DIVERSITY INITIATIVES: WHAT WORKS, WHAT DOESN’T, AND WHAT’S AT RISK

March 30, 2017

ABA Equal Employment Opportunity Midwinter Conference

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Overview

In general, a U.S. employer may not make an employment decision based on a candidate’s legally protected characteristic. *See, e.g.*, Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352), as amended, 42 U.S.C. § 2000e, et seq. ("Title VII") (prohibiting discrimination on the basis of race, color, religion, sex, or national origin). Employment decisions include all decisions that affect a term or condition of employment, including hiring, firing, promotion, demotion and other decisions that affect a term or condition of employment. *Id.* For certain protected classes, both members and non-members of the protected class may bring a discrimination claim (for example, both male and female applicants and employees may bring discrimination claims under Title VII. *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976) (both members of the protected class and non-class members can bring a claim)).

U.S. federal law does not prohibit an employer from adopting a generalized and aspirational statement regarding the company’s commitment to diversity and inclusion, as long as the statement does not cause the

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1 This section drafted with substantial input from Barbara D’Aquila and Margaret Rudloph of Norton Rose Fulbright US LLP.
employer's decision-makers to make any specific employment decision on the basis of a protected class. Employers may also engage in nondiscriminatory internal training or external outreach without violating federal law.

Remedial Requirement

Two leading Supreme Court decisions establish that so-called “affirmative action” plans are only lawful if they are based on an historical imbalance or disparity in the workforce. See Johnson v. Transp. Agency, Santa Clara Cnty., Cal., 480 U.S. 616, 632-640 (1987) (“The first issue is therefore whether consideration of the sex of applicants for . . . jobs was justified by the existence of a ‘manifest imbalance’ that reflected underrepresentation of women in ‘traditionally segregated job categories.’”) (emphasis added) (citation omitted); United Steelworkers of Am. v. Weber, 443 U.S. 193, 208 (1979) (program attributes discussed). Pursuant to these cases, a program is unlawful if:

1. The program is not grounded in documented underutilization of the protected class in specific positions and in specific labor pools;
2. The program unnecessarily trammels the rights or interests of a non-protected class employee (e.g., male, white person), by, e.g., setting aside positions for women, requiring the termination of a male employee, or barring the advancement a man;
3. The program is not temporary in nature or seeks to maintain (rather than attain) a balanced workforce; and
4. The program fails to be aspirational only and instead could be used to make employment decisions based solely on the protected characteristic.

See also Cohen v. Cnty. Coll. of Phila., 484 F. Supp. 411, 430 (E.D. Pa. 1980) (“[U]nder Weber, an employer’s affirmative action plan can be justified by the existence of a history of racial discrimination in the relevant occupation or profession at large.”).
Id. At least one Circuit Court has held that “[g]iven the clear antidiscrimination mandate of Title VII, a non-remedial affirmative action plan [aimed at promoting racial diversity rather than remedying discrimination], even one with a laudable purpose, cannot pass muster” under Title VII. Taxman v. Bd. of Educ., 91 F. 3d 1547, 1550 (3d Cir. 1996) (emphasis added).

Moreover, courts have held such programs to be legally impermissible on the grounds that the employer relied on improper statistical data when determining whether the program had a remedial purpose and when evaluating what an appropriate diversity goal was for the program. In Janowiak v. Corp. City of S. Bend, the Seventh Circuit held that “[b]ecause the City [ ] did not offer any evidence of a statistical disparity between the number of minorities in the fire department and the number of qualified minorities in the area labor pool, it failed to establish the manifest imbalance required by Johnson.” 836 F.2d 1034, 1039-40 (7th Cir. 1987). The court further noted, “the ax falls because the statistical comparison upon which the city based its plan focused not on the relevant qualified area labor pool but on general population statistics.” Id. at 1039. Similarly, a district court struck down an affirmative action plan when the employer failed to show “a conspicuous imbalance in the particular job category.” Frost v. Chrysler Motor Corp., 826 F. Supp. 1290, 1297 (W.D. Okla. 1993) (“Chrysler has failed
to show a manifest imbalance in a traditionally segregated job category, dealership owners, because it has failed to present evidence of the percentage of blacks in the population who are qualified for such positions.”). See also *Ricci v. DeStefano*, 557 U.S. 557 (2009) (employer violated Title VII by ignoring test results without a “strong basis in evidence” for believing that it would be subjected to disparate impact liability for promoting higher-scoring individuals).

