

Diversity, Equity and Inclusion In Recruiting and Hiring: Practices, Pitfalls, and Opportunities

Presented by:

Sarah Platt



Atlanta
Austin
Berlin
Birmingham
Boston
Charleston
Charlotte
Chicago
Cleveland
Columbia
Dallas
Denver
Detroit (Metro)
Greenville
Houston
Indianapolis
Jackson
Kansas City
Las Vegas
London
Los Angeles
Memphis
Mexico City
Miami
Milwaukee
Minneapolis
Morristown
Nashville
New Orleans
New York City
Oklahoma City
Orange County
Paris
Philadelphia
Phoenix
Pittsburgh
Portland (ME)
Portland (OR)
Raleigh
Richmond
Sacramento
San Antonio
San Diego
San Francisco
Seattle
St. Louis
St. Thomas
Stamford
Tampa
Toronto
Torrance
Tucson
Washington D.C.

**Ogletree
Deakins**



Goal:

All Rowing In The Same Direction

- Understand fundamental considerations
- Avoid unintentional risk
- Consider best processes to make meaningful change

Reputational Risk

Roche unit accused of stepping on D&I pledge with lawsuit



IN BRIEF: Coca-Cola investors threaten suit over law firm diversity policy

Muireann Bolger

Diversity Derivative Suit Dismissed

Monday, March 29, 2021

The Gap Urges Judge To Toss Investor's Board Diversity Suit

The Washington Post Democracy Dies in Darkness

Board Diversity Suit

Companies tweeted for International Women's Day. Then this account called out their pay gaps.

Diversity and inclusion litigation: A growing trend

June 10, 2021

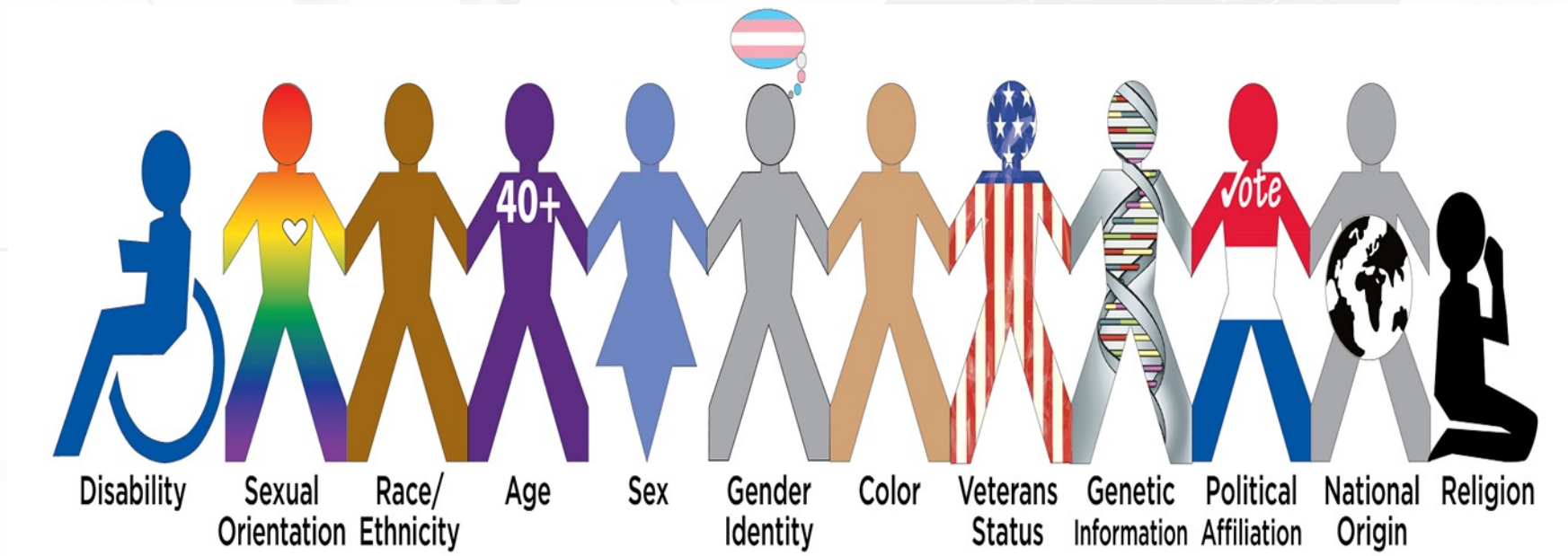


Increased number of shareholder derivative lawsuits relate to pressure on boards of directors and corporate governance

