True Diversity:

LEGAL OVERVIEW & RECOMMENDATIONS FOR EMPLOYERS

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Introduction

Diversity, Equity, & Inclusion ("DEI") has become a major focus of corporate America. In recent years, for example, over $8 billion has been spent on diversity trainings annually in the United States, according to McKinsey & Company. The desire to create workplaces that reflect the diversity of the population and to cultivate a culture where employees feel welcome and are treated fairly is a laudable goal. Even when well-intentioned, however, current, mainstream approaches to DEI may be creating legal liability for companies and having a counterproductive impact on work environments. This article provides employers with some legal considerations for DEI programs and offers recommendations to create a truly diverse and inclusive workplace where employees can thrive and businesses can flourish.

Legal Framework

To understand the legal framework most applicable to DEI in the workplace, it is helpful to step back and to reflect on the underlying, foundational principle at issue: equality under the law. The American experiment presumes equality before the law because of its ultimate conviction that each individual person has equal human dignity. The **Declaration of Independence** contains the familiar phrase that, "[W]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." This bedrock principle that "all men are created equal" rejected the concept of a monarchy or any type of hierarchy based on group identity or class. Obviously, these values have been applied far from perfectly over the years, with America's history of slavery being the most tragic example. Yet, while woefully unfulfilled at times in history, the Declaration was founded on the principle of human equality before God and promises to every American equality under the law.

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The 1960s Civil Rights Movement was motivated in large part by the call to honor this promise of our founding. As profoundly put in Dr. Martin Luther King, Jr.'s **"I Have a Dream"** address before the Lincoln Memorial in 1963:

> In a sense, we've come to our nation's capital to cash a check. When the architects of our republic wrote the magnificent words of the Constitution and the **Declaration of Independence**, they were signing a promissory note to which every American was to fall heir. ... It is obvious today that America has defaulted on this promissory note. ... But we refuse to believe that the bank of justice is bankrupt. We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation. And so, we've come to cash this check, a check that will give us upon demand the riches of freedom and the security of justice.

Shortly thereafter, Congress enacted **The Civil Rights Act of 1964**. **Title VII** of the Act is the provision applicable to employment. Under this federal law, employers may not "limit, segregate or classify [] employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin." The federal government committed to aggressive enforcement to start fulfilling its promises to every American, as eloquently advocated by King. Title VII embodies the principle of equality before the law for each individual American, which stems from the inherent human dignity of every person. Subsequently, many states also passed similar non-discrimination laws.

To comply with Title VII, companies began conducting workplace trainings to help ensure adherence to this new law and to prevent

discrimination based on an employee or applicant's race, color, religion, sex or national origin, while focusing on providing equal opportunity. Over the years, this eventually gave rise to the human resources and diversity and inclusion efforts we see today. Ironically, what started as a compliance effort has morphed into an area that is creating liability for employers, as it relates to DEI. The degree to which some employers focus on employees' protected characteristics[1]—most commonly their race and sex—to create diverse workforces, instead of focusing on employees as individuals, may cause them to run afoul of Title VII. Available remedies under Title VII include back pay, front pay, equitable relief, compensatory damages, punitive damages and attorneys' fees.

With this backdrop, we will review several areas of concern presented by mainstream DEI efforts—that is, measuring workplace diversity almost exclusively by protected characteristics (specifically race and sex), rather than treating employees as unique individuals—before providing a few recommendations for employers to cultivate a truly diverse and inclusive workplace.

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1   Protected characteristics are those that are protected under law from employment discrimination.

Risk of Mainstream DEI Programs

HIRING

It is a violation of Title VII and similar laws to make hiring decisions based on an individual's race, color, religion, sex or national origin (or other protected category). This is important for employers to remember, as many companies are aggressively pursuing increased diversity within their workplaces. The problem is not increased diversity (a good thing!); the problem is how companies define diversity. Employers often define diversity exclusively by protected characteristics and measure success only by how many women or minorities are represented. Defining diversity this way puts pressure on hiring managers to select applicants based on their race or sex, for example, to meet company goals. Hiring managers should select the most qualified candidate for a job without regard to the person's protected category. It is a violation of discrimination laws to take an applicant or employee's protected characteristic into account—even if the hiring manager has good intentions and even if the company is trying to increase diversity. [2] For example, if there are two final candidates for a job and both are qualified, the deciding factor cannot be related to the candidate's race, sex or other protected category, even if the manager is attempting to achieve greater diversity. Some employers even reward managers, departments or executives with increased compensation or bonuses for achieving diversity goals, which further incentivizes employment decisions based on an employee's protected characteristic. Hiring managers are not usually told explicitly to select diverse candidates, but the implied message to managers should not be underestimated, as it puts the company at risk for discrimination claims. With the increased focus on DEI programs throughout corporate America, employers may not realize their efforts are incentivizing violations of law. Making any employment decision based on a protected category exposes employers to liability under Title VII and similar laws.

