What Are the Legal Risks?

Employer Diversity Initiatives

By Patrick D. Smith and Katherine E. Anderegg

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Employers often talk about their commitment to achieving "diversity" and "inclusion" in their workforces. Despite the seeming ubiquity of efforts to promote diversity and inclusion, what these terms mean in practice as applied to actual employment decisions is often vague and ill-defined. Many workplace diversity efforts have the laudable goal of expanding opportunities for persons who are, or have traditionally been, underrepresented, whether in the workplace generally, or in a particular occupation. In that sense, such initiatives have the same objectives as state and federal antidiscrimination laws. But programs and policies aimed at increasing the number or percentage of employees deemed "diverse" may be subject to legal challenge if they have the effect of denying opportunities to other persons whose race, sex, or other characteristic does not satisfy an employer's definition of a diverse employee.

Title VII and other antidiscrimination laws generally prohibit an employer from making an employment decision on the basis of a person's protected characteristics, such as race, national origin, sex, disability, age, and others. But in some circumstances, the law allows, at least to some extent, consideration of a protected characteristic in recruiting, hiring, and promotion.

First, Title VII allows courts to impose on an employer, as part of equitable relief, an obligation to engage in affirmative action based on a protected characteristic, as a remedy for intentional discrimination. For example, in *United States v. Paradise*, 480 U.S. 149 (1987), the Supreme Court affirmed a district court order that the Alabama Department of Public Safety promote black and white state troopers on a one-to-one ratio for a period of time. Such race-conscious relief was warranted, the Court determined, because it was necessary to remedy persistent and egregious discrimination that occurred in the past, the goals were reasonable given the relevant labor market, and the program was temporary.

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Second, through executive orders, the federal government has imposed on private employers that have contracts with the federal government the obligation to prepare and to implement a written affirmative action plan (AAP). An AAP must include an analysis identifying any underutilization of qualified minorities and women in the contractor's workforce. When underutilization is detected, the AAP must have placement goals, timetables for achieving a balanced workforce, and programs to achieve the goals and timetables. But the AAP rules prohibit the use of quotas, preferential treatment, or other set asides based on minority status or sex. In addition, while minority status and sex may be considered as part of outreach and recruiting efforts, individual employment decisions must be made without regard to these protected statuses.

The third circumstance, and the most common, involves voluntary affirmative action. That is, an employer undertakes voluntary efforts to further equal opportunity for minorities, women, or other protected groups. If an initiative includes preferential treatment of a person in a particular protected class to such an extent that it disfavors another person who may also be protected from discrimination, the initiative has the potential to conflict with the laws that prohibit such preferences.

The remainder of this article will discuss the legal parameters governing voluntary affirmative action programs and how this legal framework may apply to employer diversity and inclusion initiatives. Although the concepts are related, diversity is not necessarily the same as affirmative action. But because there is remarkably little legal authority relating to diversity initiatives in the employment context, employers must tread carefully to ensure that their programs do not run afoul of the antidiscrimination laws.

Affirmative Action: The Precursor to Diversity

Affirmative action programs started as an effort to help black citizens overcome the historical effects of previous discrimination and segregation, and they were particularly focused on removing racial barriers to employment. In 1961, three years before Congress enacted the Civil Rights Act of 1964, President John F. Kennedy issued Executive Order 10925. This executive order required federal agencies to "promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color, or national origin, employed or seeking employment with the Federal Government and on government contracts…." The phrase "affirmative action" has its origin in this executive order, which required private businesses that had contracts with the federal government to take "affirmative action" to implement equal employment opportunity.

In 1965, after Title VII was enacted, President Lyndon Johnson issued Executive Order 11246 in an effort to strengthen the affirmative action obligations of government contractors. Executive Order 11246 required each department and agency of the executive branch to adopt an affirmative action program (AAP) and appointed the U.S. Department of Labor to oversee enforcement. In 1967, the list of protected categories in Executive Order 11246 was expanded to include women.

In 1979, the U.S. Equal Employment Opportunity Commission (EEOC) issued guidelines to assist employers to develop affirmative action programs that would not expose them to reverse discrimination liability. According to the guidelines, a voluntary affirmative action program complies with Title VII if (1) an analysis reveals that existing or contemplated employment practices are likely to cause an actual or potential adverse impact; (2) a comparison between the employer's workforce and the appropriate labor pool reveals that it is necessary to correct the effects of previous discriminatory practices; and (3) a limited labor pool of qualified minorities and women for employment or promotional opportunities exists due to historical restrictions by employers, labor organizations, or others. The guidelines provide a safe harbor for employers who implement an AAP that is adopted in good faith, in conformity with, and in reliance on, the guidelines. Notably, the Supreme Court has not determined whether these guidelines are entitled to deference by the courts, so compliance operates mainly to protect employers from EEOC enforcement actions.

