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Are Nonprofit DEI Initiatives Illegal? – Transcript

****Jess ** 00:00:02** Welcome to Charity therapy, the podcast where we explore the ups and downs of the nonprofit sector and answer your burning questions. I'm your host, Jess, owner of Law Office, and I'm excited you're here. Imagine hanging out with me and my super smart, funny, nonprofit expert pals. You get to ask them anything about your nitty gritty nonprofit life and get their wisdom for free. Whether you're a seasoned pro or just strapping on your nonprofit boots, we're here to share stories and remind you you're not alone on this journey. So get ready to join the conversation and bring me the tough question. I ain't scared. Ready to rock? Let's dive in. Hello. Hello. Welcome to this episode of Charity therapy. Today I am joined by my new friend Megan Fuciarelli. She is the founder and CEO of A Squared Consulting. Megan works with nonprofits. Of course, that's how we got connected, and she helps them stay true to their values even when they're facing pressure. Megan, thank you so much for being here.

****Megan** 00:01:06** Thanks for having me. Jess I'm super excited.

****Jess ** 00:01:08** Now, where where in the world is Megan? Where are you located?

****Megan** 00:01:11** So I am based just outside of Detroit, Michigan, but we work with people everywhere, but based just outside of Detroit.

****Jess ** 00:01:19** Love it. Same here. I'm, you know, sitting in Minnesota but helping people all over the place. I feel like my football team and your football team, my football team growing up anyway. The green Bay Packers from Wisconsin. Oh, and the Detroit Lions, we have like some beef.

****Megan**** 00:01:37 We do. It has you know, the Lions have a very interesting history. And when you talk to people from Detroit, you ask if they are always Lions fans or just recently Lions fans, because, I mean, the phrase around was the so I same old Lions because they do really well and then they bomb. And the last couple of years we've been doing pretty well.

****Jess**** 00:01:59 So yeah, see, that's how we talk about it here in Minnesota because the Vikings are very hit or miss.

****Jess**** 00:02:06 But we don't do that in Wisconsin because we're loyal to the Corps, to the green Bay Packers, no matter what he's in there.

****Megan**** 00:02:13 Absolutely. But I'm telling you, in Detroit there are some like stay true loyal fans. But most of the Detroit Lions fans are fairweather fans. And it's horrible.

****Jess**** 00:02:23 That's true. It's true. Yeah it's true. It just shows what can happen when the the fans actually own the team. I do think that is what makes the green Bay Packers very cool.

****Megan**** 00:02:33 Oh yes, I would agree.

****Jess**** 00:02:35 Yes. Well, I have a sinking suspicion that nobody that's listening to this podcast gives two wits about football. So let's dig into what we're actually going to talk about today. And before we get started, you know, we're recording this in 2025. And you are working in sort of the diversity equity inclusion space. And I got to believe that. That's like a really interesting space to operate in right now with all the executive orders and all of that. And there's just like I know from my experience, there's like a ton

of fear and a ton of misinformation that nonprofits are sort of like absorbing or or generating or just in their brains coming up with about what's allowed and what's not allowed.

****Jess **** 00:03:17 So, like, what has it been like for you this year?

****Megan **** 00:03:20 Oh my goodness. So this year has been kind of a challenging but also invigorating time. So I say that where it's been very energizing because there are people who are hungry for that genuine connection, and they see everything that's happening in our sociopolitical climate and they're like, we need to do something. And on the other side, like you said, there's a lot of the fear and people are really worried about some of the legal constraints and the misconceptions and the rhetoric around some of those legal constraints, and just trying to understand how to navigate with that care and concern and empathy and also being mindful of any potential legal ramifications. But I will also say that we've gone through similar situations like 2025. I mean, 2020 was a difficult year. 2016 was difficult. So it's been it's been kind of ebbing and flowing. I've been in this space for a really long time, but 2025 has been especially dichotomous.

****Jess **** 00:04:21 Yeah. Interesting. Okay. Well, with that, I guess you can figure out that I have a Dei related sort of question from a non-profit.

****Jess **** 00:04:31 You. You ready to dig in on this?

****Megan **** 00:04:33 Okay, I'm. I'm hoping I'm ready. Sure. Let's make it happen.

****Jess **** 00:04:36 I hope so, too. All right, here we go. This is what the listener writes in and says. I'm the executive director of a national nonprofit with employees all over the country. Most of our employees work virtually, and a big focus of the last several years has been improving the culture and community of the organization. As a part of that

effort, we started a program of employee resource groups based around shared identities LGBTQ plus Latinx, black, AAPI, and a few others. The groups are all employee driven. I recently learned of the revised EEOC guidelines that say these groups are considered discrimination. These groups are really popular among the majority of our staff, but I'm worried we could get in trouble. Do we need to discontinue this program, or are there other ways that we can do this to foster the same communities without the risk of a discrimination claim or a lawsuit?

