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# CLE RELAY

## Balancing Diversity Imperatives and Legal Risk

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# Agenda

- DEI Initiatives – History and Overview
- Applicable Legal Principles
- Recent Legislative and Litigation Developments
- Role of Compliance
- DEI Best Practices
- Questions
- Conclude



# DEI Initiatives – History and Overview

# DEI – Brief Historical Development

- 1970s – Post-Title VII, focus on legal requirements and compliance
- 1980s – Focus on hiring and integration of women/minorities into corporate “mainstream”
- 1990s – Beginning of focus on diversity “business case” and how to more broadly “manage” workplace diversity
- 2000s – Evolution to “DEI” with:
  - More visible C-Suite involvement
  - Broader social justice lens
  - Focus on sensitivity and awareness of DEI issues, and multi-faceted training
- Source - *Anand & Winters*, “A Retrospective View of Corporate Diversity Training from 1964 to the Present” (2008)

# Current State (U.S.)

- DEI broadly tied to:
  - ✓ Company profitability and growth
  - ✓ Creation and maintenance of inclusive organizations to meet:
    - ✓ Changing employee/customer demographics
    - ✓ Race for talent
  - ✓ Leadership competence and credibility
  - ✓ Core component of company's success

## Current State (Ex-U.S.)

- DEI has migrated ex-U.S. with some notable differences
- A 2021 global workplace diversity study by PwC highlights some of the regional similarities and differences in DEI initiatives and priorities:
  - ✓ Across the board, survey respondents felt that diversity was a barrier to progression at their organizations, even though most organizations had diversity as a stated value or priority.
  - ✓ Consistently, organizations' primary goal was to leverage diversity and inclusion to attract and retain talent.

## Current State (Ex-U.S.) (cont'd)

- Priorities/focuses of DEI training programs vary by region:
  - In Asia-Pacific and North American countries, training programs most commonly focused on non-discrimination and regulatory compliance.
  - In Europe, the primary focus was on overcoming unconscious bias.
  - South American organizations focused primarily on programs about embracing difference.
  - Unlike North American companies, organizations in Asia-Pacific, Europe, and South America more commonly tracked data on a variety of measures, including discrepancies in promotions, performance, and compensation.
  - Source: [Global diversity and inclusion survey: PwC](#).

# DEI Initiatives – Common Features

- C-Suite support and direction
- Regular meetings or communications focused on DEI
- DEI task forces/steering committees/councils
- Affinity and resource groups
- Anti-discrimination/harassment policies and training programs
- Quantitative diversity targets
- Ongoing collection and review of diversity data
- Pay equity analyses

# DEI Initiatives – Common Features

- Career development tools, e.g.:
  - Apprenticeships
  - Tuition assistance programs
- Vendor/supplier engagement and inclusion
- Community investments
- Sources:
  - JUST Capital Company Data Tracker ([com-justcapital-web-v2.s3.amazonaws.com](https://com-justcapital-web-v2.s3.amazonaws.com)) (2021)
  - “12 Ways Companies Are Boosting Their DEI” ([shrm.org](https://shrm.org)) (2022)

# Affirmative Action Distinguished

- Affirmative action focuses on goals intended to impact identified workplace demographic issues
- See Executive Order 11246, addressing federal contractor obligations
- See also EEOC Guidelines on voluntary affirmative guidelines, 29 C.F.R. § 1608
- Current Supreme Court precedent allows voluntary programs under narrowly circumscribed circumstances:
  - *United Steelworkers v. Weber*, 443 U.S. 193 (1979)
  - *Johnson v. Transp. Agency*, 480 U.S. 616 (1987)



# Applicable Legal Principles

# Title VII

- Prohibits discrimination on account of, among other things, race
- Protections are **not** limited to historically disadvantaged groups
  - *E.g., Hague v. Thompson Distribution Co.*, 436 F.3d 816 (7th Cir. 2006)
- Supreme Court stated long ago that Congress prohibited “discriminatory preferences for *any group, minority or majority.*”
  - *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (emphasis added)
- Principal discrimination theories:
  - Disparate treatment – Intentional discrimination
  - Disparate impact – Neutral policy that impacts protected group more harshly without any business justification necessity
- Constructive discharge and retaliation also prohibited

