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DEI in the Spotlight: Wage and Hour Implications

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With the nation's heightened focus on DEI programs and policies, U.S. employers should carefully evaluate the legal risks associated with their DEI-related wage and hour practices.

Many employers across a broad range of industries—including financial services, technology, media, healthcare, retail, and professional services—utilize compensation-related incentives to support their DEI efforts. Practices that are likely to be scrutinized by those targeting an employer's DEI initiatives include:

- ***Diversity referral bonuses.*** Over the last decade, a number of leading employers have included as a component of their overall DEI efforts a program providing special bonuses to employees who successfully refer diverse candidates. To the extent such bonuses exceed those paid to employees for referring non-diverse candidates, they will likely be among the "low hanging fruit" for challenges.
- ***Compensation tied to achievement of DEI-related goals.*** By the early 2020s, a number of companies had conditioned significant portions of their executive and management bonuses to achievement of individual and collective DEI-related goals and/or metrics. The risks inherent in these programs depends in large measure on the nature of the underlying benchmarks.
- ***Paying for time spent in employee resource groups.*** Many employers have recognized and sponsored employee resource groups (sometimes called ERGs or affinity groups), where employees with shared characteristics, interests, or identities meet to foster a sense of community and support, often focusing on DEI initiatives. Federal and state law may, depending on the circumstances, require employers to count time spent by nonexempt (*i.e.*, overtime-eligible) employees in ERG meetings, events, and other activities as "hours worked" and to pay them for that time—potentially at an overtime rate. If an employer is not required to pay nonexempt employees for the time spent in such activities, but does so anyway, it may invite legal challenges if it does not pay for time spent by such employees in other activities that are not required to be paid (*e.g.*, voluntary after-hours gatherings unrelated to the employees' job responsibilities).

- ***Paid diversity internships and fellowships.*** Structured diversity-focused internship and fellowship programs—typically designed to provide students or recent graduates from underrepresented groups with career, mentorship, and professional development opportunities, as well as exposure to the day-to-day operations of the workplace— became more widespread in the last 20 years. In addition to the risk of discrimination claims tied to programs that limit eligibility based on race or other protected categories, companies and organizations that compensate participants in these programs but that do not similarly compensate other types of interns or fellows may be exposed to disparate treatment or disparate impact claims.

As with all policies and programs related to DEI, it's the right time for employers in every industry to pressure-test their wage and hour practices to evaluate possible risk and to consult with counsel to mitigate those risks as the legal and regulatory landscape continues to evolve under the new Administration.

Proskauer's Wage and Hour Group is comprised of seasoned litigators who regularly advise the world's leading companies to help them avoid, minimize, and manage exposure to wage and hour-related risk. Subscribe to our wage and hour blog to stay current on the latest developments.

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