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Where to Place the Guardrails

Master Course on the Legal Backdrop for Corporate Diversity Initiatives

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What is a Diversity & Inclusion Program?

- A recruiting program?
  - Attracting and hiring diverse talent
- A retention program?
  - Keeping diverse talent
- A workforce development program?
  - Raising diversity awareness

Modern D&I Paradigm →

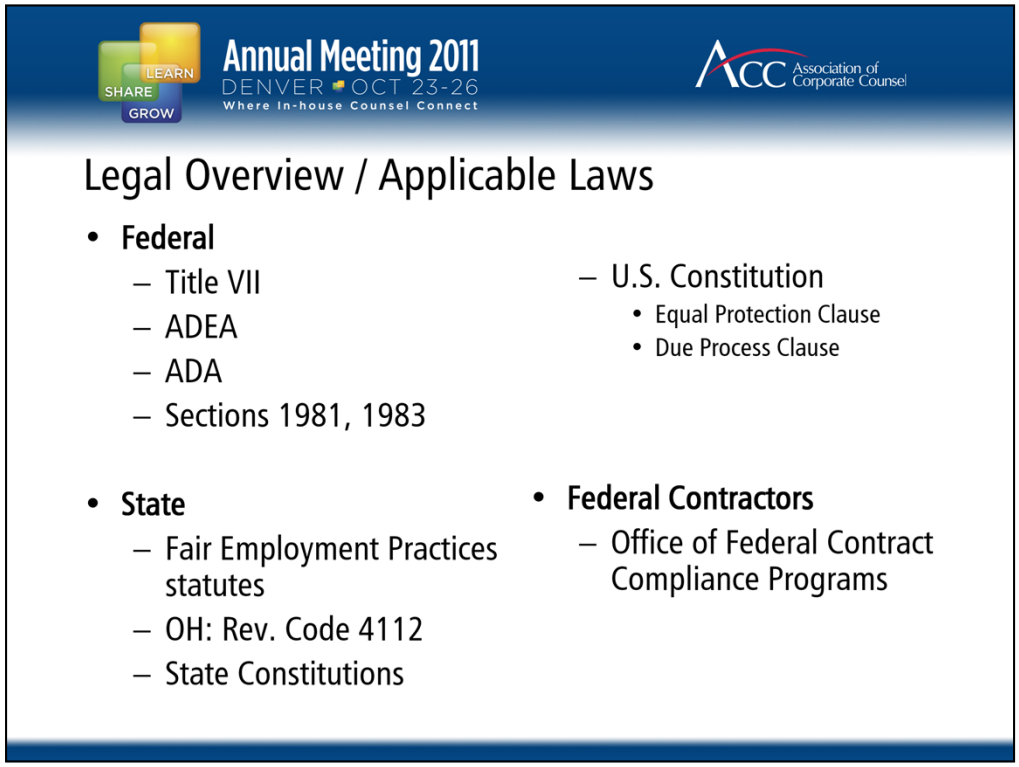
A combination of recruiting, retention and workforce development initiatives designed to foster "diversity" and "inclusion" in the workplace

What is a Diversity & Inclusion Program As A **Legal** Matter?

- A program that takes account of "protected class" status – *e.g.*, race, gender, ethnicity, sex, sexual orientation, national origin, age, disability, religion – for a workplace purpose
- As a strictly legal matter, that generally is a problem

What is a Diversity & Inclusion Program As A **Legal** Matter?

- As a general rule, protected class status is not a lawful basis for employment decisions
- But what if the employer wants to use protected class status "for the good"?
  - Should that be permitted?
  - If so, for whose "good"?
  - What if it is to someone else's "bad"?
- Courts have been struggling with these issues for decades – and continue to do so



42 USC Section 1981 – race only – applies to all contracts, including employment; no 15-employee limit; can be plead along with Title VII in race cases.

Legal Overview / Applicable Laws

- Legal Quandary
  - Laws exist because historical discrimination is real and resulted in non-diverse workforces
  - But those same laws generally prohibit discrimination not only against members of protected classes, but also in favor of the protected classes
    - So-called "**reverse discrimination**"
  - Do our non-discrimination laws ironically prevent us from diversifying our workforces?