WORKPLACE TRAINING

In recent years, DEI training has incorporated concepts of critical theory, specifically critical race theory. In short, under **critical race theory**, racism is systemic and embedded in institutions. In Western society, according to this worldview, white persons hold the systemic power, and therefore, possess white privilege and are oppressors. White individuals are considered to be guilty of racism, regardless of any individual person's intent or actions. Conversely, under this theory, non-white persons are considered oppressed and face institutional barriers to success. Any racial disparity is viewed as evidence of racism. Under this philosophy, it is necessary to divide and make judgments about individuals based on their race (or sex, under critical gender theory).

Many DEI trainings have adopted this theory and applied it to the workplace. There are many public examples throughout corporate America where white (or male) employees are encouraged to renounce their white (or male) privilege and told they are oppressors based on their race (or sex). Conversely, minority (or female) employees are told they are oppressed.

Regardless of one's perspective on critical theory, applying it in the workplace puts employers at risk of liability under Title VII. It necessarily involves stereotyping employees based on their race and

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2   There has been a narrow exception recognized, for example, in United Steelworkers of America v. Weber, 443 U.S. 193 (1979). That case permitted employers to adopt certain affirmative action programs if multiple conditions were met. Despite the apparent proliferation of affirmative action in employment, very few employers, if any, are in a position to actually meet Steelworkers' conditions today. If you are considering designing an affirmative action program that would comply with Steelworkers, we recommend retaining counsel to review the caselaw with you and carefully consider whether your program would stay within the very narrow legal guardrails.

sex. It designates employees as either oppressors or oppressed and assigns guilt to them based on their protected characteristics. Instead of making a workplace more harmonious, it fosters division. Moreover, making negative assumptions about employees based on their race or sex gives rise to hostile work environments—precisely the type of conduct Title VII was enacted to prevent.

Beyond the legal risks involved, there is also the impact on workplace culture. There is real impact of bringing controversial political topics into the workplace. Any political workplace discussion carries risk of friction, especially when it relates to employees' personal attributes (in particular, protected categories like race, sex) and when they are not related to primary business goals. As demonstrated in recent elections, the country is polarized politically, so employers should consider that their employee populations (generally speaking) may be politically divided as well. Thus, bringing any kind of political issue into the workplace is difficult to manage from an employee relations standpoint. Incorporating political topics, such as critical theory, into workplace trainings conveys the expectation that employees need to adhere to the company's viewpoint on social issues. For employees who have different philosophies or beliefs, being forced to adhere to an ideology they oppose can lead to a negative workplace culture, particularly when it is unrelated to their job responsibilities. For example, it can lead to lower employee morale, division and discord among colleagues, disengagement and high turnover, which can all result in lower productivity. In certain circumstances, it may even give rise to a hostile work environment claim on the basis of religion.

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"EQUITY" (EQUAL OUTCOME)

The term "equity" has been added to the parlance of human resources departments. Companies may or may not actually define the term or may be using it without much thought. It is important, however, to understand its meaning. In short, "equity" is about equal outcome, as compared to "equality," which is about equal opportunity. Equity is the antithesis of equal opportunity and individual protection, which are the foundational concepts of employment laws in the United States. Implementing "equity" at work necessarily entails taking from one group and giving to another based on an employee's race or sex (or other protected characteristic). For example, in an effort to increase executive diversity, companies may offer leadership development programs or mentorship opportunities but only to minority or female employees, as a way to give them a step up. Offering benefits or advantages to some employees and not others based on their protected categories (e.g., race or sex) is inconsistent with Title VII.

