

Practical Advice on Recruitment and Hiring in the Current Climate

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Agenda

- Quick Employment Law Framework Primer
- Let's do a DEI Audit of Typical Hiring Practices
 - Pipeline Considerations:
 - Internship Design
 - Use of Diverse Slates
 - Goal-Setting?
 - Consider voluntary affirmative action guidelines
 - Hiring Logistics
 - Record-Keeping
 - Training
 - Q&A

Quick Primer on Employment Law Framework

Quick Primer

Title VI and Title VII

- Same statute: Civil Rights Act of 1964, 42 U.S.C. §§ 2000 *et seq.*
- Title VI (“Title Six”) prohibits discrimination on the basis of race, color, or national origin in any program or activity that receives Federal funds or other Federal financial assistance.
- Title VII (“Title Seven”) prohibits discrimination in employment on the basis of race, color, religion, sex or national origin.

“Affirmative Action”

- Before *summer 2023*, in university admissions, race allowed to be used as a plus-factor.
- Big difference in employment: race could never be used as a plus-factor.

Quick Primer (Cont'd)

Section 1981:

- **“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts,** to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property **as is enjoyed by white citizens,** and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.”
- Reverse discrimination lawsuits.
- Unsettled, but likely that corporations have standing to assert Section 1981 claims.

Public Accommodations

- State-specific, across U.S.
- *E.g.*, Code of Virginia Section 2.2-3904
 - Protected Characteristics: race*, color*, religion, national origin*, sex, pregnancy, childbirth or related medical conditions, age*, marital status*, sexual orientation*, gender identity*, disability*, and military status
 - * - denotes protected characteristic in MD’s public accommodation statute as well
- Corporations likely have standing to bring a public accommodations claim.

“DEI Audit” on Hiring Practices

Pipeline Considerations – Internship Design

Traditional Model

Internship available to applicants who identify as a member of an underrepresented group in our profession. “Underrepresented groups” include “specifically African American/Black, Latinx, Native Americans/Native Alaskans, and/or members of the LGBTQ+ community”

Internship available to all applicants, with members of underrepresented groups encouraged to apply (particularly racial or ethnic minorities, women, LGBTQ+, and first generation professionals).

Modifying Protected Characteristics Models

Internship available to applicants who identify as a member of an underrepresented group in our profession. [Does not define or police definition in self-identification]

Internship available to applicants who identify as a member of an underrepresented group in our profession. “Underrepresented group” is defined as including racial or ethnic minority, women, member of the LGBTQ+ community, disabled, or veteran.

No Protected Characteristic Models

Internship available to all applicants. [Requirement to write essay explaining “Time you overcame a difficulty or road block to achieve your professional goals.”]

Internship available to all applicants with a demonstrated commitment to diversity and inclusion in our profession. [Requirement to write essay explaining commitment.]

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Am. Alliance for Equal Rights v. Perkins Coie LLP, 3:23-cv-01877 (N.D. Tex. Aug. 2023)

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Am. Alliance for Equal Rights v. Morrison & Forester LLP, 1:23-cv-23189 (S.D. Fl. Aug. 2023)

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Pipeline Considerations – Internship Design

- (1) What if the “diversity internship” pays interns in specific URGs more money than other interns in the same role?**
- (2) All can apply, but goal is to recruit underrepresented individuals...**

Pipeline Considerations – Partnerships

Apollo, Ares and Oaktree to Launch \$90 Million Initiative for Students at Historically Black Colleges and Universities

Leading firms invest in Black Futures with formation of “AltFinance” Initiative to introduce more HBCU students to the influential alternative investment industry

Barnard College Partners with Bridgewater Associates to Encourage More Women to Join the Investment Industry

In partnership with Bridgewater Associates, Barnard will recruit “New Pathways Bridgewater Scholars,” and will provide the training, exposure, and opportunities required to become workforce leaders.

Other ways to diversify applicant pools?

- Partnerships to build a pipeline
- Remote work as engine for expanding pool
- Industry affinity group participation – e.g., Out and Equal, National Asian Pacific American Bar Association, National Society of Black Engineers

Pipeline Considerations – Use of Diverse Slates

Diverse Slate: Any list of applicants for consideration for a role must include qualified applicants from URGs

WELLS FARGO

- Continue to expect a 50% diverse candidate slate and a diverse interviewer panel. The company expects that the 50% will evolve as our diverse representation continues to improve.
- Redefine roles that are in-scope for the guidelines based on job level, not compensation. This change is a more consistent way to apply the guidelines across the company.
- Revise the existing exception approval process to provide for manager and recruiter review and approval, and ongoing monitoring.
- Provide updated training for recruiters and managers on the diverse candidate slate guidelines, including how they should be applied throughout the recruiting and hiring process.
- Focus our ongoing monitoring of the diverse candidate slate guidelines on the effectiveness of their contribution to our goal of increasing diverse representation.
- Continue to hold senior leaders accountable for making progress on diverse representation.

Pipeline Considerations – Use of Diverse Slates

Diverse Slate: Any list of applicants for consideration for a role must include qualified applicants from URGs



Diverse Slate Approach: The more people you interview who don't look or think like you, the more likely you are to hire someone from a diverse background. To hard wire this behavior at Facebook, we introduced our Diverse Slate Approach (DSA) in 2015 and have since rolled it out globally. DSA sets the expectation that hiring managers will consider candidates from underrepresented backgrounds when interviewing for an open position.