Legal Overview / Title VII

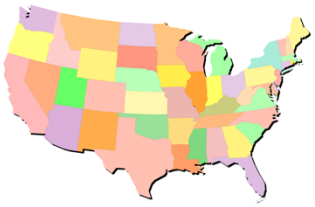
- General employment non-discrimination statute
  - Private sector
    - Virtually all, except very small employers (less than 15 employees) and private clubs
  - Public sector
    - State and local (*e.g.*, schools, state agencies)
    - Does not apply to Federal sector employees
- Prohibits discrimination on the basis of **race, color, religion, sex and national origin**
  - Known as "protected classes"
- Strict reading: employers cannot make decisions on the basis of an individual's protected class status

Legal Overview / Constitution, Art. XIV

- Equal Protection Clause
  - Protects citizens – applicants, employees – from discrimination in public employment
    - Applies to all employment decisions, including hiring, firing, advancement
  - Public sector only
    - Does not apply to private sector employment
  - Complements Title VII
    - Public sector employees have rights under Title VII and the Equal Protection Clause

Legal Overview / State Laws

- Fair Employment Practices (FEP) statutes
  - State versions of Title VII
    - Many offer greater remedies, broader coverage
- State constitutions
  - Many state constitutions prohibit discrimination, including with respect to public sector employment
- State or local civil service laws
- State or local labor contracts
  - Collective Bargaining Agreements

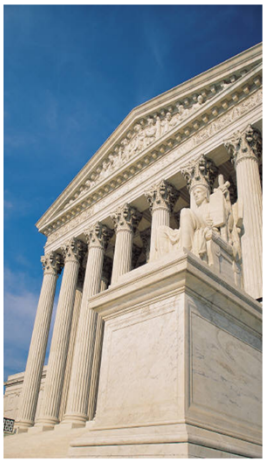


Legal Overview / The Legal Challenge

- Does the D&I program discriminate for or against any person on the basis of a protected trait?
- If so, is it lawful?
  - Not all "discriminatory" D&I programs are unlawful
  - But where there is discrimination – *e.g.*, preferences – there is the possibility of legal challenge
- If not, how can it be made lawful?

Legal Overview / Case Law

- Surprisingly little case law, especially under Title VII
  - Most recent Title VII case on issue decided by Supreme Court: 1987
  - Most recent Equal Protection Clause on issue case decided by Supreme Court: 2003
    - In education context, which may (or may not) be a significant distinction
- Many employers are fearful of litigating this issue



Legal Overview / Case Law

- Existing case law involves traditional affirmative action plans (AAPs), not modern D&I programs
  - Focus on demographics, less so on cultural awareness or inclusion programming
  - Focus on hiring and advancement, less so on empowerment, mentoring
- So, there is some legal uncertainty for the modern D&I program
  - The case law offers guidance, but not definitive parameters

Legal Overview / Case Law – Title VII

United Steelworkers v. Weber (1979)

Johnson v. Transportation Agency (1987)

- **Title VII does not ban employers from considering protected class status (*e.g.*, race, sex) in AAP**
- But to be lawful, consideration of protected class status pursuant to AAP must be:
  - **Remedial**: correct *past discrimination* or *manifest imbalance*
  - **Temporary**: attain, not maintain
  - **Limited**: Do not categorically exclude non-minority population; do no more than is necessary to achieve goal

Legal Overview / Case Law – Title VII

United Steelworkers v. Weber (1979)

- Facts:
  - Union and employer recognized underrepresentation in skilled craft position
    - Skilled craft workforce: 1.7% African-American
    - Local employee population: 39% African-American
  - Union and employer agreed to set aside 50% of new training positions for African-American applicants
- Court endorsed statistical disparity as a manifest imbalance
  - Held that union and employer could consider race in voluntary effort to correct the racial imbalance
  - Left open issues of line-drawing and calculation

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Legal Overview / Case Law – Title VII

Johnson v. Transportation Agency (1987)