**Factor versus Reason**

The prohibition against discrimination does not mean that no preferences can be given to protected-class members. The protected characteristic, such as gender or race, may be considered a factor in the employment decision, alongside other relevant factors such as qualifications, performance, and the like. See *Johnson*, 480 U.S. at 622 (“The Agency’s Plan thus set aside no specific number of positions for minorities or women, but authorized the consideration of ethnicity or sex as a factor when evaluating qualified candidates for jobs in which members of such groups were poorly represented.”); *Sharkey v. Dixie Elec. Membership Corp.*, 262 Fed. App’x 598, 606 (5th Cir. 2008) (upholding a program that considered the hiring goals for minority employees along with an applicant’s “general background, education, training, experience, aptitude for a certain kind of work, character, and probability of long term employment.”); *Stock*, 817 F. Supp. at 1302 (“In a case where an employer has an [affirmative action plan] in place, it may hire
a qualified black worker over a more qualified worker without running afoul of [a federal anti-race-discrimination law].”). Compare Frost, 826 F. Supp. at 1299 (“In contrast to a program such as in Johnson, in which gender was permitted to be considered as a ‘plus factor,’ Chrysler's right of first refusal can be utilized to completely preclude consideration of qualified non-blacks for MIP dealerships, even when there are no qualified black candidates.”) with Cohen, 484 F. Supp. at 434 (holding the plan did not unnecessarily trammel the interests of white employees because “the plan simply [required] that whenever a hiring recommendation [was] made, it must be accompanied by ‘evidence that there [was] a deliberate consistent practice’ of seeking minority candidates for potential openings).

Best Practices: Quotas versus Goals

U.S. courts disfavor quotas. Instead, the courts favor programs similar to the one in Johnson, which set “long-range percentage goals” – something the Ninth Circuit has contrasted with “quotas.” Johnson v. Transp. Agency, Santa Clara Cnty, 770 F.2d 752, 760 (9th Cir. 1984) (“A court’s serious evaluation of a plan’s measures can settle such questions as whether it in reality uses a ‘quota’ rather than a ‘goal,’ and can establish the reasonableness of the plan with respect to non-minority employees.”). When evaluating the legality of a diversity and inclusion program, courts specifically make a “serious evaluation” of whether the program uses a “quota” or a “goal.” Johnson, 770 F.2d at 765.
“Courts prefer flexible, case-by-case approaches over rigid quota systems.” *Shea v. Kerry*, 961 F. Supp. 2d 17, 39 (D.D.C. 2013), *aff’d*, 796 F.3d 42 (D.C. Cir. 2015) (collecting cases). In fact, the lack of a quota can weigh in favor of the program being permissible. *See id.* at 43 (emphasizing that although the employer set a hiring goal of 20 minorities/year, the “State’s minority goals were not accompanied by any minority-hiring quotas—State was not required to hire a particular number of minorities”); *Stock v. Universal Foods Corp.*, 817 F. Supp. 1300, 1302 (D. Md. 1993), *aff’d*, 16 F.3d 411 (4th Cir. 1994) (“The [affirmative action plan or diversity and inclusion program] specifically states that its goals are not rigid quotas, but are rather targets ‘reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work.’”) (emphasis added). As the *Cohen* court noted in approving a plan, the plan “does not set any numerical goals or guidelines, and it makes no commitment to percentages. Rather, the plan simply requires that whenever a hiring recommendation is made, it must be accompanied by ‘evidence that there is a deliberate, consistent practice’ of seeking minority candidates for potential openings . . . .” *Cohen*, 484 F. Supp. at 434 (emphasis added).

