



Employer Diversity Initiatives: Legal Considerations for Employers and Policymakers

COMMITTEE ON LABOR & EMPLOYMENT LAW

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I. INTRODUCTION

Nearly fifty years have passed since Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (“Title VII”), prohibiting discrimination in employment on the basis of race, color, religion, sex or national origin. Since then, numerous federal, state and local laws have been enacted prohibiting discrimination in employment on the basis of other protected characteristics, such as age, disability, veteran status, marital status, sexual orientation, gender identity and genetic predisposition. Employers and courts alike have struggled to implement the overriding goal of providing equal opportunity and fundamental fairness to both applicants and employees in employment decisions involving hiring, retention, compensation, promotion and termination. Many employers also seek a competitive advantage by hiring and retaining workforces that reflect and are inclusive of their applicant pool and client or customer base. Such employers recognize that diverse employees bring to their businesses experiences, perspectives, and innovation that may be missing from monocultures comprised of members of a group with little to no demographic diversity.

Today, many organizations, including bar associations, have adopted diversity goals and statements in an effort to memorialize their dedication and commitment to diversity. For example, in 2004 the New York City Bar Association (“NYCBA”) adopted its Statement of Diversity Principles, building on goals the NYCBA originally subscribed to in 1991 and “pledg[ing] to facilitate diversity in the hiring, retention and promotion of attorneys and in the elevation of attorneys to leadership positions within [their] respective organizations.”¹ Since then, 126 law firms and corporations have signed the Statement of Diversity Principles. Commitment is likely to continue and coincide with the increasing diversity of the U.S. population and college and law school graduates.²

Although nearly everyone agrees that prohibiting discrimination and promoting equal opportunity are worthy goals, there is substantial disagreement about how to best achieve such aspirations. Indeed, even seasoned federal judges do not agree about how to lawfully achieve these goals consistent with the anti-discrimination prohibitions under Title VII and similar laws. The Supreme Court’s decision in *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), a dispute that made headline news throughout the confirmation hearings of now-Justice Sonia Sotomayor, highlights some of the issues that may arise as employers attempt to work toward the goal of ensuring a diverse workforce while complying with the requirements of Title VII. In *Ricci*, a closely divided Supreme Court held by a vote of five to four that the city of New Haven, Connecticut,

¹ *Statement of Diversity Principles*, The Association of the Bar of the City of New York (2003), available at http://www.nycbar.org/pdf/diversity_principles2.pdf (last visited Apr. 21, 2011).

² Data issued by the Law School Admissions Council shows that between the 1989-1990 academic year and the 2010-2011 academic year, the total minority enrollment at the more than 175 schools being tracked more than doubled, growing from 15,720 to 35,045 students. *Total Minority Enrollment 1989-2010*, Law Sch. Admission Council, available at <http://www.lsac.org/jd/pdfs/TotalMinorityEnrollment.pdf> (last visited Apr. 21, 2011). Moreover, “[t]he United States is expected to experience significant increases in racial and ethnic diversity over the next four decades.” J. Ortman & C. Guarneri, *United States Population Projections: 2005 to 2050*, U.S. Bureau of the Census, at 3 (2003), available at <http://www.census.gov/population/www/projections/analytical-document09.pdf> (last visited Apr. 21, 2011). Based on data from the U.S. Census Bureau it is projected that Hispanic populations will more than double between 2000 and 2050, and the Asian population will increase by 79%. *Id.* Most racial groups are expected to increase their representation in the U.S. population over the next four decades, with the exception of non-Hispanic whites, who are expected to lose 6 to 7% of their proportion in the population. *Id.*

violated Title VII when it discarded employment test results that had a disparate impact on African-American and Latino firefighters. The lower courts found that New Haven was permitted to reject the test results to avoid the risk of liability under Title VII's disparate impact provisions. The U.S. Supreme Court, however, reversed, holding that ignoring the test results amounted to unlawful disparate treatment on account of race against the successful test takers (most of whom were White). In essence, the Supreme Court concluded that New Haven discarded the test results because they failed to generate a sufficient number of African-American and Hispanic firefighters qualified for promotion, thereby violating the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, which prohibits governmental employers from making decisions based on race. The majority of Justices found that the circumstances of the race-neutral test did not justify making an intentional race-based decision in the name of avoiding unintentional discrimination against African-Americans and Hispanics, who had failed the test in disproportionate numbers and who, therefore, did not qualify for promotion.

Recently, in February 2012, the Supreme Court granted *certiorari* in *Fisher v. University of Texas*, and is now poised to consider the use of racial preferences in education for the first time since 2003.³ The case was brought by Abigail Fisher, a white student who asserts that she was denied admission to the University of Texas, while minority students with lower grades than her's were offered admission. *Fisher* does not arise in the employment context and will, therefore, not be analyzed under Title VII. Rather, the claims will be analyzed under the Fourteenth Amendment's Equal Protection Clause. Nevertheless, the Court will confront issues surrounding the use of racial preferences and affirmative action in the name of diversity that no doubt may influence thoughts about the use of these practices by employers. In 2003, the majority opinion in the Supreme Court's decision in *Grutter v. University of Michigan*, written by former Justice Sandra Day O'Connor, stated that the day would come when "the use of racial preferences will no longer be necessary" in admission decisions to foster educational diversity, and suggested that day would arrive in 25 years, or in 2028.⁴ *Fisher* is set for oral argument during the Court's 2012 Fall Term.

The *Ricci* and *Fisher* cases bring into sharp focus the inherent tension between Title VII's prohibition of discrimination on the basis of protected characteristics and the equally compelling social goal of creating and ensuring a more diverse and inclusive workforce. When is an employer justified in making a decision based on race (or other protected category) in the name of avoiding an unintended adverse impact on another race (or protected category)? When may an employer adopt policies designed to increase and foster diversity at all levels of its workforce when there has not been proof of a history of discrimination by that employer? The majority and dissenting opinions in *Ricci* make it clear that each of the Justices abhors discrimination, but the issues in *Ricci* and *Fisher* also highlight the fact that the means of ensuring diversity and equal opportunities can be controversial.

³ 631 F.3d 213 (5th Cir. 2011), *cert. granted sub nom. Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012).

⁴ 539 U.S. 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today").

This Report will explore efforts by employers to attract and attain a diverse workforce and the legal impediments that may arise from implementing such initiatives. Although the Committee is unanimous in its belief that the law should prohibit discrimination and ensure equal opportunity in employment, this Report does not advocate for any particular law or changes in the current laws. Nor does it answer the question of what is the best way for an employer to ensure that its workplace is an inclusive meritocracy. Rather, the objective of this Report, on the eve of the historic Golden Anniversary of Title VII, is to provide a platform for legal policy discussions and to urge policymakers to look comprehensively at the interaction of various laws, some of which may work to undermine the goal of equal opportunity for all.

The Report begins with a brief overview of the anti-discrimination laws and the changing demographics of the U.S. workforce since the passage of Title VII. It will then discuss conflicting policies and laws and the legal risks employers face when planning and implementing certain diversity initiatives, including (i) collecting demographic information for purposes of planning and monitoring progress toward goals; (ii) taking actions based on race and other protected characteristics; and (iii) engaging in targeted mentoring and training programs. It also sets out those diversity “best practices” that are permissible under current law. The report will also discuss the extent to which diversity planning documents will be protected from disclosure. Rather than reaching conclusions, the Report ends with a series of questions intended to help further frame the issues for policy makers.

II. TITLE VII AND OTHER ANTI-DISCRIMINATION LAWS AND THE NATION’S CHANGING POPULATION

A. Title VII and Other Anti-Discrimination Laws

The foundational federal anti-discrimination statute is Title VII of the Civil Rights Act of 1964 (“Title VII”). Title VII prohibits discrimination in employment on the basis of race, color, religion, sex or national origin.⁵ Subsequently enacted federal statutes prohibit discrimination on additional bases. For example, the Age Discrimination in Employment Act of 1967 prohibits discrimination in employment against persons who are 40 years of age or older.⁶ The Americans with Disabilities Act prohibits discrimination in employment based on disability, perceived disability, a history of disability or association with a disabled individual.⁷ Many states and municipalities also have enacted anti-discrimination laws that prohibit discrimination on the grounds covered by federal law and, at times, go beyond the protections offered under federal law by protecting other traits, such as sexual orientation and marital status.⁸

⁵ 42 U.S.C. § 2000e.

⁶ 29 U.S.C. § 621.

⁷ 42 U.S.C. § 12101.

⁸ For example, most New York City-based employers are covered by the New York State Human Rights Law, N.Y. Exec. Law. § 296, and the New York State City Human Rights Law, N.Y. City Admin. Code § 8-101. In addition to prohibiting discrimination in employment on the bases protected under federal law – race, color, religion, sex, national origin, age, disability or genetic predisposition – New York’s statutes go farther, prohibiting discrimination

Generally, Title VII prohibits employers from making employment decisions “because of” an individual’s race, color, religion, sex or national origin.⁹ Similarly, an employer is prohibited from granting preferential treatment to any individual on account of his or her protected demographic characteristics due to a numerical imbalance in the employer’s workforce.¹⁰ Title VII also prohibits employers from considering any of the characteristics protected by Title VII in any employment decision if they are a motivating factor for any employment practice.¹¹

The Supreme Court has construed Title VII’s prohibition against discrimination to recognize claims by members of both the minority and non-minority groups.¹² For example, a White employee may assert a claim for race discrimination, just as an African-American or Asian employee can. Likewise, a male employee can claim gender discrimination, just as a female employee can.¹³ The prohibitions against discrimination are universal, applying to all races, genders, national origins and religions. No group is to be favored or disfavored under the law.

The courts have recognized two distinct theories of unlawful discrimination: disparate treatment and disparate impact.¹⁴ Disparate treatment occurs when an employee is intentionally treated less favorably because of a protected characteristic.¹⁵ Under a disparate treatment theory, a plaintiff must prove, as one element of the claim, discriminatory intent or motive.¹⁶ An act which is deliberate, knowing and adversely affects members of a protected group will establish intent.¹⁷ Under a disparate impact theory, a practice which is neutral on its face may become the

on additional grounds, such as sexual orientation, military service, genetic carrier status, marital status, creed, alienage, citizenship status or conviction record.