- Facts:
  - Employer adopted plan to remedy underrepresentation of women and minorities in certain positions
    - Road Dispatcher: 0 of 238 were women
  - Employer hired woman for vacancy despite fact that she received lower test score than comparable male
    - Employer admitted that it considered applicant's sex in decision, but that it was just one of many factors
- Court found that plan was remedial, temporary and limited – hence lawful
  - Remedial: it sought to correct "manifest imbalance"
  - Temporary: it sought to attain, not maintain
  - Limited: it did not preclude non-minority applicants from consideration; minority status was a "plus, but not only factor

Women accounted for 36% of the applicable workforce

Legal Overview / Case Law – Title VII

- What is a "remedial" plan?
  - Past discrimination by employer
  - Obvious underrepresentation in employer's workforce
  - NOT societal or industry discrimination; not for "role model" purposes
    - Focus on employer's current and historical workforce
- What is a "temporary" plan?
  - Sunsets after diversity goal accomplished
- What is a "limited" plan?
  - Does not unnecessarily harm interests of non-minority population
    - Allows majority to compete for positions
    - No quotas or set-asides

Legal Overview / Case Law – Title VII
A Modern Challenge

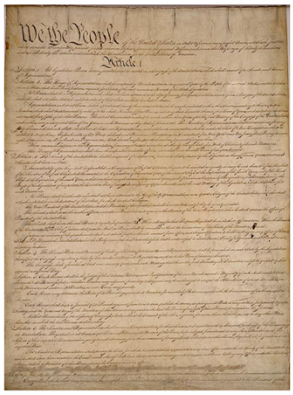
Taxman v. Bd. of Education (3rd Circuit, 1996)

- Facts:
  - AAP: if two equally qualified candidates for job action (hire; layoff), give preference to minority candidate
  - AAP was non-remedial, but was intended to promote racial diversity on faculty
    - In fact, no underrepresentation on faculty vs. local population
- A more modern form of D&I
  - Role modeling for students, junior faculty, community
  - Value of diversity for sake of organization and constituents
- Case would have put modern view to legal test
  - Settled before Supreme Court argument
    - Advocacy groups were concerned that the case would end many non-remedial D&I programs

Legal Overview / Case Law – Equal Protection Clause (EPC)

Not clear how broadly the case law applies

- Should apply to public sector employers
  - But, education context might be meaningful distinction
- Less clear if or how it applies to private sector employers
  - No direct legal application, but many commentators believe the Supreme Court would look to recent EPC analysis in any future Title VII cases



Legal Overview / Case Law – EPC

Regents of UC v. Bakke (1978)

- Court struck down quota-based admissions plan
  - 16 seats "set aside" for minority applicants
- Court opened the door to "diversity rationale", however
  - Justice Powell, in deciding vote, held that "diversity", broadly understood, can justify a D&I program, at least in higher education
  - Justice Powell pointed to Harvard "plus" program as example of a permissible D&I plan

Legal Overview / Case Law – EPC

Bakke (continued)

- Harvard's "Plus" Plan
  - Individualized consideration for each applicant
    - Race/ ethnicity were "plus" factors to be given individualized weight, along with other factors
    - Race/ethnicity were not decisive factors
    - No set-asides or quotas
  - Goal was to attain, not maintain
  - Focus on value of diversity to student experience
  - Decision generated excitement
    - First ever Supreme Court recognition of "diversity" as a legitimate goal

Legal Overview / Case Law – EPC

Bakke (continued)

- But using race/ethnicity as part of D&I admissions program <u>cannot</u> be justified by:
  - Societal discrimination
  - Racial balancing
  - Historical underrepresentation in professions
- So, only two possible justifications:
  - Remedy past discrimination by institution
  - Achieve diversity, broadly understood

Legal Overview / Case Law – EPC

Wygant v. Jackson Bd. of Ed. (1986)

- Court struck down preferential layoff protection policy
  - Some Caucasian teachers laid off ahead of African-American teachers with less seniority
  - Board wanted to provide minority teacher "role models" for minority students to help correct societal discrimination
- Court rejected "societal discrimination" and "role model" arguments in favor of remedial focus
  - Implied that for *employment* purposes (as opposed to student admissions), a *remedial* justification was necessary
- Generated concern about status of "diversity" rationale, especially for employers

