



➤ May 19, 2022

Discrimination/Disparate Impact and Other Issues Faced by Employers Striving to Diversify the Workplace

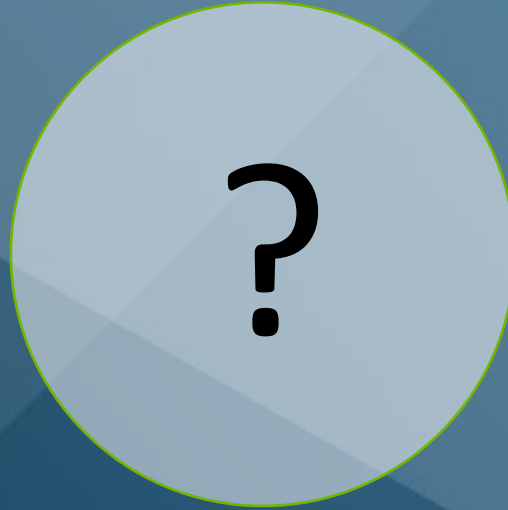


Presentation By:
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Before We Begin



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➤ Presenter

Alejandro Pérez Jackson Lewis PC

Alejandro assists employers facing a variety of employment disputes, including employment discrimination, sexual harassment, wrongful termination, workplace torts, trade secret/anti-piracy, non-compete agreements and unfair competition litigation and arbitration. Alejandro's clients value his proactive and practical approach to identifying preemptive HR strategies that increase employee job satisfaction, minimize risk, and reduce overall litigation costs.



The Business Case for Diversity

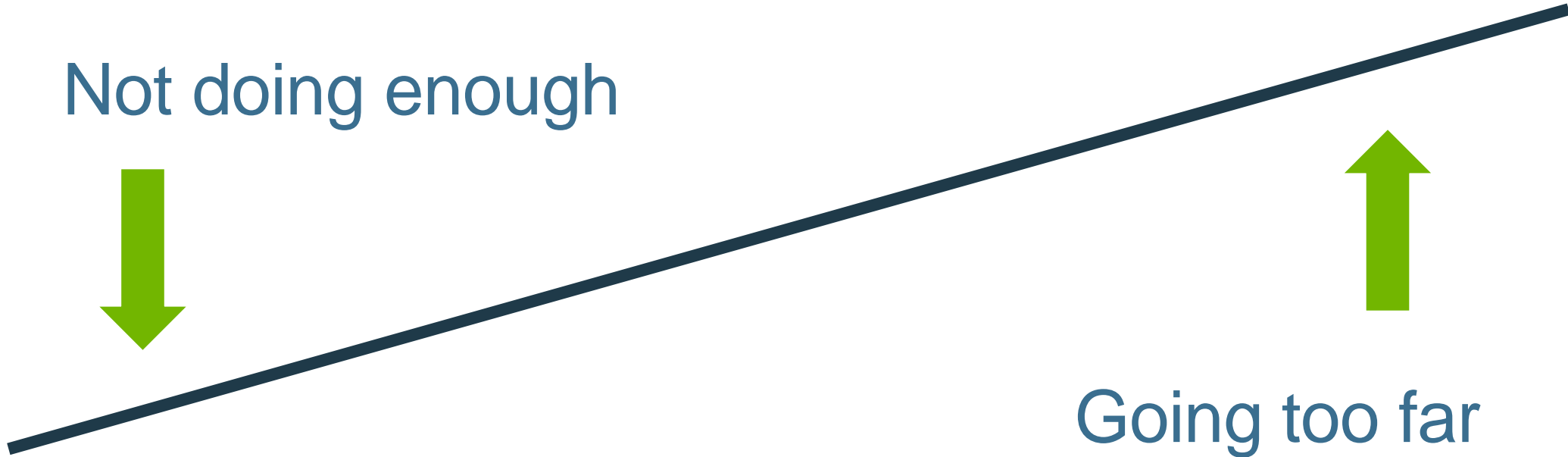
- Improved decision making.
- Enhanced reputation.
- Client recognition.
- Increased loyalty.
- Improved recruiting.
- Improved financial metrics.
- Stakeholder engagement.

