

# Creating Effective and Legal Diversity, Equity, and Inclusion Programs

Kelly S. Hughes (Charlotte)

Sarah J. Platt (Milwaukee)

May 11, 2021



Ogletree  
Deakins

# Why Diversity and Inclusion?

- NOW a priority within many organizations
  - Impact on bottom line
  - Creativity and productivity
  - Retention, development, and culture efforts
  - New customer markets
- BUT implementing a **legally-compliant** and **effective** program is a challenge



# Issues to Consider

- Discrimination claims
- Federal agency shift
- National demographic changes
- Multi-national context
- Generational differences in understanding
- Expansive nature of diversity



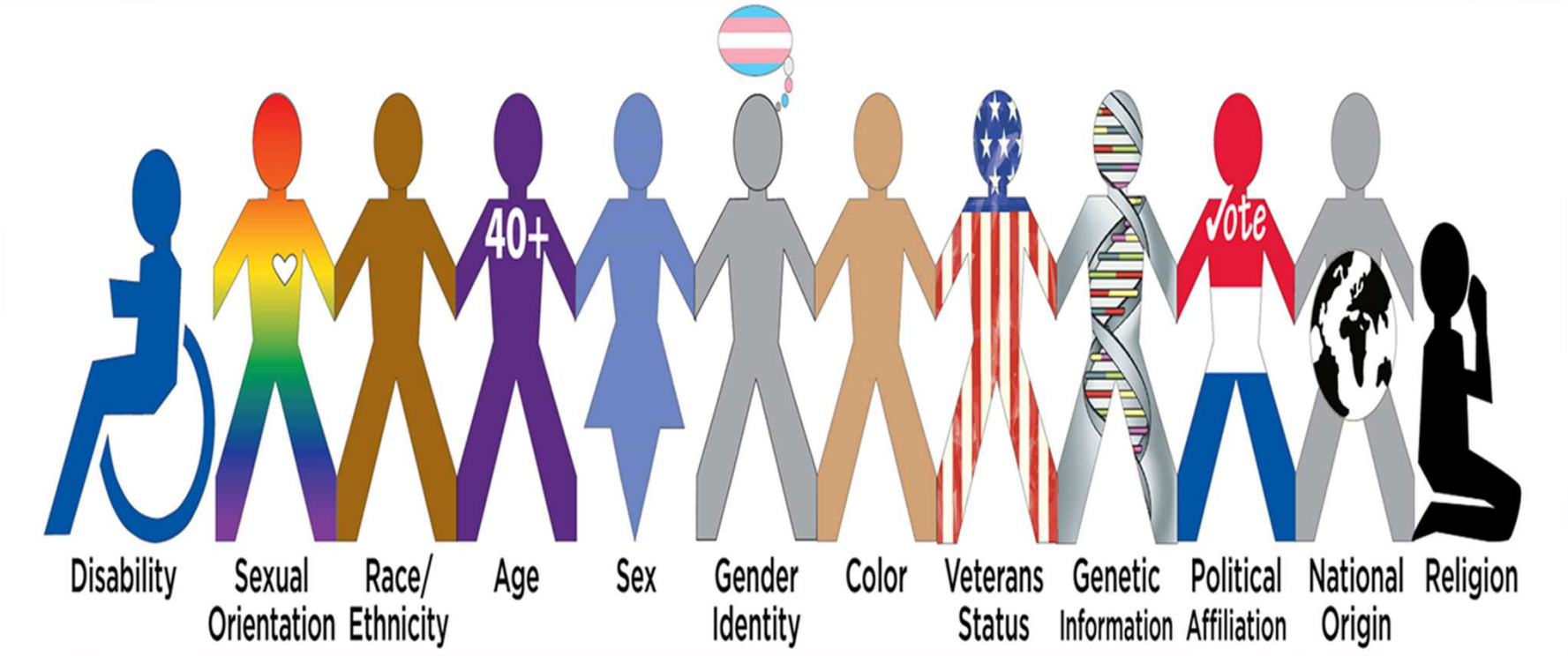
Legal Issue	Illustrations
Discrimination	Prohibitions on absolute quotas (e.g., U.S.); certain laws require pay data reporting requirements for companies above a certain size (e.g., UK, Australia, Japan)
Personal data protection	Requirements to inform employees about how their data is being used, and limitations on what can be collected, which purposes are valid, and how long it can be kept
(Voluntary) Affirmative action	Certain data collection and reporting requirements (e.g., federal contractors in the U.S.); some companies engage in voluntary plans; some laws outside the U.S. require quotas for underrepresented categories in certain circumstances (usually gender or disability)
Evidentiary privilege	Relevant information is subject to disclosure in litigation unless protected by an evidentiary privilege such as the attorney-client privilege (privileges differ by country)