⁹ 42 U.S.C. §§ 2000e-2(a) & 2(d). In addition, 42 U.S.C. § 1981 makes it unlawful for an employer to use an individual’s race as the basis for interfering with the making, performance, modification and termination of contracts, or the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship. *See* 42 U.S.C. § 1981(b).

¹⁰ 42 U.S.C. § 2000e-2(j).

¹¹ 42 U.S.C. § 2000e-2(m).

¹² *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976).

¹³ Reverse discrimination is not actionable, however, under the federal Age Discrimination in Employment Act. *General Dynamics Land Sys. v. Cline*, 540 U.S. 581 (2004).

¹⁴ *See Raytheon Co. v. Hernandez*, 540 U.S. 44, 54 (2003) (“This Court has consistently recognized a distinction between claims of discrimination based on disparate treatment and claims of discrimination based on disparate impact”); *see also Olmstead v. L.C. by Zimring*, 527 U.S. 581, 617 n.2 (1999), *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993).

¹⁵ *EEOC v. Francis W. Parker Sch.*, 41 F. 3d 1073, 1076 (7th Cir. Ill. 1994); *see also Carpenter v. Boeing Co.*, 456 F. 3d 1183, 1186-87 (10th Cir. 2006); *Acree v. Tyson Bearing Co.*, 128 F. A’ppx 419, 426 (6th Cir. Ky. 2005); *Hemmings v. Tidyman’s Inc.*, 285 F. 3d 1174, 1181 n. 4 (9th Cir. 2002).

¹⁶ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 631 (2007) (“A disparate-treatment claim comprises two elements: an employment practice, and discriminatory intent”); *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 986 (1988).

¹⁷ *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (“Proof of discriminatory motive is critical, although [in some situations] it can be inferred from the mere fact of differences in treatment”).

basis for discrimination if the practice has a disproportionately adverse affect upon members of a protected class.¹⁸ Employment practices subject to a disparate impact analysis can include both objective practices, such as methods of testing or physical standards of height or weight, and subjective practices such as hiring decisions based on a word-of-mouth hiring policy.¹⁹ It is not necessary for the plaintiff to establish the employer's discriminatory motive or intent in a disparate impact case.²⁰

The case law that has developed under Title VII and other anti-discrimination laws makes it perfectly clear that in passing these laws, Congress's intent was to eradicate discrimination.²¹ That is, Congress intended to ensure that employment decisions, such as hiring, firing, promotions and access to other tangible benefits, are not made "because of" an individual's race or other protected category but rather because of merit.²² The prohibition applies regardless of whether the employer had an intent to discriminate or simply implemented a neutral policy that had the unintended, but real, impact of discriminating against individuals based on race if that policy is not job-related and consistent with a business necessity or, in the case of age, based on a reasonable factor other than age.²³

Although Title VII prohibits discrimination, there is strong support for efforts to enhance the utilization of, and opportunities for, people of color and women in the workplace. Indeed, the regulations adopted with respect to Title VII state:

¹⁸ *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) ("Under the [Civil Rights Act of 1964, 42 U.S.C. 2000e], practices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices"); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 645-46 (1989)(Under the "disparate-impact" theory, "a facially neutral employment practice may be deemed violative of Title VII without evidence of the employer's subjective intent to discriminate that is required in a 'disparate treatment' case").

¹⁹ *Ricci v. DeStefano*, 557 U.S. 557 (2009); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Griggs*, 401 U.S. 424.

²⁰ *Int'l Bhd. of Teamsters*, 431 U.S. at 335 n.15; see also *Prescott v. Higgins*, 538 F. 3d 32, 41 (1st Cir. 2008); *Crawford v. United States Dep't of Homeland Sec.*, 245 F.. App'x 369, 379 (5th Cir. 2007).

²¹ See *Ledbetter*, 550 U.S. at 660 (stating that Congress intended to "secure" a "robust protection against workplace discrimination."); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. Ill. 1971) ("In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes"); See also Steven L. Willborn, *The Disparate Impact Model of Discrimination: Theory and Limits*, 34 Am. U. L. Rev. 799, 827 (Spring 1985) ("The most plausible explanation of the legislative history of title VII is not that the drafters intended to distinguish between two theories of discrimination that had not yet evolved, but that they 'included both subdivisions in the statute to be certain to prohibit all forms of discrimination in employment'") (citation omitted).

²² See *Gross v. FBL Fin. Serv.*, 129 S. Ct. 2343, 2354 n.4, 2356 (2009) ("'Because of' [does] not mean 'solely by reason of' or 'exclusively on account of' . . . Congress made clear that it intended to prohibit all invidious consideration of sex, race, color, religion, or national origin in employment decisions") (emphasis in original).

²³ See, *supra* notes 16-17; *Int'l Bhd. of Teamsters*, 431 U.S. at 335 n.15 ("Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment"); *Griggs*, 401 U.S. at 430 ("Under the [Civil Rights Act of 1964, 42 U.S.C. § 2000e], practices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices."); *Wards Cove Packing Co.*, 490 U.S. at 645-46 (Under the "disparate-impact" theory, "a facially neutral employment practice may be deemed violative of Title VII without evidence of the employer's subjective intent to discriminate that is required in a 'disparate treatment' case").

[T]he 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.²⁴

In addition, the U.S. Equal Employment Opportunity Commission (“EEOC”) “encourages voluntary affirmative action and diversity efforts to improve opportunities for racial minorities in order to carry out the Congressional intent embodied in Title VII” and believes that employers “must be allowed flexibility in modifying employment systems and practices to comport with the purposes” of the statute.²⁵

The EEOC’s regulations attempt to reconcile the law’s goal of creating a more diverse and inclusive workforce with its equally compelling prohibition against discrimination on the basis of protected characteristics, such as race and sex.²⁶ In particular, the EEOC’s Affirmative Action Guidelines encourage employers to adopt voluntary affirmative action plans and programs, which may provide for gender- or race-conscious actions, but only if the employer has conducted a reasonable self-analysis, has a reasonable basis for concluding the action is appropriate, and the action is reasonable.²⁷ Thus, as long as adopted in accordance with the EEOC’s Affirmative Action Guidelines, the EEOC recognizes that a private employer may voluntarily adopt policies appropriate to overcome the effects of past or present practices, policies or artificial barriers to equal employment opportunity.

Companies that embrace diversity and seek to have their workplace populations better reflect the demographics of the qualified workforce populations in which they operate, ironically, find themselves facing the threat of litigation or other legal impediments to promoting and maintaining diversity. For example, seemingly objective criteria adopted to ensure non-discrimination and merit-based decisions may, unintentionally, have a disparate impact on a

²⁴ 29 C.F.R. § 1608.1(c).

²⁵ EEOC Compliance Manual, No. 915.003 § 15-33, Apr. 19, 2006 (citation omitted), *available at* <http://www.eeoc.gov/policy/docs/race-color.pdf> (last visited Apr. 21, 2012).

²⁶ *See, e.g.*, 29 C.F.R. § 1608 (Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, as Amended) (“Affirmative Action Guidelines”); 29 C.F.R. § 1607.17 (Policy Statement on Affirmative Action).

²⁷ *See* 29 C.F.R. §§ 1607.13, 1608.3, 1608.4. Employers may also be required to adopt an affirmative action plan pursuant to government regulation. For example, federal contractors may be subject to the affirmative action requirement of Executive Order 11246, which is enforced by the U.S. Department of Labor’s Office of Federal Contract Compliance Programs, and/or affirmative action requirements of state and local governments. Executive Order No. 11246, *available at* <http://www.dol.gov/compliance/laws/comp-eeo.htm#overview> (last visited Apr. 21, 2012). In addition, race-conscious efforts may be required when court-ordered after a finding of discrimination or negotiated as a remedy in a consent decree or settlement agreement. *See, e.g., Local 28 of Sheet Metal Workers’ Int’l Ass’n v. EEOC*, 478 U.S. 421, 448-49 (1986) (noting that Congress gave lower courts broad power under Title VII to craft the most complete relief possible to remedy discrimination, including the power to fashion affirmative action relief).

particular group. Likewise, well-intentioned efforts to promote diversity may run afoul of laws they were intended to respect. For example: laws that are designed to ensure confidentiality of medical conditions preclude employers from taking voluntary surveys of employees with disabilities that might aid in developing programs to provide training and work opportunities to such employees or assessing accommodation efforts; special mentoring and other programs for people of color and women may be viewed as improperly excluding Whites and men in violation of Title VII's absolute prohibition of discrimination on the basis of race or gender; and laws that are designed to help veterans (especially through federal contractor hiring) may have an adverse impact on women. Employers must walk a tightrope, carefully balancing competing legal obligations. The risks they face may cause some employers to opt not to adopt certain diversity initiatives for fear of being accused of "reverse" discrimination.

Further complicating the landscape for employers is the legal recognition of an increasing number of protected groups and a desire for employers to include these groups in diversity initiatives. Disability, veteran status, sexual orientation, gender expression and identity, marital status, genetic predisposition to medical conditions and domestic violence victims are among the categories of protected groups that have been added to civil rights laws in the last 25 years.²⁸ Most recently, federal and state legislatures have proposed to add the unemployed as a protected category of persons.²⁹ The expanding number of protected categories has rendered virtually every employee protected from discrimination based on at least one trait. Diversity initiatives are no longer limited to programs that may help increase the percentage of women and people of color in a workforce; rather, they may be tailored to increase the presence of people who fall into other "protected classes" and, more generally, to ensure an inclusive workplace that values employees from all groups. Thus, any policy changes need to take into account modern-day notions of diversity and inclusiveness and the dramatic changes that have occurred over the last 50 years in employment policies and, as discussed below, in the country's working population.

²⁸ The Americans with Disabilities Act (ADA), 42 U.S.C. 12101, was enacted in 1990; The Uniform Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. 4301, was enacted in 1994; and the Genetic Information Nondiscrimination Act ("GINA"), codified at 42 U.S.C. 2000ff, was enacted in 2008. The Employment Non-Discrimination Act ("ENDA") is a proposed bill that would prohibit employment discrimination based on sexual orientation or gender identity. Sexual orientation and gender identify, as well as a number of other categories, are protected in New York by the New York State Human Rights Law, N.Y. Exec. Law 296, and the New York City Human Rights Law, N.Y.C. Admin Code 8-107.

