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LEGAL CASE FOR DIVERSITY AND INCLUSION: KEY LAWS, CASES, AND REGULATIONS

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Many people believe that corporate diversity and inclusion ("D&I") efforts are somehow an exception to federal and state laws about non-discrimination. Nothing could be further from the truth. Appropriate and effective corporate D&I strategies and initiatives seek to create workplaces that achieve the societal goal where all employees are treated fairly, equitably, and within the guidelines established by relevant law. The following sections outline the statutes, case law, regulations, and other legal bases support—and encouraging aggressive D&I efforts.

Federal law, cases at every level of the judiciary including the Supreme Court, and regulations promulgated by enforcement agencies, such as the U.S. Equal Employment Opportunity Commission ("EEOC"), all make clear that aggressive D&I programs are lawful, and in some circumstances mandatory. At the same time, however, those programs must comply with federal non-discrimination laws and avoid so-called "reverse discrimination" where members of majority groups are discriminated against in the name of assisting members of underrepresented groups.

Today's presentation will review key laws, court decisions, and regulations that create guidelines, "guardrails" if you will, for D&I programs that protect both minority and majority groups, and help realize the objective of workplaces where all employees are treated fairly and equitably. Below is a discussion of the key laws, cases, and regulations.

I. Statutes

A. Title VII, Civil Rights Act of 1964 (42 U.S.C. 2000e, *et seq.*)

Title VII of the Civil Rights Act of 1964 is a federal law that prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion. It generally applies to employers with 15 or more employees, including federal, state, and local governments. Title VII also applies to private and public colleges and universities, employment agencies, and labor organizations.

Title VII is the primary statute under which federal employment discrimination claims arise. It is also the model for most state anti-discrimination laws, which typically include

the same five "protected classes," often with additional categories, such as marital status, veteran status, gender identity, and LGBT status.

The two primary Supreme Court cases interpreting Title VII in the D&I context (referred to as "voluntary affirmative action" by the Court), and several key progeny, are outlined below.

One additional idea to keep in mind is that Title VII prohibits discrimination based on "sex" and "race", not "female" and "minority." Thus, Title VII protects men and non-minorities, as well as women and minorities. Thus, so-called "reverse discrimination" cases are cognizable under Title VII.

B. Age Discrimination in Employment Act (29 U.S.C. Section 621)

The Age Discrimination in Employment Act of 1967 (ADEA) protects certain applicants and employees 40 years of age and older from discrimination on the basis of age in hiring, promotion, discharge, compensation, or terms, conditions or privileges of employment. The ADEA is enforced by the Equal Employment Opportunity Commission (EEOC). Note that the Virginia Human Rights Act ("VHRA") is similar in that it also prohibits employment practices that discriminate on the basis of age against applicants and employees who 40 years or older (VA Stat. Sec. 2.2-3900 *et seq*.). But note that VHRA covers employers with *six* or more employees.

C. Americans with Disabilities Act Amendments Act of 2008 (42 U.S.C. Section 12101, *et seq.*)

The Americans with Disabilities Act ("ADA") prohibits discrimination against individuals with disabilities in all areas of public life, including jobs, schools, transportation, and all public and private places that are open to the general public. The purpose of the law is to make sure that people with disabilities have the same rights and opportunities as everyone else. The ADA provides civil rights protections to individuals with disabilities similar to those provided to individuals on the basis of race, color, sex, national origin, age, and religion in the Civil Rights Act of 1964. It guarantees equal opportunity for individuals with disabilities in public accommodations, employment, transportation, state and local government services, and telecommunications.

In 2008, the Americans with Disabilities Act Amendments Act ("ADAAA") was signed into law and became effective on January 1, 2009. The ADAAA made several significant changes to the definition of "disability." The changes in the definition of disability in the ADAAA apply to all titles of the ADA, including Title I (employment practices of private employers with 15 or more employees, state and local governments, employment agencies, labor unions, agents of the employer and joint management labor committees).

The ADAAA made several significant changes to the definition of disability to ensure that the term would be broadly construed and applied without extensive analysis, so that all individuals with disabilities could receive the law's protections. The ADAAA has moved most litigation under the ADA from questions of whether an employee had a covered disability, to a far greater focus on whether the employer engaged in an effective "interactive process" with the employee to understand the scope of the disability and identify (and implement) an appropriate accommodation. Employers are not obligated to implement the employee's preferred accommodation, but unless there is an "undue hardship," the employer is required to implement some type of accommodation. As you might expect, the question of "undue hardship" is another area of frequent litigation.

