

WEBINAR

SHOOSMITHS

Employment webinars series 2024 | Managing conflicting protected beliefs in and out of the workplace

This webinar will begin at 10:00

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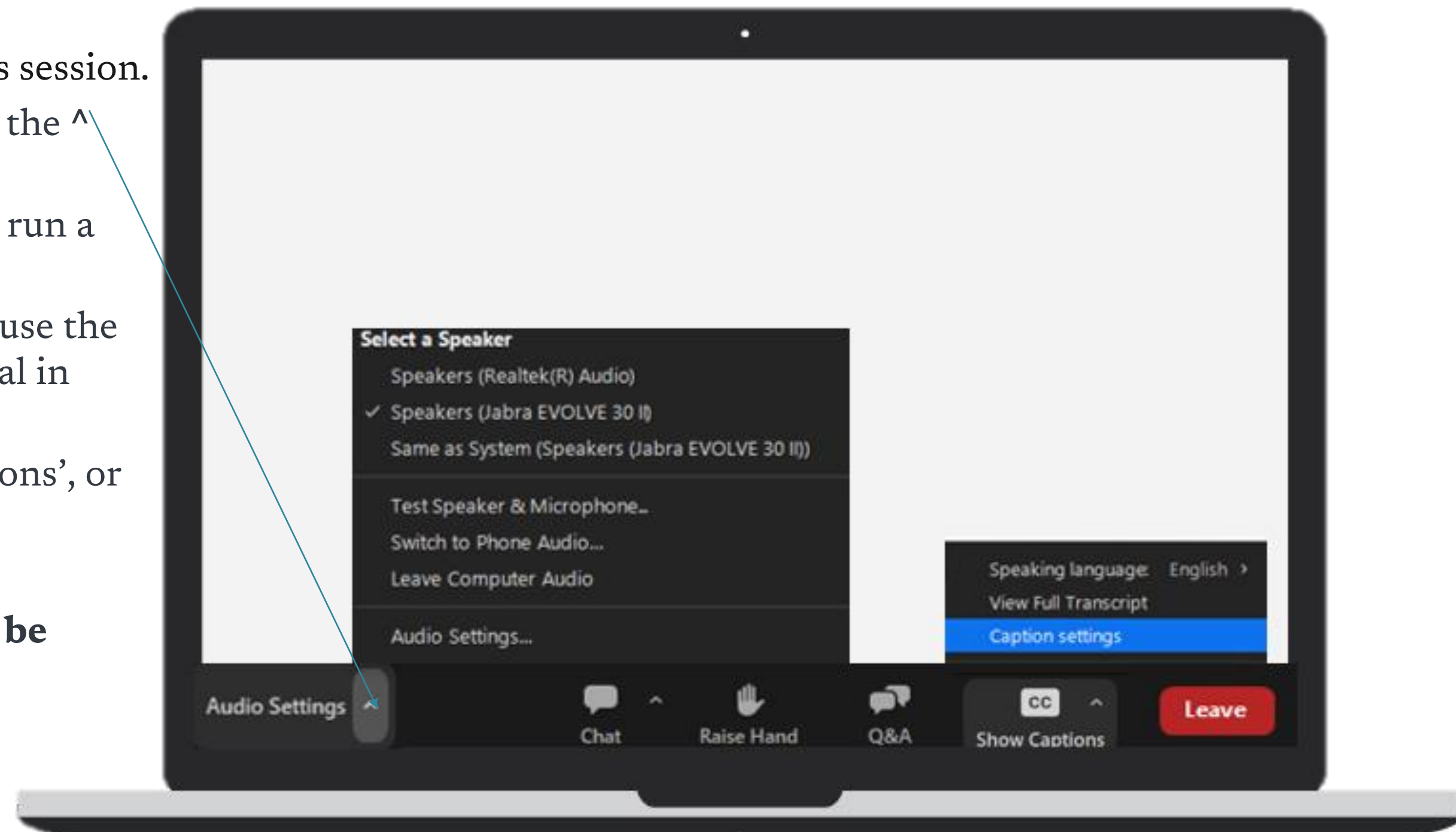