By Julianne McShane

March 8, 2022 at 8:13 p.m. EST

Legally Protected Characteristics



Key Federal Laws

- **Title VII of the Civil Rights Act of 1964** – Prohibits discrimination based on race, color, religion, sex (including sexual orientation), and national origin.
 - This statute does not just protect women and people of color.
 - It also protects men and whites, if they are the subject of intentional discrimination because of their gender or race.
- **Age Discrimination in Employment Act of 1967** – Prohibits discrimination against 40 years of age or older.
- **Americans with Disabilities Act** – Prohibits discrimination on the basis of disability.

Key Federal Laws/Executive Order (cont'd)

Equal Pay Act – Prohibits sex-based compensation discrimination and mandates that men and women in the same establishment doing *jobs that require equal skill, effort and responsibility* and are performed under similar working conditions are paid equally, unless compensation is based on a *seniority system, a merit system, a system that measures the quantity or quality of work, or any other differential not based on sex.*

* The EPA does NOT require proof of intent to discriminate.

Executive Order 11246 – Prohibits federal contractors from discriminating in employment decisions on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin.

- Greater government scrutiny on these issues for federal contractors

EEO v. Affirmative Action v. DE&I Law

EEO

- Generally passive and prohibitory, setting forth what employers cannot do – cannot discriminate based on protected characteristics!

Affirmative Action

- Requires covered employers (federal contractors and subcontractors) to take proactive steps – regulatory compliance is key

DEI

- “Voluntary affirmative action”
- Purpose to increase the representation of underrepresented groups and reap benefits of a diverse workforce
- Voluntary, self-directed, and not regulated by an external entity (with limited exceptions)

Privilege Protocols

Privileged Analysis

- Initial analysis generally needed to identify priorities
- Conduct under attorney-client privilege

Establish Protocols

- Involve counsel early
- Mark documents “Confidential/Privileged”

Implement Initiatives

- Identify initiatives
- Involve broader group to implement initiatives

Surveys and Self-Identification

- Information can be very helpful to focus attention and programming on areas of most need
- Surveys, done right, can measure and even foster a sense of inclusion
- BUT there are state and federal laws that govern when and how you can collect information
 - Applicants v. employees
 - Must be voluntary
 - Certain demographics more restricted than others
 - Remaining culturally competent

Voluntary Self-Identification

- As a federal contractor, a company is required to invite applicants and hires to self-identify their race/ethnicity, gender, disability and veteran status using categories identified by the government
 - It is voluntary. Applicants may decline to self-identify
 - The U.S. government now allows employers to note non-binary employee counts in the comment field
 - Race and Ethnicity are combined

Voluntary Self-Identification

- **Hispanic or Latino** - A person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin regardless of race.
- **White** - A person having origins in any of the original peoples of Europe, the Middle East, or North Africa.
- **Black or African American** - A person having origins in any of the black racial groups of Africa.
- **Native Hawaiian or Pacific Islander** - A person having origins in any of the peoples of Hawaii, Guam, Samoa, or other Pacific Islands.
- **Asian** - A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian Subcontinent, including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam.
- **Native American or Alaska Native** - A person having origins in any of the original peoples of North and South America (including Central America), and who maintain tribal affiliation or community attachment.
- **Two or More Races** - All persons who identify with more than one of the above five races (White, Black or African American, Native Hawaiian or Pacific Islander, Asian, Native American or Alaska Native). For the purposes of this group, identifying as Hispanic or Latino and only one of the listed 5 race groups does NOT qualify.

