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An Employer's Guide To Addressing Workplace Diversity

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Recent events and attendant social justice movements have thrust long-standing racial inequities into the spotlight and ignited a national and global conversation. That conversation has not only taken place in the streets, but has naturally permeated the workplace, both domestic and international, and the (virtual) watercooler.

This moment is unique; it presents employers with a fresh opportunity to engage employees in an authentic and constructive dialogue about employee experiences and racial equality.

However, in meeting this unique moment, employers should be mindful of their corresponding legal obligations that may arise from these conversations, including, but not limited to, how they chose to reaffirm their commitment to creating a diverse and inclusive workforce. Considering ways to reach particular diversity goals through lawful recruitment and hiring practices is just one avenue that employers should carefully review.

How have employers fostered a dialogue about race and inequity, and what are the attendant legal risks?

Over the past few months, employers around the country have engaged employees on the topics of race and equity, including through town hall discussions, speaker series with external and/or internal speakers, smaller focus group discussions, and employee surveys. These employer sponsored events present a pathway for employers to broach what has historically been the elephant in the room and to bring greater understanding and awareness of race and equality within the workplace.

Such discussions often prove fruitful both personally and in terms of employee morale; the conversations generate awareness of the impact that implicit bias and microaggressions can have on peers and colleagues, provide an opportunity for often difficult self -reflection on old habits, and bring into focus how to be an ally to historically marginalized groups.

Employers should not shy away from these conversations because nothaving them is a risk in and of itself. Instead, employers should account for the risk s inherent in discussions about inequity which may be perceived to be occurring in the workplace.

An employer should approach the discussions with an eyes-wide-open recognition of its legal duty to investigate claims of unlawful discrimination and harassment of which it becomes aware or should reasonably have become aware.[1] So what steps should an employer take to mitigate the risks inherent in having these difficult and often emotional conversations?

First, remind employees that these meetings are not the place to air complaints about specific incidents at work or individual colleagues. By keeping specific workplace complaints out of these town hall or small discussions where human resources representatives may or may not be present, employers will better ensure that employee complaints do not fall through the cracks.

Also, employers should set a tone for discussions that avoids infringing upon individual privacy rights of employees who may have made informal or formal complaints or calling out individuals for real or perceived policy violations or unlawful conduct. Employers should also remind employees that tape recording meetings is not permitted unless there has been express consent given.

Next, to make sure there is a clearly articulated channel — other than public town hall meetings — to report inappropriate conduct, employers would be well advised to take this opportunity to revisit their anti-discrimination and anti-harassment policies to ensure, not only that such policies are legally compliant, but that the policies meet this moment.

For example, employees should have clear and multiple avenues to report complaints of discrimination and harassment even under virtual or short-staffed conditions. In addition, employees should be reminded that discrimination and harassment prohibitions apply even in a virtual working environment. And, of course, employees should understand what constitutes unlawful discrimination and harassment and how to properly report a complaint pursuant to the policy.

With that foundation, employers should have a higher degree of confidence when conveying that town hall forums and other discussion groups are intended only to foster the sharing of personal experience and learnings regarding racial inequities.

Employers should be clear that these conversations are not designed for lodging formal complaints that should otherwise be raised with HR and/or in accordance with a company's reporting policy and procedures. Employers should be mindful of their messaging in this regard so as to not defeat the utility of these sensitive conversations by impressing upon employees a feeling that they are being censored and that anything they say may lead to investigation.

These conversations also have the potential to be significant in fostering a more inclusive workplace. Perhaps by having such conversations about race and inequality, the topics will become less stigmatized and will help normalize thoughtful attention to ensuring employment decisions are made on the merits and that workplace inequities are recognized and promptly addressed.

For example, these discussions may bring deeper focus and understanding to employers' regular anti-harassment and implicit bias training. Hearing from respected colleagues about their life experiences in these new conversations may help managers and peers develop a greater awareness of challenges presented by race and help employees to recognize biases and work to set them aside when making decisions about hiring, work assignments and promotions.