D. Lilly Ledbetter Fair Pay Act of 2009

The Lilly Ledbetter Fair Pay Act was the first legislation signed by President Barack Obama, on January. 29, 2009. The Ledbetter Fair Pay Act amended the Equal Pay Act of 1963 to specifically overturn the Supreme Court's interpretation of Equal Pay Act in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.,* 550 U.S. 618 (2007). In that decision, the Court interpreted the Equal Pay Act's requirement that a claim of discrimination in pay be made within 180 days of the act of alleged discrimination as requiring that the claim be filed within 180 days of the *first* act of discrimination. In Ms. Ledbetter's case, the Court held that the discrimination had occurred many years earlier when she had first joined Goodyear, and so her claim was time-barred. The Lilly Ledbetter Act amended the Equal Pay Act to clarify that actionable discrimination based on age, religion, national origin, race, sex and disability will "accrue" every time the employee receives a paycheck that is deemed discriminatory.

The Lilly Ledbetter Fair Pay Act gives employees the right to file suit 180 days after the last pay violation and not only 180 days after the initial pay disparity. In effect, each paycheck restarts the 180-day countdown to file a claim.

II. Supreme Court Cases

A. *United Steelworkers v. Weber*, 443 U.S. 193 (1979)

The leading U.S. Supreme Court case, *United Steelworkers v. Weber*, 443 U.S. 193 (1979), addressed the circumstances under which companies can apply racial preferences in employment. *Weber* approved a 50% set-aside of slots for African Americans in an employer-conducted training program that would qualify them for advancement, based on the company's written, Voluntary Affirmative Action Plan ("VAAP") demonstrating the following:

1. A "manifest imbalance" between representation of African Americans in "traditionally segregated job categories" and their availability in the relevant labor pool (shown by statistical analysis);
2. Methods chosen to correct the manifest imbalance do not "unduly trammel the rights" of unprotected employees (here, non-African Americans) and do not "create an absolute bar to the advancement of non-minority employees" (*e.g.*, by discharging Whites and replacing them with minorities); and
3. The VAAP is "temporary," used only to *attain* representation and not to *"maintain"* representation.
4. Note that the 50 percent set-aside—a clear "quota"—was authorized in *Weber*, even though some subsequent cases in other areas state that "quotas" are unlawful.

B. *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S 616 (1987)

Eight years after *Weber*, the Supreme Court faced the preference question in the context of a female who received a promotion over a higher-qualified male. *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987), applied the Weber standards in the context of a female being promoted over a male pursuant to the company's Voluntary Affirmative Action Plan VAAP. The Court reviewed the circumstances underlying the promotion against the Voluntary Plan, and upheld the promotion in the gender context. The Court made it clear that (a) statistical analyses are the basis for demonstrating "manifest imbalance," (b) an employer *does not need to admit past discrimination* to support the Voluntary Affirmative Action Plan (societal discrimination is sufficient), and (c) the absence of a "quota" for increasing female representation in the workforce supported the "did not unnecessarily trammel" prong of the analysis.

These two seminal Supreme Court cases established the test for when U.S. companies can apply preferences in employment programs and decisions to assist in eliminating under-representation of specifically identified minorities (*e.g.*, African Americans, Hispanics) and females. While there have been no succeeding Supreme Court cases substantially modifying the test set forth, subsequent cases in other contexts (*e.g.*, higher education admissions such as the *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) decision, authorizing "diversity" as a compelling state interest justifying preferential admissions; and *Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir. 2003), applying *Grutter* in the public employment context) support applying preferences in decision-making as long as the established standards are met.

C. Lower Court Cases After *Weber/Johnson*

1. *Shea v. Kerry,* 796 F.3d 42 (D.C. Cir. 2015), upheld the District Court's grant of summary judgment in favor of defendant State Department on White employee's claim of reverse discrimination (analyzed under Title VII, not U.S. Constitution), finding the Affirmative Action Plan valid under *Weber/Johnson.*

2. *Oerman v. G4S Government Solutions*, WL 3138174 (D.S.C., 2012) (Report and Recommendation by U.S. Magistrate Judge): held that Federal contractor's reliance on its *EO 11246 AAP* (not a Voluntary AAP) to downsize a White manager instead of an African American manager (in the same group, deemed equally qualified), using "race as a tie-breaker" because the AAP identified minorities as underutilized in the manager category, not justified by the AAP because the AAP (repeating OFCCP regulation language) prohibits taking race into account in selection decisions. *But see Sharkey v. Dixie Electric Membership Corp*., 262 Fed. Appx. 598 (5th Cir. 2008), a Court of Appeals decision upholding a race-based employment decision under a Federally-mandated, OFCCP-regulated AAP.

3. *Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672 (4th Cir. 1996), is a Fourth Circuit case applying Weber/Johnson in the context of pay increases to female faculty.

4. Many of the lower court cases apply the requirements of Weber/Johnson but deny summary judgment because of disputed facts. Some of the cases pay close attention to the labor pools selected, noting that general population may be sufficient for jobs with no special qualifications, but that jobs with special qualifications need to identify labor pools with those qualifications.