****Speaker 3**** 00:05:34 Oh, I love this question.

****Jess **** 00:05:36 It's a that's a juicy one. And like just full disclaimer, people, neither of us are employment lawyers. So.

****Megan**** 00:05:43 Right. And I have to.

****Speaker 3**** 00:05:44 Say what we say with a grain of salt. Exactly.

****Megan**** 00:05:47 And first of all, I just want to thank the listener for sharing because it's really evident that they care about their organization and that they want to continue the work, and they want to be mindful of not getting in trouble for continuing the work. So I think there's a lot to unpack. And the first thing is to really understand what the EEOC guidance really was. So in March of 2025, I think it was March, right.

****Speaker 3**** 00:06:15 March. It was March.

****Megan**** 00:06:16 Okay. So in March, the EEOC, they joined together with the Department of Justice. They issued guidance. It was technical assistance guidance, and it

flagged potential legal risk under the Civil Rights Act. So what they emphasized in that guidance was that even well-intentioned Dei programs like ERGs. ET Cetera can cross the line. So they were saying that the guidance, the guidance that they provided is that they cannot limit membership in workplace groups such as ERGs, to certain groups.

****Megan**** 00:06:51 So that could be seen as unlawful segregation if you limit them. Now there's a difference between employee resource groups and affinity groups. Right. So an employee resource group is meant to be for anyone who either identifies as that identity and their allies, or people who are interested in knowing more or helping others to know more about that identity. So I think the listener mentioned LGBTQ. They mentioned, see, what else did they mention? I think they mentioned.

****Speaker 3**** 00:07:25 That Latin, black, AAPI, Asian-American, Pacific Islanders.

****Jess**** 00:07:29 Yeah.

****Megan**** 00:07:30 So what I would recommend in this situation is instead of only allowing people who identify as a member of that group to join the ERG to say, we're keeping these ERGs as opportunities to understand our community better, and we welcome everyone to join. The purpose of an ERG is to provide information and to help build a community of understanding and empathy around that group. So as long as you're not denying membership into the ERG, you are safe, according to that guidance that was issued by the EEOC.

****Speaker 3**** 00:08:06 Would it be?

****Jess**** 00:08:07 You're saying that's different than an affinity group? I just want to make sure we're clear on that. Can you like kind of.

****Megan**** 00:08:14 Yeah. So an ERG is meant for anyone who wants to learn. The purpose of an ERG is for education. That's the purpose of it. The purpose.

****Speaker 3**** 00:08:24 Of.

****Jess**** 00:08:24 The resource.

****Megan**** 00:08:25 Exactly. The purpose of affinity groups is people who identify in that category come together to create a sense of belonging and community that is more exclusionary. So the guidance that we're giving some of our clients is to be very mindful around affinity groups and not have that be community sponsored or company sponsored, have them be more informal. Formal social gatherings that people do within the organization. They might invite people, but it's not sponsored by the company themselves. It's an internal. An employee says, hey, I want to get together with other people as part of the LGBTQ community. Let's go have a happy hour on Friday. As long as it is not sponsored by the company. And what I mean by that is they're not sending out emails saying everyone's invited, or only LGBTQ members are invited.

****Megan**** 00:09:18 It's a member or an employee saying, I'm going to offer this opportunity. I happen to be part of this community, and I would love to have other members come join me for a drink on Friday.

****Jess**** 00:09:29 So let me stop you there. Like is the moving it outside of the company really important in your mind.

****Megan**** 00:09:37 For the affinity groups? If you are limiting membership? I would.

****Jess **** 00:09:42 Yeah, but not for an erg.

****Megan**** 00:09:44 No ergs stay within the company lines because the purpose of ergs is to be a resource. You don't need to limit membership. What you need to.

****Jess **** 00:09:54 Do is have.

****Megan**** 00:09:54 Really strong values of. This is a safe place. You're not welcoming many people who are not allies to that community. You're saying we don't care how you identify as long as you support this identity?

****Jess **** 00:10:07 Got it? Got it. I just think that's important because when I here, move it outside of the company. Of course, you know me in my nonprofit birth control, I'm like, oh, no.

****Jess **** 00:10:16 Oh, yeah. Absolutely. All these groups are gonna be like, oh, but we can't do this and we can't do that. We need insurance. And now we should start a new nonprofit. And I'm like, no, don't do that. Right. It's a happy hour, folks. Like, you're fine. Just just keep it a happy hour.