The Risks

- Lawsuits
 - Discrimination
 - Reverse Discrimination
 - Hostile work environment
- Public relations
- Shareholder actions
- Retention issues
- Toxic culture

➤ Balancing the Legal Risks

Not doing enough



Going too far

➤ Disparate Impact

- In the early years of the EEOC's operation, most of the claims were of disparate treatment--decision makers unlawfully considering protected categories when making employment decisions.
- The EEOC began to study facially neutral hiring and employment practices and found that discrimination did not only occur through intentional acts of overt discrimination, but through neutral policies and practices that had disproportionate, adverse impact on protected classes.

➤ Disparate Impact

- 3-Step Burden-Shifting Analysis: (1) the plaintiff's prima facie demonstration of a policy's disparate impact; (2) the defendant's job-related business necessity defense of the policy; and (3) the plaintiff's demonstration of a less discriminatory policy

➤ Employer Diversity Plans

- United States Steelworkers v. Weber, 443 U.S. 193 (1979)
- Johnson v. Transportation Agency, 480 U.S. 616 (1987)

➤ Seminal & Recent Case Law

- **Griggs v. Duke Power Co.**, 401 U.S. 424 (1971)
- Title VII “proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.”
- **Wards Cove Packing Co. v. Antonio**, 490 U.S. 642 (1989)
- Established burden shifting analysis prior to 1991 Civil Rights Act

➤ Reverse Discrimination

- Ricci v. DeStefano
- Johnston, et. al, v. School Dist. of Philadelphia
- Gaza v. Memphis Light, Gas and Water Division
- Duvall v. Novant Health, Inc.

➤ Seminal & Recent Case Law

- **Lewis v. City of Chicago**, 560 U.S. 205 (2010)
- 300 days to file EEOC Charge begins to run from the date the challenged practice was applied, not from when it was adopted



➤ Rooney Rules

- “Rooney Rule”- The NFL & Beyond
 - NFL: every NFL team with a head coaching vacancy must interview 1+ diverse candidates.
- Expanded to include the general manager and other like front office positions
- Beyond: Several companies have variations of the Rooney Rule (Amazon, Box, Intel, Microsoft, Uber)

➤ Rooney Rules: Risks and Legal Considerations

- Reverse discrimination
- Policy should expressly prohibit decision-makers from basing hiring and/or promotion decision on race, ethnicity, gender, etc.
- Effective public relations campaign to avoid unintended consequences

➤ Rooney Rules: Additional Commentary

- Reasons for resurgence?
- External clients also demanding diverse slates

➤ Affinity Groups – Risks and Legal Considerations

- Efforts to make affinity groups a requisite part of performance review package
- Best Practices
- Legitimate Purpose
- Groups unrelated to workplace should be excluded
- Creation of groups that are adverse to other groups
- Groups are not focused on negotiating terms and conditions

➤ Affinity Groups – Risks and Legal Considerations

FLSA

- Time spent attending employer-sponsored lectures, meetings, and training programs is generally considered compensable
- But doesn't need to be considered working time if:
 - Attendance is outside of the employee's regular working hours
 - Attendance is voluntary
 - The activity is not directly related to the employee's job, and
 - The employee does not perform any productive work during such attendance
- Employees must be paid for time spent working for civil/charitable purposes if the work is:
 - At the employer's request
 - Under the employer's direction or control, and
 - While the employee must be on the employer's premises
- But time spent voluntarily in civil or charitable activities outside of the employee's normal working hours is not hours worked and do not need to be compensated

➤ Affinity Groups – Risks and Legal Considerations

Title VII - Discrimination, harassment, hostile work environment, retaliation

- Employer not recognizing certain affinity groups while recognizing others
 - *Moranski v. General Motors Corp.*, 433 F.3d 537 (7th Cir. 2005) – employee claimed that his employer discriminated against him based on religion by not allowing a Christian Employee Network. Court held no religious discrimination because all religious groups were not allowed.
- Employer treating certain affinity groups or their members differently than others
 - *Flood v. Bank of America Corp.*, 780 F.3d 1(1st Cir. 2015) - plaintiff alleged sexual orientation harassment based in part on her supervisor prohibiting her from attending LGBT affinity group meetings during work hours, even though other employees were permitted to attend similar types of meetings. The court denied the employer's motion for summary judgment on the plaintiff's hostile work environment claim, finding that genuine issues of material fact existed about whether the alleged acts of harassment were based on the plaintiff's sexual orientation and sufficiently severe and pervasive.