Legal Overview / Case Law – EPC

Gratz v. Bolinger (2003)

Grutter v. Bolinger (2003)

The "Michigan Cases"

- EPC challenge to university admissions D&I programs
- Michigan defended its D&I plans on the basis of modern goals:
  - Create an inclusive and diverse student culture
  - Foster cross-cultural learning and debate
  - Prepare students to join diverse global workforce
  - Enhance student experience, institutional relevance

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Legal Overview / Case Law – EPC

Gratz v. Bolinger (2003)

- Michigan assigned 20 points (1/5 of total needed) to all underrepresented minority undergraduate applicants
  - Effectively ensured admission of all minimally qualified underrepresented minority applicants
  - No individualized evaluation – 20 points was decisive factor
- Court found admissions process unlawful
  - Race was decisive factor, not just a "plus" factor
  - So, failed the *Bakke* "plus"-system test
- BUT: Court explicitly affirmed "diversity rationale"
  - First confirmation of Justice Powell's 25-year-old *Bakke* opinion

"Underrepresented minorities" – African-American, Hispanic and Native American applicants

Sued under Section 1981 and EPC.

Court rejected notion that non-remedial program was unconstitutional *per se*. This program just wasn't narrowly tailored.

Legal Overview / Case Law – EPC

Grutter v. Bolinger (2003)

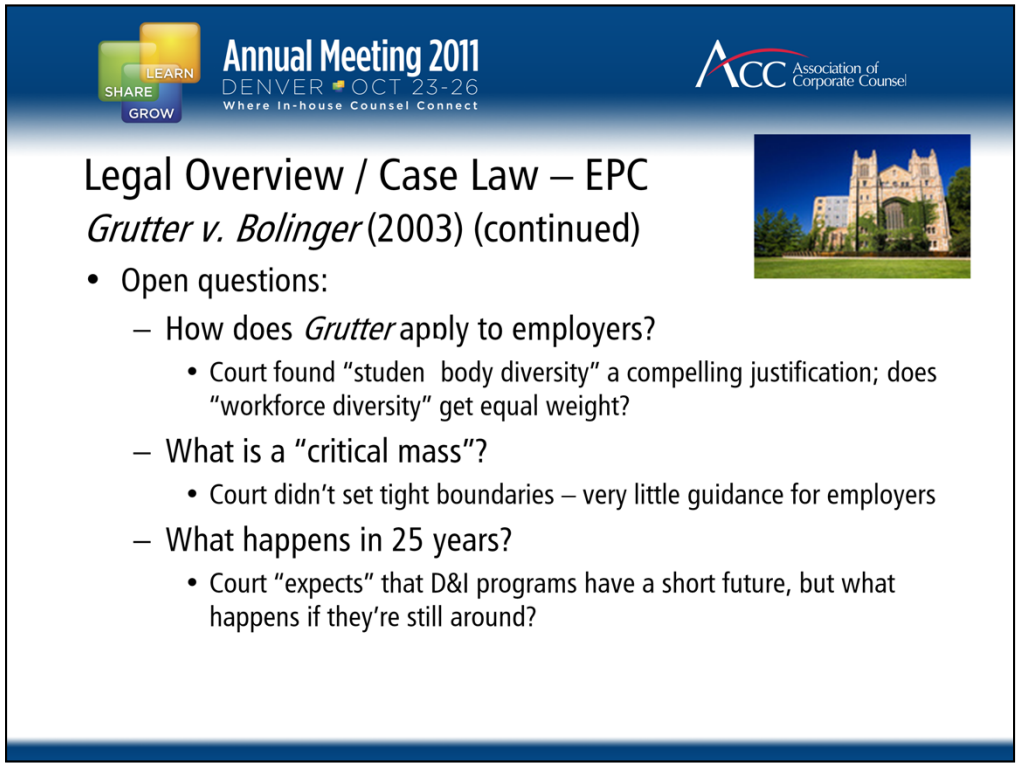
- Law School D&I admissions program
  - Each application received "holistic" review
    - Underrepresented ra e/ethnicity status was a "plus" factor in review
  - Goal to achieve "critical mass" of underrepresented minority enrollment to enhance student experience (a pure diversity rationale)
    - Critical mass – a meaningful number, but not defined in advance
    - No quotas or set targets; no set-asides
  - No explicit sunset, but convincing evidence that Law School hoped to end program