****Megan**** 00:10:34 Exactly. And that's that's the biggest thing that's helping people understand the difference. Right, of an employee resource group. Technically, the reason why they were created was to not limit membership. You want to bring in more people from outside entity to build allies and to build a community of belonging and a sense of community. That's what you want with an ERG. So the guidance, if organizations were running ERGs with that initial mindset, then there's really nothing within the guidance that they need to shift. However, many ergs were running them like affinity groups.

****Jess **** 00:11:10 Gotcha.

****Megan**** 00:11:11 So that's the problem. And that's where there became some blurred lines. But if people are running errands as they were intended for resources and education and knowledge, and you were inviting anyone to it who wants to increase the knowledge around that identity within the organization, then the EEOC guidance really does not impact that at all.

****Jess **** 00:11:35 So this is what I'm hearing is this is a good time to look at whatever documentation you have around your employee resource groups and double verify the language around it. And, you know, if this is something that you maybe you have a poster hanging in the cafeteria or you have it posted in your online procedures place where people go to look at things they can do at work. We need to make sure that those documents are updated or already maybe they already say this is the problem with question is we don't really know, right? We don't know whether everyone is invited and they're just not showing up, or whether they are exclusive because they say they're exclusive or whether, you know, there's not enough information here. But for anybody listening to this, it sounds like we need to go in and make sure, like whatever our notices to the employees are, whatever our internal policies are, that we're making it clear that people can join regardless of their own racial identity.

****Megan**** 00:12:39 Correct. Racial identity, sexual identity, religious identity, etc..

****Megan**** 00:12:45 Yes.

****Jess **** 00:12:46 Yeah. Okay. Well, I love that answer because, you know, people get so they hear half of it. And I feel like people are not going out and reading all of the information. They're just sort of like taking the snippet. And so this again, like, I think I feel like I've said this on a lot of episodes recently is like, you need to go in and really

read the official government documents, whether it's an executive order or the or new EEOC guidance. Don't just react to something that you saw on social media or LinkedIn or whatever. Like, let's get the real answers here. And for this organization to it is a little bit concerning to me that we haven't met with HR yet. Like I'm like, where's what an HR have some sort of thought process into this. In your experience, would you say that that's accurate or no?

****Megan**** 00:13:40 So what I will say to that is Dei initiatives, Is ERG initiative's supplier diversity initiatives have all kind of undergone a lot of transformation in the last few years.

****Megan**** 00:13:53 Some of them are nestled under HR. Some of them are not. And if this work was part of the core values of the organization, it's not necessarily HR. If it was an initiative for recruitment and retention then it was. So it's it's looking again like you said earlier, it's looking at why did they create ERGs in the first place. Did they create ERGs for a sense of community. Then that might just be under leadership, not necessarily under HR, because when people feel like they belong to a community, they're more productive, which means operations are better. Right. So all of that comes forward if they're doing it because they want to retain more diverse talent, then that would be under HR. And I've seen more corporations put Dei work. ERG worked back under HR recently because of some of the executive orders and legislation to try and safeguard, because no executive order is going to eliminate an HR program from an organization. That's not going to happen. So they're using that as a safeguard and they're moving supplier diversity into procurement.

****Megan**** 00:15:04 Right. And they're moving corporate social responsibility into public relations. Right. So they're moving some of those pieces that have a rhetoric of fear or a misnomer around it into other categories that they know are more quote unquote, safe.

****Jess**** 00:15:23 Yeah. Pro tip, Pro tip, folks, if that if you're listening to this and you're big enough to have all those departments. Yeah. It's just I think it jumps off the page to

me as like, hey, this is equal Employment Opportunity Commission guidance. That sort of smacks of employment.

****Megan**** 00:15:41 Absolutely.

****Jess**** 00:15:42 Yeah. And HR is not even a factor in this listener's question. So I'm like did we do this. Whenever something comes up that's like a legal employment thing I'm like did we run it by HR. Did we call our employment counsel? Because it would be if this listener doesn't actually my concern is actually that they don't have HR. That that's.

****Megan**** 00:16:08 Interesting. I yeah.

****Jess**** 00:16:10 Well, just based on my experience, I've worked with plenty of clients who are on the precipice of like family medical leave Act compliance that still don't have an HR manager, right? They're like 49 employees.

****Jess**** 00:16:24 And it's the CEO or the person who used to do membership or something like that just gets like, hey, this is your job now. And they're not officially trained. Just want to put that out there. If you're a national organization with employees in a multitude of states. That's a very complex human resources challenge that you're going to be dealing with at any given time about any given issue, and you should probably make sure that you have dedicated human resources, whether that's a professional employer organization, a service, a fractional HR executive, something because.