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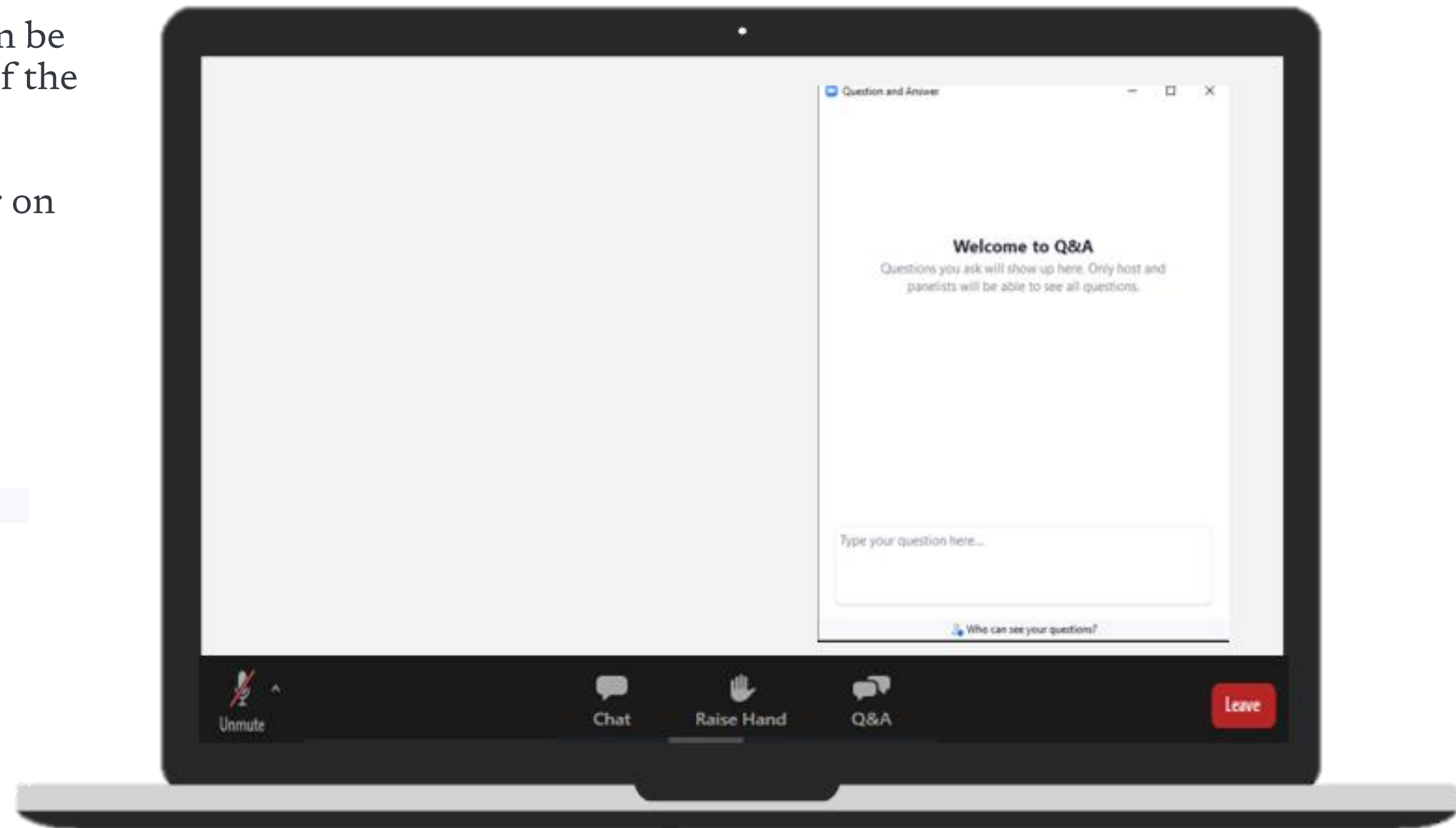
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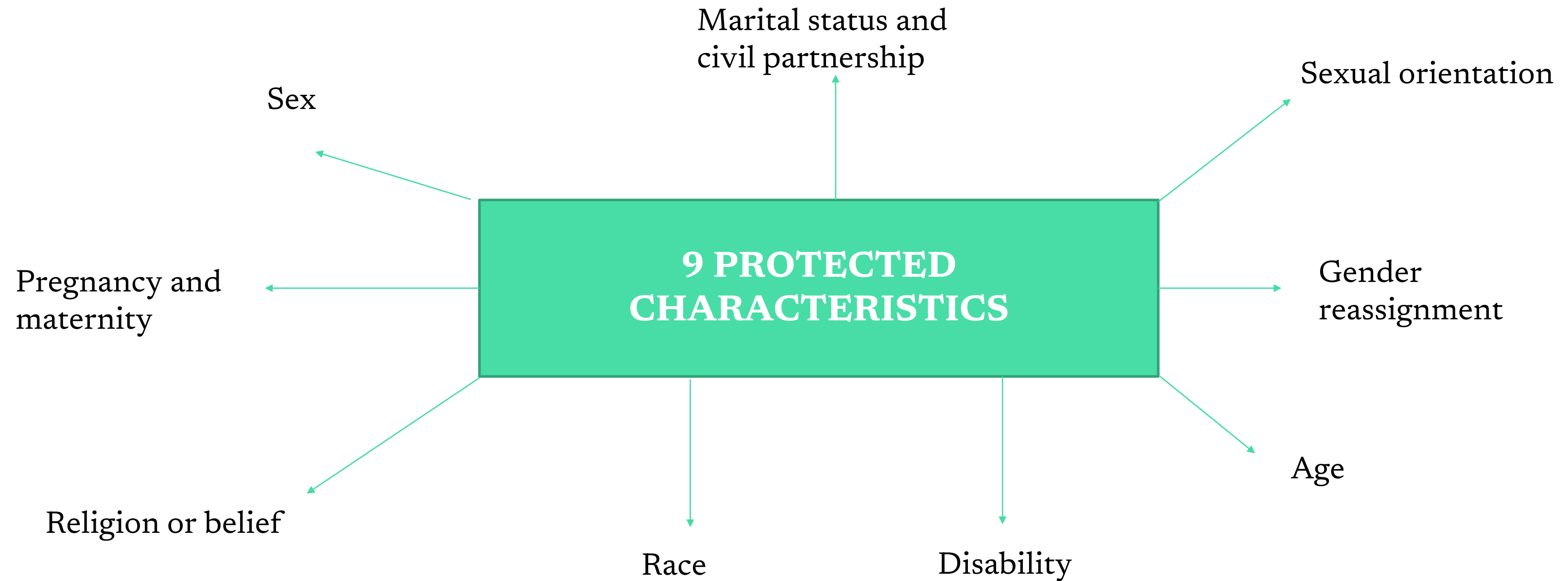
Agenda

