

Annual Update

Part 6: Diversity, Equality, and Inclusion Top Legal Challenges and Best Practices for Your Company

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PRESENTATION OUTLINE

Defining Diversity and Inclusion

Most Common Legal Challenges

Communicating DEI Commitment

Reducing Pay Equity Claims

Affirmative Action Plans

Question

Diversity and Inclusion are Interrelated

- Inclusion doesn't occur unless you have a diverse pool of applicants for positions; it starts even before applications are reviewed.
- Culture of Organization
 - Where are we recruiting from?
 - What types of benefits do we use to entice applicants?
 - How are we supporting efforts for diversity and inclusion in the community?
 - Delete “not a good culture fit” from vocabulary
 - What is professionalism? Are you creating inclusion or assimilation?
- Retaining talent
 - How do we keep diverse employees?
 - “It's not us, it's them” viewpoint is fatal

Combatting Bias Manager Training

- Equip managers with the tools to be successful
- Just-in-time feedback to employees – regardless of protected class
- Reframe how support is offered
 - Active Listening
- Manager Self-reflection
 - What beliefs, biases or mindsets are driving my behavior?
 - Does this support the values of the company?

Words and Phrases that Have a History

- Peanut Gallery
 - Vaudeville-era theaters, worst seats in the house for people of color
- Spaz
 - Relates to disabilities and associated with cerebral palsy
- Hooligans
 - 19th Century cartoon regarding Irish immigrants
- “No Can Do”
 - Mocking Chinese Pidgin English
- “Rule of Thumb”
 - 1600 law allowing men to assault their wife with a stick

Other Phrases to be Mindful of

- No offense, but. . .
- Don't be such a prude
- That was a ballsy move
- Wearing the pants
- Don't worry your pretty little head
- It's not a big deal
- Someone is whipped
- Why do all (men/women) . . .
- Grow a pair
- Boys will be boys
- It was just a joke
- Smile
- Working mom (versus working parent)
- When will you take time to start a family?
- For a woman/man you are a great . . .
- Office mom
- It's time to man up
- Are you sure you can handle this?
- "Debbie Downer" or "Negative Nancy"

Most Common Legal Challenges

- Marketing a commitment to DEI without violating Title VII or state FEPA rules
- Pay Equity Claims
 - Race
 - Gender
- Affirmative Action Plans

Why?

General Barriers that Inhibit Equal Employment Opportunity

- The "Like Me" Syndrome
 - Stereotypes
 - Prejudice
- Perception of Loss by Persons Threatened by Equal Employment Opportunity Practices
 - Ignorance
- Other Barriers

Title VII and FEPA Rules

- Race, gender, sex, sexual identification, sexual orientation are all aspects that CAN NOT be taken into account even if you are attempting to take these factors into account in a positive way.
- October 2020, DOL OFCCP sent letters to Wells Fargo and Microsoft questioning whether the Companies' commitments to diversity (publicly announcing a plan to double the number of Black managers and senior leaders in the U.S. workforce by 2025) violated Title VII because it took race into account in hiring and promoting.

Managing Title VII and FEPA Risks

- The term “diversity hire” should never be used
- During the interview process, all managers/interviewees should be reminded of appropriate/inappropriate questions and characteristics that cannot be taken into account in determining qualifications for the position.
- EEOC Recommendation: **THE "SPLENDID" APPROACH**
 - **STUDY** -- Since one cannot solve problems that one doesn't know exists, know the law, the standards that define one's obligations, and the various barriers to EEO and diversity.
 - **PLAN** -- Know one's own circumstances (workforce and demographics - locally, nationally, and globally). Define one's problem(s); propose solutions; and develop strategies for achieving them.
 - **LEAD** -- Senior, middle, and lower management must champion the cause of diversity as a business imperative, and provide leadership for successful attainment of the vision of a diverse workforce at all levels of management.
 - **ENCOURAGE** -- Companies should encourage the attainment of diversity by all managers, supervisors, and employees, and structure their business practices and reward systems to reinforce those corporate objectives. Link pay and performance not only for technical competencies, but also for how employees interact.
 - **NOTICE** -- Take notice of the impact of your practices, after monitoring and assessing company progress. Self-analysis is a key part of this process. Ensure that a corrective strategy does not cause or result in unfairness.
 - **DISCUSSION** -- Communicate and reinforce the message that diversity is a business asset and a key element of business success in a national and global market.
 - **INCLUSION** -- Bring everyone into this process, including white males. Help them understand that EEO initiatives are good for the company and, thus, good for everyone in the company.
 - **DEDICATION** -- Stay persistent in your quest. Long term gains from these practices may cost in the short term. Invest the needed human and capital resources.

Pay Equity Claims

- “You could attract/retain more diverse talent, you just aren’t (paying enough/providing rich enough benefits).”
- Diversity consultants guidance as to attracting and retaining talent versus the culture you already have/have created.
- “The market” is not a defense to pay equity claims.
 - Sign on bonuses and how this may create a pay equity nightmare.
- “Diversity” is not a defense to pay equity claims.

Reducing Pay Equity Claims

- Pre-determine salary ranges for positions
- Assess current pay rates versus market
- Seek feedback if an offer is rejected
- Recognize the costs associated with onboarding as it relates to increase of pay to current workforce
- Regular pay equity audits
- Policies concerning bonuses/raises/cost of living adjustments
 - All of these amounts need to be taken into account in understanding what the wages are of the employees for pay equity purposes

Mandated Affirmative Action Plan

- OFCCP – Federal contractor obligation to take action to ensure that applicants are employed, and employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran. The regulations state that the affirmative action obligation reaches all terms, conditions, and privileges of employment, including recruitment, promotion, termination, and compensation.
- Covered contractors are those that have any number of employees and have contracts valued in aggregate at more than \$10,000 (Executive Order 11246), a contract valued at more than \$15,000 (Section 503), or a contract valued at \$150,000 or more (VEVRAA). Examples of affirmative action requirements that apply to all covered contractors include the following:
 - Providing notice to applicants and employees that the contractor is an equal opportunity employer by using taglines in job advertisements.
 - Posting the “EEO is the Law” poster and other notices to inform applicants and employees of the employer’s nondiscrimination and equal opportunity obligations.
 - Under VEVRAA, providing notice to the relevant American Job Center (CareerOneStop) or state workforce agency that it is a federal contractor requesting priority referral of protected veterans and that it has job openings to list in the job bank.
- Contractors that have at least 50 employees and also meet the contract value thresholds under Executive Order 11246, VEVRAA, and/or Section 503 are required to develop and maintain written AAPs.

Voluntary Affirmative Action Plan

1. The plan is remedial in nature, in that there has been past discrimination or possible adverse impact as to the group in question.
2. The plan does not unnecessarily interfere with the interest of non-minority employees, such as by terminating those employees to replace them with diverse employees.
3. The plan or program is temporary in nature with the goal of achieving some type of balance without maintenance

Rooney Rule

- Background
- Interviewing versus hiring
- Channels of recruitment
- Diversity of hiring team

Measuring Failure and Success

Points of Failure

- Lack of measurable goals: Permissible under AAP and if looking to rectify for a period of time
- Communication to current employees “diversity hire”
- Environment – physical and cultural

Achieving Success

- Plan of action to increase diversity of candidates
- Accountability if goals are not met
- Training on best practices and D&I topics



Thank you!