****Megan**** 00:17:04 That's.

**Jess ** 00:17:04 Great to me as a lawyer. Yeah, that's like my little like, How come they didn't mention talking to HR? Like, okay. So just, you know, now might be the time to like level up professionally on a few fronts. And I love that. Your answer is like, you don't have to stop doing this because I feel like the thing everybody jumps to is we have to stop. And it's like a knee jerk reaction.

Megan 00:17:30 Knee jerk reactions.

Megan 00:17:32 And that's what causes the pendulum to go from one side to the other. I mean, that's the issue is that fear comes in and people are saying, okay, we'll just stop everything and we don't need to stop everything. We need to be mindful of our language. We need to be proactive so that we don't have to come back and change things later, but also stay true to your values and stay true to your beliefs, and stay true to who you are as an organization. Because if you implemented ERGs because they were aligned to your values, there's no reason to stop that. If you implemented ERGs because you thought it was the cool, hip thing to do, then okay, stop doing them like that's not the reason to continue, right?

**Jess ** 00:18:18 Yeah, exactly. Exactly. Well, I feel like there's a few takeaways here. The first is anytime there's new equal employment opportunity guidance right now, probably a good time to run it by your HR provider. Maybe an employment lawyer. Somebody get a second opinion second.

**Jess ** 00:18:42 Just remember there's a difference between employee resource group and affinity group. And as long as you're allowing everyone to participate in the purpose is to build understanding and to be a resource. Hence in the name, you're fine. But we might need to update our paperwork. But like you can keep doing that if you have a true affinity group. This is my third takeaway. We might want to move that out of the company, because that shouldn't be company sponsored where it's limited to only people of this identity can join. Right. Correct. And parsing those things can be complicated because some things are named wrong. It sounds like one thing, but it looks like another. So reviewing all your documents is important and then really staying curious. And I think this is like right now, like this is just over and over again. The big one.

Stay curious. Do your research. Get professional advice. Don't shoot from the hip. Operate on a knee jerk reaction. And remember, it's okay to stay true to your core values like you are a private corporation.

****Jess **** 00:20:00 Your private non-profit. Yes, we have to follow the law, but we don't have to operate from a place of like fear and uncertainty and shutting down everything.

****Megan**** 00:20:13 And I'm sure you can testify to this, Jess. Executive orders, memos, guidance. None of those are law.

****Jess **** 00:20:21 Yeah. I was like, do I bring this up? Do I want to go down this rabbit hole?

****Megan**** 00:20:26 This is law. But I'm not a lawyer, so. But I think that's just important to note is executive orders. All of those things are things that change as soon as a different person comes into office.

****Jess **** 00:20:37 Exactly.

****Megan**** 00:20:38 They're not codified. They're not in law.

****Jess **** 00:20:42 Right. And, you know, like we said, we're not employment litigators. But y'all. Until and unless we start seeing cases where the judges are referring to and hanging their opinions on the guidance documents. You're fine. Like, just keep doing you boo. Okay. Megan. You're amazing. I love that you are out there able to, like, answer some of these questions for people.

****Jess **** 00:21:08 Where can people find you if they want to connect with you? Learn more. How can people get Ahold of you?

****Megan**** 00:21:13 So the easiest way would either go to our social media or our website. So we have for myself personally, it's just Megan Futrell, but it's spelled complex, like it's complex spelling. So the easy one is us to consulting. Our name is Us squared, but our website is us the number two consulting.com. And all of our information is there, all of our social media. Our handle is us to consulting. It's an easy way to get Ahold of us.

****Jess **** 00:21:43 Love it. Thank you so much for being here. I really appreciate you taking the time. Folks, if you enjoyed this episode with Megan, if you know an organization that needs to, like review their ERG documents, hey, share this episode with them. Leave us a rating on your podcast app. It really does help people find the show. If you have a question or a story to share, please do send it in.

****Jess **** 00:22:07 I will keep it anonymous. Send me a note online at Charity Therapy Show. And as always, thank you for listening.

****Megan**** 00:22:15 Thank you so much for having me, Jess.

****Speaker 4**** 00:22:18 Yeah, it was a pleasure.

About the Author



Hi, I'm Jess Birken.

I'm the owner of Birken Law Office, I help nonprofits solve problems so they can quit worrying and get back to what matters most – The Mission. I'm not like most attorneys, I actually have an outgoing personality, and – like you – I like to think outside the box. Most of my clients are passionate and have an entrepreneurial spirit. I'm like that too. My goal is to help you crush it. Getting bogged down in the minutia sucks the joy out of the important stuff. My clients want to do the work – not the paperwork.

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