- What are protected characteristics and why do they matter?
- Top tips for preventing discrimination in the workplace and improving diversity, equity and inclusion
- Balancing differing protected characteristics at work with a focus on protected beliefs
- Understanding when to act on discriminatory conduct outside of work



What are protected characteristics and why do they matter?

Equality Act 2010 – in a nutshell



Equality Act 2010 – in a nutshell

Types of discrimination

Direct discrimination

Treating someone less favourably than others because of a protected characteristic

Indirect discrimination

Any policies or practices by an organisation that place people with a protected characteristic at a particular disadvantage

Harassment and Sexual Harassment

Unwanted behaviour linked to a protected characteristic and/or of a sexual nature that violates someone's dignity or creates an offensive environment for them

Disability Discrimination

- 1. Duty to make reasonable adjustments** where a provision or practice adopted by the organisation, or physical feature of the employer's premises, place people with disabilities at a substantial disadvantage
- 2. Discrimination arising from disability** – treating someone unfavourably because of something that arises as a consequence of a person's disability.

Victimisation

Subjecting someone to a detriment because they have complained, or the perpetrator believes they will complain, about discrimination or harassment

The cost of getting it wrong

- Impacts morale / working environment
 - Low employee retention
 - Grievances
 - Increased sickness absence
- Disciplinary investigations / hearings
- Legal costs and tribunal claims
 - Financial costs including legal fees and any financial compensation – loss of earnings / injury to feelings / expenses / aggravated damages NB: compensation is uncapped
 - Criminal liability for certain harassment offences
 - Personal injury claims and awards
- Reputational damage
- Potential for personal liability

Top tips for preventing discrimination in the workplace and improving diversity, equity and inclusion

What is DE&I?

Diversity recognises that everyone is different in a variety of visible and non-visible ways, and that those differences are to be recognised, respected, valued, promoted and celebrated. They may include, but are not limited to, differences protected by equalities law

Equity is about ensuring equality of access, treatment, outcomes and impact in both employment and service delivery

Inclusion is the practice of including people in a way that is fair for all, values everyone's differences, and empowers and enables each person to be themselves and achieve their full potential and thrive at work

Benefits of DE&I

- Attracts widest talent
- Meets procurement requirements
- Increases employee retention
- Improves decision making
- Better financial performance
- Operational resilience
- Enhances reputation
- Attracts investors and consumers

Challenges to DE&I

- Bias
 - Bias v considered objective decision making
 - The “Instant Connection”
 - Unconscious bias
- Prejudice

Top tips

- Ensure staff understand their rights and responsibilities under your relevant policies
- Encourage staff to challenge and report any behaviour that could be deemed discriminatory or is otherwise inappropriate in the workplace
- Work with staff and managers on identifying their assumptions and beliefs and challenging their perceptions
- Provide lines of support to enable staff to raise any concerns they might have
- Help management build a more inclusive and respectful culture
- Remind staff to always be mindful of the way they communicate with colleagues, including when speaking to them and in emails

