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Developing Effective and Legally Compliant DEI Policies

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In this article, the authors offer suggestions to employers interested in creating diversity, equity, and inclusion policies.

Corporate policies on diversity, equity, and inclusion (DEI) are being subjected to increased scrutiny and legal challenges even as the U.S. workforce becomes more diverse on nearly every measure – race, sex, gender identity, religion, age, national origin, ethnicity, language, politics, disability status, and many other categories. Because demographic trends nearly guarantee that diversity will increase over the next generation – on the lines we currently think of and several that we do not – DEI programs will become more, not less, important to organizations looking to succeed as the world transforms.

BACKGROUND

Increased diversity presents tremendous opportunities for businesses and other organizations. If properly harnessed and managed, diverse teams often can accomplish things that homogenous teams cannot; different viewpoints, backgrounds, and life experiences can coalesce in ways that are creative and unexpected and that solve problems in innovative ways.

Increased diversity also presents challenges for employers. People who do not share the same background experiences can sometimes talk past each other, may not have the same level of trust, and may ultimately fail to cooperate in a way that best helps the organization.

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Faced with the inevitability of a broadly diverse workforce and the opportunities and challenges such a workforce presents, employers have in recent years ramped up DEI programs and policies. Such policies vary widely in terms of scope and commitment but are common features of corporate life in the 2020s.

DEI programs that effectively help employers maximize the benefits and minimize the challenges of a diverse workforce are not easy to design. Some programs have been represented as heavy-handed in the way they treat race, sex, gender, and other characteristics.

With the high-profile decision of the U.S. Supreme Court in July 2023 in *Students For Fair Admissions, Inc. (SFFA) v. Harvard* that invalidated the use of race in college admissions, corporate DEI policies and practices have come under increasingly close scrutiny by people and organizations that believe the policies have gone too far. High-profile “reverse discrimination” lawsuits have resulted in recent eye-popping verdicts; Fortune 500 companies and law firms have been sued in the aftermath of *SFFA v. Harvard*. More lawsuits are certainly coming this year.

The good news for employers is that nothing has really changed in employment law; discrimination on the basis of race, sex, religion, national origin, and a number of other protected characteristics remains unlawful. The bad news is that the brighter spotlight that is shining on DEI policies as a result of the Supreme Court’s decision means that businesses may be called on more frequently to justify their DEI programs in court and in public opinion. And the increased politicization of DEI programs may itself require a change in the presentation and approach of such programs to make sure that they are effective with a wide and diverse audience.

This spotlight provides an opportunity for employers to adjust and recraft their DEI policies to be more effective and, at the same time, protect themselves from claims that such programs violate the law. Employers should carefully design a program that makes sense for their particular organization. While DEI programs will necessarily vary according to the organization and its goals, good programs will share many common elements.

COMMON ELEMENTS

Make Non-Discrimination a Core Component of the DEI Policy

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating on the basis of race, color, religion, sex, or national origin in any employment decision. State laws and government contracts reiterate this bedrock principle. The primary basis for claims made by

individuals and groups challenging DEI programs is that those programs discriminate against employees on one or more of these protected bases. While most organizations have a separate strong non-discrimination policy, such a policy is not always incorporated into a DEI policy. DEI policies that do not incorporate non-discrimination as a core component risk being misinterpreted, by managers eager to please or juries eager to find legal violations, as mandates to discriminate in favor of certain favored groups (to the detriment of certain unfavored groups).

In addition, a perception that certain employees are favored or disfavored on the basis of protected characteristics such as race or sex will undermine the effectiveness of a DEI program.

Match the Goals of Your DEI Program to the Mission and Culture of Your Unique Organization

Before crafting an effective DEI Program, an organization needs to understand itself. Articulating what the organization does, for whom it does it, how and by whom it does what it does, and the regulatory environment in which it operates will allow the organization to articulate how and why its version of a DEI program fits within its larger goals and is not simply an afterthought.

Understand the Composition of Your Current Workforce and What Your Future Workforce Is Likely to Be

A DEI program should be built around the organization's current workforce. Understanding who your employees are, as individuals and as a team, allows an organization to move consciously to the next level and build an even better organization. Statistics on race, sex, or similar protected characteristics can provide some valuable information for moving forward as an organization, but they can mask as much as they reveal if used clumsily.

Understand and Articulate What the Organization Means by "Diversity"

There are many different ways in which individual humans differ from one another, and a DEI policy should articulate which characteristics it will be addressing and why. In theory, true non-discrimination applied to the increasingly diverse U.S. workforce will result in increased diversity in an organization's workforce. Analyzing protected characteristics to evaluate the organization's conscious or unconscious compliance with non-discrimination values is one important component of a DEI policy. Understanding how people

with different backgrounds can best work together and how the organization can get the most out of people with different life experiences also requires awareness of what those backgrounds and life experiences are.

Similarly, Examine and Articulate What “Equity” and “Inclusion” Mean in the Context of the Organization

Equity and Inclusion have broad, and sometimes contradictory, meanings. In an effective and legally compliant DEI program, they should be seen as tools for an organization to get the most out of each individual employee. Equity does not mean that every individual will experience the exact same result or outcome, nor even that every individual employee will succeed. But neither does it mean that one size fits all in terms of the support needed to have the best chance to succeed. Equity in DEI programs means providing individualized support, when appropriate, to allow employees the best chance to succeed. Inclusion similarly means making sure that employees are able to succeed and bring positive value to the organization by building camaraderie and teamwork that recognizes the diversity among the employees. No employee is perfect, but most can be better performers with some individualized attention and a strong organizational culture that fosters excellence and teamwork. Organizations need to be clear-eyed about what they can do to help individual employees and about what they cannot.

Review Training Materials to Ensure That They Fit the Organization’s Values

There is a wide variety of consultants and training materials on DEI in the marketplace. Many of these are excellent and can assist organizations in creating effective and legally compliant DEI programs. Some, however, stray from the core non-discrimination requirements of state and federal law in ways that both undermine their effectiveness and present legal challenges. Politicians opposed to DEI generally have seized on some of these training materials and in at least two states (Florida and Texas) have tried to pass laws restricting what employers can include in DEI training for employees. While these specific laws have constitutional problems (Florida’s has been enjoined and Texas’s has not yet become law), the programs they purport to ban are unlikely to be very effective in most workplaces, even if they are not illegal. Employers should be very wary of using training programs that would not pass muster under these laws, even in states in which there is no law purporting to prevent such programs.

CONCLUSION

Some employers may look at the current confrontational landscape and back away from DEI programs. But U.S. society and the U.S. workforce are only going to become more diverse. Organizations need to address how best to operate in this increasingly diverse ecosystem; those that do not simply will not be as successful as they could be. Instead of being a reason to retreat, the current situation is better viewed as an opportunity to create a DEI program that works for the organizations in our increasingly diverse society.

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