²⁹ President Barack Obama proposed the American Jobs Act in 2011, a federal bill which would ban discrimination against the jobless. *See* S. 1549, 112th Congress (2011) and H. Doc. No. 112-53 (2011). Legislation has been introduced in New York in 2011 that would have the same effect. *See* S. 5151, 2011 Gen. Assemb., Reg. Session (N.Y. 2011); S. 5316, 2011 Gen. Assemb., Reg. Session (N.Y. 2011); A 7830, 2011 Gen. Assemb., Reg Session (N.Y. 2011).

B. Changing U.S. Demographics Since Title VII Was Enacted

Along with the backdrop of an increasing number of employment non-discrimination laws and protected categories and broader-based employer diversity programs, there have also been seismic changes in the demographics of the U.S. population and workforce.

For example, in 1964, at the time Title VII was enacted:

- More than 88% of the U.S. population was White,³⁰ every justice on the U.S. Supreme Court was a White male,³¹ and there were only six African-American³² and three female judges at the federal level.³³
- Approximately 33% of the working population was female³⁴ and only about 10% of working women were mothers.³⁵
- The gender-wage gap was estimated to be 59%,³⁶ and women comprised only 40% of college graduates³⁷ and 3% of law school graduates.³⁸
- Non-Whites comprised 4.7% of college graduates³⁹ and African-Americans represented only 1.3% of total U.S. law school enrollment.⁴⁰ There were a total of 701 African-Americans enrolled in law schools across the country.⁴¹

³⁰ *Historical Statistics of the United States Colonial Times to 1970 Part 1*, U.S. Bureau of the Census, pt.1, n.17, (1975), available at <http://www2.census.gov/prod2/statcomp/documents/CT1970p1-01.pdf>. (last visited on Apr. 21, 2012)

³¹ Susan Navarro Smelcer, *Supreme Court Justices: Demographic Characteristics, Professional Experience, and Legal Education, 1789-2010*, Congressional Research Serv., (Apr. 9, 2010), available at <http://www.fas.org/sgp/crs/misc/R40802.pdf> (last visited Apr. 21, 2012).

³² *The Integration of the Federal Judiciary: History, Biographies, and Statistics*, Just The Beginning Foundation, available at <http://jtbf.org/index.php?src=gendocs&ref=TheIntegrationoftheFederalJudiciaryHistoryBiograph&category=Main> (last visited Apr. 21, 2012)

³³ Mary L. Clark, *Carter's Groundbreaking Appointment of Women to the Federal Bench: His Other "Human Rights" Record*, Am. Univ. 11.3 *Journal of Gender Social Policy & the Law* (2003), available at <http://www.wcl.american.edu/journal/genderlaw/11/clark.pdf?rd=1> (last visited Apr. 21, 2012).

³⁴ *Statistical Abstract of the United States 1966 (87th ed.)*, U.S. Bureau of the Census, (1966), available at www2.census.gov/prod2/statcomp/documents/1966-01.pdf (last visited on Apr. 21, 2012).

³⁵ *Historical Statistics of the United States Colonial Times to 1970 Part 1*, *supra* note 31. This refers to the percentage of women who were both married and had children; unwed mothers are not included.

³⁶ *The Wage Gap Over Time: In Real Dollars, Women See a Continuing Gap*, Nat'l Comm. on Pay Equity, (Sept. 27, 2010), available at <http://www.pay-equity.org/info-time.html>. (last visited on Apr. 21, 2012).

³⁷ *Statistical Abstract of the United States 1966 (87th ed.)*, *supra* note 35, at 130.

³⁸ *Table 242- First-professional degrees conferred in dentistry, medicine, and law, by sex: 1949-50 to 1988-89*, Higher Education: Degrees, 260, sourced from, *Degrees and Other Formal Awards Conferred surveys, and Integrated Postsecondary Education Data System (IPEDS), Completions survey*, U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, Feb. 1991.

Moreover, in 1964, it was not uncommon to find segregated workplaces, with express and obvious discriminatory treatment of people of color and women.

By 1989, at the time of Title VII's 25th anniversary:

- The U.S. population was 84% White and 12% African-American,⁴² and a woman and an African-American were members of the Supreme Court.⁴³
- Women comprised almost 45%⁴⁴ of the working population and about 22% of working women were mothers.⁴⁵
- The gender-wage gap was estimated to be 66 %, ⁴⁶ and women comprised over 52% of college graduates,⁴⁷ and over 40% of law school graduates.⁴⁸
- Non-Whites comprised over 15% of college graduates⁴⁹ and 10% of law school graduates.⁵⁰

³⁹ *Statistical Abstract of the United States: 1965 (86th ed.)*, U.S. Bureau of the Census, 1965, available at www2.census.gov/prod2/statcomp/documents/1965-01.pdf (last visited Apr. 21, 2012).

⁴⁰ H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 *Stanford L. Rev.* 367, 375 n.15, (Nov. 2004), available at <http://www.law.berkeley.edu/faculty/rubinfeldd/SanderFINAL.pdf> (last visited Apr. 21, 2012).

⁴¹ *Id.*

⁴² *Statistical Abstract of the United States 1991 (111th ed.)*, U.S. Bureau of the Census (1991), available at www2.census.gov/prod2/statcomp/documents/1991-01.pdf (last visited Apr. 21, 2012).

⁴³ Smelcer, *supra* note 32.

⁴⁴ *Women in the Labor Force: A Databook, Report 1034, Table 2, Employment status of the civilian noninstitutional population 16 years and over by sex, 1970-2002 annual averages*, U.S. Dep't of Labor, Bureau of Labor Statistics (2006), available at <http://www.bls.gov/cps/wlf-tables2.pdf> (last visited Apr. 21, 2012).

⁴⁵ *Women in the Labor Force: A Databook, Report 973*, U.S. Dep't of Labor, Bureau of Labor Statistics (2004), available at <http://www.bls.gov/cps/wlf-databook.pdf> (last visited Apr. 21, 2012).

⁴⁶ *The Wage Gap Over Time: In Real Dollars, Women See a Continuing Gap*, *supra* note 37.

⁴⁷ *Table 245 – Bachelor's degrees conferred by institutions of higher education, by racial/ethnic group and sex of student: 1976-77 to 1988-89*, Higher Education: Degrees, sourced from, *Degrees and Other Formal Awards Conferred surveys, and Integrated Postsecondary Education Data System (IPEDS), Completions survey*, U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, Nov. 1990.

⁴⁸ *Id.*

⁴⁹ *Table 295 – First professional's degrees conferred by degree-granting institutions, by sex, race/ethnicity, and field of study: 2007-2008.*, Nat'l Ctr. for Educ. Statistics, June 2009, available at http://nces.ed.gov/programs/digest/d09/tables/dt09_295.asp (last visited Apr. 25, 2012).

⁵⁰ *Table 251 – First-professional degrees conferred by institutions of higher education, by racial/ethnic group, major field of study, and sex of student: 1988-89*, Higher Education: Degrees, 273, sourced from, *Degrees and Other Formal Awards Conferred surveys, and Integrated Postsecondary Education Data System (IPEDS), Completions survey*, U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, Oct. 1990.

Today, on the eve of Title VII's 50th anniversary, even more progress has been made.

- The U.S. population is 72% White,⁵¹ 12% African-American, 15% Hispanic and 5% Asian,⁵² America is governed by its first African-American President, there are three women (one of whom is Latina) and one African-American on the U.S. Supreme Court, and African-Americans comprise about 11%, Hispanics about 7%⁵³ and women about 25% of the federal judiciary.⁵⁴
- Approximately 50% of the working population is female⁵⁵ and about 71% of working women are mothers.⁵⁶
- The gender-wage gap is estimated to be 77%,⁵⁷ and women comprise over 57% of college graduates⁵⁸ and about 50% of law school graduates.⁵⁹
- Non-Whites comprise approximately 28% of college graduates⁶⁰ and almost 25% of law school graduates.⁶¹

⁵¹ Lindsay Hixson, Bradford B. Hepler, and Myoung Ouk Kim, *The White Population: 2010*, 2010 Census Briefs, U.S. Bureau of the Census (Sept. 2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-05.pdf> (last visited Apr. 21, 2012).

⁵² Karen R. Humes, Nicholas A. Jones, and Roberto R. Ramirez, *Overview of Race and Hispanic Origin. 2010 Census Briefs*, U.S. Bureau of the Census (March 2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf> (last visited Apr. 21, 2012).

⁵³ Russell Wheeler, *The Changing Face of the Federal Judiciary*: Governance Studies at Brookings, at 1, (Aug. 2009), available at http://www.brookings.edu/~media/Files/rc/papers/2009/08_federal_judiciary_wheeler/08_federal_judiciary_wheeler.pdf (last visited Apr. 21, 2012).

⁵⁴ Marie T. Finn, *The American Bench: Judges of the Nation* (Forster-Long LLC, 21st ed. 2011).

⁵⁵ *Women in the Workforce: Female Power*, Economist, Dec. 30, 2009, available at <http://www.economist.com/node/15174418> (last visited Apr. 21, 2012).

⁵⁶ *Employment Characteristics of Families Summary*, U.S. Dep't of Labor, Bureau of Labor Statistics, Mar. 24, 2011, available at <http://www.bls.gov/news.release/famee.nr0.htm> (last visited Apr. 21, 2012).

⁵⁷ *The Wage Gap Over Time: In Real Dollars, Women See a Continuing Gap*, *supra* note 37.

⁵⁸ *Digest of Education Statistics, Table 258, Degrees conferred by degree-granting institutions, by level of degree and sex of student: selected years, 1869-70 through 2016-17*, Nat'l Ctr. for Educ. Statistics, available at http://nces.ed.gov/programs/digest/d07/tables/dt07_258.asp (last visited Apr. 21, 2012).

⁵⁹ *Women in the Law in the U.S.*, Catalyst, Jan. 2012, available at <http://www.catalyst.org/publication/246/women-in-law-in-the-us> (last visited Apr. 21, 2012).

⁶⁰ *Table 286 - Bachelor's degree conferred by degree-granting institutions, by sex, race/ethnicity, and field of study: 2007-2009*, Nat'l Ctr. for Educ. Statistics, available at http://nces.ed.gov/programs/digest/d10/tables/dt10_286.asp.

