

Safely Implementing DEI Initiatives

Issue:

How can employers further their Diversity, Equity and Inclusion (DEI) initiatives without inviting increased government scrutiny and potential litigation?

Historical Context:

Many organizations have been spurred by recent events to recommit to fostering a more inclusive workforce. Some have been moved to acknowledge historical disparities and commit publicly to addressing them. But instituting a DEI initiative and disclosing these efforts require a comprehensive plan.

Critical Factors:

In an effort to build a more equitable workforce, and in the face of mounting pressure, organizations have been releasing their DEI data. But there is a conundrum: acknowledge historical disparities in pay or promotions based on race, gender, and other protected characteristics, and face a potential lawsuit, increased scrutiny by the U.S. Equal Employment Opportunity Commission (EEOC) and other agencies, or the risk of shareholder derivative suits seeking to hold directors and officers of major companies accountable for alleged failures to uphold their DEI commitments. How can employers be transparent without inviting costly and unfounded litigation and other risks?

Six Steps to Take:

It is essential to work closely with counsel when pursuing a DEI initiative or aggregating or releasing DEI data. Adopt these measures to avoid or minimize potential monetary exposure and reputational damage:

1. **Conduct a DEI assessment.** Analyze your data to determine where DEI performance is not meeting objectives. Many corporations delay a DEI assessment (or

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avoid one altogether) out of fear it will uncover significant diversity deficiencies. However, this is a reason to be proactive, and to conduct an assessment safely — with guidance of counsel, under privilege — and adjust your efforts accordingly. While it is most beneficial to assess *before* making public statements or releasing DEI information, it is not too late to work with legal counsel if public statements or commitments have already been made.

2. Implement “race/gender-neutral” DEI efforts. Review policies and practices for biases. Review position descriptions and announcements for any job requirements that could limit the pool of applicants based on race or gender. DEI measures that are designed and implemented in a race- and gender-neutral fashion are less likely to raise a legitimate legal challenge. (Importantly, although Title VII of the Civil Rights Act prohibits employers from taking race and gender into account, race/gender-conscious programs and employment decisions may be permissible where neutral measures have failed, provided such measures are taken pursuant to a compliant Voluntary Affirmative Action Plan.)

3. Focus on pay equity. Conduct pay equity and adverse impact analyses by gender, race and ethnicity, age, and other factors. Use advanced regression analyses of various job categories and workplace functions to facilitate prompt corrective action where inequities appear.

4. Use benchmarking tools. Proactively monitor DEI performance to prevent patterns of inequity from emerging. An array of assessment tools are available, including:

Regular statistical benchmarking (including creation of industry/geographic-specific databases) of workforce demographics to continually identify (and address) “gaps/underutilizations”;

Rigorous use of “big data” to identify status, trends, and problems; and

Industrial/organizational psychologists and other experts to create and validate pre- and post-employment tests.

5. Enhance EEO policies and training. Regularly update Equal Employment Opportunity (EEO) policies and distribute them to all employees. Ensure that the policies are given high priority by senior management. Provide comprehensive training to ensure that company practices effectively implement company policies. Make sure that internal complaint systems, processes, and outcomes build credibility with employees. Effective internal mechanisms may prevent employees from pursuing external remedies (such as a plaintiff’s attorney) and can serve as an “early warning system” if there *is* cause for concern.

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6. Develop an authentic DEI narrative. Work with legal counsel to create a narrative that resonates with diverse employees, allies, and other stakeholders. Only if the narrative is authentic to the organization and fully represents the voices of its workforce can leaders build “buy in,” credibility and trust — and minimize the likelihood employees will seek an alternative avenue to address workplace concerns.

More information on this topic can be found at www.jacksonlewis.com.

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