III. EEOC Affirmative Action Guidelines (29 CFR Part 1608)

Consistent with the rationale of the Supreme Court *Weber* and *Johnson* cases, the U.S. Equal Employment Opportunity Commission ("EEOC") has established Guidelines, set forth at 29 CFR Part 1608, entitled "Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, As Amended." As noted in the "Statement of Purpose," Section 1608.1:

> "Since the passage of Title VII in 1964, many employers, labor organizations, and other persons subject to Title VII have changed their employment practices and systems to improve employment opportunities for minorities and women, and this must continue. . . Many decisions taken pursuant to affirmative action plans or programs have been race, sex, or national origin conscious in order to achieve the Congressional purpose of providing equal employment opportunity. Occasionally, these actions have been challenged as inconsistent with Title VII, because they took into account race, sex, or national origin. . . Any uncertainty as to the meaning and application of Title VII in such situations threatens the accomplishment of the clear Congressional intent to encourage voluntary affirmative action. The Commission believes that by the enactment of Title VII Congress did not intend to expose those who comply with the Act to charges that they are violating the very statute they are seeking to implement. Such a result would immobilize or reduce the efforts of many who would otherwise take action to improve the opportunities of minorities and women without litigation, thus frustrating the Congressional intent to encourage voluntary action. . . Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in Title VII. Affirmative action under these principles means those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity."

Sections 1608.1 and 1608.2 establish that companies facing a charge of discrimination because of actions taken to their Voluntary Affirmative Action Plans may defend such actions pursuant to their Plans and the EEOC Guidelines, both in an EEOC investigation, and in private litigation.

According to the EEOC Guidelines, the Voluntary Affirmative Action Plan must include:

1. "Reasonable self-analysis" (adverse impact; effects of prior discriminatory practices—underrepresentation). "There is no mandatory method of conducting a self-analysis. The employer may utilize techniques used in order to comply with Executive Order 11246 . . ." Section 1608.4 (a).
2. "Reasonable basis" for concluding action is appropriate (from the analysis). "It is not necessary that the self-analysis establish a violation of Title VII. The reasonable basis exists without any admission or formal finding that the

person has violated Title VII, and without regard to whether there exists arguable defenses to a Title VII action." Section 1608.4 (b).

3. "Reasonable action" taken in accordance with the plan. "The action taken pursuant to an affirmative action plan or program must be reasonable in relation to the problems disclosed by the self-analysis. Such reasonable action may include goals and timetables or other appropriate employment tools which recognize the race, sex, or national origin of applicants and employees. It may include the adoption of practices which will eliminate the actual or potential adverse impact, disparate treatment, or effect of past discrimination by providing opportunities for members of groups which have been excluded, regardless of whether the persons benefited were themselves the victims of prior policies or procedures which produced the adverse impact or disparate treatment or which perpetuated past discrimination." Section 1608.4 (c). "Such steps, which in design and execution may be race, color, sex, or ethnic 'conscious,' include, but are not limited to, the following:"

    a. Establishment of short and long-term goals and timetables for specific job classifications, taking into account availability of qualified persons in the relevant job market;

    b. Recruitment program designed to attract qualified members of the group in question;

    c. Systematic effort to re-design work, jobs, and training to progress in career field;

    d. Revamping selection instruments or procedures to reduce or eliminate exclusionary effects on particular groups in particular job classifications;

    e. Initiation of measures designed to assure that particular groups are included in selection pools;

    f. Career and advancement training for particular groups;

    g. Establishment of a system of regular monitoring of the Voluntary Affirmative Action Program, and procedures for making adjustments as needed.

Additionally, in recognition of the *Weber/Johnson* requirements, the Guidelines require the following:

1. The Voluntary Affirmative Action Plan must be in writing, and dated;
2. The race/sex-conscious provisions of the Plan should be maintained only so long as is necessary to achieve the Plan's objectives; and,
3. The goals and timetables should be reasonably related to the availability of qualified or qualifiable applicants, and the number of employment opportunities expected to be available. Section 1608.4 (c) (2).

IV. Conclusion

Federal and state laws, court decisions, and regulations mandate non-discrimination in employment. The discrimination prohibitions apply equally to majority and minority groups. That is, discrimination against members of majority groups, *e.g.,* white men, is also prohibited, even if the intent of the discrimination is to assist members of traditionally underrepresented groups, such as minorities and women.

Within those prohibitions, however, there is significant, lawful, opportunity to implement measures designed to assist members of underrepresented groups obtain employment and succeed in the workplace. The laws, court decisions, and regulations discussed above outline the boundaries of lawful D&I programs (also know as "voluntary affirmative action"), and support, indeed encourage, strong efforts to secure the benefits of diverse and inclusive workplaces.

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