⁶¹ *Digest of Educ. Statistics, Table 307, First-professional degrees conferred by degree-granting institutions, by sex, race/ethnicity, and field of study: 2007-08*, Nat'l Ctr. for Educ. Statistics, available at http://nces.ed.gov/programs/digest/d10/tables/dt10_307.asp (last visited Apr. 21, 2012).

Whereas in 1964, “valuing diversity” was unheard of, today programs honoring diversity are the norm at most large law firms and Fortune 500 companies, as well as many other businesses. Some of the changes can be fairly attributed to the enactment of anti-discrimination laws and litigations under them. Other changes are due to a contemporaneous evolution of society’s views toward race, gender and other protected characteristics. As is described in a seminal article by Professors David Thomas and Robin Ely, a close examination of the events spanning the passage of the Civil Rights Laws through at least the early 1990s demonstrates a societal “evolution” from a desire to prevent overt discrimination, to promotion of equal opportunities, to a sophisticated understanding that “equal” does not mean “identical,” to a phase where society became free to acknowledge differences and then to celebrate differences, to today’s current challenge of how to best leverage those differences for the greater good.⁶²

Notwithstanding the progress made to date, women and people of color continue to be underrepresented in the workforce (or pockets of it).⁶³ This is particularly apparent in the highest levels of companies and professions, compared to their representation in the workforce and general population. Although women currently hold 46% of administrative, managerial and professional positions, they comprise only three percent of CEOs at Fortune 500 companies.⁶⁴ Currently, only nineteen CEOs of Fortune 500 companies are people of color, including two women of color.⁶⁵ In law firms, while 45% of associates are women, only 20% of partners are women.⁶⁶ Minorities comprise 20% of associates, but make up less than 7% of law firm partners.⁶⁷

It is also apparent the recent recession has hit member of protected categories particularly hard. Unemployment rates for women, people of color, the disabled and veterans are significantly higher than that of White men. While 6.9% of White men are unemployed,⁶⁸ 7.7%

⁶² David A. Thomas and Robin J. Ely, *Making Differences Matter, A New Paradigm for Managing Diversity*, Harvard Business Review, Vol. 74, No. 5, at 79-90 (Sept./Oct. 1996), available at [http://www.hispaniccsc.org/2007%20Summit/Appendix/96510p2\[1\].pdf](http://www.hispaniccsc.org/2007%20Summit/Appendix/96510p2[1].pdf) (last visited Apr. 21, 2012).

⁶³ Heather A. Haveman and Lauren S. Besesford, *If You’re So Smart, Why Aren’t You the Boss? Explaining the Persistent Vertical Gender Gap in Management*, Annals of the American Academy of Political & Social Science, 639 Annals Am. Acad. Pol. & Soc. Sci. 114 (Jan. 2012).

⁶⁴ *The White House Project, Benchmarking Women’s Leadership*, Nov. 2009, available at <http://www.womenscolleges.org/files/pdfs/BenchmarkingWomensLeadership.pdf> (last visited Apr. 25, 2012).

⁶⁵ *Fortune 500 Black, Latino, Asian CEOs*. Diversity Inc, available at <http://diversityinc.com/leadership/fortune-500-black-latino-asian-ceos/> (last visited Apr. 21, 2012).

⁶⁶ *Law Firm Diversity Wobbles: Minority Numbers Bounce Back While Women Associates Extend Two-Year Decline*, Nat’l Assoc. For Legal Career Prof’ls, available at http://www.nalp.org/2011_law_firm_diversity (last visited Apr. 21, 2012).

⁶⁷ *Women and Minorities in Law Firms- By Race and Ethnicity*, Nat’l Assoc. For Legal Career Prof’ls, available at http://www.nalp.org/women_minorities_jan2012 (last visited Apr. 21, 2012). See also Sloan, Karen, *Ethnic Diversity Improved at Law Firms in 2011; for Women, Not so Much*, Nat’l Law Journal, Nov. 3, 2011 available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202523207499&slreturn=1> (last visited Apr. 21, 2012).

⁶⁸ *Household Data, Table A-2: Employment Status of the Civilian Population by Race, Sex, and Age*, U.S. Dep’t of Labor, Bureau of Labor Statistics, Apr. 6, 2012, available at <http://www.bls.gov/news.release/empsit.t02.htm> (last visited Apr. 21, 2012).

of women,⁶⁹ 13.6% of people of color,⁷⁰ 14.8% of people with disabilities⁷¹ and 9.1% of veterans are unemployed.⁷²

Thus, diversity programs may be as necessary now, as they ever have been. However, notions of what are appropriate diversity initiatives may need to change in light of the above changes in demographic representation. The law also may need to change to permit more targeted and/or expanded initiatives if we, as a society, are to reach the goal of true equal opportunity for all.

III. AFFIRMATIVE ACTION AND OTHER INITIATIVES AIMED AT INCREASING DIVERSITY IN THE WORKPLACE

There are numerous aspects of diversity programs that may raise legal concerns for employers ranging from data collection and reporting to validation of employment tests to the protection of sensitive information from disclosure. The tightrope walk between avoiding or correcting disparities while at the same time avoiding disparate treatment is also fraught with risk. As discussed below, whether diversity initiatives are lawful or cross the line into prohibited favoritism depends on the specifics of the initiative. An employer may lawfully adopt a policy aimed at increasing respect for diversity in the workplace or at recruiting a more diverse applicant pool. But an employer may face claims of disparate treatment discrimination if a diversity policy results in favoritism in hiring, firing or promotion decisions – decisions that tangibly benefit one individual or group of individuals to the detriment of another.

In this section, we will address the state of the law regarding various diversity initiatives, including the collection of data for diversity planning.

A. Voluntary Affirmative Action and Preferential Treatment

1. Supreme Court Decisions Regarding Affirmative Action

The Supreme Court has not yet squarely addressed the question of whether promoting diversity can be a sufficient justification for a private sector employer considering race, or another protected characteristic, when making a decision.⁷³ The two Supreme Court cases that

⁶⁹ *Employment Situation Summary Table A: Household Data, Seasonally Adjusted (Jan. 2012)*, U.S. Department of Labor, U.S. Dep't of Labor, Bureau of Labor Statistics, Apr. 6, 2012, available at <http://www.bls.gov/news.release/empsit.a.htm> (last visited Apr. 21, 2012).

⁷⁰ *Id.*

⁷¹ *Persons with a Disability: Labor Force Characteristics Summary*, U.S. Dep't of Labor, Bureau of Labor Statistics (June 24, 2011), available at <http://www.bls.gov/news.release/disabl.nr0.htm>. (last viewed Apr. 21, 2012).

⁷² Adam Peck, *Jobs Report: Unemployment Rate For Returning Veterans Fell 6 Percentage Points*, ThinkProgress (Feb. 3, 2012), available at <http://thinkprogress.org/security/2012/02/03/418108/jobs-report-promising-for-veterans/?mobile=nc> (last viewed Apr. 21, 2012).

⁷³ Although an employer may voluntarily decide to adopt an affirmative action plan, employers may be required to adopt an affirmative action plan as a result of government regulation, court order or negotiated settlement agreement. See, *supra* note. 28; Executive Order No. 11246, available at <http://www.dol.gov/compliance/laws/comp-eeo.htm#overview> (last visited Apr. 21, 2012); *Local 28 of Sheet Metal Workers' Int'l Ass'n*, 478 U.S. at 448-49.

have considered the validity of voluntary affirmative action programs in the employment context – *United Steelworkers v. Weber*,⁷⁴ and *Johnson v. Transportation Agency, Santa Clara County*,⁷⁵ – support only a limited remedial justification for such programs.

In *Weber*, the Court held that while Title VII generally prohibits race-conscious employment decisions, the statute does not prohibit “affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories.”⁷⁶

The affirmative action plan in *Weber* involved a national collective bargaining agreement between a private employer and a labor union. The agreement included a provision requiring the employer’s local plants to reserve at least 50% of the openings in craft training programs for African-Americans until the percentage of skilled African-American craftworkers was comparable to their representation in the local labor force. After examining the legislative history surrounding the enactment of Title VII, the Court held that given Congress’s clear intention to remedy racial discrimination against African-Americans, the statute’s ban on discrimination “cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts to hasten the elimination of such vestiges.”⁷⁷

In finding the particular affirmative action plan at issue valid under Title VII, the Court noted that the plan did not “unnecessarily trammel the interests of the white employees,” as it did not require any non-beneficiaries to be dismissed, did not create an absolute bar to the advancement of non-beneficiaries. In addition, the Court found that the plan was a temporary measure, not designed to maintain racial balance.⁷⁸

Nearly 25 years ago, in 1987, the Supreme Court addressed the validity of affirmative action plans in the employment sector for the next and last time.⁷⁹ *Johnson* involved a challenge to a county agency’s decision to consider gender when promoting a female employee to the position of road dispatcher over a male employee with a higher exam score. The employment decision was made by the county agency pursuant to a voluntary affirmative action plan, which provided for gender to be considered as a factor in promotion decisions within traditionally segregated jobs in which women were significantly underrepresented. At the time of the female employee’s promotion, no woman held any of the county’s 238 skilled craft positions, including the road dispatcher position into which the female employee was promoted.⁸⁰

In affirming the validity of the county’s affirmative action plan, the Court provided clearer guidelines for what constitutes a valid plan. The Court found the county’s plan was valid because it: (1) was aimed at remedying a manifest imbalance in a traditionally segregated job

⁷⁴ 443 U.S. 193 (1979).

⁷⁵ 480 U.S. 616 (1987).

⁷⁶ *Weber*, 443 U.S. at 209.

⁷⁷ *Id.* at 204.

⁷⁸ *Id.* at 208.

⁷⁹ *Johnson*, 480 U.S. 616.

⁸⁰ *Id.* at 621.

category; (2) was temporary, seeking to eradicate the effects of segregation and not simply to maintain a permanent racial and sexual balance; and (3) did not “unnecessarily trammel” the rights of non-beneficiaries by requiring non-beneficiaries to be dismissed or by creating an absolute bar to their advancement.⁸¹

Together, *Weber* and *Johnson* support the proposition that race or gender-conscious decisions made pursuant to an appropriately tailored voluntary affirmative action plan that is designed to remedy the effects of discrimination in a traditionally segregated job category will not constitute discrimination under Title VII in light of the statute’s clear legislative intent to remediate the effects of such practices.

