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Intersection of Affirmative Action and Diversity/Inclusion

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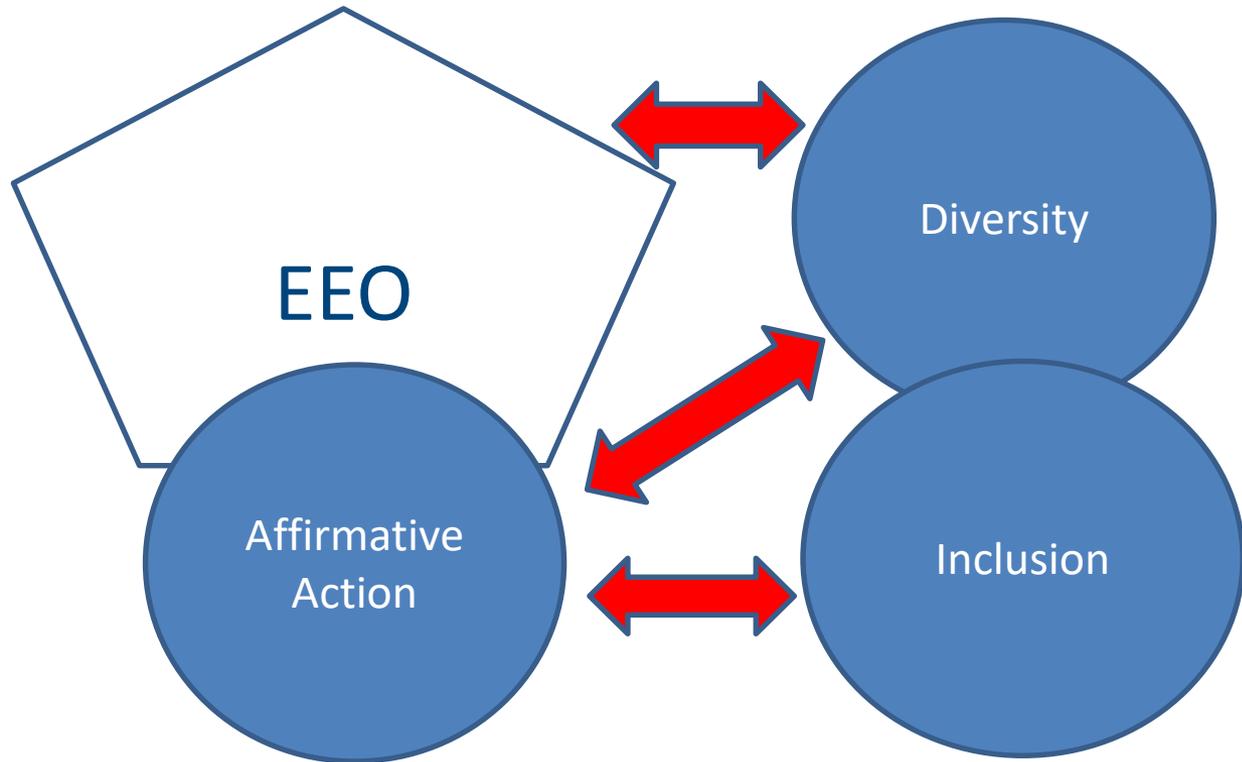
EEO, Affirmative Action, Diversity & Inclusion



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Compliance Focus

Business Focus



Affirmative Action



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- One aspect of the federal government's efforts to ensure equal employment opportunity
- Legally mandated for nonexempt federal contractors and subcontractors
 - Executive Order 11246
 - Section 503 of the Rehabilitation Act
 - Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA)
- Targets outreach to underutilized groups of minorities and women
- Remedial approach -- measures good faith efforts in making progress toward goals for minorities, women, individuals with disabilities, and veteran applicants

Limitations on Affirmative Action



- Unless AAP implementation follows the detailed requirements established by the courts, there is risk of liability under Title VII
 - Unlawful preferences
 - Reverse discrimination claims
- AAPs are, by nature, remedial and thus serve as “temporary” programs designed to achieve a goal

Diversity



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- An organizational and managerial process for developing an environment to maximize the potential of all employees and to drive business success
- Driven by business necessity, not legal mandate
- Much broader than race, ethnicity, gender, disability, veteran status
- Focuses on long-term goal to build a culture of engagement, respect, and perspective

Summing up the differences...



