

The Legal Landscape of Diversity, Equity & Inclusion



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Diversity, equity and inclusion (“DEI”) initiatives are increasingly important to today’s workforce and in today’s workplace. While there is no legal requirement to implement DEI initiatives, potential benefits include attracting and retaining top talent, driving innovative solutions, enhancing financial performance and defending employment claims.

What Is Legally Required?

The terms “diversity” and “inclusion” do not appear in Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, or the Americans with Disabilities Act. Regardless, employers should consider written DEI policies and should strengthen related equal opportunity and anti-harassment policies. Employers may have an affirmative defense to legal claims if furthering efforts to eliminate discrimination,

including policy implementation and effective enforcement.

Metrics based analysis is commonly one of the first steps in DEI, and employers may adopt programs with defined metrics when an imbalance is identified. In order to comply with Title VII, any plan must be designed to open employment opportunities for the targeted group but may not bar advancement or require discharge of non-targeted employees. Be wary of quotas (sole reliance on numbers to the exclusion of qualifications). Decisions should be based on qualifications and application of preferences as opposed to based solely upon a prohibited category (i.e. gender or race).

Best Practices

Although numerous angles for successful DEI initiatives exist, some suggestions for best practices include:

- 1) Identify imbalances in the past (i.e. self-analysis) and tailor solutions to those particular issues (commonly referred to as a “reasonable basis” for concluding an action is appropriate). During this process, recognize that a one-size-fits-all solution is unrealistic.
- 2) Take reasonable action in accordance with your DEI plan. Reduce actions or plans to writing. Ensure application only as long as necessary to achieve identified objectives.

- 3) Communicate your efforts, goals and positions.
- 4) Review a program’s effectiveness with your identified goals and ensure no reverse discrimination (where members of a majority group suffer discrimination in DEI efforts) occurred as a result of your initiatives.

DEI In The Courts

Despite the lack of explicit statutory reference, DEI initiatives have certainly become part of the legal discussion. For example, in a 2016 Title VII matter, a court reviewed the employer’s Code of Conduct, which included initiatives and practices related to DEI, equal opportunity and non-discrimination and encouraged reporting of perceived harassment and discrimination. The employer’s adoption and adherence to these policies and procedures were part of the court’s consideration in ultimately dismissing the claim.

Another example is the court’s acceptance of expert testimony where such opinions analyze employer’s DEI initiatives and/or alleged unconscious bias. Specifically, in 2019, expert opinion testimony on an employer’s lack of an inclusive culture was presented to the jury. At present, there is a split within the courts on whether such testimony is relevant and admissible, but such a possibility represents a new challenge (and cost) for employers.

As a final example, the discovery process can be impacted by DEI initiatives, which almost certainly will be subject to exchange in any discrimination and/or retaliation suit. A discovery issue that will need to be addressed is whether such policies and programs are confidential and/or proprietary business documents of the organization.

Here to Stay

DEI initiatives have been and will certainly continue to be part of the legal landscape for employers. Numerous resources for DEI initiatives exist, but all lead to a common objective for employers: a workplace where all employees are treated fairly and equitably while ensuring continued compliance with non-discrimination laws and regulations.

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