At least one court has held that a diversity and inclusion program with a 50% promotion goal was impermissible, because it trammels the rights of the non-protected class members. *See In re Birmingham Reverse Discrimination Emp’t Litig.*, 20 F.3d 1525, 1532 (11th Cir. 1994).
The court held that the city's goal that 50% of promotions to a specific position be filled by qualified black employees unnecessarily trammelled the rights or interests of non-black employees. *Id.* The Eleventh Circuit criticized the "rigid, arbitrarily selected quota." *Id.* at 1543. "In [the court's] view, the City decree fail[ed] under Title VII because the indefinitely-lasting, arbitrarily-selected 50% figure for annual black promotions to fire lieutenant unnecessarily trammel[ed] the rights of non-black firefighters by unduly restricting their promotional opportunities through establishment of an arbitrary fixed quota." *Id.* at 1542 (emphasis added).

**A Note About Equal Pay**

None of the above should be read to imply that employers should be concerned about legal ramifications of fixing a pay disparity. Employers have a legal obligation to pay men and women, whites and people of color, Christians and Muslims, Americans and foreigners, equal pay for equal (or substantially similar) work. If an employer has reason to suspect that it has a pay disparity favoring a certain type of employee on the basis of gender, race, religion, or national origin, it must take immediate steps to address that disparity or face the risk of liability. Fixing a pay disparity is not the same thing as an affirmative action plan; it is an independent legal obligation.

**Diversity Audits: Discoverable in Litigation?**

The question inextricably tied to all of the above is, ‘How can we study this issue, without exposing ourselves to negative consequences if we are later sued and have to turn over the materials in discovery?’ And plainly, the
issues must be studied, for employers must be able to establish that the plan is remedial in nature, and accordingly must have evidence to back that up. Similarly, in order to learn whether and where a pay disparity is occurring, a rigorous data analysis must be undertaken.

There seems to be a widespread and mistaken impression among many employers that they can engage attorneys, either in-house or external, to direct diversity studies, and therefore imbue them with the protections of the attorney work product doctrine or attorney-client privilege. But this is far from the case.

Audits may be undertaken as part of a legal obligation, in anticipation of litigation, or voluntarily to create a more diverse workplace. It is the last category – self-critical analyses - where the underlying materials will not be protected from discovery. No circuit court has recognized a “self-critical analysis” privilege.³

Work Product

Unless a study is undertaken because of pending litigation or anticipated litigation, it is not work product. To invoke work-product protection, a party must show “in light of the nature of the document and the factual situation in the particular case, [that] the document can be fairly said to have been prepared or obtained because of the prospect of litigation.” In re

Grand Jury Subpoena, 357 F.3d 900, 907 (9th Cir. 2003). See also United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998) (same).

“A generalized fear of litigation does not turn a compliance audit into attorney work product.” Lewis v. Wells Fargo, 266 F.R.D. 433, 441 (N.D. Cal. 2010). “Likewise, the fact that an employer anticipates the possibility of litigation from an event or accident does not automatically qualify an in-house report for protection from discovery.” Musa-Muaremi v. Florists’ Transworld Delivery, Inc., 270 F.R.D. 312, 317 (N.D. Ill. 2010). “A more or less routine investigation of a possibly resistible claim is not sufficient to immunize an investigative report developed in the ordinary course of business.” Id. (quoting Binks Manuf. Co. v. Natl. Presto Indus., Inc., 709 F.2d 1109, 1118 (7th Cir. 1983)).