# Title VII (cont'd)

- Reverse discrimination claims
  - Courts generally require some “background circumstances” to contextualize claims
    - *Formella v. Brennan*, 817 F.3d 503, 511 (7<sup>th</sup> Cir. 2016)
  - Circumstances can be provided by evidence employers are under “pressure” from, among other things, “corporate superiors imbued with belief in ‘diversity’”
    - *Preston v. Wis. Health Fund*, 397 F.3d 539, 542 (7<sup>th</sup> Cir. 2005)
  - In some cases, DEI programs or focus on diversity has been deemed sufficient to withstand summary judgment:
    - *Duvall v. Novant Health Inc.*, 2020 WL 6567140 (W.D.N.C. Nov. 9, 2020) (denying summary judgment on employee’s claims that he was terminated as part of an initiative aimed at increasing diversity in upper leadership)
    - *Kepple v. GPU Inc.*, 2 F. Supp. 2d 730 (W.D. Pa. 1998) (denying summary judgment on sex discrimination claims where employee adduced evidence of a program to “fast-track” women into certain positions and pointed to emails from “management referring to the company’s need for diversity”).
  - However, “reflecting a desire to improve diversity” and not generally considered direct evidence of discrimination.
    - *Johnson v. Metropolitan Gov’t of Nashville*, 502 F. App’x 523 (6<sup>th</sup> Cir. 2012)

# Other Federal Legislation

- Americans with Disabilities Act
  - Prohibits discrimination against qualified individuals with disabilities
- Some recent DEI initiatives have broadened scope to include greater emphasis on workplace opportunities and equal treatment for disabled individuals
- See, e.g., U.S. DOL Office of Disability Employment Policy

# State Legislation – Anti-Discrimination

- Most states provide comparable Title VII protections
  - E.g., Illinois Human Rights Act
  - New York State Human Rights Law
  - California Fair Employment and Housing Act (FEHA)
- Most state protections track the Title VII disparate treatment and disparate impact frameworks
- State law protections should generally extend to reverse discrimination theories

# Takeaways

- DEI initiatives generally raise no discrimination concerns
  - Seeking to expand pool of applicants
  - Allowing diverse groups to come together for a common cause and identify issues of concern
  - Promoting awareness of employee differences
  - Identifying unintended barriers to career advancement
  - Promoting outward-facing initiatives of diverse groups
- Care, however, must be taken to avoid actions that can raise discrimination issues
  - Race-based employment decisions
  - Establishing quotas where no lawful affirmative action obligations exist
- Care must also be taken to manage intersection of DEI initiatives and other employment actions that occur in the workplace



# Recent Legislative and Litigation Developments

# Legislation/Regulatory Actions Promoting DEI

- Executive Order 13985 (2021) – Advancing Racial Equity and Support for Underserved Communities Through the Federal Government
- SEC Response to Climate and ESG Risks and Opportunities
- NASDAQ Rule 5605(f) regarding board diversity and disclosure
- California laws (SB 826 and AB 979) mandating diverse board memberships for California-based companies
- State pay equity laws
  - Almost every state imposes some type of obligation or disclosure requirement
  - Source: The Pay Equity Project, *Fifty-State Pay Equity Law Summary*

# Legislation Seeking to Regulate DEI Efforts

- Florida “anti-woke” amendments to Florida Civil Rights Act (2022)
  - Mirrors Trump administration executive order limiting certain topics in federal contract training
  - Identifies various “prohibited concepts” that DEI training may not “espouse...an individual to believe” as a “condition of employment”
  - Permits discussion of concepts if they are presented in “an objective manner without endorsement of the concepts.”



# Recent and Pending Legal Challenges

- California lower courts strike down board diversity mandates
  - *Crest v. Padilla*, No. 20-STCV-37513 (LA Super. Ct.) struck down mandates related to underrepresented communities on boards
    - Laudable purpose of law could not overcome constitutional requirement that race-based remediation be narrowly tailored to serve a compelling government interest
  - *Crest v. Padilla*, No. 19-STCV-27561 (LA Super. Ct.) struck down mandates related to representation of women on boards
    - Law did not permit attempts to remedy “generalized, non-specific allegations of discrimination”

## California Law Requiring Board Diversity Is Struck Down

In a blow to the state’s efforts to deal with disparities in the workplace, a judge found the law unconstitutional. It’s unclear whether the state will appeal the ruling.