The leading case concerning the permissible parameters of voluntary affirmative action is *United Steelworkers v. Weber*, 443 U.S. 193 (1979). United Steelworkers of America and Kaiser Aluminum & Chemical Corp. entered into a collective bargaining agreement that included an affirmative action plan designed to eliminate "conspicuous racial imbalances" in Kaiser's predominately white employee base. The AAP reserved 50 percent of the openings in in-plant craft-training programs for black employees. Weber, who had been denied admission into the training program, even though less senior black employees had been accepted, asserted that he had been discriminated against because he was white.

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In holding that the AAP in the collective bargaining agreement did not violate the rights of the white employee under Title VII, the Court established what has become known as the "*Weber* criteria." The *Weber* criteria include the following: (1) the plan must be remedial in nature; that is, its purpose is breaking down old patterns of racial segregation and hierarchy in occupations that have been traditionally closed to minorities; (2) the plan must not unnecessarily trammel the interests of white employees, for example, by discharging white employees and replacing them with black employees, or effectively barring whites from advancement; and (3) the

plan must be temporary, aimed at achieving racial balance and not maintaining it.

The second leading case concerning the legality of voluntary affirmative action under Title VII is *Johnson v. Transportation Agency*, 480 U.S. 616 (1987). The Supreme Court in *Johnson* held that an AAP that took into account the gender of qualified applicants as one factor in making promotional decisions within a traditionally male-dominated job classification did not violate Title VII. In addition to extending the *Weber* criteria to gender, *Johnson* was significant in that it explained the evidence that an employer may rely on in adopting a Title VII-compliant AAP. First, the plan may qualify as remedial even if there is no evidence that the employer itself had engaged in past discrimination. Rather, it is enough to point to a conspicuous imbalance in traditionally segregated job categories. Second, for jobs that require no special expertise, the relevant comparison is the percentage of minorities or women in the employer's workforce relative to the percentage in the area labor market or general population. When a job requires special training, the proper comparison is with those in the labor force who possess the relevant qualifications.

The *Johnson* Court held that the AAP also satisfied *Weber*'s second and third criteria. It did not unnecessarily trammel on the rights of male employees because it did not set aside particular positions for women; instead, it required them to compete with all other applicants. The plan also required selection of the most qualified applicants. Lastly, the plan was temporary and adjusted annually to provide a reasonable guide for actual employment decisions.

Is Diversity Distinct from Affirmative Action?

The EEOC's enforcement guidance takes the position that Title VII permits "diversity efforts designed to open up opportunities to everyone." Unlike affirmative action, which the guidance describes as intended to "overcome the effects of past or present practices, policies, or other barriers to employment opportunity," the EEOC contends that diversity is a "business management concept under which employers voluntarily promote an inclusive workplace." Companies "implement diversity initiatives for competitive reasons rather than in response to discrimination, although such initiatives may also help to avoid discrimination." In short, the substantive difference between affirmative action and diversity is that the affirmative action is backward-looking (i.e., it looks to remedy the effects of past discrimination), while diversity is forward-looking (i.e., it is about making a better future, not making up for sins of the past).

Despite the EEOC's position that forward-looking diversity initiatives comply with Title VII, most courts that have addressed the issue have not necessarily agreed. For example, in *Frank v. Xerox Corp.*, 347 F.3d 130 (5th Cir. 2003), the court of appeals reversed the grant of a summary judgment to an employer that maintained a program known as the "Balanced Workforce Initiative (BWF)." The stated purpose of the program was to ensure that "all racial and gender groups were proportionately represented at all levels of the company." The initiative's targets were established on an annual basis and were based on government labor force data. The company produced reports listing the actual and desired racial and gender compositions of each office. Managers were evaluated based on how well they complied with the targets. In 1991, the BWF reports showed that the number of black employees in the company's Houston office exceeded the percentage of black persons in the relevant labor market. The plaintiffs were black employees who claimed that their opportunities for advancement were restricted because of the BWF reports showing that black employees were overrepresented. The company did not offer evidence that the initiative had a remedial purpose. In reversing the district court's grant of summary judgment, the Fifth Circuit found that "[a] jury looking at these facts could find [the company] considered race in fashioning its employment policies and that because Plaintiffs were black, their employment opportunities had been limited."

Taxman v. Piscataway Board of Educ., 91 F.3d 1547 (3d Cir. 1996), addressed the validity of an AAP with the stated purpose of promoting "racial diversity," although the evidence showed that the workforce was racially balanced. A white teacher who was laid off challenged the use of the affirmative action plan to retain a black teacher instead of her. The two teachers were equally qualified, with equal seniority; however, the teacher who was retained was the only black teacher in the department. The board chose to dismiss the white teacher, in the interest of maintaining a "culturally diverse" faculty. The school board's affirmative action plan provided no goals, standards, structure, or benchmarks to evaluate the success of the plan. The court found that the school board could theoretically grant racial preferences entirely by whim, potentially even to the detriment of the traditionally segregated groups that Title VII was enacted to protect. The court also noted that the plan was not temporary in nature. Finally, the court concluded that the harm imposed by the plan—the loss of a job by a tenured non-minority employee—was so severe that even had the plan's goal of racial diversity been legitimate, the plan would impermissibly encumber the rights of nonbeneficiaries. *See also Schurr v. Resorts Int'l Hotel, Inc.,* 196 F.3d 486 (3d Cir. 1999) (holding that an employer violated Title VII when it hired a qualified minority applicant instead of an equally qualified white applicant, under its state-mandated affirmative action plan; the plan was not based on any finding of historical or then current discrimination in the industry or job category); *Cunico v. Pueblo Sch. Dist. No. 60*, 917 F.2d 431 (10th Cir. 1990) (holding that an AAP was invalid where goals were "a diverse, multi-racial faculty and staff" and "equity for all individuals through equal employment opportunity policies and practices," and there was no evidence such goals were necessary to remedy past discrimination). *But see Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996) (holding that selection of a black applicant over white applicants for the position of lieutenant at a boot camp for young prisoners did not violate equal protection where the consideration of race was based on the unique goal of reformation in the experimental correction program).