“General Test” for Voluntary Affirmative Action

- 1) Must mirror the purpose of Title VII in opening employment opportunities for minorities in occupations that have traditionally been closed to them (or be “**remedial**” in nature)
- 2) **Does not unnecessarily trammel** the interests of the non targeted group (e.g., white, male, etc. employees)
- 3) Is **temporary** in nature
- 4) Is **not intended to maintain** a racial balance, **but eliminate** a manifest racial imbalance

DE&I-Oriented Cases

- A prospective plaintiff must show a causal connection between a D&I initiative and any adverse employment action
- Diverse interview panels shield against discrimination claims
 - *Scales v. Slater* (5th Cir. 1999)
 - *Solorzano v. Shell Chemical*, (E.D. La. 2000)
- Targeting a “manifest imbalance” (based on specific benchmarking) was justified
 - *Gonzalez v. Green* (W.D. Tex. 2009)
- Using “blind” resumes permitted
 - *Gonzalez v. Green* (W.D. Tex. 2009)

Other DE&I-Oriented Cases

- Inclusive recruitment strategies designed to expand pool of qualified applicants to include qualified diverse applicants are lawful...and even encouraged!
 - *Duffy v. Wolle* (8th Cir. 1997), *Hammer v. Ashcroft* (8th Cir. 2004)
- BUT strategies should not be designed to exclude or not consider qualified applicants who are outside the defined diversity metric
 - *Rudin v. Lincoln Land Comm. Coll.*, (7th Cir. 2005)
 - Employer had policy that explicitly favored hiring minority over non-minority applicants
 - After interview slate was selected, candidate was added to create a diverse slate, and he (Black male) was ultimately selected
 - Employer testified that it would not “necessarily look at ... white applicants” when selecting for interview

DE&I-Oriented Cases

- Quotas are unlawful

- **EXAMPLE: *Frank v. Xerox Corp. (5th Cir. 2003)*** - “Balanced Workforce Program” called for racial and gender groups to be proportionately represented at various levels in the company; challenged by black employees

TAKEAWAYS

- 1) An over-emphasis on diversity metrics can be challenged as an unlawful quota.
- 2) Examine program mechanics AND monitor its implementation by managers closely

Legal Guardrails for DE&I Practice

DO

Hire and promote based on qualifications

Remember race and gender are protected categories and include all races and all genders

Approach all with care and consistency

Consult with Legal

DON'T

Hire or promote solely because of race, gender or other protected class/diversity metric