Cases decided by the Court in the educational context, while applying a strict scrutiny analysis under the Fourteenth Amendment’s Equal Protection Clause, also provide guidance for private employers considering diversity initiatives. In *Grutter v. Bollinger*, the Supreme Court considered the University of Michigan’s admissions policies and found that the University had a compelling interest in promoting diversity at the school and in its courses and that the University’s admissions system, under which racial diversity was considered as a “plus,” did not amount to a quota system.⁸² The Court held that the Equal Protection Clause allows “the narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.”⁸³ In reaching this conclusion, the Court noted that “major American businesses have made [it] clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. . . .”⁸⁴ Despite this statement, the Court’s decisions do not resolve whether a voluntary affirmative action plan can serve a non-remedial goal, such as an operational need or a desire to achieve or maintain diversity in the workplace.⁸⁵

On February 21, 2012, the Supreme Court granted *certiorari* in *Fisher v. University of Texas at Austin*⁸⁶ and, this fall, will likely consider the standard it enunciated in *Gutter*. In *Fisher*, Abigail Fisher, a white Texas resident, sought undergraduate admission to the University

⁸¹ *Id.* at 630-39.

⁸² 539 U.S. 306, 330 (2003); *cf. Gratz v. Bollinger*, 539 U.S. 244, 279 (2003) (finding that the University’s system of “predetermined point allocations,” which awarded 20 points to underrepresented minorities, “ensures that the diversity contributions of applicants cannot be individually assessed” and was therefore unconstitutional).

⁸³ 539 U.S. at 343.

⁸⁴ 539 U.S. at 330. The Supreme Court, however, has not yet ruled on whether an operational need, diversity rationale or another non-remedial goal can justify voluntary affirmative action efforts in the workplace. *See* EEOC Compliance Manual, No. 915.003 § 15-33, Apr. 19, 2006, *available at* <http://www.eeoc.gov/policy/docs/race-color.pdf> (last visited Apr. 21, 2012) (citation omitted).

⁸⁵ *See* EEOC Compliance Manual, No. 915.003 § 15-33, Apr. 19, 2006, *available at* <http://www.eeoc.gov/policy/docs/race-color.pdf> (last visited Apr. 21, 2012). (“The Supreme Court has not yet ruled on whether an “operational need” or diversity rationale could justify voluntary affirmative action efforts under Title VII”); *Johnson*, 480 U.S. at 649 (O’Connor, J. concurring) (“[C]ontrary to the intimations in Justice Steven’s concurrence, this Court did not approve preferences for minorities ‘for any reason that might seem sensible from a business or social point of view’”) (citation omitted).

⁸⁶ *Fisher v. Univ. of Tex.*, 631 F.3d 213 (5th Cir. 2011), *cert. granted sub nom. Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012).

of Texas and was denied.⁸⁷ She then sued the University, arguing that minority applicants with lower grades were admitted and challenging the University's admissions policies on grounds that the policies discriminated on the basis of race in violation of the Equal Protection Clause of the Fourteenth Amendment. The University has a two-prong approach to admission. First, the University has a policy, mandated by Texas law, automatically admitting Texas high school seniors in the top ten percent of their class to a Texas state university. In addition, since 2004, after *Grutter* was decided, the University's admissions policies allow race to be considered as one of several factors when admitting individuals who failed to qualify for admission under the top ten percent policy. Fisher challenged this policy, arguing, among other things, that: it should not have been adopted absent a "strong basis in evidence" that remedial action was necessary to address historical race discrimination by the University; the top ten percent policy created racial diversity such that consideration of race in admission was not necessary; and that the University's consideration of race involved "racial balancing" in violation of a general prohibition against quotas. The district court granted summary judgment in favor of the University and the Fifth Circuit affirmed.⁸⁸

Fisher is being closely watched to see whether, given the current composition of the Court, the Court will change its position respect to the consideration of racial diversity in school admissions, which may provide employers with additional guidance as they consider and implement policies and programs designed to enhance workplace diversity.

2. Other Cases Addressing Affirmative Action Programs

Although never squarely addressed by the Supreme Court, lower courts interpreting Supreme Court precedent have typically rejected affirmative action plans, and, thus, race- or gender-conscious decisions, premised on non-remedial justifications. For instance, in the influential holding of *Taxman v. Board of Education*, the Third Circuit held that an affirmative action plan aimed at promoting racial diversity rather than remedying the historical effects of discrimination was prohibited by Title VII.⁸⁹

The plan at issue in *Taxman* allowed a New Jersey school board to consider race in layoff decisions involving equally qualified teachers, with the stated purpose of the plan being the improvement of racial diversity. After reviewing the legislative history surrounding enactment of Title VII, the court found that the statute was enacted to further two goals: (1) to end discrimination on the basis of race, sex, religion or national origin; and (2) to remedy the effects of segregation of minorities in the national workforce.⁹⁰

After reviewing the Supreme Court's interpretation of Title VII in *Weber* and *Johnson*, the Third Circuit concluded that only on the basis of the second goal – the eradication of the "consequences of prior discrimination" (*i.e.* through a remedial plan) – are racial preferences in

⁸⁷ *Id.*

⁸⁸ *Fisher v. Univ. of Tex.*, 645 F. Supp. 2d587 (W.D. Tex. 2009), *affirmed*, 631 F.3d 213 (5th Cir. 2011), *cert. granted sub nom. Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012).

⁸⁹ 91 F. 3d 1547 (3d Cir. 1996).

⁹⁰ *Id.* at 1557.

the form of an affirmative action plan able to avoid violating the statute's mandate against discrimination.⁹¹ Such a conclusion is consistent with the holdings in *Weber* and *Johnson*, the Third Circuit held, because the plans in those cases were affirmed exclusively on remedial grounds.

The court in *Taxman* also found that the plan was invalid for the independent reason that it would “unnecessarily trammel” the interests of non-minorities. Unlike the plans upheld by the Supreme Court, the school board's plan provided no structure or benchmarks serving to evaluate the success of the plan. For instance, in *Weber*, the plan reserved 50% of the openings in craft training programs until the percentage of African-American craftworkers was proportional to their representation in the labor force. Devoid of any express goals or standards, the court found the school board could theoretically grant racial preferences entirely by whim, potentially even to the detriment of the traditionally segregated groups that Title VII was enacted to protect. The court also noted that the plan was not temporary in nature, a clear requirement of Supreme Court precedent. Finally, the court concluded that the harm imposed by the plan – the loss of a job by a tenured non-minority employee – was so severe that even had the plan's goal of racial diversity been legitimate, the plan would impermissibly encumber the rights of non-beneficiaries.⁹² Formal regulations and informal guidance on affirmative action promulgated by the U.S. Equal Employment Opportunity Commission also focus on remediating the effects of past discrimination and do not endorse affirmative action policies aimed solely at achieving diversity in the workplace.⁹³

The Supreme Court's recent decision in *Ricci*, although it does not squarely address the issue, casts further doubt on whether non-remedial goals, such as promotion of diversity, can support affirmative action in private sector employment.⁹⁴ In *Ricci*, the Court held that the employer could not refuse to certify promotion application test results simply because they had a disparate impact against minority applicants or the employer wanted to achieve a more desirable

⁹¹ *Id.* (emphasis in original).

⁹² *Id.* at 1564 (relying on the Supreme Court's observation in *Weber* that the plan did not require discharge of non-minority workers in upholding the plan).

⁹³ *See, e.g.*, 29 C.F.R. § 1608.

⁹⁴ The Second Circuit has recently read *Ricci* as standing for the proposition that before applying the *Weber* and *Johnson* factors, a court must “determine whether a voluntary, private, race- and sex-conscious employer action” even constitutes an affirmative action plan. *United States v. Brennan*, 650 F. 3d 65, 97 (2d Cir. 2011). In concluding that this is the threshold step in analyzing an employer's race- and/or sex-conscious action, the Second Circuit noted that although the Supreme Court described the decision not to certify the test at issue in *Ricci* as a voluntary “race-based action,” the majority opinion did not cite *Weber* or *Johnson*. *Brennan*, 650 F. 3d at 98. “Nor did the [Supreme] Court apply the ‘manifest imbalance’ and ‘unnecessary trammeling’ factors. Instead the Court adopted a ‘strong basis in evidence’ standard.” *Id.*; *see also Ricci*, 129 S. Ct. at 2676. The Second Circuit, thus, concluded that “*Ricci* . . . makes clear that at least some race- or sex-conscious voluntary employer actions are not subject to the ‘affirmative action’ analysis of *Weber* and *Johnson*.” *Brennan*, 650 F. 3d at 98; *see also Ricci*, 129 S. Ct. at 2700 (Ginsberg, J., dissenting) (“This litigation does not involve affirmative action”). The Second Circuit, thus, has drawn a distinction between “affirmative action plans,” which it concluded are “intended to provide *ex ante* benefits to all members of a racial or gender class,” and “make-whole relief, which [it described as] intend[ing] to provide *ex post* benefits to specified individuals who have suffered discrimination.” *Brennan*, 650 F. 3d at 104. Where *ex post* benefits are at issue, the Second Circuit held, an employer may not invoke the affirmative action defense of *Johnson* and *Weber*, but rather must apply the strong basis in evidence standard. *Brennan*, 650 F. 3d at 104.

racial distribution of promotion-eligible candidates.⁹⁵ The Court held that the employer would be justified in refusing to certify the results only if it had a “strong basis in evidence” to conclude that it would be liable for discrimination if it certified the results.⁹⁶

B. An Examination of Diversity Initiatives

Today, the diversity policies adopted by most employers are not narrowly focused on remediating the effects of past discrimination. Rather, most employers establish policies to advance diversity, either as a social good in its own right or as a means of offering better goods and services and competing more effectively in a diverse marketplace. Such policies typically are not temporary and they generally cover all employees and all positions within the organization, thus including groups of beneficiaries and job categories as to which there may not be predicate factual findings of traditional patterns of segregation and continuing manifest imbalances in the relevant workforce.

But the disconnect between the permissible bases for affirmative action recognized under the Title VII and its regulations and the purposes that today’s employers generally articulate for their diversity policies is not necessarily a problem. The question is how the diversity policy or initiative is used in the employment context.

Nothing in the law prohibits an employer from implementing a diversity policy with the goal of promoting respect for differences. Similarly, the law does not forbid diversity policies aimed at recruiting employees from a more diverse applicant pool or encouraging the development of diverse employees.

