An Employment Lawyer's Guide to Leaning In on DEI



When a company's HR or Diversity, Equity, and Inclusion (DEI) department has a new idea for advancing diversity, one of the first things they do is reach out to their employment counsel to discuss the new idea. They want to know: Can we do this? Is it legal?

Some suggestions from HR could include:

- A sponsorship program open to all but that has a stated objective of increasing diversity in leadership;
- Referral bonuses for referring candidates of a particular gender, or ethnicity;
- Financial support to an employee engagement group that concentrates on one demographic; or
- Requiring diverse slates during hiring.

Too often, as employment lawyers, our reflexive answer suggestions like these is "no." Our strongest reason? The risk of a reverse discrimination claim. But maybe our fears are misplaced. The risk of a successful reverse discrimination claim based on the ideas noted above is minimal to zero.

By leading with this advice, we discount the greater risk that exists when the organizations we support fail to make progress in diversity, equity, and inclusion: Nothing – or very little – changes. We've been giving this refrain for decades. In doing so, we unintentionally chill progress.

Moving beyond complicity

We have been complicit by being too cautious. Yes, reverse discrimination cases have occurred. In the context of advancing DEI, the risk we are most concerned about is a failure to hire or a failure to promote claim.

But while there is risk, it may be overstated. The Equal Employment Opportunity Commission (EEOC) records suggest that over the last five years, between one to two percent of charges alleging failure to hire or failure to promote have been filed by white claimants. That is only a few hundred per year of the many tens of thousands of charges filed annually. Moreover, given that reverse discrimination cases are but a fraction of traditional discrimination cases, why do we give so much more weight to avoiding this relatively low risk than we do to avoiding the far more common risk of

a traditional discrimination claim?

More importantly, there are a few simple rules to help avoid or defend against the vast majority of such claims, while still supporting your company's DEI efforts:

- If a designated test score is required for selection, don't select someone below that threshold.
- Don't set a hard numerical quota for selection of a particular demographic group.
- If you allow a candidate's race or gender to be taken into account as a positive factor among many, follow the rules laid out in Title VII for voluntary affirmative action programs, pursuant to which race and gender may be taken into account.
- Train your managers on how to make non-discriminatory selections and how to communicate the nondiscriminatory bases for their selection.

There are a lot of actions we can promote that steer clear of violating these rules. We can:

- Educate managers about the demographics in their group compared with candidate availability.
- Encourage managers to become involved in diversity-related activities, such as sponsoring an employee resource group or serving as a mentor to an employee from an underrepresented group, and even financially reward the managers for doing so.
- Require training on implicit bias and work with HR to develop bias interrupters to mitigate the impact of those biases.
- Call for diverse slates from recruiters before interviews commence.
- Mandate diverse interviewing teams.
- Scrutinize qualifications to determine if they are imposing requirements that are not truly job-related.
- Augment qualifications with other job-related qualities that might naturally diversify the pool, such as the ability to effectively manage and support a diverse team or demonstrated cross-cultural competency. Consider giving weight to proven ability to be successful under adverse circumstances, also known as "grit," which could be demonstrated in many ways, such as working through college or being successful as one of few underrepresented workers in an otherwise nondiverse work environment.
- Unpack with managers why underrepresented candidates during the final cut are not selected to ensure that vague concepts like "fit" were not used and to gain an understanding of how to provide stronger candidates going forward.
- Reinforce the business benefits of diverse teams, including increased innovation and employee satisfaction.
- Relentlessly reinforce the value the company places on diversity.
- Be mindful of our language. For example, we should not reflexively warn HR not to reduce qualification standards when seeking diverse candidates, as if that is inevitable with candidates who are otherwise under-represented in the workforce.

Setting targets, not quotas

Aspirational targets where the organization strives to meet a numerical representation goal within a designated timeframe are permissible. They should be set based on a clear understanding of what is reasonably attainable, given an organization's workforce statistics and circumstances.

Aspirational targets are not quotas. With quotas, a specified number of a particular group must be hired. If the hiring manager falls short of corporate expectations and

that number is not met, they may face consequences. A manager might therefore decide to hire someone based solely on a demographic characteristic, even if that person is not qualified, just to meet the quota.

An aspirational target also has a numerical objective in mind, but the difference is in how it is managed. These targets incentivize the use of all legally permissible approaches prior to the point of selection (and prohibits illegal approaches), which should increase the chances of the target being reached. Because the manager is not measured on selections, there is no temptation to violate Title VII.

In the past, employment lawyers have often recommended against setting such goals. Again, we point to fears of reverse discrimination. Our concern is that a disgruntled individual not selected for a position covered by the aspirational goal might claim that the aspirational goal was the reason for the non-selection. That is a possible risk, but does our fear that we will be unable to defend the remote claim justify the glacial speed of reaching true representation?

Besides, the risk of suit by a disappointed candidate exists with every competitive selection that is made. And if the concern is inartful emails that suggest that the protected status was the sole reason for the selection, that can be preemptively addressed through training.

The safest and most impactful way to use aspirational goals is to set them at the executive level. Suits by disappointed executive candidates are extremely rare. The jobs are single incumbent jobs so there is virtually no risk of a class action. The number of decision makers are limited and given their sophistication level, less likely to create inartful emails.

Goals to diversify the executive ranks sound bold and therefore may be particularly welcomed by employees and customers alike. As a plus, once such executives are in place, they are likely to influence the tone at the top and promote further diversity efforts throughout the organization.

It is also possible to use race and gender more explicitly as one factor among many in selections when made pursuant to a voluntary affirmative action plan. Title VII actually permits this. Of course, there are rules.

The program must be:

- Narrowly tailored;
- Remedial in nature to address an underrepresentation;
- Limited in duration to the time it takes to remedy the underrepresentation;
- Used only to achieve, not to maintain, the representation; and
- Constructed so it does not “unnecessarily trammel” the rights of the non-favored group.

The US Supreme Court ruled in the *Weber* and *Johnson* cases, over 35 years ago, that this practice is allowed. But very few private employers do this because we fear that the underrepresented group will seize on the factors justifying this plan as evidence of discrimination.

Underrepresentation vs discrimination

But an admission of underrepresentation is not an admission of discrimination. There can be many reasons for underrepresentation unrelated to employer misdeeds. For example, perhaps the organization has had difficulty attracting talent (possibly due to a misperception of being inhospitable) despite its best efforts. And if that underrepresented group seizes on the voluntary affirmative action plan as a basis to

bring a claim, that was a disgruntled group ready to sue already (presumably at the lack of progress).

Another commonly cited reason for not engaging in voluntary affirmative action efforts is the potential discoverability of the data. But if performed by a sophisticated labor economist and under privilege, the conclusions should be both defensible and protected from disclosure.

One more commonly cited concern is that talented underrepresented employees will resent the implication that they were selected because of an affirmative action program. Here, messaging is the key.

This is not to say that a voluntary affirmative action plan is risk free. It's not. There are risks. But we give outsized weight to the risk of doing something and inadequate weight to the risk of failing to make progress. At a time when consumers and employees are demanding more equity and business benefits of diverse teams, such as greater innovation and better decision-making, are well documented, inaction has more significant costs.

Source: Association of Corporate Counsel

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