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A Practical Approach to Diversity Programs

An expert identifies some of the legal risks associated with company diversity programs and describes several best practices to limit those risks. Making such changes can help shield a business from litigation as well as cultivate a more robust and diverse workforce.

By Larry Turner, Esq.



As both a business and legal imperative, employers are adopting diversity goals and programs to increase the diversity of their workforces. While essential, there are measures HR leaders should consider before implementing any initiatives so to avoid significant legal risks.

Plaintiffs frequently contend that an employer's failure to meet its own diversity metrics demonstrates that the employer's senior management knew of the discriminatory condition and failed to take the necessary corrective action.

Starting in 2000, with the Coca-Cola settlement of \$192 million, a stream of multimillion-dollar class-action discrimination actions has demonstrated how the absence of diversity throughout a company may be a significant legal risk. Not to be overlooked, federal legislators have increased their focus on the issue of diversity and inclusion as well.

It is essential for employers to stay abreast of what constitutes permissible diversity measures and to use best practices without inadvertently fueling future litigation.

The Diversity Imperative

Diversity has become a business best practice among the most successful corporations as well as a critical factor in the recruitment and retention of a talented workforce. Companies are constantly rated on the basis of their commitment to diversity -- and their actual and perceived commitment to diversity can enhance their public image.

The reverse is true as well: A perceived lack of this commitment can severely tarnish an organization's image.

Truly embracing the diversity of a workforce can also dramatically impact the bottom line. For example, in the early 1980s, women at Reebok voiced their frustration that they could not find a good aerobics shoe. Reebok listened and

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executed a marketing campaign for women's aerobic shoes.

As a direct result of listening to its female employees, Reebok went from a \$12 million-a-year shoe company to a \$3 billion powerhouse. Since then, diversity has been a critical corporate priority for Reebok.

The federal government also continues to scrutinize the degree of diversity in the workplace. The Equal Employment Opportunity Commission has sharpened its practices on systemic-discrimination claims.

And, imbedded within a broad package of financial-industry reforms contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act is a provision requiring *each* governmental agency covered by the Dodd-Frank Act to establish an Office of Minority and Women Inclusion (OMWI) to be responsible for matters relating to "diversity in management, employment and business activities."

Each OMWI director must monitor the diversity efforts of the agency, the regulated entities and the agency contractors and subcontractors. Failure of a contractor or subcontractor to meet the OMWI's standards could lead to contract termination.

Thus, it is without question that the absence of diversity can create significant liabilities for companies.

Many multimillion-dollar class-actions have successfully used the lack of women and minorities in the upper levels of management as *prima facie* evidence of company-wide discrimination.

A recent example is the *Velez vs. Novartis Pharmaceuticals Corp., No. 04 CIV 9194, 2007 WL 2197800 (S.D.N.Y., July 31, 2007)*. In that case, plaintiffs were awarded more than \$250 million in punitive damages, \$3.4 million in compensatory damages for the 13 named plaintiffs, and class-wide compensatory damages for the 5,600 female sales employees.

Subsequent to this verdict, the parties agreed to a total settlement package of about \$175,000,000 in monetary and non-monetary relief.

In addition to making good business sense, being able to respond to lawsuits or the threat of litigation with persuasive evidence of realistic and achievable diversity initiatives or diversity goals, as well as reasonable diversity gains, can be significant in overcoming an attack from plaintiffs.

Evaluating Diversity Efforts

Employers must be well versed in the scope of the attorney-client privilege and the attorney work-product doctrine when deciding to analyze their diversity efforts. Even then, caution should be the guide.

Attorney-client privilege protects certain communications made between a client and his or her attorney: The communication must be between the client and attorney, and it must be for the purpose of providing or eliciting legal advice. The attorney work-product doctrine protects from disclosure documents and information prepared by, or at the instruction of, counsel in anticipation of litigation.

In order for an analysis to be protected by the attorney-client privilege, counsel must be acting as an attorney providing legal advice (as opposed to providing business advice or management advice), and the communication must be

between attorney and client and made and maintained in confidence.

For example, if a compensation analysis is done for business reasons, (e.g., to determine if the compensation system is working properly) the analysis is not privileged, even if an attorney is involved. However, if a compensation or other analysis is done to provide legal advice regarding a company's compliance with various equal-opportunity laws or litigation risks, the attorney-client privilege does apply.

An employer's ability to protect information generated in evaluating or preparing diversity policies as "privileged" without an attorney's involvement is largely undefined and recognized by only a few courts.

The Supreme Court did address the question of whether a company can prevent the disclosure of a self-critical analysis in *University of Pennsylvania v. EEOC*, 493 U.S. 182, 110 S.Ct. 577, 107 L.Ed.2d 571 (1990). It decided common law and the First Amendment did not prevent disclosure of such analyses in the context of Title VII cases. *Id.* at 582-85.