Legal exposure may arise, however, when there is a challenge to a discrete employment action – such as a hiring, firing or promotion decision – that adversely impacts one person or group but is taken pursuant to a policy aimed at achieving or maintaining diversity in the workplace. Employers will not have strong support under the law as it currently exists for defending such a policy or action. Under the statutory language of Title VII, as amended by the Civil Rights Act of 1991, race-conscious employment decisions cannot be defended on the basis of “business necessity” or *bona fide* occupational qualification.⁹⁷ Private-sector employers, therefore, must be cautious about whether their general workplace policies and diversity initiatives support – or might be characterized as supporting – concrete employment actions that adversely impact non-minorities, as compared with *bona fide* affirmative action policies that are responding to an identified, documented, remedial goal, which is limited and temporary.

This tension is highlighted by an informal opinion letter issued by the EEOC in June 1990. The letter, which was drafted by a staff attorney at the EEOC in response to an inquiry raised by an organization of college-placement professionals, stated that “[c]lassifications and

⁹⁵ *Ricci*, 129 S.Ct. 2658.

⁹⁶ *Id.* at 2664.

⁹⁷ *See* 42 U.S.C. 2000e-2(e) (providing for a *bona fide* occupational qualification defense on the basis of religion, sex, or national origin).

referrals based exclusively on an individual's race constitute a *per se* violation of Title VII.”⁹⁸ For instance, the letter stated that it would not be lawful for a school or employer “to hold minority-only job fairs, recruiting dinners, internship programs, etc.”⁹⁹ The letter stated that a particular group could be the focus of a program, but that if non-minorities did not have an opportunity to participate in the program it could result in liability.¹⁰⁰ Advocates of minority-clerkship programs, which assigned interested first year law students to firms after screening them based on a variety of criteria, were concerned about the opinion, and questioned, among other things, whether, if non-minority law students needed to be included it would be a minority-clerkship program in name alone.¹⁰¹ In 1991, the EEOC rescinded the opinion, noting that it was going to be studying the issue in more detail.¹⁰²

Thus, employers must carefully design diversity programs to avoid legal claims by employees who claim to have been disfavored or excluded by such programs. Following are some of some common initiatives that must be carefully considered by employers before implementation as they have the potential to create liability under the current law.

Company Sponsored Networks: Many large law firms and Fortune 500 Companies have employee networks. These are generally referred to as affinity groups. Some are grassroots efforts, where the employer does not provide resources to the group; others are heavily supported and/or sponsored by the employer, such as where the employer provides a budget for events, meeting rooms or has dedicated scholarships or charitable giving campaigns. Although these networks can permissibly be named and related to specific races or genders or other protected categories, *i.e.* the Woman's Initiative; the South Asian Society; the Black Alumni Society, where they evidence any employer contribution, they should not exclude membership based on an individual's protected status. In other words, where an employee network is “recognized” by an employer – even just as a legitimate voice in terms of input on workplace policies – that network cannot discriminate in terms of membership or participation on the basis of race, gender or any other category protected by law. Often employers recognize this, but in practice the employees who run such groups may not be as knowledgeable about the limitations imposed by law. Thus, depending on how they operate, such networks may present legal risks for employers.

Company “Rewards” for Achieving Diversity Goals: An area that is currently hotly debated is the benefit of, and legal risks associated with, rewarding managers who achieve

⁹⁸ See Don J. DeBenedictis, *Minority-Recruitment Warning: EEOC opinion letter to placement officials says programs can't exclude whites*, 77 A.B.A.J. 14, 14 (1991), available at: http://heinonline.org/HOL/Page?handle=hein.journals/abaj77&div=7&g_sent=1&collection=journals (last visited Apr. 21, 2012); see also Scott Jaschik, *EEOC Officials Rescind Letter Declaring Career Fairs for Minority Students were Illegal*, Chronicle of Higher Education, Vol. XXXVII, No. 29, Apr. 3, 1991, at A21, available at <http://chronicle.com/article/EEOC-Officials-Rescind-Letter/87215/> (last visited Apr. 21, 2012). We have attempted to obtain a copy of the EEOC opinion letter, which was subsequently withdrawn, from a number of sources, including directly from the EEOC, but have been told that the opinion cannot be located.

⁹⁹ See DeBenedictis, *supra* note 99; see also Jaschik, *supra* note 99.

¹⁰⁰ See DeBenedictis, *supra* note 99; see also Jaschik, *supra* note 99.

¹⁰¹ DeBenedictis, *supra* note 99; see also Jaschik, *supra* note 99.

¹⁰² See also Jaschik, *supra* note 99.

diversity goals. Employers must walk a careful line to ensure that selection decisions are merit based, if they will reward managers for honoring diversity initiatives, such as recruiting a diverse slate of qualified candidates for job openings. An open question employers face today is whether they can, lawfully, select a minority candidate over a non-minority where the two candidates are otherwise “equal” on the premise that the law permits consideration of diversity as a “plus.”¹⁰³ As discussed above, voluntary affirmative action may require an employer to admit that it has a disparity and a history of past discrimination. Because of the risks associated with such admissions and with favoring any employee, even if to promote diversity, an employer may reasonably decide not to engage in voluntary affirmative action to avoid the risks associated with such action.¹⁰⁴

Company Conduct through Vendors: An employer is free to hire recruiters to target certain underrepresented populations to ensure that the broadest array of candidates have access to employment opportunities at the firm or company. Thus, employers may decide to advertise at predominantly black colleges or focus recruiting events at women’s clubs, etc. However, just as an employer is not permitted to deny access to these recruiting events based on race, the employer cannot knowingly permit a vendor from denying access to an event based on race (or other protected category).

For example, an employer may decide that it needs greater outreach to professional women in terms of potential recruits and hire a vendor that specializes in recruiting from Ivy League schools. The vendor, wanting to meet the employer’s stated goals, hosts several recruiting events at Ivy League schools where it limits attendance to women. Although the vendor may not be an employer and is, thus, arguably not subject to Title VII’s prohibitions, the employer cannot ask the vendor to engage in conduct that it could not legally undertake itself under Title VII. Thus, even seemingly lawful recruiting initiatives must be carefully managed to avoid running afoul of the law.

Accommodating Client Preferences: Another area where employers may tread precariously close to the line of violating Title VII – while, perhaps, well-intended – is in the area of accommodating client preferences. Presently there is significant societal pressure for employers to have a diverse workforce. Clients and prospective clients may “demand” that the employees working with them reflect certain diversity standards. Although the demands may be in the name of diversity, companies must carefully evaluate how they respond to such client demands to avoid violating existing law.

¹⁰³ This issue has arisen in the context of both school admissions and employment. In considering whether a law school admissions program that considered race and ethnicity as “plus” factors for admission because they affected the school’s diversity, the Supreme Court found that the Equal Protection Clause did not prohibit this narrowly tailored use of race in admissions decisions. *Grutter v. Bollinger*, 539 U.S. 306 (2003). In *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), the Court considered whether an employer’s promotion policies were valid when it passed over a male employee and promoted a female employee pursuant to its affirmative action plan. The Court held that the agency appropriately took into account the sex of the female employee in making its decision.

¹⁰⁴ Even if an employer decides not to engage in voluntary affirmative action, it still may decide to engage in initiatives that foster diversity. *See, supra* at 22-23.

Helping Veterans: Affirmative action for veterans raises another issue: disparate impact on the basis of gender. As of November 2011, only about 8.5% of veterans were female.¹⁰⁵ While no one disagrees with the hiring of veterans, affirmative action for veterans will advantage far more men than women and may cause or exacerbate gender disparities in an employer's workplace.

Testing: Another area that is ripe for litigation risk for employers is employee testing. Recent Supreme Court and lower court decisions have highlighted the problems faced by employers who use standardized tests for promotion and hiring decisions. These tests are typically adopted in the name of promoting fairness and reducing potential bias that may arise in subjective decision-making. Yet, tests that have a disparate impact, even if designed to evaluate an individual's qualifications for a position, remain subject to challenge on various grounds. Thus, the use of tests is another area that can be fraught with uncertainty.

In *Ricci*, a test administered to identify firefighters qualified for promotion in the city of New Haven resulted in a disparate impact against minority applicants.¹⁰⁶ The Court concluded, however, that the City could not consider the lack of diversity in the race of those passing the test as a reason for discarding the test results unless it could show that the test was not job related and consistent with business necessity, or if an equally valid, less discriminatory alternative was available. It found that there was no strong basis in evidence for that conclusion. Without a strong basis in evidence, the Court held the City could not refuse to certify the test results since the City's reason for doing so was based on a desire to achieve a more desirable racial distribution of promotion-eligible candidates.

The majority decision, far from resolving the tension between disparate impact and affirmative action, seems to have added to the dilemma for employers seeking to avoid liability related to a disparate impact arising from its selection procedures with respect to hiring and/or promotions. Any action to avoid the disparate outcome could raise a claim of intentional discrimination, as it did in this case. Yet, certifying test results could result in a challenge and liability based on the disparate impact.

Since the *Ricci* decision, lower courts have diverged on whether to read *Ricci* as narrowly applied to standardized promotion and hiring tests implemented by government employers, or to read it broadly as applying to any case involving the tension between Title VII's disparate impact and disparate treatment provisions.¹⁰⁷

¹⁰⁵ *Fact Sheet: Women's Veterans Population*, U.S. Dep't of Veteran Affairs, Nov. 2011, available at <http://www.va.gov/WOMENVET/WomenVetPopFS1111.pdf> (last visited Apr. 21, 2011).

¹⁰⁶ 129 S. Ct. 2658.

¹⁰⁷ *United States v. City of New York*, 683 F. Supp. 2d 225 (E.D.N.Y. 2010) (finding City intentionally discriminated against minority firefighter applicants when it continued to rely on a hiring test that produced disparate results and stating that continued reliance on a test with a disparate impact can be evidence of an employer's discriminatory intent and lead to a finding of liability under Title VII's intentional discrimination provision); *NAACP v. N. Hudson Reg'l Fire & Rescue*, Nos. 10-3965, 10-3983, 2011 U.S. App. LEXIS 24562 (3d Cir. Dec. 12, 2011) (finding geography-based hiring plan discriminated against African-Americans who resided in counties excluded by the hiring plan and noting that while *Ricci* would not dictate the outcome because a hiring

The impact of *Ricci* is significant for employers who use standardized procedures to make selection decisions. *Ricci* and its progeny emphasize the heightened scrutiny courts may apply when evaluating whether an employer's promotion and hiring decisions violate disparate impact or disparate treatment under Title VII. The cases underscore the difficult balancing act that employers must engage in to avoid the possibility of discriminatory treatment while ferreting out any ongoing disparate impact. Most importantly, they show that employers will be held accountable for vetting testing procedures before implementing them.