Some may say the DEI approaches described above are necessary to create a diverse work environment. Again, regardless of one's personal perspective, the language of Title VII prohibits applying this approach in the employment context. Moreover, **Section 703(j)** specifically says "nothing contained in [Title VII] shall be interpreted to require any employer … 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." This language underscores Congress's intent that Title VII is to ensure equal treatment of employees, not guarantee against all disparities that may exist for a variety of reasons. Furthermore, treating employees differently or classifying them based on their protected characteristics is inconsistent with the principles upon which our country was founded, which embrace the concept of individual rights.

Recommendations

While the mainstream approach to DEI can be problematic, as discussed above, we believe a better path is possible. We encourage employers to consider the following recommendations to develop a truly diverse and inclusive workplace and to cultivate a positive culture where every employee is treated fairly and respectfully:

Be involved & proactive.

It is crucial for top-level leaders to be involved in and aware of the company's human resources and diversity initiatives. This will be easier or harder depending on the size of the organization. While HR professionals play an important and invaluable role, executives should take the lead on defining diversity and setting the tone on these topics. Many problems can be mitigated by being clear on their company's approach to diversity and setting expectations early on. Employees are the most important asset of an organization, and workplace culture and morale are worthy investments.

Define diversity, equality and inclusion.

Define diversity in a way that best suits your industry and business needs. The uniqueness each employee brings into the workplace is so much more than their protected characteristics. Therefore, we recommend approaching diversity from a lens that recognizes the individuality of each person (e.g., their viewpoints, thoughts, skill sets, backgrounds and experiences). We also recommend replacing the term "equity" with "equality" to ensure all employees receive equal opportunities. Not only does this approach mitigate legal risk, but it encourages a more unified, positive and truly inclusive workplace.

◆ **Sample definition of diversity:** We recognize and value the uniqueness of each individual person. We believe the best workplaces bring together employees with diverse skill sets, backgrounds, experiences and viewpoints to achieve common goals. We see this as the best way to realize our company's mission.

◆ **Sample definition of equality:** We work to ensure all employees are treated fairly and have equal opportunity. We prohibit and strongly condemn discrimination on the basis of any characteristic protected by law.

◆ **Sample definition of inclusion:** We strive to create and to cultivate a workplace environment where every employee is treated with dignity and respect and as a valued member of our team.

Cultivate viewpoint diversity.

A **recent study** found over one third of employed Americans fear their personal political views will negatively impact their job. One of the best ways to alleviate that fear and foster inclusiveness is to create an environment where viewpoint diversity is respected. Consider adopting a Viewpoint Diversity Policy in which the company affirms it respects diversity of viewpoint and understands and respects that employees likely have a wide variety of personal political, religious and social perspectives. Similarly, with the proliferation of cancel culture and the frequent animosity among and between political parties, employees may fear their legal activities outside of work will cause them to lose their jobs. For example, an employee may be afraid that by supporting a particular political candidate or cause they will be negatively impacted at work. This not only silences employees but erodes democracy. To alleviate that concern, consider implementing an Off-Duty Civil Rights Policy in which the company indicates its respect for all employees to exercise their civil rights of freedom of speech, free exercise of religion, freedom of association,

peaceable assembly and protest, outside of work (with some necessary disclaimers, such as so long as the conduct is legal, non-violent, is not a direct conflict of interest with the company's primary business, etc.). Conducting training on conflict management and the importance of viewpoint diversity at work is also helpful.

Correspondingly, before announcing company statements around political or social issues not directly related to business goals, take time to consider the impact of such statements on all employees. Even when it is well-intentioned, issuing company statements from one point of view, when not closely tied to the company's mission, can stifle employees' diversity of thought or opinions at work and create division among team members.

Focus on equal opportunity.

Be creative and intentional about expanding your applicant pool to find the best candidates possible and to help ensure equal opportunity. Make hiring decisions without regard to an individual's protected category and select the person best qualified for the role based on merit, experience and skills. Review job descriptions to determine whether the company is inadvertently excluding candidates who may otherwise be qualified. For example, consider whether college degrees are truly necessary as a way to expand opportunity to various socioeconomic groups, or whether a position may be filled on a part-time or flexible basis to be more amenable to applicants with caregiving responsibilities or other needs.

Conduct training.