**Another California board diversity law was struck down, but it already had a big impact.**

## Recent and Pending Legal Challenges (cont'd)

- *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (U.S. No. 20–1199)
  - Challenge to race-conscious admission programs
  - Commentators watching to see possible impact of decision on similar workplace programs

### ***Supreme Court Will Hear Challenge to Affirmative Action at Harvard and U.N.C.***

The court's new conservative supermajority may be skeptical of admissions programs that take account of race to foster educational diversity.

# Recent Case Study

- Private company institutes “diverse slate” policy
  - At least half of candidates for \$100,000+ jobs must be diverse
- Existing policy is re-introduced in 2020 as part of DEI push
- Employees contend they were required to conduct “sham” interviews in order to meet “diverse slate” requirements
- One individual who raises concerns is subsequently terminated under disputed circumstances
- In June 2022, company announces a pause to review policy and related processes, including how policy should be applied by decisionmakers

# Takeaways

- Legislation efforts in “both directions” likely to proliferate, especially at the state level
- Related regulatory efforts and litigation likely to increase, especially in pay equity areas
- Litigation challenging application of DEI efforts in private workplaces also likely to increase
- Developments highlight critical importance of internal compliance, oversight and review of programs and concerns that may be raised



# Role of Compliance Efforts in Promoting Effective DEI Initiatives

# Compliance Role Around DEI Initiatives

**Inception**



## Compliance Role Around DEI Initiatives (cont'd)

- Periodic “pressure-testing” of how initiatives are in fact applied
  - Evaluate how DEI aspirations are being applied
- Look for evidence of:
  - × Misapplication of aspirational goals
  - × Creation of “de facto” quotas or goals
  - × Inexact or inaccurate communications around DEI objectives
  - × Actual “gaming” of system

## Compliance Role Around DEI Initiatives (cont'd)

- Provide robust internal processes for evaluating concerns
  - ✓ Documented and well-communicated processes for raising concerns
  - ✓ Guidelines for conducting thorough and prompt investigations
  - ✓ Disciplined processes for collecting information and document investigation
  - ✓ Post-investigation assessment to identify program design or process changes



# Best Practices For Promoting DEI

# Guardrails and Best Practices

- Credibly drive initiatives from top of organization
- Avoid quotas or hard “set asides”
- Focus on aspirational objectives
- Know your workplace and monitor its evolution
- Set “smart” goals that in fact relate to workforce imbalances/needs

# Guardrails and Best Practices (cont'd)

- Focus broadly on all possible barriers, such as:
  - Recruiting
  - Hiring
  - Retention/attrition
  - Career advancement
  - Leadership opportunities
- Clearly and regularly communicate DEI goals to all constituents
- Regularly review DEI programs
  - Pressure test how goals are being used
  - Confirm goals remain appropriate

# Guardrails and Best Practices (cont'd)

- Use metrics and meaningfully evaluate the results
  - Process metrics
  - Outcome metrics
- Understand how data is to be collected, evaluated, and disclosed
- Consider how to coordinate your DEI efforts and your need to evaluate legal compliance
- Consider how to coordinate your DEI efforts and instances where claims of non-compliance are raised



# Questions



# **Restrictive Covenants: Enforceability Challenges and Other Options to Protect Business Interests**

**Friday, June 24, 12:00 – 1:15 pm CT**

Andrew Vail, Jason Bradford, Ben Halbig, Meg Hlousek, Lauren Benigeri, Casey Jedele



# Supreme Court Term in Review

## Friday, June 29, 12:00 – 1:15 pm CT

Ian Heath Gershengorn, Jessica Ring Amunson,  
Adam G. Unikowsky, Ishan K. Bhabha, Matt Hellman

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# Questions?

## Contact Laura Zavala

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**Thank You!**