# Developing a Diverse Workforce

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Issues of racial equality have at times dominated news cycles this year. Against this backdrop, and notwithstanding the other challenges of 2020, many employers are working to meaningfully enhance their approaches to attracting and retaining a diverse workforce. The framework below outlines opportunities for employers to consider as they expand their recruitment efforts and look for ways to support an inclusive work environment.

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employment discrimination on the basis of race, color, religion, sex and national origin at a federal level. The law applies to most private employers with at least 15 employees and provides protections for employees (and former employees) and job applicants. Pursuant to Title VII, employers may not take an adverse employment action against an employee or job applicant because of his or her race. However, Title VII does not prohibit all race-conscious employment efforts.

## Review of Recruitment Efforts To Increase Diversity of Talent Pool

The Equal Employment Opportunity Commission's (EEOC) April 2006 Compliance Manual Section 15 makes clear that Title VII forbids not only recruitment practices that purposefully discriminate because of race but also practices that disproportionately limit employment opportunities based on race and that are not related to job requirements or business needs. The EEOC also recognizes that Title VII permits diversity efforts designed to open up opportunities for everyone, particularly in the field of recruitment. Compliance Manual Section 15 provides that if an employer notices, for example, that Black workers are not applying for jobs in the numbers that would be expected given the available labor force, the employer can lawfully adopt strategies to expand the applicant pool of qualified Black workers — such as by recruiting at schools with high Black enrollment.

While the EEOC has explained that Title VII allows employers to adjust recruiting efforts to increase workplace diversity, Compliance Manual Section 15 informs that Title VII prohibits screening or culling recruits on the basis of race. Title VII specifically forbids job advertisements based on race, color and other protected traits, and prohibits discrimination by employment recruiting agencies. If an employer directs a recruiter to only search for applicants of a specific race and the recruiter honors this request, both the employer and the recruiter could be liable.

Perhaps the most well-known diversity recruitment efforts are those associated with the 2003 "Rooney Rule," which initially required each National Football League team to interview at least one person of color when seeking to fill head coaching positions. The current iteration of the Rooney Rule, updated in May 2020, requires teams to interview two minority candidates from outside their organization for head coaching positions and at least one minority candidate from outside their organization for vacant offensive, defensive or special teams coordinator positions. Organizations outside the sports world have adopted their own version of the Rooney Rule. Some law firms, for instance, have adopted a variation called the "Mansfield Rule," which requires active consideration of diverse candidates for at least 30% of open leadership and governance positions. The Rooney Rule can be a useful self-check measure for employers attempting to ensure equal opportunity for an applicable labor force. However, employers should be mindful, when considering implementation of their own version of the Rooney Rule, that having a racial quota system would violate Title VII.

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## Voluntary Affirmative Action Plans

Should other changes in recruiting practices fail to meaningfully increase the diversity of a workplace, an employer might consider implementing an affirmative action plan (AAP). A formal plan designed by the employer to enhance equal employment opportunities, AAPs contain a diagnostic component that includes a number of quantitative analyses designed to evaluate the composition of an employer's workforce and compare it to the composition of the relevant labor pools. AAPs also include action-oriented programs. If women and people of color are not being employed at a rate to be expected given their availability in the relevant labor pool, the employer's AAP includes specific practical steps designed to address this underutilization. These steps can include, for example, actively recruiting at schools with predominantly minority or female enrollments or offering counseling to assist employees in identifying training and educational programs to enhance promotions and opportunities for job rotation or transfer. Certain government contractors and subcontractors are required by law to adopt AAPs.

In the seminal *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, the U.S. Supreme Court in 1979 held that Title VII does not prohibit a private employer from voluntarily enacting a legally valid AAP. The Supreme Court explained that the primary purpose of Congress in enacting Title VII was to open employment opportunities for people of color in occupations that had been traditionally closed to them. Accordingly, Title VII cannot be read to forbid all race-conscious affirmative action efforts.

Post-*Weber*, courts and the EEOC have found that employers may adopt voluntary AAPs to correct a clear imbalance in a traditionally segregated job category. A voluntary AAP should mirror the purpose of Title VII and cannot unnecessarily trammel the interests of those outside the group that the voluntary AAP is designed to protect. For example, it cannot create an absolute bar to advancement or continued employment or involve a quota or inflexible goal. Instead, a voluntary AAP should be flexible enough so that each candidate competes against all other qualified candidates. Additionally, courts and the EEOC have indicated a voluntary AAP should be temporary (*e.g.*, not designed to continue after the AAP's goal has been met) and limited to attaining, not maintaining, a balanced workforce. Importantly, some courts have found that an employer's deviation or noncompliance with its voluntary AAP is not in and of itself sufficient to establish liability under Title VII. However, noncompliance can constitute evidence of discriminatory intent when other actions of the employer are being challenged. Accordingly, once an AAP is enacted, employers should refrain from ad hoc affirmative action decisions that are proscribed by their AAP.

## Efforts To Create an Inclusive Work Environment

While recruitment efforts can help employers connect with diverse talent, they will not be fully effective unless an employer takes steps to retain that talent. Employers might consider a variety of efforts to maintain and foster diversity within an existing workforce, including:

- Communicating with all employees the reasons for supporting diversity. For example, leaders within the company should regularly communicate how the commitment to diversity and supporting initiatives align with and advance the company's culture and equal opportunities policy, business strategy or social responsibility priorities.
- Conducting a pay equity audit. Such audits present the opportunity to intensively review workforce data through a statistical analysis of employee compensation. Pay equity audits can help employers see if any pay disparities exist, and if so, whether they are limited to a specific portion or portions of the employee population and can be explained by legitimate business justifications.
- Training managers and supervisors who conduct performance evaluations to apply consistent, objective standards and expectations in assessing employees on the basis of work product.
- Reviewing compensation and promotion criteria and decisions to ensure employees are being treated equitably across diversity lines.
- Reviewing company policies and practices for any that could result in a disparate impact. For example, ensure equitable accessibility to work opportunities by evaluating job requirements for advancement and ensuring that all employees are able to receive training, feedback, experience, mentorship or other relevant resources to help develop requisite skills.
- Supporting affinity groups (also known as employee resource groups), which are organizations within a company for employees with shared characteristics and social identities, and may include allies to those communities. Employers should be consistent in allowing affinity groups within the same protected category. For example, if an employer allows an affinity group for Black employees the employer must allow another affinity group for Asian or Latinx/Hispanic employees. Employers should also make clear to employees that joining affinity groups is optional.
- Implementing learning initiatives that devote attention to the experiences regularly associated with membership in a protected class, as part of an effort to increase understanding and respect, and eliminate biases. An example is displaying diversity posters or hosting events on an organization's

premises to raise awareness about topics impacting LGBTQ+ employees within the organization. These kinds of efforts have been found to be lawful even when other employees have made faith-based objections, claiming, for example, that an employer recognizing LGBTQ+ employees violated another employee's religious freedoms.

This article addresses Title VII, but employers should be mindful that Title VII, a federal statute, does not preempt state anti-discrimination laws, which can be more protective of employees than Title VII. Employers should always review applicable state law before adjusting recruitment and hiring practices.

Given the intense focus on equity in the workplace, employers should expect that their actions and practices will come under increased scrutiny by current and former employees as well as investors and government regulators. The proactive steps outlined in this framework, along with other measures, can serve to protect an employer's long-term interests.

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