Use unlawful quotas or fixed numerical goals based on race

DE&I Major Programming Areas

Recruitment/Hiring

Training

Employee Resource Groups

Succession Planning/Evaluation/Promotion

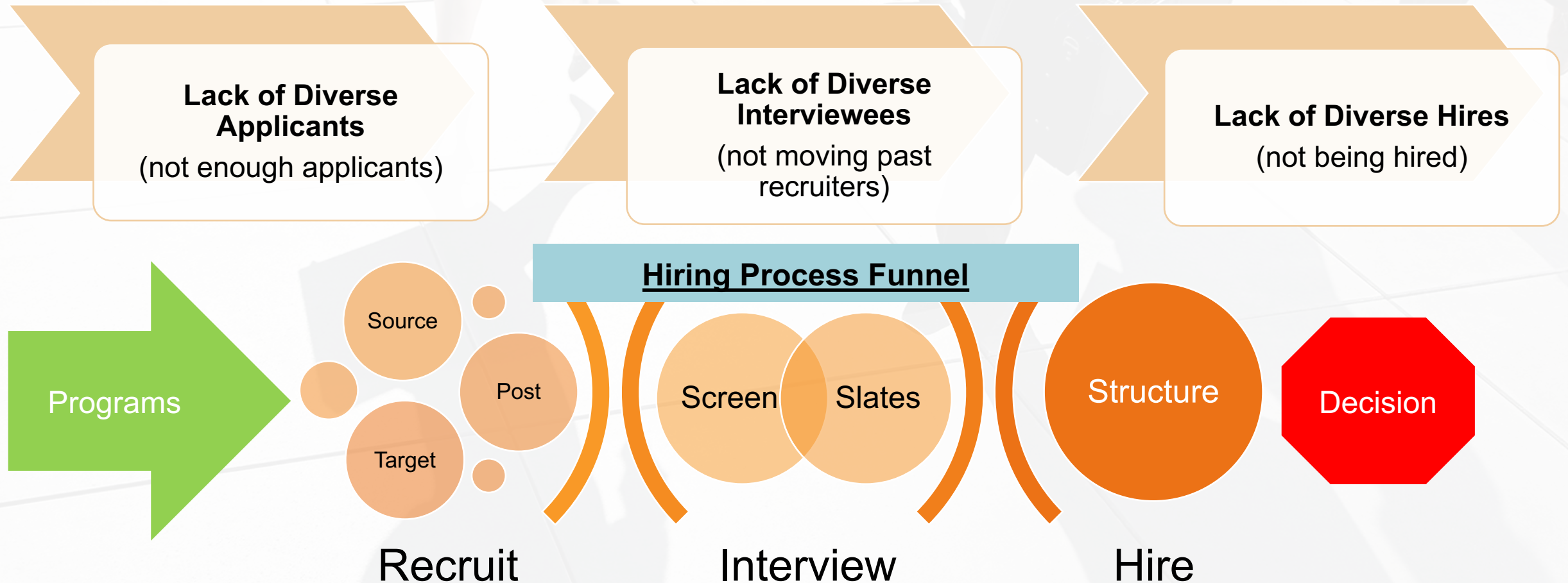
Leadership Engagement/Development

Supplier/Vendor/Contracting

Community Engagement/Philanthropy

Recruitment & Hiring

- Efforts that **increase pool to include diverse candidates** are lawful
- Three Problems in Diverse Recruitment or Hiring to Solve



Recruiting & Hiring





DE&I Goal-Setting: Top 10 Tips

01

Understand diversity data collection

02

Set aspirational goals vs. unlawful quotas

03

Think as measuring progress vs. “numeric targets”

04

Resist goals too narrowly defined as “hitting numbers”

05

Consider how to leverage data to drive DE&I programming

06

Anticipate employee concerns

07

Expect challenges or complaints and prepare a defense

08

Understand and align data so goals not seemingly arbitrary

09

Promote holistic programming metrics beyond HR

10

Develop communication strategy

Guardrails For Sourcing Talent

- Use multiple sources – including at least one that is broad (like company website or un-targeted Indeed, LinkedIn)
- Set hiring criteria in advance
 - Do not include criteria that unnecessarily limit the pool (e.g. certain schools, experience with certain companies, etc.)
 - Consider whether language of posting is inclusive
 - Do not change the criteria mid-recruitment
- If using artificial intelligence/software tools, do so thoughtfully
- Consider using the “blind resume” option to select for interview
- Do not re-open sourcing after selecting interview slate just to locate diverse candidates

Guardrails For Interview Process

- Do not select less qualified candidates for interview based solely on diversity
 - Diversity of backgrounds, experience, perspective can be a favorable factor among qualified candidates
 - Focus on what the candidate would add to the team, not just on demographics
- Use diverse interview panels
- Use consistent behavior-based questions
- Provide specific examples of the candidate's behaviors or responses to support hiring conclusions
- Debrief among interviewers and pressure test each other's conclusions, check for biases

What If the Hiring Manager Says...

“Find me a female/Black/Hispanic/diverse candidate”

- Need to respond to clarify expectations
- Train HR to alert legal
- Train hiring managers on acceptable DE&I efforts

Potential Response:

We do not source or select candidates for advancement based solely on gender, race, or other protected categories. We make diligent efforts to seek and attract candidates from diverse backgrounds and select interviewees who can enhance our teams



What if ...

What else have you faced?





Thank You!

Sarah Platt

Ogletree, Deakins, Nash,
Smook & Stewart, P.C.

Sarah.platt@ogletree.com