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Affirmative Action	Diversity
Government Mandated	Voluntary
Legally Driven	Business Driven
Quantitative	Qualitative
Problem Focused	Opportunity Focused
Assimilation (getting people in)	Integration (changing culture)
Reactive	Proactive
Focus on Race, Gender, etc.	Focus on Similarities, Differences

Diversity vs. Affirmative Action



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- When affirmative action is tied to valuing and/or managing diversity, “diversity” often becomes tainted by negative perceptions of “affirmative action”
 - Leads to resistance and polarization
- Studies show that attitudes toward affirmative action are closely tied to how the AAP is implemented
 - Preferences lead to backlash
 - Preferences are rarely legal
- Goal is to manage these sometimes competing concepts

Acting On Your AAPs



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Organizational Profile/Job Group Analysis



- Time-constrained: snapshot of what you have in your workforce as of specific date
- Limited utility: Most employers create job groups for AAPs and don't use them anywhere else
- BUT:
 - Can this data assist you in revealing your “glass ceiling”?
 - Can it help identify pay inequities?

Availability Analysis



- **Dependent on:**
 - Composition of job groups
 - Two factors (in place for decades)
 - Recruitment (using 2010 census)
 - Feeder jobs/groups
 - Good faith estimate of factor weighting
 - Test used for declaring underutilization
- **Business value?**
 - Based on arbitrary factors using dated census data
 - Based on one day out of 365

Goals



- Minority/women: objectives which are reasonably attainable by means of applying every good-faith effort to make all aspects of the entire affirmative action program work.
- IWDs: disability utilization goal (7% for each job group)
- Veterans: hiring benchmark (currently 5.9%)
- Minority/women goals are generally dependent upon
 - Availability analysis
 - Opportunities
 - Implementation

Goals



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- Goals are not
 - Quotas
 - A substitute for merit-based selections
 - A justification to extend preference to any individual on the basis of any protected characteristic
- Not limited in duration; OFCCP eliminated timetables a long time ago
- Goals should not be addressed by hiring but by outreach and recruitment
 - Not “hire more minorities/women”
 - Not “hire regardless of qualifications”
 - Always hire “the most qualified” and be ready to defend that decision

Hypothetical 1



- Reilly (white female, non-veteran) worked in Company's procurement department for over 5 years and received good performance reviews and repeated raises.
- When the procurement department was reorganized, a Strategic Sourcing Manager position was advertised both internally and externally.
- Reilly applied for this new position, which required "five to seven years of strategic sourcing experience and supervision." She received the highest interview score of all the internal candidates.
- Clunis (black male veteran) was an external applicant for the position. He did not have five years' experience but was interviewed. He received a lower interview score than Reilly.
-

Hypothetical 1



- Hiring manager for the position was a member of Company's Workforce Diversity Team. Company also had a diversity goal for this position and was actively recruiting veterans in order to get tax credits.
- Clunis, not Reilly, was awarded the position.
- Reilly sued for race and gender discrimination.
- What is the outcome and why?

Hypothetical 1: Takeaways



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- Proven employee who met advertised requirements **vs.**
- Unknown job seeker who did not meet minimum qualifications
- Internal applicant had higher interview score
- Hiring manager had diversity goal for position
- Company was seeking veterans

- **Diversity goal and vets preference trumped qualifications in the selection process → never a legitimate reason for hiring**
- **Company lost this case**

Impact Ratio Analyses and Diversity



- No requirement on HOW to do these or WHAT format is preferable
 - Conduct all analyses under privilege!
- Selections (external)
 - Goal is to expand the pool of qualified and diverse applicants
 - Recruiting and retention strategies also leverage diversity efforts
 - What about pre-employment assessment tools and adverse impact?
 - Pen and pencil: adversely affect minority groups
 - Physical skills: adversely effect women
 - Uniform Guidelines on Employee Selection Procedures (UGESP)

Impact Ratio Analyses and Diversity



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- Promotions (internal)
 - Reflects inclusion, growth, retention
 - Enhanced by mentoring, succession planning, affinity groups
 - Requires training of managers and supervisors
 - Requires supportive corporate culture
- Terminations (voluntary, involuntary)
 - Identification of areas of high attrition

AAP Narratives



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- Required commitments
- Voluntary commitments under the rubric of “good faith efforts”
 - “Managers evaluated on success”
 - Be careful not to encourage quota hiring!
 - Less than 20% of diversity programs use metrics

Hypothetical 2



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- HR dreads having to put the AAP data together every year for the consultant. This year, though, HR was pleased at the tremendous increase of minority job seekers for unskilled jobs which were received from diversity sources. All of these job seekers were included on the applicant log but because HR was very busy, disposition reasons weren't kept for all job seekers.
- At HR Manager's direction, new HR clerk pulled data off of HRIS and sent it to consultant. Because it was in the system, she assumed the data was accurate.
- Before the AAP was completed, OFCCP audited one of the locations.

Hypothetical 2



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- HR received completed AAPs and supporting data from consultant 3 days before OFCCP deadline. Not wanting to be late, HR quickly sent this information to OFCCP, including adverse impact analyses that included all of the job seekers and which showed statistically-significant problems in hiring for minority laborer applicants.
- After reviewing the submission, OFCCP asked HR to justify adverse impact in hiring for blacks and Hispanics in the laborer group, and asked for rejection reasons for each applicant. OFCCP also asked for recruitment and referral sources as well as an outline of the selection process.
- What is OFCCP likely to do with this? Will “diversity efforts” make a difference?

