

Beware the Pitfalls of Well-Intentioned DEI Programs

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Agenda

- Defining DEI in the workplace
- Understanding the impact of DEI on your business
- Distinguishing affirmative action programs
- Implementing effective DEI programs
- Exploring legal risks

What Is DEI in the Workplace?

- **DEI is the acronym for diversity, equity, and inclusion**
 - *Diversity*—Different demographic representations among employees, including age, race, gender, nationality, sexual orientation, gender identity, veteran status, etc.
 - *Equity*—Encompasses the fair treatment of a diverse group of employees in employment processes, policies, and procedures—e.g., pay, promotions, access and development
 - *Inclusion*—The creation of a feeling of belonging, respect, and engagement

Why Is DEI Important?

■ **Company performance**

- Research shows better financial performance
- Organizations report more innovation
- Organizations report increased productivity

■ **Recruitment and retention**

- Recruitment of a diverse group of employees increased
- Retention more likely where employees feel a sense of belonging
- Employees show more pride in their work

Does DEI = Affirmative Action?

- DEI programs voluntarily address representation, fairness, and belonging in the workplace.
- Affirmative action plans require actions to provide equal opportunity and advance in employment qualified people of certain groups.
- For example, federal contractors and suppliers have obligations under specific laws, which vary based on contract dollar value and the type of services.¹

¹ Executive Order 11246 of 1965, as amended (E.O. 11246)(prohibits discrimination and requires programs to provide equal employment opportunity for qualified minorities and women (30 Fed. Reg. 12319, 32 Fed. Reg. 14303, 34 Fed. Reg. 12985, 43 Fed. Reg. 46501, 44 Fed. Reg. 1055, and 67 Fed. Reg. 77141)); Section 503 of the Rehabilitation Act of 1973 (Section 503)(requires actions to “employ and advance in employment”, qualified individuals with disabilities (29 U.S.C. § 793)) Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA)(requires actions to “employ and advance in employment”, qualified protected veterans (38 U.S.C. § 4212))

What to Consider for Implementation

- **Define your DEI strategy**

- Conduct a privileged analysis of your employee population
 - Compare representation to labor market and industry
 - Look at representation for specific jobs and job levels
- Evaluate recruiting practices—e.g., candidate pools, job descriptions and requirements, and pre-hire job screening
- Collect employee feedback
 - Use engagement surveys to understand employee experience

What to Consider for Implementation

- **Best practices**

- Determine appropriate benchmarking data
- Set goals that are measurable and align with Title VII
- Determine accountability scheme
- Establish plan for internal and external communication and disclosures

How to Avoid Legal Risks

- **Don't**
 - Issue conclusions about perceived regulatory or other legal violations
 - Set quotas or set asides that ignore qualifications
 - Discharge nontargeted employees
 - Bar advancement of nontargeted employees

How to Avoid Legal Risks

- **Do**
 - Comply with obligations under Title VII of the Civil Rights Act of 1964
 - Protect employee data and comply with privacy laws
 - Seek solutions to address hiring, promotion, and retention barriers
 - Review your DEI program regularly
 - Emphasize the prohibition against any form of discrimination

Resources

■ Case law

- *Grutter v. Bollinger*, 539 U.S. 306 (2003)
- *White v. Oakland County Community College*, NO. 19-10465; 2020 WL 5908319 (E.D. Mich. Oct. 6, 2020)

■ Benchmarking data

- U.S. Bureau of Labor Statistics
- U.S. Census Bureau
- U.S. Equal Employment Opportunity Commission Employment Statistics

■ Industry insights

- American Staffing Association research, publications, and member resources