➤ Affinity Groups – Risks and Legal Considerations

- Employer forcing employees to support an affinity group
 - *Schwartzberg v. Mellon Bank, N.A.*, 307 Fed.Appx. 676 (W.D. Pa. 2008) – employee offended by email inviting him to a luncheon cohosted by a LGBT affinity group. Employee claimed that his religious beliefs did not condone same sex relations and that the employer was forcing him to support these beliefs. The court disagreed noting that the employer did not require or suggest that the plaintiff change his religious beliefs and participation in the luncheon was voluntary.
- Retaliation
 - Employer taking adverse action based on complaints/issues raised through an affinity group.

➤ Affinity Groups – Risks and Legal Considerations

What to do:

- Membership in affinity groups should be voluntary
- Membership/participation should be provided to all employees regardless of race, sex, national origin, religion, age, sexual orientation or other protected categories
- Be consistent when deciding which affinity groups to recognize
- Treat all affinity groups the same with respect to employment decisions – granting time off to attend meetings
- Don't take adverse action against employees for conduct in affinity groups that may be considered protected activity

➤ Affinity Groups – Risks and Legal Considerations

NLRA

- Could violate NLRA if employers bargain with affinity groups regarding employees' terms and conditions of employment by
 - Dominating or interfering with the formation of an affinity group and treating it as a labor organization
- Failing to bargain with a union that already represents employees
- Could interfere with employees' Section 7 rights

➤ Affinity Groups – Risks and Legal Considerations

What to do:

- Make clear that the affinity group's purpose is not to represent employees regarding their terms and conditions of employment
- Refrain from discussing or proposing terms and conditions of employment including wages, rates of pay, hours of work, conditions of work
- Do not restrict employees from discussing topics in affinity groups that could be deemed protected concerted activities for mutual aid or protection

➤ Affinity Groups: Commentary

Benefits:

- Attracting, recruiting, and retaining diverse employees
- Promoting diversity, cultural awareness, and an inclusive work environment
- Increasing employee job satisfaction, morale, and productivity
- Fostering professional development and learning through mentoring/networking

Policy prohibiting affinity groups:

- That do not have a legitimate business purpose (i.e., groups based on sports, hobbies, or other outside activities unrelated to employment)
- With a purpose to exclude, divide, or oppose any employees or other affinity groups
- Representing any employees regarding terms and conditions of employment

➤ Use of AI: Risks and Legal Considerations

Views from an in-house perspective:

- Unintentional screening out of diverse candidates
- Use of AI to obtain diverse candidates
 - Uncertainty and issues related to application and understanding of the technology



➤ Use of AI: Risks and Legal Considerations

- Unconscious bias of those who build the algorithms
 - Data used may be flawed (i.e., algorithm for selecting best resumes may be based on the resume of previously successful employees (white, male, particular educational background))
- Privacy concerns
 - Collection and storage of candidate data
- Objective analysis provided by AI may harm diversity efforts

➤ Attempts to Limit Training (Trump era and now Florida)

The bill makes it unlawful to “subject a person, as a condition of employment ... to training, instruction, or any other required activity” that compels such individual to believe:

Members of one race, color, sex, or national origin are morally superior to members of another

That an individual, by virtue of his or her race, color, sex, or national origin (Demographics), is inherently racist, sexist, or oppressive, whether consciously or unconsciously

That an individual’s moral character or status as either privileged or oppressed is necessarily determined by his or her Demographics

That an individual, by virtue of his or her Demographics, bears responsibility for ... actions committed in the past by other members of the same Demographics.

An individual, by virtue of his or her Demographics, should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion.

An individual, by virtue of his or her Demographics, bears personal responsibility for and must feel guilt ... because of actions ... committed in the past by other members of the same Demographics.

➤ Overall Best Practices

- Link Diversity, Equity & Inclusion to all facets of your operations
- Drive Cultural & Behavioral Focus
- Pursue flexible goals for diversity, as opposed to quotas
- Work proactively to increase diversity in your pools for hiring, promotions, mentoring and succession planning
- Focus on developing new approaches / behaviors to pursuing diversity
 - – with an emphasis on efforts, not outcomes
- Make employment decisions (such as for hiring, promotions, mentoring and succession planning) based on skills, professional accomplishments and other objective criteria, rather than on protected characteristics

➤ What to Avoid

- Quotas (vs. Goals) - Recruiting & HRM
- Arbitrary adaptation or misuse of diverse candidate slate programs in recruiting
- Lack of clarity and transparency
- Exclusive ERGs

Before Q&A



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