

Navigating Diversity and Inclusion

Companies can mitigate risk while also fully supporting their diversity program and project leaders by balancing and accounting for legal risks in the beginning and throughout implementation of each diversity initiative.

By Lora Picini and Esther Lander

The heightened publicity of several high-profile incidents of police brutality against people of color has shined an uncomfortable spotlight on institutional racism and its negative impact on the lives of people of color, including in the employment context. As a result, many companies are making diversity and inclusion not only a top priority but also a business imperative.

Diversity Commitments and Their Consequences

Although corporate diversity initiatives take on many forms, most aim to increase opportunity for minorities and women. Diversity on boards can be achieved simply by taking race and gender into account at the time of selection. However, the same is not true in the employment context. Employment discrimination laws protect Caucasian and male employees and applicants from discrimination to the same extent as minorities and women. As a result, well-intentioned efforts to promote diversity in the workforce may expose employers to liability for reverse discrimination. For example, the Department of Labor's Office of Federal Contractor Compliance Programs recently made inquiries of at least two Fortune 500 companies that publicly pledged to double their Black leadership, citing concerns that the companies'



potential use of "quotas" violated anti-discrimination obligations.

Companies also are seeing fallout when promised commitments to diversity and inclusion fail to achieve success. More than 15 shareholder derivative lawsuits have been filed in federal court seeking to hold directors and officers of major corporations accountable for allegedly misleading investors when making public commitments to improve diversity and inclusion. While some of these claims have been dismissed, others have survived dismissal and at least three companies have agreed to settlements valued at more than \$90 million.

Lawful Diversity Initiatives

It is important to understand the difference between diversity

initiatives and affirmative action. Affirmative action takes race into account when making consequential employment decisions. Courts have consistently struck down affirmative action *unless* (1) a court has found past or ongoing discrimination justifies the affirmative action; or (2) evidence shows a "manifest imbalance" in "traditionally segregated jobs" and the affirmative action is narrowly tailored to remedy the imbalance without unnecessarily harming those outside the minority group.

Unlike affirmative action, diversity initiatives promote inclusiveness without placing non-minorities at a disadvantage. One way to distinguish lawful diversity initiatives from

potentially problematic affirmative action is to consider whether the initiative is “inclusive” or “exclusive.” Inclusive initiatives, such as intentionally recruiting at locations known to have more minority job seekers, expand the talent pool without diminishing opportunities for non-minorities. These inclusive initiatives improve the playing field by identifying as many qualified candidates as possible.

By contrast, “exclusive” initiatives are more restrictive and can result in the exclusion of non-minority employees or applicants. These potentially problematic initiatives include setting fixed percentage or numerical quotas of minority applicants to fill vacancies or laying off workers of a particular race in order to maintain overall workforce diversity numbers.

Privilege: Mitigating Risk When Implementing Diversity Programs

In view of the legal risk associated with poorly executed diversity initiatives, companies that want to establish successful and lawful diversity programs should exercise greater care in the initial planning stages.

Companies implementing new diversity initiatives should actively involve legal counsel when designing, communicating about the need for, and implementing diversity programs. Counsel can help to ensure that such initiatives comply with applicable laws and that appropriate steps are taken to protect sensitive documents or analyses as attorney-client privileged. Counsel can advise on the legality of various initiatives, such as the proper way to implement diverse candidate slates, the potential adoption of a “certified pools program” with an associated

diversity recruitment plan, the establishment of proper representation goals that are based on an appropriate underutilization analysis, and the implementation of proper accountability methods and incentives for management.

Competing Priorities: Business Operations and Diversity Initiatives

In addition to considering legal landmines when implementing new diversity initiatives, companies also face the challenge of successfully navigating the competing priorities of the various company stakeholders.

Support of Existing Business Leaders: In order for diversity programs to be successful, there must be clear support from at least one “champion” in executive leadership, whether it is the CEO or another respected C-Suite member. The executive “champion” must be willing to regularly communicate their support to all levels of the company, as well as approve the necessary funding and staff to make the program successful. Company communications should share the various reasons why the program is good for the company, with the goal of having at least one reason resonate with each leader and employee. These reasons can include the potential financial benefits to the company, the increase in employee retention and overall engagement, and the improvement in company culture and public image.

Diversity Program Leaders and Consultants: Once a diversity program is approved, the program leaders as well as any potential outside consultants engaged to support the program will be eager to move

forward without any roadblocks. They will want to first establish a company baseline, by gathering employee input and employment data. Any requests to access employee demographic data, as well as recruitment or hiring data, may be met with initial resistance from Human Resources. Therefore, data sharing protocols should be established from the beginning to provide for the smooth transition of data related to the initiative. Also, as noted above, the company would be wise to engage legal counsel in any baseline analyses or information gathering. As long as the work is being performed at the direction of counsel, and for purposes of rendering legal advice, the company will be able to argue that the outcome of such data analyses, focus groups, surveys, etc. is protected by the attorney client privilege. Ultimately, continued cooperation between the diversity team, the consultants and legal counsel is key to success.

In conclusion, companies can mitigate risk while also fully supporting their diversity program and project leaders by balancing and accounting for legal risks in the beginning and throughout implementation of each diversity initiative.

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