

Diversity & Inclusion for Communicators: Legal Insights to Mitigate Risk

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Webinar

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Agenda

- Title VII and anti-discrimination laws;
- Legal considerations in hiring, mentoring, advancement and training;
- Legal pitfalls including language usage;
- How Legal, Communications and HR can work together to boost success.

Laws Prohibiting Discrimination

- Title VII of the Civil Rights Act of 1964:
 - Forbids employers from making employment decisions based on **race, color, religion, sex or national origin.**
- Age Discrimination in Employment Act of 1967
- Americans with Disabilities Act
- State and local laws protecting additional categories.
 - Additional categories include sexual orientation, gender identity, gender expression, marital status, military service, genetic carrier status, creed, alienage, citizenship status or conviction record.

Title VII Burden Shifting Framework

- Plaintiff makes out a prima facie case when s/he demonstrates that s/he is:
 - A member of a protected class;
 - Suffered an adverse employment action;
 - Experienced damages.
- Burden then shifts to defendant employer to articulate a legitimate, nondiscriminatory reason for the employment action.
- The plaintiff must then demonstrate that the employer's reason was pretext for discrimination.

Equal Opportunity v. Title VII

Ricci v. DeStefano, 129 S.Ct. 2658 (2009) –

New Haven violated Title VII and engaged in unlawful disparate treatment on account of race when it discarded employment test results that had a disparate impact on Black and Latino firefighters.

Exceptions: “Affirmative Action” Programs

- Executive Order 11246: certain federal contractors and subcontractors are required to take affirmative action to ensure equal employment opportunity.
- In addition, all employers may establish a voluntary “affirmative action plan” based on a historical imbalance or disparity in the workforce.
- These have been “codified” by the EEOC in its Voluntary Affirmative Action guidelines.
- Include activities with respect to hiring, training, retention and promotion.

Supreme Court Decisions Regarding Affirmative Action

Johnson v. Transportation Agency, 480 U.S. 616 (1987)

United Steelworkers of America v. Weber, 443 U.S. 193 (1979)

A permissible affirmative action plan must:

- (1) further Title VII's statutory purpose by break[ing] down old patterns of racial segregation and hierarchy in "occupations which have been traditionally closed to them";
- (2) not "unnecessarily trammel the interest of white employees";
- (3) be "a temporary measure [that] . . . is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." *Id.*

When are rights “trammeled”

There is “no precise formula for determining whether an affirmative action plan unnecessarily trammels the rights of non-beneficiaries.”

- Type of plan: hiring more likely than layoff
- What is the degree of “plus” (i.e. are both candidates qualified)
- Duration: the shorter the time period, the less likely others are to be affected.
- Plan generally must consider race-neutral alternatives and be “tailored to fit the violation” sought to be addressed.
i.e. less restrictive means such as minority recruitment, educational programs, and training.
- Courts prefer flexible, case-by-case approaches over rigid quota systems.

EEOC Voluntary Affirmative Action Plan

The EEOC will regard affirmative action programs as appropriate under these circumstances:

- 1. Adverse effect.** Title VII prohibits practices which have an adverse impact unless justified by business necessity, or that “tend to deprive” persons of equal employment opportunities.” Employers may take affirmative action based on an analysis which reveals facts constituting actual or potential adverse impact, if such adverse impact is likely to result from existing or contemplating practices.
- 2. Effects of prior discriminatory practices.** Employers may take affirmative action to correct the effects of prior discriminatory practices. The effect of prior discriminatory practices can be initially identified by a comparison between the employer’s workforce, or a part thereof, and an appropriate segment of the labor force.
- 3. Limited labor pool.** Because of historic restrictions by employers, there are circumstances in which the available pool, particularly of qualified women and minorities, for employment or promotional opportunities is artificially limited. Employers may and are encouraged to take affirmative action in such circumstances including but not limited to the following:
 1. Training plans and programs, including on-the-job training, which emphasize providing minorities and women with the opportunity, skill and experience necessary to perform the functions of skilled trades, crafts, or professions;
 2. Extensive and focused recruiting activity; and
 3. Elimination of the adverse impact caused by invalidated selection criteria.

Affirmative action v. Diversity initiative

- Affirmative action: Gender/race conscious programs permitted as per EEOC Guidelines. Programs must be temporary and for the purpose of remediating past discrimination. May not be used to maintain gender/racial balance once achieved.
- Diversity initiative: goal of promoting respect for differences, aimed at recruiting employees from a more diverse applicant pool, or encouraging the development of diverse employees. Programs typically cover all employees in all job categories, and are not temporary.

When Does Risk Arise?

When there is a challenge to a discrete employment action – i.e. hiring, firing, promotion – that adversely impacts one person or a group but is taken pursuant to a policy aimed at achieving or maintain diversity in the workplace.

Examples of Diversity Initiative Activities

1. Establishment of senior level diversity committee
2. Training activities
3. Hiring/pipeline building activities

Compare:

“We are an equal opportunity employer. All applicants will be considered for employment without attention to race, color, religion, sex,”

“URM encouraged to apply (African American/Black, Hispanic, Pacific Islander, Native Americans especially encouraged to apply but all are welcome).”

Diversity Initiative Activities (cont.)

5. Affinity Groups

6. Sponsorship/mentorship programs

7. Setting and accountability/rewards for achieving diversity goals

- Is there a difference between a “quota” and a “goal”?

Damore v. Google, LLC (Cal. Sup. Ct. Santa Clara Cty 2018)

- Class action complaint by two former white, male employees alleging that discrimination against them based on their “perceived conservative political views”, “male gender” and/or “Caucasian race.”
- Google employs illegal “hiring quotas” to fill its desired percentages of women and “racially-favored minorities.”

Damore v. Google Allegations

Complaint specifically singles out several DEI initiatives as evidence of bias against white men.

- i.e. Providing extra interviews or a “more welcome environment.”
- At company meetings, departments in which women comprised 50% of the workforce were “praised” and ones that were not were “shamed.”
- Posts from employee online forums where manager used strong language to suggest that white men should decline being on speaker panels unless the panel is diverse. Used phrase “cheesy white male executive.”
- A post from a hiring manager: “if you are on a hiring committee, and are looking at applicants and you see a stellar white male applicant, think long and hard about whether your department needs another white man. . . .”
- Email from a global staffing team describing a program including “emphasis on diversity (80% of talent featured should be diverse)”.
- Claim that “Diversity Scorecard” listing statistics and objective of “reaching or exceeding the available candidate pool with respect to diversity” was actually an illegal quota.

Best Practices

- Involve legal in review and design and communication of DEI programs.
- Training of managers to properly communicate elements and goals of program.
- Have you updated your employee handbook lately? Creation of new policies, greater transparency and inclusive language to create more inclusive environment.
- Review of company policies/trainings to create an anti-harassment culture.

Q & A

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