A great way to build an inclusive workplace is to communicate expectations of how employees should treat each other at work. Companies should ensure their management teams and employees understand what conduct is and is not acceptable. As a best practice to mitigate legal risk, every employer should at least conduct training around discrimination and harassment laws, which is the

umbrella of diversity and inclusion. Consider supplementing that training with content to help build a positive culture, which focuses on civility, kindness and respect at work and sees and values employees as individuals. Avoid divisive political topics unrelated to the workplace and concepts that promote employees' protected characteristics over their individual skills, beliefs, viewpoints and backgrounds. Be sure to have legal counsel review the content of training; as discussed above, some mainstream approaches are actually putting employers at risk.

Review policies and practices.

Periodically review company policies and procedures to identify ways in which they could be improved to help ensure all employees are treated as fairly as possible (e.g., decrease the chance for bias or favoritism and increase consistency).

Invest in employees.

To help improve employees' performance and opportunity for promotion, invest in skills-based training and leadership training. Making these benefits available to all employees can help everyone be more successful.

Build teams.

Take time to do team-building activities. Finding commonality with coworkers and cultivating an attitude of teamwork is foundational to a truly inclusive and positive workplace culture.

Draft a communication plan.

With DEI a prominent topic in today's culture, be prepared to answer questions from internal employees or applicants about your diversity efforts. Also be prepared to tell your company's story to external parties who may inquire about your company's initiatives. Clarity and transparency go a long way in both setting expectations and building trust.

Monitor success.

It is easy to measure employee diversity by protected characteristics and demographics, which essentially entails checking a box. It is harder to monitor success of diversity efforts that focus on viewpoint diversity and a truly inclusive environment. Some ways to measure this include: (1) anonymous and confidential employee surveys that ask, among other things, about workplace culture; how comfortable employees feel sharing their opinion or a dissenting opinion; and ideology; (2) the number of substantiated complaints around discrimination/harassment; (3) employee retention levels; and (4) feedback from employee exit surveys.

Conclusion

Creating workplaces free of discrimination and harassment and cultivating work environments where every employee is treated fairly and respectfully helps build a solid organizational foundation. Diversity and inclusion programs can be a valuable component of that effort. And when done in a way that honors the uniqueness of employees as individuals—e.g., their diverse viewpoints, backgrounds, skill sets, values, experiences and beliefs—it not only lays the groundwork for a thriving workplace, but is consistent with the moral and legal principles upon which our country was founded and helps fulfill the promise to every American of equality under the law.
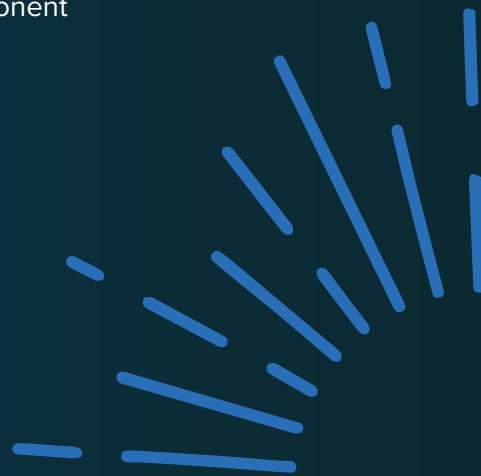
About the Author

Stephanie Holmes is an experienced labor and employment lawyer and the founder of BrighterSideHR, where she offers HR consulting services and workplace training programs. She started her legal career at a large, international law firm where she represented employers in a wide variety of labor and employment matters, ranging from single plaintiff to complex class action cases. She then worked as an in-house counsel for a Fortune 500 company for almost a decade, where she worked closely with HR, business leaders, and executives on a myriad of employment issues. Stephanie received her Bachelor of Arts in political science and American studies from Illinois Wesleyan University and her J.D. from The Catholic University of America Columbus School of Law. She is also a trained mediator through the Northwestern University School of Professional Studies and has years of experience helping resolve workplace conflict.

About True Diversity

Philanthropy Roundtable's True Diversity initiative provides an equality-based and holistic framework for embracing diversity. It values every person as a unique individual and empowers charitable organizations with the freedom and flexibility to advance their missions and help those in need. Learn more at **TrueDiversity.org**.

About Philanthropy Roundtable

Philanthropy Roundtable is a nonprofit organization dedicated to building and sustaining a vibrant American philanthropic movement that strengthens our free society. To achieve this vision, the Roundtable pursues a mission to foster excellence in philanthropy, protect philanthropic freedom and help donors to advance liberty, opportunity and personal responsibility.

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