Pipeline Considerations – Use of Diverse Slates

Diverse Slate: Any list of applicants for consideration for a role must include qualified applicants from URGs



Expanding Diverse Slates

A candidate slate, defined as all candidates considered by the hiring manager, needs at least two qualified women candidates (global) or at least two qualified candidates who are women, Black or African American, or Hispanic (U.S.) to be considered diverse. We also deploy diverse interview teams, as this invites different perspectives in the candidate selection process and leads to more diverse hiring outcomes. It is required that all candidate slates be diverse.

Pipeline Considerations – Use of Diverse Slates

Diverse Slate: Any list of applicants for consideration for a role must include qualified applicants from URGs

- Ensure a real commitment to the approach
- Which jobs should you target?
- Consider diversity of *interview panels*
- Avoid tokenism

Pipeline Considerations – The “Rooney Rule”



The Washington Post
Democracy Dies in Darkness

DEI's 'Rooney Rule' placed under legal microscope, on and off the field

Stephen Miller's America First Legal files an EEOC complaint against the NFL, adding to the wave of challenges against a hiring practice widely used in corporate America

Hundreds of companies have adopted some form of the Rooney Rule since 2003, when the league began compelling teams to interview minority candidates for any head coaching position. Many Fortune 500 companies go further, with some requiring that as many as three-quarters of job contenders come from underrepresented groups, or offering incentives to select them.

Goal-Setting – Affirmative Action Plans

- Title VII supports “Voluntary” Affirmative Action Plans
- Looks very different to educational “affirmative action”:
 - Employer must demonstrate a manifest imbalance in the workforce based on protected characteristics when comparing representation to the relevant availability pool/pipeline.
 - Goals should match availability.
 - Imbalance should be remedied through broader applicant pool outreach, pipeline recruitment, and training.
 - **Same concepts when building out a diverse slate approach?**

Goal Setting – Affirmative Action Plans – Hypo

In 2020, our company made public commitments that 40% of our entry-level employees will be female, and doubling our overall representation of Black employees by 2025.

We were about to publish our annual update on our progress toward those goals.

Should we change our approach?

Hiring Logistics

- Record-Keeping
 - Fulsome description for hiring selection that does not include protected characteristics
 - Check written forms!
- Training for Recruiters/Interviewers/Hiring Managers
 - Protected characteristics are never reason for hiring decision
 - Reframe to consider diversity of experience, leadership, resilience, commitment to diversity.

Not permissible...

- *Bonus – candidate a woman!*
- *Plus factor – POC*
- *Extra value – helps diversity goals*

Diverse experience, and ideas...

- *Bonus – leadership experience with ERG*
- *Plus factor – excellent recommendation*
- *Extra value – improves average GPA for entering class*

A black and white photograph of a meeting table. Several hands are visible, some holding papers, some pointing at a laptop screen, and some holding pens. There are coffee cups and various documents scattered on the table. The overall scene suggests a collaborative work environment.

What now?

- Consider a “DEI Audit”
- Consider voluntary affirmative action guidelines
- Increased training
- Anticipate pipeline challenges
- Stay aware of state laws!

Q&A?

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Paul Hastings' Employment Law Practice

Employment Law Department Overview

Who We Are

We are a recognized market leader in complex employment law and human capital issues. We have a depth of bench and experience in the employment law space unparalleled among our peer firms. Our team regularly navigates evolving and cutting-edge employment issues, class and other mass litigation, regulatory investigations, and enforcement actions, as well as providing advice and direction on compliance issues. We advise c-suite and boards as they address increasing regulatory monitoring and enforcement, shareholder demands, as well as employee activism.

We are consistently sought out to assist with the largest and most challenging employment and human capital matters in the market. Most recently, our lawyers have been engaged to defend our clients, including **Activision**, **Google**, and **Disney**, in some of their most challenging, headline-grabbing matters that carry significant legal, financial, or reputational risk.

What We Do

- Employee Mobility and Trade Secrets
- Employment Counseling and Preventative Advice
- Employment Litigation (Class, Collective, Individual, Systemic)
- Human Capital Compliance/ESG
- International Employment Law
- Pay Equity Litigation
- Regulatory Investigations and Enforcement Defense
- Traditional Labor and the National Labor Relations Act (NLRA)
- Wage & Hour/Private Attorney General Act (PAGA)
- Workforce Data and Technology
- Workplace Retaliation and Whistleblower Defense

Market Recognition

Chambers AND PARTNERS

Band 1

Nationwide Labor and Employment Law

Band 1

Labor and Employment Law in California

Band 1

Labor and Employment Law in D.C.

Band 2

Labor and Employment Law in New York



Tier 1

Labor and Employment Disputes (Including Collective Actions): Defense

Tier 2

Workplace and Employment Counseling

Tier 2

Trade Secrets

*“The Paul Hastings team has an **encyclopedic knowledge** of case law and relevant legislation.”*
– Chambers 2023

*“The Labor and Employment group are the **very best in the field.**”*
– Legal 500 2023

*“The **partners are exceptional.** ... They elevate legal practice to an art form.”*
– Legal 500 2023