Moreover, attention to these topics may not only boost employee morale, but employees and employee affinity groups may feel empowered to speak up to continue having the conversation about workplace equity issues even beyond this unique moment.

Creating and Maintaining a Diverse Workforce

Having open conversations with employees is a start, but it is not enough. Employers know or suspect — and may confirm in these discussions — that more needs to be done to maintain a more diverse workforce. This goal cannot be achieved without taking a holistic view of the entire employment life cycle, starting with recruiting and hiring efforts.

Employers are asking more than ever before how they can get beyond perceived performative allyship and instead take meaningful steps toward diversity and inclusion.

Recruiting and Hiring

Many employers realize that their workforces do not reflect the diversity of the communities they serve. Some employers want to know if they can publicly state and pursue hiring quotas or aspirational goals of a workforce with a certain percentage of nonwhite employees. Can an employer lawfully say this in its recruiting materials?

The short answer is that hiring quotas based on race are generally unlawful under Title VII because they entail making employment decisions, at least in part, on the applicant's or employee's protected status. One exception is where an employer establishes a voluntary affirmative action plan to remedy a historical disparity in the workplace.

However, according to the U.S. Supreme Court's 1979 ruling in United Steelworkers of America v. Weber, such plans are permissible in very limited circumstances where: (1) preferences are intended to "eliminate conspicuous racial imbalance in traditionally segregated job categories"; (2) the rights of nonminority employees are "not unnecessarily trammel[ed]"; and (3) the plan is temporary in duration and not permanent.[2]

Such plans are closely scrutinized,[3] and courts have held that any nonremedial affirmative action plan, if aimed at promoting diversity, rather than remedying historical discrimination, could be in violation of Title VII.[4]

So what alternative approaches can employers take to reach diversity goals?

A rule or policy that requires all candidate pools to include a minimum number of candidates of color is one strategy that has been adopted to increase diversity in hiring. Such a rule does not require hiring a person of color, or giving preference to a person of color; rather, it ensures that the selection pool includes at least one person of color.

Unlike hiring quotas based on race,[5] the concept of a minimum diversity requirement in the hiring pool merely seeks to guarantee that a certain number of nonwhite candidates will be given consideration for a job opening. And because minority status is not a factor in the ultimate hiring decision, courts have found similar rules to be valid under Title VII.[6]

Applications and iterations of minimum hiring pool requirements have raised awareness about the lack of diversity in leadership positions across America. And as the Supreme Court recognized in Grutter v. Bollinger in 2003 in the context of upholding the University of Michigan Law School's affirmative action plan to increase the diversity of the student body: "[M]ajor American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to a widely diverse people, cultures, ideas, and viewpoints."[7]

With that in mind, employers should continue to consider how to expand the candidate pool, implement their own hiring pool rules, and/or engage in self -reflection to ensure they are taking the steps to organically increase the diversity of their workforce.

In order to expand the candidate pool, employers can look at their historic recruitment efforts, including by reviewing what universities, job boards and trade groups they target for recruitment. In that vein, employers can expand their recruitment efforts to historically nonwhite colleges or present to university affinity groups or other minority pipeline programs.

Employers choosing to recruit on college campuses or partner with university affinity or pipeline groups should give careful consideration to who attends on behalf of the company — e.g., is the company only sending nonminorities to present at a minority-orientated affinity group? They should also consider the messaging conveyed. Will the company's stated commitment to diversity be perceived as genuine?

Other actions employers may decide to take to increase the diversity of their candidate pool might include:

- Placing job ads where they are likely to been seen by nonwhite audiences, or attending minority job fairs;
- Utilizing job boards that are focused on nonwhite audiences, such as diversity.com, ihispano.com or com;
- Prominently highlighting the company's diversity and inclusion efforts on its website and social media;
- Creating mentorship programs that focus on underrepresented groups; and
- Partnering with trade groups (e.g., the National Association of Black Journalists) or other associations (e.g., Sponsors for Educational Opportunity; Leadership Council on Legal Diversity) to create a pipeline of diverse [8]

Employers are not required to do any or all of these but could consider selecting those options that work for their business.