# Some of the Laws That Impact DE&I

- Title VII of the Civil Rights Act of 1964
- Americans With Disabilities Act
- Age Discrimination in Employment Act
- State and local nondiscrimination laws
- Federal contract compliance laws



# Legally Protected Characteristics



# D&I-Oriented Cases

- Claim that program runs afoul of Title VII and/or Section 1981
- *Johnson v. Trans. Agency*, 480 U.S. 616 (1987)
  - Upheld Agency's Plan finding no set aside; allowing consideration of race/ethnicity or sex as a factor when evaluating qualified candidates for jobs in which members of group poorly represented. Set out 4-part test that allows voluntary affirmative action programs by companies. (See also, *United Steelworkers of Am., v. Weber*, 443 U.S. 193 (1979).)

# Why Metrics Matter

- Numbers don't lie\*
- Metrics motivate business leaders
- Brings latent issues to the surface
- Helpful in professional development/succession planning
- Stakeholders are demanding transparency

**\*When appropriately caveated and properly analyzed.**



# Dangers of Data

- Easy to manipulate
- Easy to misunderstand
- Challenging to aggregate meaningfully
- “Good” numbers can lead to complacency
- “Bad” numbers can be scapegoated
- Could be weaponized against the company legally or reputationally
- Don’t forget data privacy laws

# Issues in Goal Setting

- Over-emphasis on diversity metrics can be challenged as unlawful quotas
  - Case 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.

# D&I Program Goal Setting

- Do
  - Make goals flexible/aspirational
  - Emphasize outreach instead of hitting a number
  - Focus on inclusion efforts
- Don't
  - Use quotas (think creatively!)
  - Give preference to candidates based on diverse characteristic alone

# D&I: Areas of Programming

- Major Areas of D&I Focus

1. Recruitment/Hiring
2. Training
3. Employee Resource Groups
4. Succession Planning/Evaluation/Promotion
5. Leadership Engagement/Development