Hypothetical 2 - Takeaways



- Increased applicant flow for unskilled jobs → “big numbers lead to big problems”
- No verification or refinement of applicant flow before AAP prepared
- HR sent desk audit materials to OFCCP without verifying accuracy or strategically analyzing
- HR included adverse impact analysis in desk audit submission
 - Note: adverse impact analysis prepared by non-attorney consultant or HR staff is NOT privileged

Hypothetical 2 - Takeaways



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- Recruiting did not track application dispositions
- OFCCP will request outline of selection process – looking for screening “steps”
- Unmonitored recruiting “diversity” efforts → large statistical problem → \$\$\$\$ and press release

Outreach and Recruitment



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- Affirmative action goals: limited to minorities, females, veterans, individuals with disabilities
 - What about socio-economic, geographic, community-based goals?
- If you need “more” → get “more” into the qualified applicant pool
- Consider outreach sources and whether they are profitable investments of time and money
 - Staffing agencies: affirmatively request diverse candidates
 - Employee referral programs: good and bad
 - Make changes if what you are doing is not creating diverse pools of qualified applicants
 - Need to change focus is current efforts do not work
- Effort is the most important element of outreach and recruitment; meeting goals is secondary
- Qualifications must be the key focus!

Hypothetical 3



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- Company's AAPs historically revealed few women in maintenance jobs and always resulted in female goals for these positions.
- In an effort to improve the utilization of women in maintenance and other jobs, company instituted diversity efforts.
- Employees were paid bonuses for referrals who were hired and were paid an extra bonus if the referral hired was a woman.
- Recruiters were encouraged to forward female applicants to hiring managers
- Hiring managers' performance appraisals included evaluation of whether or not they met AAP goals.
- **Male applicants sued for discrimination. Can they prevail?**

Hypothetical 3 - Takeaways



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- Action-oriented efforts in place
- **But:** did recruiters/managers have a goal or a quota?
- **These diversity efforts incentivize hiring to the numbers**
 - Bonus for female hires
 - Recruiters encouraged to forward females (not “qualified job applicants” to hiring managers
 - Evaluation for meeting (not “making progress toward”) AAP goals

Limitations on Affirmative Action



Affirmative action exists to eliminate both discrimination and underutilization

. . .

and underutilization is affected by both selection and retention.”

- » Kravitz, The Diversity-Validity Dilemma: Beyond Selection-The Role of Affirmative Action, *61 Personnel Psychology* 173, 182 (2008)

Limitations on Affirmative Action



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Limitations on Affirmative Action



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- By definition, metrics are limited to those involving women and minorities
- Can be divisive
 - Negative perception fueled by ignorance
 - “Audits gone bad” do not help perception in the executive suite

Diversity Management



- Non-mandated management approach to creating environment that allows all employees to reach maximum potential
- Excludes no one
- Provides a process to assess where company is organizationally and examine barriers which prohibit reaching goals
- Managers: act as change agents
- Employees: don't have to value all differences but do have to acknowledge that they exist

Safeguards



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- Do not blindly set goals for females and minorities
 - Use defensible method of setting goals
 - Only set goals when warranted
- Establish basic/minimum qualifications
- Implement defensible targeted recruiting
- Make process fair and transparent
 - Keep EEO information away from hiring decision makers
 - Open job postings for promotions/transfers
 - Diverse teams in the hiring and promotion process

Safeguards



- Be careful about diversity “goals”
- Encourage race/gender “neutral” efforts
- Under current law, there must be “manifest imbalance” in a “traditionally segregated job category”
 - Supreme Court has never approved race-conscious measures undertaken to achieve diversity outside of the higher education context
 - Once minorities/females are “fully utilized,” employer may not use race- or gender-conscious means to maintain diversity

Safeguards



- Inclusive, nondiscriminatory programs are generally lawful
- Listen to employees
- Understand the issues and address them without regard to protected status
- Include white males!

Safeguards



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- Educate!
 - Diversity is not “preferential”
 - Diversity is not a belief system
 - Use values that appeal to all (respect, fairness)
 - Diversity is a business imperative
 - Keep focused on the organization’s success
 - Ensure that employees know that discrimination is prohibited
 - Goals are not quotas
 - No hiring preferences for unqualified applicants or employees

Conclusion



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- “Affirmative action” is not a defense to race- or gender-based hiring
- “Diversity” is a key business strategy that can lead to increased productivity, workforce quality, better recruiting results and longer retention
- Implemented erroneously, “diversity” hiring and promotion may equate to “discriminatory” hiring and promotion

Conclusion



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- **Communication and training is key**
- What do affirmative action goals mean?
- How is the diversity effort measured?
- How should diversity and affirmative action goals be used in the employment process?

Questions?



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