Employers should also scrutinize the contents of their job descriptions and applications that may foster or hinder applications by nonwhite applicants. For example, employers could revise their job descriptions to limit job requirements to absolute must haves, including by removing unclear or unnecessary requirements (e.g., education or experience requirements).

In addition, employers could remove terms or phrases from job postings such as gender-coded words — i.e., words that are typically understood to be coded for and/or targeted to a male or female audience — that might dissuade certain candidates from applying. For example, some commentators report that job postings that contain words like "dominant" tend to dissuade females from applying, while job postings that contain words like "supportive" or "collaborative" to tend dissuade males.

Finally, employers often may assume they are looking for the right f it when hiring their next candidate. Employers can and should look for candidates that will thrive in the work environment and should expect long-term success.

Employers may want to reconsider however, how they perceive a right f it and if the current perception is necessarily the best way to diversify a workforce. Employers should be careful not to seek only employees that look and think like the ones that already work there.

How to start and then continue the conversation about race, equity and inclusion while staying mindful of legal obligations is not easy. In evaluating what works best for your business and workforce, it is important to remember there is not one solution that works best for all.

[1] An employer may have an obligation to investigate not only complaints or conduct that it knows about, but also such complaints or conduct that it reasonably should have known about. See Ramirez v. Cetta Inc., d/b/a Sparks Steak House LLC, No. 19-cv-986, 2020 WL 5819551, at *11 (S.D.N.Y. Sept. 30, 2020) ("If the harassment is perpetrated by the plaintiff's non-supervisory coworkers, an employer's vicarious liability depends on the plaintiff showing that the employer knew(or reasonably should have known) about the harassment but failed to take appropriate remedial action."); see also Malik v. Carrier Corp., 202 F.3d 97, 105–06 (2d Cir. 2000) ("an employer's investigation of a … harassment complaint is not a gratuitous or optional undertaking; under federal law, an employer's failure to investigate may allow a jury to impose liability on the employer."); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) (knowledge of corporate officers of unlawful conduct can in many circumstances be imputed to a company under agency principles).

[2] United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979).

[3] The U.S. Department of Labor has continued to scrutinize the use of diversity goals that appear to amount to unlawful hiring quotas, including, most recently, in questioning Microsoft's commitment to double its number of African-American managers and executives. Private universities are a recent target of the DOL's attention as well.

[4] See Schurr v. Resorts Int'l Hotel, Inc., 196 F.3d 486, 496 (3d Cir. 1999) (affirmative action plan unlawful under Title VII because there was no evidence of "manifest imbalance" being addressed); Taxman v. Bd. Of Educ., 91 F.3d 1547, 1550 (3d. Cir. 1996) ("Given the clear antidiscrimination mandate of Title VII, a non-remedial affirmative action plan, even one with a laudable purpose, cannot pass muster.").

[5] See 42 U.S.C. § 2000e-2(j) ("Preferential treatment not to be granted on account of existing number or percentage imbalance. Nothing contained in this subchapter shall be interpreted to require any employer ... subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.").

[6] Cf. United States v. City of New York, 308 F.R.D. 53, 66 (E.D.N.Y. 2015) ("by setting a goal (not a quota) for recruitment (not for hiring), the provision does not impermissibly 'trammel the interests' of other minority or non-minority applicants; black applicants are given no preference in hiring.").

[7] Grutter v. Bollinger, 539 U.S. 306, 308 (2003).

[8] In addition, employers can consider initiatives to help increase the diversity in hiring, such as tying part of a bonus and/or compensation to meeting certain diversity goals.

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