It is now evident that public employers are left with the dilemma of choosing between two potential lawsuits when faced with test results that have a disparate impact. The "strong basis evidence" test is difficult to measure and will no doubt result in tests being certified. But the same standard could create a disincentive for employers to take action to correct results if not facing a claim of discrimination. As Justice Ginsburg stated, "[t]he strong-basis-in-evidence standard . . . as barely described in general, and cavalierly applied in this case, makes voluntary compliance a hazardous venture."¹⁰⁸

These cases illustrate the catch-22 employers find themselves in – they are challenged for using tests developed to increase fairness, and challenged for using excessive subjectivity. Moreover, the *Ricci* analysis fails to address the impossible position an employer may be in – being accused of discrimination regardless of whether it uses the test results resulting in a disparate impact or discards them. The problem is further complicated by the complexity of the test validation rules and the fact that it is not clear whether the strong basis in evidence test in *Ricci* would apply with respect to private employers.

The testing cases and any future clarifications to law and policy must also be considered in light of the Uniform Guidelines for Employment Selection Procedures ("UGESP"), published in 1978 by the EEOC and Department of Labor to provide employers with guidance about how to determine if a selection procedure is lawful for purposes of Title VII disparate impact theory. UGESP applies to various selection procedures, including standardized testing for hiring and promotion. However, it does not apply to recruiting procedures designed to attract a diverse slate of candidates, or seniority systems and other production-based systems that an employer may use for promotion decisions.¹⁰⁹ Moreover, validation is a complex and expensive proposition in many cases, often necessitating detailed analyses of jobs and data and the hiring of test consultants.¹¹⁰

As mentioned above, the UGESP do not apply when a selection procedure does not have a disparate impact. Of course, the only way to determine whether a disparate impact exists is to use the procedure – again creating a catch-22 for employers. The *Ricci* decision resulted in further confusion regarding the legal ramifications of using (or failing to use) tests in employment, since the test New Haven used had not been formally validated, had a disparate

practice, and not a test, was at issue, *Ricci* was still relevant to determining whether the hiring practice violated Title VII).

¹⁰⁸ *Ricci*, 129 S. Ct. 2658 at 2701.

¹⁰⁹ 41 C.F.R. § 60-3.2(B)-(C).

¹¹⁰ 29 C.F.R. § 1607.14(B)(3).

impact, yet, according to the Supreme Court, could not be thrown out after it was administered. It is not clear that the reasoning in *Ricci* is confined to the disparate impact of municipal civil service tests. Rather, the Supreme Court's analysis in *Ricci* casts a shadow over non-governmental employers who may seek to use or discontinue use of a selection procedure or who voluntarily adopt affirmative action plans to correct what they perceive as imbalances in the representation of women and minorities in the workforce.

*Collecting Data through Surveys and Survey Results: Associations*¹¹¹ and even government agencies, such as the Office of Federal Contract Compliance ("OFCCP"), expect employers to conduct voluntary surveys of applicants and employees to assess the protected classifications, like race, gender, sexual orientation, disability and veteran status of applicants and employees, so that they may measure diversity, the effectiveness of programs and/or engage in affirmative action for these groups. While something as innocuous as conducting voluntary surveys may seem non-controversial, in fact, even such data collection may create risks for employers.

For example, the EEOC and state agencies tell employers not to ask questions that might reveal an applicant's protected traits during the interview process. The fear is that by requesting and obtaining such information, an employer might take a protected trait into consideration when hiring, in contravention of the law. The Americans with Disabilities Act prohibits employers from asking applicants about disabilities except in very limited circumstances. It also prohibits employers from asking employees about disabilities unless the inquiry is job related and consistent with business necessity or in connection with a request for a reasonable accommodation.¹¹² At the same time, the agencies want employers to track information so that they may investigate employers and evaluate compliance and the success of diversity initiatives. Thus, employers must carefully consider how and when they voluntarily survey applicants and employees and shield the responses from hiring managers and the supervisors of employees to avoid running afoul of various laws.

¹¹¹ For example, the National Association for Legal Career Professionals ("NALP") reports statistics concerning law firm diversity, including with respect to the representation lawyers who are racial minorities, women, lesbian, gay, bisexual or transgender, or disabled. See *Diversity & Demographics*, Nat'l Assoc for Legal Career Prof'ls, available at <http://www.nalp.org/diversity2> (last visited Apr. 21, 2012). Vault also administers an annual Law Firm Diversity Survey which compiles information about the demographics of law firms. See *Law Firm Diversity Programs: The Vault/MCAA Guide to Law Firm Diversity Programs*, Vault Career Intelligence, available at <http://www.vault.com/wps/portal/usa/corporate-responsibility/green-programs?profileType=3031>. (Last visited Apr. 21, 2012).

¹¹² 42 U.S.C. § 12112; EEOC Enforcement Guidance Notice, No. 915.002, Disability Related Inquiries and Medical Examination of Employer Under the Americans With Disabilities Act (ADA), 7/27/00, available at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> (last visited Apr. 21, 2012). The OFCCP has proposed changes to regulations promulgated under Section 503 of the Rehabilitation Act that would, among other things, mandate pre-offer surveys of applicants with disabilities. See *Affirmative Action And Non Discrimination Obligations of Contractors and Subcontractors Regarding Individuals With Disabilities*, 76 Fed. Reg. 77056 (Dec. 9, 2011); See also *OFCCP Publishes Proposal to Improve Job Opportunities for Individuals with Disabilities*, U.S. Dep't of Labor, Office of Federal Contract Compliance Programs, available at http://www.dol.gov/ofccp/regs/compliance/sec503/Sec503_Media_Release_2011-12-07.htm

C. Diversity Best Practices

Although the diversity initiatives discussed above present various legal risks, there are some initiatives that foster diversity, which are clearly permissible and, in many instances, considered best practices. Some examples include:

- establishing a senior-level diversity committee with management/executive committee representation to oversee and support diversity efforts;
- encouraging firm leaders to participate in diverse bar associations and other community organizations that foster and enhance diversity;
- striving for diverse slates of qualified candidates when making hiring and promotion decisions;
- demonstrating commitment by the General Counsel, Chief Executive Officer, managing partners and department heads to hire, promote and advance qualified, diverse applicants;
- being transparent regarding the criteria required for and timing of promotion;
- establishing a formal process for the distribution of assignments and accurate and effective feedback on career development and advancement;
- developing plans for attorneys and training in areas that promote advancement, including business development, networking and leadership skills;
- ensuring that programs that assist attorneys in managing work and personal life, such as flexible work arrangements and family care leaves, are available to all attorneys, regardless of gender and race;
- fostering a mentoring culture that includes developing and implementing an effective internal mentoring program and providing instruction on how to establish and maintain informal mentoring relationships;
- fostering opportunities for internal and external networking and encouraging participation in external networking activities; and
- requiring mandatory, ongoing education concerning diversity issues, such as discrimination, and stereotyping, for all firm members.

This list is not exhaustive and these, and other initiatives, can be implemented to foster diversity and demonstrate the employer's commitment to ensuring diversity at all levels of its workforce.

IV. CURRENT CHALLENGES SURROUNDING DIVERSITY PLANNING MATERIALS AND LITIGATION

While diversity initiatives designed to promote a more inclusive workforce can be quite beneficial, organizations planning diversity initiatives must be cautious. The materials compiled to assist in the planning and implementation of a diversity initiative may pose some risks to the organization. For example, during the planning process, an organization will most likely assemble and amass information related to the business's existing diversity initiatives and the factors that influence the company's diversity initiatives. After gathering and reviewing this information, an organization should be prepared for the possibility that these materials may uncover significant disparities in the demographic make-up of the company and/or reveal business practices that may reflect poorly on the organization.

Of significant concern for many employers is the possibility that these materials may be disclosed, especially in the context of litigation. For example, a company's examination of where it is in terms of having a representative workforce may show the historic over-inclusion of White males and the continued under-representation of other minority groups, though not necessarily due to any intentional discrimination. A party demanding or moving to compel disclosure of diversity planning materials stands to gain a variety of information — the existence (or lack) of diversity, qualitative data, etc. As such, information once sought to improve the organization and enhance diversity may actually be used as ammunition against the organization.

A. Attorney-Client Privilege

Currently, employers seeking to protect internal diversity planning efforts or audits may be most successful if they conduct the analysis in a way that will permit them to assert the attorney-client privilege under the Supreme Court's decision in *Upjohn Co. v. United States*.¹¹³ Under *Upjohn*, a communication will be covered under the attorney-client privilege when the communication is made for the purposes of obtaining legal advice, even when the communication is made by an employee outside of the directors or officers comprising a corporation's "control group."¹¹⁴ Thus, an employer may gather diversity or affirmative action information through interviews with employees in order to provide this information to counsel for the purposes of obtaining legal advice, and assert the attorney-client privilege over such communications.¹¹⁵

There are, however, some limitations and considerations employers should take into account when conducting such an audit. (1) If the employer later seeks to use the fact of its internal efforts as a defense in a subsequent litigation, the employer may be found to have

¹¹³ 449 U.S. 383 (1981).

¹¹⁴ *Id.* at 396-397. The Court also noted that "the [attorney-client] privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Id.* at 390-91. As in all cases, the attorney-client privilege covers only communications, not underlying facts. *Id.* at 395-96.

