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Keeping DEI Legal: Voluntary Affirmative Action

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What is OK — and what isn't — when it comes to methods for improving workforce diversity?

Employers are creative and strategic when it comes to workforce diversity initiatives. Sometimes, however, that creativity — and the motivation to move the needle on diversity metrics — can create unintended consequences. There are two competing notions at play here: the legal requirement to make employment decisions that are not based on protected characteristics, and the desire to ensure underrepresented groups are fully considered in the employment process. How can employers do the latter without violating the former?

Traditional affirmative action efforts focus on the recruitment process and are based on the theory that creating diverse candidate pools will, over time and through application of a neutral selection process, naturally lead to more diverse workplaces. US federal contractors have been required to engage in such affirmative action efforts since 1965 when President Lyndon Johnson signed Executive Order 11246 following the Civil Rights Act of 1964. Many non-federal contractors understand the value of utilizing diverse recruitment sources and do so voluntarily.

But what if casting a wide net for applicants and using recruitment sources geared toward diverse candidates fails to produce the desired result? And what can employers legally do to ensure that the diverse candidates who do apply for employment are considered and evaluated by hiring managers? This is a complex legal issue, and employers should tread carefully before implementing procedures that specifically take race, gender, or other protected characteristics into account.

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Principles of non-discrimination

Employers are prohibited from basing employment decisions on a person's protected characteristic, such as race and gender, under both Title VII of the Civil Rights Act and the Executive Order, and these protections apply equally to men and non-minorities. The regulations implementing Executive Order 11246 state:

> "In all employment decisions, the contractor must make selections in a nondiscriminatory manner. Placement goals do not provide the contractor with a justification to extend a preference to any individual, select an individual, or adversely affect an individual's employment status, on the basis of that person's race, color, religion, sex, sexual orientation, gender identity, or national origin."
>
> Executive Order 11246

Collecting demographic information from applicants is legal so long as it is "not used in the selection process," per the US Equal Employment Opportunity Commission (EEOC), as explained in its Informal Discussion Letter. This guidance suggests that employers cannot use the race and gender information voluntarily disclosed by applicants to ensure that candidate pools presented to hiring managers are diverse or to highlight diverse candidates for consideration.

"Title VII forbids not only recruitment practices that purposefully discriminate on the basis of race but also practices that disproportionately limit employment opportunities based on race and are not related to job requirements or business needs," according to the EEOC's April 2006 Compliance Manual on Race Discrimination.

The EEOC further states that "the process of screening or culling recruits presents another opportunity for discrimination. *Race obviously cannot be used as a screening criterion*. Nor may employers use a screening criterion that has a significantly disparate racial impact until it is proven to be job related and consistent with business necessity." (Emphasis added). Based on this statement, employers are prohibited from advancing candidates in the selection process based on their race or gender. It would obviously be unlawful for an employer to refer white applicants to a hiring manager after reviewing candidates' race information; it would be equally unlawful to apply such a practice to minority candidates. Similarly, offering different terms or benefits of employment — such as training opportunities — to some employees, but not others on the basis of race or gender is problematic.

EEOC's guidelines on voluntary affirmative action

These pronouncements regarding non-discrimination, however, must also be read in conjunction with

the EEOC's guidelines on voluntary affirmative action. The Commission recognized that Title VII was enacted "to improve the economic and social conditions of minorities and women by providing equality of opportunity in the work place" and that Congress intended for employers to "act on a voluntary basis to modify employment practices and systems which constituted barriers to equal opportunity… ."

The guidelines further provide:

> "The principle of nondiscrimination in employment because of race, color, religion, sex, or national origin, and the principle that each person subject to title VII should take voluntary action to correct the effects of past discrimination and to prevent present and future discrimination without awaiting litigation, are mutually consistent and interdependent methods of addressing social and economic conditions which precipitated the enactment of title VII. Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in title VII."
>
> US Equal Employment Opportunity Commission

Although written in 1979, these words are equally applicable today.

Employers are provided with a defense to claims of "reverse" discrimination if their actions are "adopted in good faith, in conformity with, and in reliance upon a written interpretation or opinion of the Commission …," according to the guidelines.