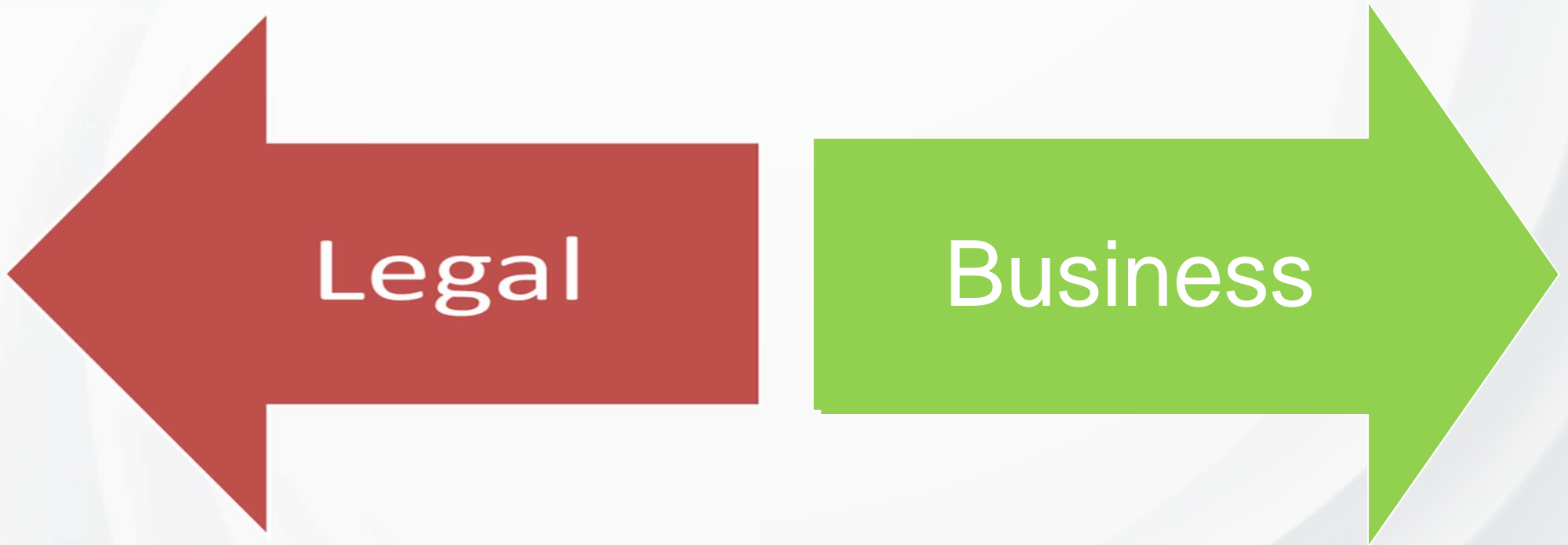
# D&I Programming Areas

- Diverse recruitment and hiring
  - “Rooney Rule” programs and diverse slate initiatives
  - Efforts to expand the pool of qualified diverse candidates
  - Bias interrupters
- Diversity and/or inclusion-oriented training
  - Resourceful and innovative training topics
  - Creative training options/modes
  - Not mandatory, but most inclusive training

# D&I Programming Areas

- Employee Resource Groups
  - A defined purpose or mission that is open to all
  - A business resource
- Succession Planning, Evaluation and Promotion
  - Experience or skill-set development programs
  - Transparency and objectivity to process
- Leadership Engagement and Development
  - All who lead/manage included throughout

# Organizational Difficulty



# Privilege v. Transparency

- You cannot get privilege back if it was not established on at the outset
  - Document in writing direction of counsel over statistical analysis (DE&I metrics, pay equity audits, etc.)
  - Keep the information on a “need to know” basis
- You may choose to waive it later, but do not do so inadvertently



# Questions and Discussion



# Thank You!

Kelly S. Hughes

Ogletree Deakins

201 South College Street

Suite 2300

Charlotte, NC 28244

[kelly.hughes@ogletree.com](mailto:kelly.hughes@ogletree.com)

704-405-3132

Sarah J. Platt

Ogletree Deakins

1243 North 10<sup>th</sup> Street

Suite 200

Milwaukee, WI 53205

[sarah.platt@ogletree.com](mailto:sarah.platt@ogletree.com)

414-239-6416



Ogletree  
Deakins

# About the Firm

Ogletree Deakins is one of the largest labor and employment law firms representing management in all types of employment-related legal matters.

The firm has more than 900 attorneys located in 53 offices across the United States and in Europe, Canada, and Mexico.

We represent a diverse range of clients, from small businesses to Fortune 50 companies.



Ogletree  
Deakins

Premier client service is a firm tradition and remains our top priority.

Our attorneys pledge to:

- Understand your business and objectives
- Focus on and anticipate your needs
- Collaborate to develop creative business solutions
- Harness technology and innovation to better serve your interests
- Communicate in a timely and effective manner
- Provide quality representation with exceptional value

Ogletree  
Deakins

Value  
Innovation  
Quality  
Collaboration  
Communication

**CLIENT PLEDGE**

# Our 53 Offices

Atlanta  
Austin  
Berlin  
Birmingham  
Boston  
Charleston  
Charlotte  
Chicago  
Cleveland  
Columbia  
Dallas  
Denver  
Detroit (Metro)

Greenville  
Houston  
Indianapolis  
Kansas City  
Las Vegas  
London  
Los Angeles  
Memphis  
Mexico City  
Miami  
Milwaukee  
Minneapolis  
Montréal

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

# Find Us Online



[www.ogletree.com](http://www.ogletree.com)



[twitter.com/ogletreedeakins](https://twitter.com/ogletreedeakins)



[linkedin.com/company/ogletree-deakins](https://linkedin.com/company/ogletree-deakins)

Ogletree  
Deakins