Since then, many courts have ruled in accordance with that decision; however, some courts have found circumstances when companies are not required to share such analyses -- such as when notes of interviews with employees were made with the understanding that any comments would be kept confidential.

Other decisions have protected only the narratives collected in an internal review, requiring disclosure of the evaluative or analytical portions of the assessment. Yet, even those courts that do recognize the self-critical-analysis privilege emphasize that it can be waived easily.

In light of these concerns, employers should be prudent when implementing "higher-risk" diversity initiatives, such as:

- * Unprivileged, rudimentary benchmark studies used to assess underrepresentation;
- * Numerical representation targets linked to managers'/supervisors' performance ratings and bonus outcomes;
- * "Diverse slate" programs that require managers to interview minority and female candidates for a particular position (typically, targeted toward positions deemed to be underrepresented); and
- * Internships, training, career development, mentoring or other programs open predominantly to female or minority employees.

Best Practices

The following best practices are the core elements of successful voluntary diversity programs and provide the foundation for developing more tailored programs.

High-Level Management Accountability

Diversity efforts will not be effective unless there is a high-level management commitment to, and accountability for, implementing diversity strategies and making progress at the operational level.

It is imperative that the person in charge of diversity at the organization take

ownership for diversity goals and be responsible for overseeing and implementing diversity strategies throughout the company. He or she should report to the highest levels within the company (at a minimum, to the head of HR) and have authority to implement diversity policies and hold other managers accountable.

Large diversity committees, without high-level management accountability and high-level executives participating on the committee, have less accountability and are generally ineffective.

Connecting Diversity to Performance

Many employers have made compliance with diversity initiatives a performance measure and hold managers accountable within their departments or organizations for achieving the diversity goals of the company.

Connecting the implementation of diversity initiatives with performance is an important factor in holding managers accountable for such policies.

That is not to say that performance needs to be tied to a specific numerical goal or increase in minority representation. Performance measures should focus on whether managers have sought to increase diversity by implementing various company initiatives -- and not just rely on numbers.

Diverse Slates of Candidates

Organizations should develop a policy that requires a diverse and qualified slate of candidates to be considered for each management-level internal or external opening.

The No. 1 priority of this recognizes that candidates must be both diverse and qualified. It would be completely ineffective and counterproductive to have unqualified minority candidates in a pool of interviewees who are never selected.

As part of any diverse-slate policy, it is essential to implement steps (or reinvigorate steps) to identify diverse candidates from a variety of sources, mostly external to the company.

Require that any staffing or recruiting firms used by the company provide a diverse slate of qualified candidates for all open positions.

Also, develop and implement a succession-planning/management-development program with a particular focus on the upward mobility of women and minorities. This program might include providing formal mentoring of women and minorities, regular formal and informal interactions with senior managers, individual-development plans for participants and targeted job moves for those in the program.

Finally, it is important that employees and external candidates be made aware of job openings. Whether you have a formal posting policy or not, employers must have a mechanism to make employees aware of openings. That also will help implement an effective diverse-slate policy.

Identify and Develop Under-qualified Candidates

Recognizing that there may be shortfalls in your internal feeder pools of qualified women and minority candidates to fully implement the diverse-slate initiative, it is important to simultaneously implement a process to identify potential candidates

who are under-qualified and develop individual plans to assist them in becoming qualified for future positions.

Communication

Another essential element of effective diversity programs is communication. It is imperative that the company communicate its commitment to diversity and provide employees with information about the company's initiatives.

Establish Rational Diversity Goals

Some companies establish unrealistic diversity goals based on improper research and analysis and have no hope of achieving their intended goals. This approach can have negative consequences.

Essential to establishing rational goals is the ability to properly assess your utilization of women and minorities. A proper analysis will include a review of available data from several sources to assess the actual or target availability/ utilization.

Measure Progress

One of the keys to implementing diversity strategies is to establish HR systems to capture relevant information and to properly measure your progress.

Ensure that proper HR systems and software are available to track information related to diversity initiatives, and install, create or modify HR systems to capture all of the relevant data to measure progress and compliance with the company's diversity goals and policies.

Once appropriate systems are established to capture relevant information, it is important to analyze the data so problems can be identified and adjustments made to policies, practices and procedures.

While diversity programs are essential to achieving a company's diversity goals, the potential legal risks associated with these programs must be appreciated by employers. Staying abreast of the evolving legal contours of permissible measures, and utilizing best practices must be a foundation for a company's diversity efforts. That will help shield a business from litigation as well as cultivate a more robust and diverse workforce.

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