Therefore, employers should follow specific steps and procedures before implementing any voluntary affirmative action efforts, and legal counsel should thoroughly review the processes taking into account the guidelines and existing case law.

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Determine basis for voluntary affirmative action

Three circumstances when voluntary affirmative action may be appropriate are described in the guidelines:

- **Adverse effect.** Employers may use affirmative action procedures if an analysis shows actual or potential adverse impact caused by existing or contemplated practices.
- **Effects of prior discriminatory practices.** Employers "may take affirmative action to correct the effects of prior discriminatory practices," which "can be initially identified by a comparison between the employer's work force, or a part thereof, and an appropriate segment of the labor force."
- **Limited labor pool**. "Because of historic restrictions by employers, labor organizations, and others, there are circumstances in which the available labor pool, particularly of qualified minorities and women, for employment or promotional opportunities is artificially limited."

Establish an affirmative action plan

If an employer identifies appropriate circumstances for taking affirmative action, it must develop a plan that contains:

- A reasonable self-analysis;
- A reasonable basis for concluding action is appropriate; and
- Reasonable action.

The self-analysis should focus on determining whether any employment practices adversely affect a protected group and the reason why. No specific methods for analysis are mandated, and the techniques set forth in the regulations implementing Executive Order 11246 may be used for conducting the self-analysis. For example, through statistical analysis, Company A might find that Asian and Latinx workers are underrepresented within middle management positions in the Seattle Metro Area as opposed to their availability in that labor market.

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An employer can conclude that a **reasonable basis** for the plan exists if the self-analysis shows any employment practice has an adverse effect, does not correct effects of past discrimination, or results in disparate treatment. Continuing the example above, Company A reviews middle management promotions and hires and finds that qualified Asian and Latinx workers who applied for roles were not selected due to preferences given to employee referrals. Company A decides to institute voluntary affirmative actions to address the underrepresentation.

The final step in establishing a voluntary affirmative action plan requires that the action taken by the employer “be reasonable in relation to the problem disclosed by the self analysis (sic). The **reasonable action** *can* “recognize the race, sex, or national origin of applicants or employees.” The guidelines include a non-exhaustive list of the types of actions employers can then take, including “measures designed to assure that members of the affected group who are qualified to perform the job are included within the pool of persons from which the selecting official makes the selection.”

In other words, an employer can implement procedures to ensure that candidate pools considered by a hiring manager are diverse before making a selection decision. In our example then, Company A sets a placement goal for Asian and Latinx workers for its middle manager jobs and trains its recruiters and hiring managers to treat employee referrals on the same footing as all other candidates. Company A further educates about its placement goals and encourages candidate slates for middle management roles to include qualified Asian and Latinx workers.

The voluntary affirmative action plan should also satisfy the following criteria:

- Be narrowly tailored to address the issues identified in the self-analysis;
- Avoid restrictions on opportunities for non-protected groups;
- Maintain race/gender-conscious steps for a limited time and only for as long as needed to achieve the objectives identified;

- Reasonably relate any goals and timetables to the availability of qualified applicants and the number of employment opportunities; and

- Be dated and written.

  Given the complexity of the law in this area, employers should involve counsel in each aspect of developing a voluntary affirmative action plan and reviewing relevant legal precedent.

Employers cannot use race or gender-conscious selection procedures unless they have sufficient justification, undertake a thorough assessment of existing procedures, and develop a written plan that adheres to the Commission's standards, according to Title VII and the EEOC's Guidelines. Given the complexity of the law in this area, employers should involve counsel in each aspect of developing a voluntary affirmative action plan and reviewing relevant legal precedent.

Dawn Blume

Senior Counsel, People & Culture

BP America, Inc.

Dawn Blume is senior counsel, people and culture, at BP America, Inc.

Cara Yates Crotty

Partner

Constangy, Brooks, Smith & Prophete, LLP

Cara Yates Crotty is a partner at Constangy, Brooks, Smith & Prophete, LLP, where she is also chair of the Affirmative Action/OFCCP Compliance practice group.