Legal Overview / Case Law – EPC

Grutter v. Bolinger (2003) (continued)

Court approved the Law School's admissions program

- Accepted diversity rationale as legitimate justification
  - A big "win" for D&I advocates
- Race was not decisive
  - Not every minimally qualified, underrepresented minority applicant was accepted
- Law School interpreted diversity broadly
  - Many non-minorities with lower GPAs, LSAT scores were admitted based on other "soft factors"
- Law School testified that it wanted to end D&I program as soon as possible
  - Court held cryptically that it "expected" no need for the D&I program in 25 years



Note that educational institutions tend to get broader discretion in civil rights area than do employers.

Legal Overview / Case Law – Putting It Together

- The Court may have opened the door to non-remedial use of race/sex/ethnicity for D&I programs
  - But maybe not:
    - *Grutter* does not explicitly apply outside educational context
    - *Grutter* does not explicitly apply to Title VII claims
- The Court remains suspect of D&I programs based on protected class status
  - So, to be permissible under either Title VII or EPC, D& I programs still must be **limited** and **temporary**, and arguably must be **remedial**

Legal Overview / Case Law – Putting It Together

Roberts Court

Ricci v. DeStefano (2009) – EPC and Title VII

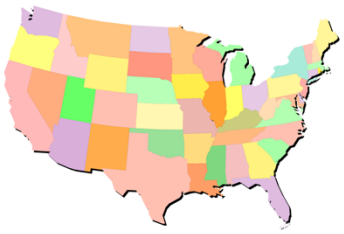
- Benign discrimination – in this case, setting aside results of a promotional test based on observed disparity in results – is "a decision based on race" and generally unlawful
  - No African-American scored high enough for promotion
  - City concerned about disparate impact claims from African-American firefighters
- To make race-based decision because of concern about disparate impact liability, employer must have "strong basis in evidence" that it would have been liable for disparate impact discrimination

Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1 (2007)

- "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." - Justice Roberts

Legal Overview / State Laws

- Most states follow federal law
  - No significant distinctions for multi-state employers to consider
- Note: reverse discrimination claims under many state statutes (and Title VII) require a higher *prima facie* showing
- Jury sympathies hard to generalize



Legal Overview / Challenges of Defending Reverse Discrimination Claims

- Tension between courts' preferred D&I program justification – remedial need – and risk of identifying workforce imbalance, discriminatory conduct
  - Do you have to concede past or current discrimination?
- Uncertain whether non-remedial justifications are viable in employment context
  - *Wygant* (employment, 1986) vs. *Grutter* (education, 2003) – was it context or time that changed the analysis?
- Even if non-remedial justifications are viable under EPC analysis (public sector), uncertain whether the justifications apply to Title VII claims (private sector)
- Uncertain whether non-temporary D&I programs are lawful, at least where preferences are part of the program

Diversity Programming / Applying the Law

- D&I programs generally fall within three basic areas:
  - Recruiting/Sourcing
  - Retention/Mentoring
  - Training & Development
- We must be mindful of reverse discrimination claims in each of these three areas

Applying the Law – Recruiting Programs

Always unlawful:

- Quotas
- Set-aides
- Decisive preferences
- Differing selection processes or criteria

May be *unlawful:*

- *Non-remedial, preference-based ("plus") plans*
  - *E.g., "reflect the customer"*
- *Preferences based on stereotypes*
- *Programs without sunset*

Should be lawful:

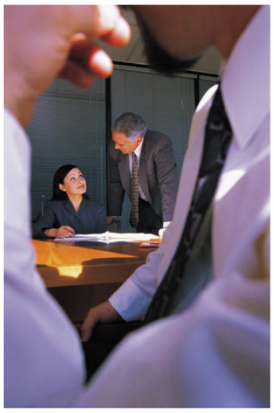
- Enlarging the candidate pool through outreach, so long as every candidate competes on equal ground with individualized consideration
- Using protected class as a "plus" factor pursuant to **temporary**, **remedial** and **limited** D&I plan

Applying the Law – Sourcing Programs

- Many employers use sourcing to further D&I initiatives, such as by:
  - Requiring vendors to meet workforce diversity metrics
  - Requiring vendors to assign "diverse" employees to company projects
  - Reserving assignments for minority-owned vendors
  - Using financial incentives to reward managers, vendors for meeting diversity metrics
- Sourcing D&I programs are subject to the legal analysis that governs recruiting D&I programs

Applying the Law – Retention/Mentoring Programs

- Mentoring
  - Special coaching for women, minorities
    - Better: make mentoring available to all
- Advancement
  - "Fast-tracking" women, minorities
    - Better: encourage diverse internal applicants
- Key Issues
  - Does it operate as a "preference" system?
  - Are corporate resources used discriminatorily?
- As with recruiting, such retention programs may be unlawful if not *remedial, limited* and *temporary*
  - Same Title VII, EPC analysis applies



Applying the Law – Retention Programs

Employee Resource Groups/Affinity Groups

- Legal concerns
  - Discrimination
    - Allocation of corporate resources (dollars, time, space)
    - Significance to internal advancement
    - Perpetuation of stereotypes
  - Unionization
    - Risk of unintended formation of labor union
    - Risk of employer domination of labor union
- Best practices
  - Permit ERG formation equally
    - Different races, genders, ethnicities
  - Provide equal corporate support
    - Not necessarily equivalent
  - Secure labor counsel
    - Do not allow ERG to represent members or negotiate members' terms or conditions of employment

Applying the Law – Workforce Training and Development

- Cultural awareness programming
  - Beware stereotyping
  - Ensure equal opportunity and resources for diverse groups
- Management training
  - Beware stereotyping
  - Consider privilege, confidentiality issues
- Diversity audits
  - Beware the appearance of targets, quotas
  - Consider privilege, confidentiality issues

Applying the Law – Other Issues

- Policy documents
  - Recite your lawful rationale
    - Not role modeling; correcting societal discrimination
    - If your D&I rationale is not lawful, revisit it
  - Recite the timing, purpose and methods
  - Anticipate the document becoming public
    - You will rely on it if your D&I program is challenged
- Be consistent!
  - Ensure your communications are consistent as to purpose, methods, timing
    - Inconsistency = pretext
- Use financial incentives with caution
  - Not *per se* unlawful, but may lead to unlawful behavior
  - Important to set expectations, monitor results
  - Applies to new hire recruiting, internal promotions/assignments and sourcing decisions

Staying Out of Trouble

1. Don't Use Quotas or Set-Asides
   - Focus on enlarging the pool
2. Don't Set Demographic Targets
   - Consider "critical mass" analysis
3. Don't Rely on Stereotypes
   - Consider diversity broadly – experience, background, not just race, ethnicity, sex or other protected class status
4. Don't Assign Automatic Value to Protected Class in Recruiting and Advancement
   - Consider the "plus" system, or just enlarge the pool
5. Don't Set Formulaic "Objectives" for Managers
   - The "objectives" may operate as a quota

Staying Out of Trouble

6. Don't Discriminate In D&I Programming
   - *E.g.*, between ERGs, workforce populations
7. Don't Allow ERGs to Become Labor Unions
   - Don't negotiate employment terms and conditions
8. Don't Overuse Financial Incentives
   - If used, monitor to ensure they do not create quotas
9. Don't Cure Societal, Industry Discrimination
   - Remember that non-remedial D&I plans in recruiting, advancement are untested, potentially unlawful
10. Don't Forget to Document, Document, Document
    - If you use D&I to make selection decisions, you must have strong D&I plan documentation to refute reverse discrimination claims