Promote diversity without violating discrimination laws

Workplace diversity initiatives can benefit employers and employees alike, but they can also present a challenging dynamic for employers.

Examples: Could hiring a candidate because of his or her protected category by itself be considered discriminatory? Is it discriminatory to staff a project with diverse employees because a client requested it?

In most cases, Title VII of the Civil Right Act prohibits employers from making decisions based on an applicant's or employee's protected status.

The only legally recognized exception is when employers establish "affirmative action" plans based on a historical imbalance or disparity in the workforce. These plans are permissible when:

1. Preferences are intended to "eliminate conspicuous racial imbalances in traditionally segregated job categories"
2. The rights of nonminority employees are "not unnecessarily trammeled" and
3. The preferences are temporary in duration.

State vs. federal law

Courts closely scrutinize affirmative action plans.

In *Schurr v. Resorts International Hotel*, a white plaintiff alleged he was denied a technician job based on race when the position was offered to an equally well-qualified minority candidate. A New Jersey law required Resorts International to take affirmative steps to employ minorities. At the time, the technician category was 22.5% minority, less than the law's goal of 25%. The employer believed it had to hire the minority applicant.

The 3rd Circuit held that the affirmative action plan violated Title VII because it was not based on a finding of discrimination in the casino industry or the technician job category and so was not put in place based on a historical imbalance or disparity in the workforce.

Schurr illustrates the challenge facing employers. Even when an affirmative action plan is required by state regulation, it may violate Title VII. Employers considering affirmative action plans must make sure they meet all the required factors.

7600 Leesburg Pike, Suite 300, Falls Church, VA 22043-2004 (800) 543-2002

Diversity for contractors

Another potential exception to Title VII's prohibition on making employment decisions based on protected status is Executive Order 11246, which requires certain federal contractors and subcontractors to take affirmative action to ensure equal employment opportunity.

Affirmative action plans under the executive order are typically mandated by government contract, whereas affirmative action plans that address a historical imbalance or disparity are typically either voluntary or mandated by court or agency order. The courts have not yet decided whether such hiring decisions based on an affirmative action plan can still violate Title VII.

Promoting diversity

What should employers do when they do not meet the requirements of an affirmative action plan, but still want to promote diversity? Courts have made it clear that any nonremedial affirmative action plan, if aimed at promoting diversity, rather than remedying discrimination, could violate Title VII.

While there is no clear legal guidance for employers, the solution may lie in treating diversity as *one factor* in employment decisions, rather than as a preference or a deciding factor. Similarly, it is best for employers to have diversity goals, not specific quotas.

Supreme Court weighs in

In 2003, the Supreme Court upheld a college admissions system that considered the race or ethnicity of applicants a "plus" factor (*Grutter v. Bollinger*, 2003), and struck down a system that allocated points to underrepresented minorities (*Gratz v. Bollinger*, 2003).

In 2016's *Fisher v. University of Texas*, the most recent Supreme Court decision on the issue, the court upheld an admissions system in which "consideration of race is contextual and does not operate as a mechanical plus factor for underrepresented minorities."

In that case, the university made decisions based on an applicant's Academic Index and Personal Achievement Index scores. A PAI score is based on information such as essay scores, letters of recommendation and community service, with race given weight as a subfactor. Thus, "although admissions officers can consider race as a positive feature of a minority student's application, there is no dispute that race is but a 'factor of a factor of a factor' in the holistic-review calculus."

Applying *Fisher* to the employment context, employers should consider diversity as but one factor in their overall assessment of a candidate.

Never hire a diverse candidate based solely or primarily on the candidate's diversity. Rather, consider diversity as one of the many individualized considerations about a candidate. In the context of individualized assessments and diversity goals (rather than quotas or other hard numbers), it is likely that a court would uphold an employer's decision to hire a diverse, qualified candidate.

However, such an outcome is never guaranteed, and the decision to promote workplace diversity is ultimately a business decision that comes with potential risks.

Jessica X.Y. Rothenberg is an associate in the Labor and Employment Practice Group of Pepper Hamilton.

7600 Leesburg Pike, Suite 300, Falls Church, VA 22043-2004 (800) 543-2002