Balancing differing
protected
characteristics at work
with a focus on
protected beliefs

Protected beliefs

- Religion or belief is a protected characteristic
- Belief covers a wide range of issues e.g. gender critical beliefs and includes a lack of a belief
- A belief can be protected even where it is controversial, offensive or unpopular, but it must:
 - be worthy of respect in a democratic society
 - not be incompatible with human dignity
 - not conflict with the fundamental rights of others
- Best to assume majority of beliefs held by staff will be protected
- Sometimes this means employers and other staff have to tolerate views they do not agree with
- Most significant risk areas arise from a clash between religious / philosophical beliefs and sexual orientation / gender reassignment as recent case law has shown

Protected beliefs

- Some background
 - *Forstater v CGD Europe and others*
 - gender critical belief (including a belief that sex is immutable and should not be conflated with gender identity, and that trans women are men) was a philosophical belief qualifying for protection under the Equality Act 2010
 - *Higgs v Farmor's School*
 - Previous case law was considered and the relevant tests consolidated.

Consequence - An extended slant on direct discrimination?

Finding the balance

- Balancing the rights of all individuals at work and ensuring they promote DE&I is a challenge
- There is no hierarchy of protected characteristics – each treated equally
- Under the ECHR individuals have the right to:
 - Freedom of thought, conscience and religion and to manifest their religion or belief
 - Freedom of expression
 - Respect for private and family life, home and correspondence
 - NB: These rights are qualified e.g. way in which a religion or belief is manifested can be limited where justified and necessary in a democratic society
- But employers must ensure those rights don't result in discrimination or harassment

Protected beliefs – top tips

- Workplace policies are important – they allow you to:
 - Recognise that people may have conflicting beliefs
 - Emphasise the need for respect at work
 - Confirm expectations that everyone has to comply with certain baseline behaviours – crucial following *Higgs*
 - Set clear guidelines on what those baseline behaviours are
- Remember fostering an inclusive workplace means being inclusive to everyone
 - Even if you are naturally more supportive of some groups or causes, don't unintentionally alienate workers with different views
 - *Fahmy v Arts Council England*
 - *Adams v Edinburgh Rape Crisis Centre*
- Regular, repeated training on policies and procedures

Protected beliefs – top tips

- Train managers on recognising and resolving conflict
- Is a zero-tolerance policy the best approach?
 - *Borg-Neal v Lloyds Banking Group plc*
- Be as flexible as possible and explore all the options
 - *Ladele v London Borough of Islington*
 - *Mackereth v DWP*
- Distinguish between conduct and belief - but remember that the extended test for direct discrimination is likely to apply so seek early advice

Understanding when to act on discriminatory conduct outside of work

Two key questions

- Is the employer liable for an employee's discriminatory conduct outside of work?
 - Relevant if the conduct is causing offence to other employees and may therefore expose the employer to claims
 - It may put pressure on the employer to take action
 - “in the course of employment”
- Is the employee's conduct outside of work any of the employer's business?
 - Relevant in assessing whether a dismissal may be fair
 - And/or whether any action by the employer is a proportionate reaction to the manifestation of a philosophical belief

In the course of employment

- Social gatherings of work colleagues may be regarded as an extension of employment
 - *Chief Constable of Lincolnshire Police v Stubbs*
 - *Sidhu v Aerospace Composite Technology Ltd*
- Social media posts: work or personal?
 - *Forbes v LHR Airport Ltd*
- The employer may decide to discipline the employee even if the conduct is outside of the course of employment

Is it any of the employer's business?

- Does the conduct relate to the employment relationship?
 - Concerns other employees
 - Could cause reputational damage
 - Associates the individual with their employer
- *Keable v London Borough of Hammersmith and Fulham*
- *Omooba v Michael Garrett Associates Ltd*
- *Page v Lord Chancellor and another* and *Page v NHS Trust Development Authority*

Social media

- Work on the assumption there is no privacy to social media posts
- Social media policies
 - Provide guidance for workers sharing views on social media, particularly on topics that could be discriminatory or lead to conflict
 - Remind workers to be mindful of their language, respectful and considerate of others
 - Stipulate that staff make clear views expressed are their own
 - Be clear that social media may be monitored
 - Make it clear that inappropriate posts could lead to disciplinary action, including dismissal

Key takeaways

- The case law on protected beliefs is still developing
- The bar for establishing a protected belief is set low, so the key battlegrounds are on the manifestation of it and the employer's reaction
- The onus is on employers to develop an inclusive and respectful culture
- Social media creates headaches for employers and a need for clear guidelines
- More to follow

Questions?

Your speakers



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