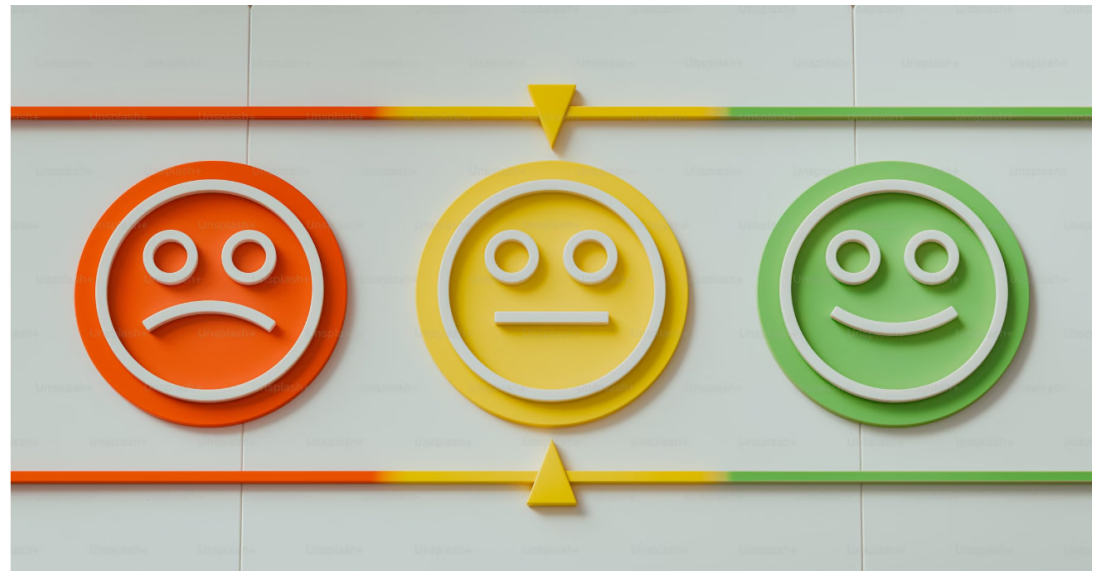




How Flashpoints Investigations Are Different

Why Flashpoints Investigations Are Unique

- **Higher Stakes.** The investigation may be a precursor to litigation that is protracted, high-stakes, and public.
 - The handling of the investigation itself may be at issue in ensuing litigation.
- **Significant (Internal and External) Pressure and Scrutiny.** The company likely will be facing significant internal and external pressure to make what is perceived to be the correct decision.
- **Strong Emotions.** Flashpoints investigations are inherently fraught with very strong emotions from all involved. These emotions may jeopardize a productive, collaborative work environment.



Why Flashpoints Investigations Are Unique (Cont.)



- ***Reputation Implications.*** A flashpoints investigation may implicate not only the reputation of the company, but also the reputations of individual executives, managers, or employees.
- ***Potential Significant Business Disruption.*** Because of the nature of flashpoints, the investigation carries with it the potential for significant disruption to the business – both internally from employees and externally from customers and clients.
- ***Other Issues.***
 - Heightened concern about personal exposure; and
 - Concerns about doxing and personal safety.



Core Values

- The company's core values must serve as a guide.
 - As with all investigations, applicable laws, regulations, and written company policies are critical to defining the standard to which employees are held.
 - Complaints involving flashpoints tend to push the limits of the law and policy, so the company must rely on its core values to ground its response to the allegations.



How Should Employers Handle Flashpoints Investigations?

Applicable Law

- It is critical that the investigation be conducted with a deep understanding of the complex web of laws and regulations applicable to managing employee conduct.
 - Title VII and state law equivalents
 - The National Labor Relations Act (NLRA)
 - State political and off-duty conduct laws
 - President Trump's recent Executive Orders touching on diversity, religion, and gender identity
 - EEOC Guidance

Applicable Policies

- Identify the applicable policies – and be open to updating them.
 - Investigators often are tasked with determining whether it is substantiated that the accused violated company policy(ies).
 - Failing to adhere to the company’s own policies and procedures in conducting the investigation can leave the company vulnerable to litigation.
 - As laws and regulations change, written policies must be updated to reflect these changes.
 - Policies and procedures should be drafted with flashpoints in mind, giving the company sufficient discretion to adopt to unexpected circumstances – without deviating from the company’s core values or the law.



How Should Employers Handle Flashpoints Investigations?

- ***The Right Flashpoints Investigator.*** It is critical that the company identify and select an experienced, knowledgeable, and appropriately trained investigator.
 - Knowledge of the company's core values, the applicable law, and the applicable policy(ies);
 - Level of cultural competency that is generally unnecessary for a run-of-the-mill workplace investigation;
 - Emotional intelligence





Privilege Considerations

- Because flashpoints investigations are particularly likely to result in litigation, it is critical to have a clear legal strategy regarding whether the employer intends to have the investigation handled under privilege.
- At the same time, there is no guarantee that the privilege will hold.
- Also, at some point during the litigation, the company may decide that it is in its best interests to waive the privilege.
- As a result, a well-documented investigation is key.

Flashpoints Investigations (Revisiting Hypothetical)



What In-House Counsel Can Do Right Now



- Consider an Internal Cultural Flashpoints Task Force
- Create a Process to Identify and Flag Flashpoints Litigation
 - choose the right litigation team
 - get started on the right foot
- Train Internal Investigations Team on Flashpoints
 - choose Flashpoints-aware investigator

We're Here to Help





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