Grutter v. Bollinger: Opening the Door to Diversity as a Compelling Interest

Grutter v. Bollinger, 539 U.S. 306 (2003), involved an equal protection challenge to admissions practices at the University of Michigan Law School. The objectives of the

admissions process were to achieve "a mix of students with varying backgrounds and experiences who will respect and learn from one another" and to attain a "critical mass" of underrepresented minority students. The admissions program used a "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment." One of the factors that the law school considered as a "plus" factor was an applicant's race.

The Court held that the Michigan program did not violate a non-minority applicant's right to equal protection because "diversity" is a compelling state interest that can justify the use of race in university admissions. The Court concluded that diversity was "the heart of the Law School's proper institutional mission" and that without a contrary showing, the university should be presumed to act in good faith with respect to its admissions decisions. The majority also relied on multiple amici briefs submitted by major American businesses, research associations, and a high-ranking military officer, that argued that a racially diverse student body better prepares students for an increasingly diverse workforce and society, and this student body is necessary to develop the skills needed in today's increasingly global marketplace.

In *Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir. 2003), the Seventh Circuit relied on *Grutter*'s diversity rationale to uphold, on equal protection grounds, the AAP for the Chicago Police Department. One of the city's stated rationales for considering race and ethnicity in hiring decisions was the "operational need for a diverse police department." The court noted that racial diversity was a compelling interest in a large metropolitan police force charged with protecting a racially and ethnically divided major city such as Chicago.

In contrast, the Supreme Court in *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), held that a public school district's plan that considered a child's race in determining whether a parent had the right to choose the school that their children attended violated equal protection. The evidence showed that the school district created the plan to increase diversity rather than to remedy prior discrimination. The Court distinguished the need for diversity in higher education, which the *Grutter* Court upheld, from the need for diversity in primary and secondary education.

Does the *Grutter* Rationale Apply to Diversity Programs Under Title VII?

Our research revealed that no court has addressed whether *Grutter*'s rationale applied to diversity programs under Title VII or another antidiscrimination statute. As such, its application is limited at this time to public employers who make employment decisions based on a constitutionally protected classification, such as race or gender. Constitutional protections do not apply to employees of private employers, nor do they extend to employees based on statutorily protected characteristics such as age or disability.

Private employers and public employers whose diversity initiatives extend beyond race, gender, or other constitutionally protected interests are wise to exercise caution in the implementation of a program that favors a particular group with the intent of creating a diverse workforce. The most effective way to insulate a diversity initiative from court scrutiny is to rely on the long-standing affirmative action precedent. Employers should ask the following questions:

- Is the plan remedial in nature; that is, does the employer intend to address past discrimination or existing employment practices that have a discriminatory effect? The remedial goal does not necessarily have to be related to the particular employer's past practices; instead, it could be aimed as job categories or occupations that have been historically closed to the protected group.
- Does the plan avoid unnecessarily trammeling the interests of majority or male employees who would be adversely affected by the favoring of another protected group? A plan that results in the replacement of existing employees in favor of a protected group, or which effectively limits advancement opportunities of the majority group, will not likely satisfy the Title VII standards.
- Does the plan envision an end point, at which time it will no longer be necessary? The plan should be temporary and designed to achieve a balance, not to maintain a balance indefinitely.
- What evidence justifies the existence of the plan? Are there statistics demonstrating a manifest imbalance between the number of the protected group in the relevant labor market versus those in the workforce?
- Does the plan focus on expanding the recruiting pool or otherwise expanding opportunity generally to persons in the protected class, while still allowing an individualized employment decision that is not based on a protected characteristic?
- Which protected groups does the plan intend to promote? The more categories of "diverse" employees, the more difficult it will be to identify a legitimate remedial purpose to preferring the members of that group.

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Conclusion

The prevalence of employer diversity initiatives and the relative lack of legal challenge to those programs to date (particularly among private employers) could lead an employer to conclude that diversity programs do not present legal risk. While diversity may be worthy or desirable, under the existing legal precedent, the goal of achieving a diverse workforce, in and of itself, is not likely a legally sufficient reason to justify such programs. Employers and their counsel should reexamine whether their commitment to diversity is consistent with the requirements of Title VII and other antidiscrimination laws. FD