In addition, in order to be protected by the work product doctrine, the audit materials must be directly related to specific litigation. That means that the audit must study the same population at issue in the litigation; if it is broader, or pertains to a different set of employees, then it cannot fairly be said to have been produced because of that litigation. See, e.g., Cruz v. Coach Stores, Inc., 196 F.R.D. 228, 232 (S.D.N.Y. 2000) (where audit materials did not mention the plaintiff or the pending lawsuit, and none of the materials pertained to plaintiff, it was not work product); Marceau v. I.B.E.W., 246 F.R.D. 610, 614 (D. Ariz. 2007) (“Again, the in-camera review of the document reveals that this was an audit designed to study and propose solutions for on-
going management issues facing the company. It is true that the past history of litigation supports the contention that litigation was anticipated, but in light of the history of the issues addressed in the Report it is reasonable to believe that the Report would have been prepared in the absence of anticipated litigation.

**Attorney-Client Privilege**

Workplace audits conducted for business purposes are not attorney-client privileged, even when carried out by attorneys. When it comes to the privilege, the purpose of the communication controls. If the purpose of the communication is to further a business function, rather than to procure legal advice, the communication is not privileged. *See, e.g., U.S. v. ChevronTexaco Corp.*, 241 F.Supp.2d 1065, 1069 &1072 (N.D.Cal. 2002) (“corporations may not conduct their business affairs in private simply by staffing a transaction with attorneys.”); *Musa-Muaremi v. Florists’ Transworld Deliver, Inc.*, 270 F.R.D. 312,316 (N.D. Ill. 2010) (“The privilege does not, however, protect business decision advice, even when that business advice is rendered by an attorney or an attorney is one of those participating in the business decision.”); *U.S. v. ISS Marine Services, Inc.*, 905 F.Supp.2d 121, 128 (D.C. 2012) (same).

Many courts have recognized that where an internal audit is undertaken for purposes of general compliance, or to improve some aspect of business, it is part of a company’s routine business operations and is not done
for the purpose of securing legal advice; hence, the materials associated with that audit are not privileged. See, e.g., ISS Marine Services, Inc., 905 F.Supp.2d at 132 (“The fact that Inchape had an obvious and compelling business purpose to conduct an internal audit to ascertain any overpayments further militates in favor of concluding that the privilege does not apply because it suggests that the audit reports would have been created even if Inchape was not seeking legal advice.”); Marceau v. IBEW, 246 F.R.D. 610, 613-14 (D. Ariz. 2007) (holding that an audit prepared by outside counsel was not protected by the attorney-client privilege, despite being marked as such, because “[t]he co-mingling of the purposes of the audit between identifying improved business operations and obtaining legal advice to this degree vitiates the protection of the attorney-client privilege.”); Cruz v. Coach Stores, Inc., 196 F.R.D. 228, 231 (S.D.N.Y. 2000) (“The claim of attorney-client privilege fails because, the Court finds, the purpose of the ‘investigative audit’ was not solely, or even primarily, to enable its counsel to render legal advice to Coach.”); Musa-Muaremi, 270 F.R.D. at 317 (“Likewise, the fact that an employer anticipates the possibility of litigation from an even or accident does not automatically qualify an in-house report for protection from discovery. . . . the record demonstrates that the reports were created as part of FTD’s routine response to an employee’s complaint.”); Anderson v. Marsh, 312 F.R.D. 584, 591 (E.D. Cal. 2015) (“The reports are not created for the purpose of obtaining legal advice, but as part of the investigation into the
officer involved shooting. . . . the fact that general counsel reviews the
documents created during the investigation is not sufficient to entitle them to
attorney-client privilege.”).

The modern tendency of many companies to try to shield these
materials from discovery by involving counsel in the audit process is
misplaced, and actually raises the very real possibility of harming their
reputation if a court is asked to review, which can have severely negative
consequences in litigation.

In Sum

Employers’ concerns are understandable. In many instances, diversity
studies can show where a company is vulnerable to legal action. Yet the
answer is not to try to corrupt the attorney client privilege and work product
doctrines in an attempt to hide its valuable efforts. Rather, if the studies
reveal a problem, then fix it – and take proud ownership of the efforts. A
company that has undergone such a process is not an attractive target for a
prospective plaintiff. (Note that the Equal Pay Act and many state laws
mandate that the under-paid employees’ salaries be adjusted up, and prohibit
adjusting another employee’s salary downward.)