¹¹⁵ *Carter v. Cornell Univ.*, 159 F.3d 1345, 1998 WL 537842, at *2 (2nd Cir. July 9, 1998) (applying the privilege to interviews conducted by an investigator acting as an "agent of defense counsel" in conducting interviews of defendant's employees necessary for provision of legal advice).

waived the attorney-client privilege over the material by putting it at issue in the case.¹¹⁶ As a corollary to this consideration, employers should consider having counsel separate from their litigation counsel conduct such audits in order to avoid subsequent waiver issues. (2) Employers must ensure that it is obvious on the face of any analyses created that the information is being gathered for the purposes of obtaining legal advice, rather than advice that could be considered merely operational or business-related.¹¹⁷ (3) In interviews with employees, the employer should make it clear to the employee being interviewed that the information is being gathered for purposes of obtaining legal advice, that the interview is covered by the company's attorney-client privilege, and that only the company can waive that privilege.¹¹⁸ (4) Employers must ensure that all communications and legal analyses created in an affirmative action planning process or audit are clearly marked as being directed to or from counsel, marked confidential and privileged, and are kept separate from general human resources or other operational files. Failure to do so may lead a court to find that such memoranda or analyses are part of business efforts rather than legal advice.¹¹⁹ Similarly, employers should avoid disseminating the legal analyses obtained beyond the necessary recipients of the legal advice in order to avoid waiving the privilege.

B. Self-Evaluation Privilege

Although employers may attempt to invoke the judicially created self-evaluation privilege (also known as the self-critical analysis privilege) to protect diversity planning materials and analyses, the potential for disclosure should be taken seriously.¹²⁰ The self-evaluation privilege applies where a party has conducted a confidential analysis of its own performance, in an effort to engage in the remedial process, for a matter implicating a substantial

¹¹⁶ See, e.g., *Robinson v. Time Warner, Inc.*, 187 F.R.D. 144, 146 (S.D.N.Y. 1999) (finding that the notes and memoranda generated during an employer's internal investigation of discrimination complaints were privileged, and that the privilege had not been waived because the employer had not sought to use the fact of the investigation as a defense); *Brownell v. Roadway Package System*, 185 F.R.D. 19, 25 (N.D.N.Y. 1999) (finding that the employer had waived its privilege over internal investigation documents by asserting the adequacy of its investigation as a defense).

¹¹⁷ *United States v. Davis*, 132 F.R.D. 12 (S.D.N.Y. 1990); see also *MacNamara v. City of New York*, No. 04 Civ. 9612 (KMK) (JCF), 2007 WL 755401, at *7 (S.D.N.Y. Mar. 14, 2007) (upholding the attorney-client privilege where the documents were clearly seeking or giving legal advice and not mere policy or political advice).

¹¹⁸ *Upjohn*, 449 U.S. at 394 (finding that employees must be made "sufficiently aware that they were being questioned in order that the corporation could obtain legal advice"); see also *Cruz v. Coach Stores, Inc.*, 196 F.R.D. 228, 231 (S.D.N.Y. 2000) (finding that an employer's failure to make employees aware that they were being questioned so that the corporation could obtain legal advice rendered the attorney-client privilege inapplicable).

¹¹⁹ See *Hardy v. N.Y. News, Inc.*, 114 F.R.D. 633, 644 (S.D.N.Y. 1987) (finding that documents created as part of an employer's efforts to create an affirmative action plan that were not clearly addressed to counsel, were not marked privileged and confidential, and were intermingled with other personnel documents were not protected by the attorney-client privilege).

¹²⁰ However, in federal question cases, courts must apply federal law when determining if material is privileged. Rule 501 of the Federal Rules of Evidence provides, in relevant part, "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law." Fed. R. Evid. 501 (2009).

public interest.¹²¹ Application of the privilege is also dependent on whether the disclosure of such information would deter the party from conducting a candid review in the future.¹²² In substance, the privilege relieves the opposing party of its obligation to provide the “purely analytical material,” absent a showing of need by the other side.¹²³ The basic premise of the privilege is that “the privilege shields a party’s self-analysis from discovery where ‘an intrusion into the self-evaluative analyses of an institution would have an adverse effect on the [evaluative] process, with a net detriment to a cognizable public interest.’”¹²⁴ Moreover, the privilege ensures that organizations and businesses will continue to engage in socially useful self-evaluative investigations and evaluations of professional standards.¹²⁵

Neither the Supreme Court nor the Second Circuit has definitively settled the question of whether the self-evaluation privilege should be properly recognized under federal law.¹²⁶ With no clear answer to guide lower courts, the privilege has not been uniformly applied.¹²⁷ Likewise, courts within the Second Circuit lack a clear consensus as to whether, and how, the self-evaluation privilege should be applied.¹²⁸

¹²¹ *Wimer v. Sealand Serv.*, No. 96 Civ. 8730 (KMW) (MHD), 1997 U.S. Dist. LEXIS 9475, at *1-2 (S.D.N.Y. July 3, 1997) (declining to apply the self-critical analysis privilege where the material/information in dispute was comprised purely of factual information).

¹²² *Id.* at *2.

¹²³ *Id.* at *2.

¹²⁴ *Trezza v. Hartford Inc.*, No. 98 Civ. 2205 (MBM) (KNF), 1999 U.S. Dist. LEXIS 10925, at *3-4, 6 (S.D.N.Y. July 20, 1999) (concluding that there is a public interest in preserving: (1) notes concerning possible remedies to address plaintiff’s concerns and (2) an internal study used to evaluate the extent of the conduct complained of — “precisely the type of evaluative and analytical exercise in which the public has a strong interest in encouraging corporations to engage”).

¹²⁵ *Hardy*, 114 F.R.D. at 642 (declining to extend the self-critical analysis privilege where the threat of disclosure would have an insignificant deterrent effect upon the preparation of the defendant’s affirmative action plan because defendant had an obligation to comply with the law and, as a matter of sound business management, had “an obligation to take steps to prevent litigation by implementing policies that will improve the utilization of minorities”).

¹²⁶ *MacNamara v. City of New York*, No. 1:04 Civ. 9216 (KMK) (JCF), 2007 U.S. Dist. LEXIS 17478, at *17 (S.D.N.Y. Mar. 14, 2007) (concluding that “[l]ike other courts, [this court is] ‘doubtful [the self-critical analysis privilege] should be recognized at all’”).

¹²⁷ The applicability of the self-evaluation privilege has not been uniformly accepted by federal courts outside of the Second Circuit. *See e.g.*, *EEOC v. City of Madison*, No. 07-C-349-S, 2007 U.S. Dist. LEXIS 70647, at *1 (W.D. Wisconsin Sept. 20, 2007) (concluding that the Seventh Circuit has not recognized the self-evaluative privilege); *Banks v. Lockheed-Georgia*, 53 F.R.D. 283, 285 (N.D. Ga. 1971) (acknowledging that the self-evaluative privilege does apply to Title VII cases, however, refusing to compel production of candid self-analytical and evaluative documents pertaining to the of employer’s equal employment opportunities initiatives); *Tharp v. Sivyer Steel Corp.*, 149 F.R.D. 177, 184-85 (S.D. Iowa 1993) (rejecting the self-evaluation privilege where the plaintiff in a sexual discrimination case sought to compel production of defendant’s work-force analysis, job group analysis, statements of goals, prior year affirmative action results, identification of problem areas and the development of action-oriented programs to eliminate problems); *Reichhold Chems. v. Textron*, 157 F.R.D. 522, 526 (N.D. Fl. 1994) (holding that the self-evaluative privilege should be applied in appropriate environmental cases because there is a “public interest in allowing individuals and corporations to candidly assess their compliance with environmental regulations . . .”).

¹²⁸ *See e.g.*, *Ovesen v. Mitsubishi Heavy Indus. of Am., Inc.*, No. 04 Civ. 2849 (JGK) (FM), 2009 U.S. Dist. LEXIS 9762, at *6-7 (S.D.N.Y. Jan. 23, 2009) (declining to extend the privilege where the defendant failed to establish that

Moreover, even if asserted, the self-evaluation privilege will not apply to all information contained in an organization's self-evaluation. In order for the privilege to apply, the documents and information sought to be withheld from disclosure must: (i) "result from a critical self-analysis undertaken by the party seeking protection"; (ii) "be of the type whose flow would be curtailed if discovery were allowed"; and (iii) be of the type that the public has a strong interest in preserving free flow of.¹²⁹

The privilege has received differing reactions among the courts, including by the Southern District of New York in *Mazzella v. RCA Global Communications*.¹³⁰ In that case, the court analyzed the self-evaluation privilege in the context of a sex discrimination action, where the employee notified her employer of her pregnancy and shortly after, her supervisor began to criticize her work performance without cause.¹³¹ Following the criticism, the defendant terminated the plaintiff's employment.¹³² In the plaintiff's interrogatory requests, she demanded information relating to the employer's affirmative action and equal opportunity programs; however, the defendant claimed that the matters were privileged because they constituted institutional self-evaluation.¹³³ The court addressed two conflicting policies in the area of employment discrimination. First, the idea that documents relating to affirmative action and equal employment opportunity programs will usually contain not only internal self-analysis performed by the company, but also purely factual material, which may be highly relevant to plaintiff's case. Second, that "countervailing polic[ies] to facilitate private enforcement of anti-discrimination laws, and denying a plaintiff access to probative materials concerning defendant's

the information would not have been generated had its authors believed that it would be disclosed and because of the privilege's "checkered existence in the federal courts") (citation omitted); *In re Winstar Communs. Sec. Lit.*, No. 01 CV 3014 (GRD), 2007 U.S. Dist. LEXIS 85134, at *9 (S.D.N.Y. Nov. 27, 2007) (noting that "[t]o the extent other federal courts have recognized the self-critical analysis privilege, the trend over the last several years has been to find that the privilege is inapplicable in securities fraud actions"); *Miller v. Praxair, Inc.*, No. 3:05 CV 402 (CFD), 2007 U.S. Dist. LEXIS 34260, at *8-9 (D. Conn. May 10, 2007) (denying plaintiff's discovery requests pertaining to defendant's affirmative action plans based on, among other things, the self-critical analysis doctrine); *MacNamara*, 2007 U.S. Dist. LEXIS 17478, at *6 (noting that the "availability of the privilege remains 'an open question in this Circuit'" (citation omitted); *Trezza*, *supra* note 125; *In re Fed'n Internationale de Basketball*, 117 F. Supp. 2d 403, 407 (S.D.N.Y. 2000) (noting that "[t]he question whether a self-evaluative privilege ought to be recognized as a matter of federal law has not yet been settled by the Supreme Court or the Second Circuit"); *Roberts v. Hunt*, 187 F.R.D. 71, 74 (W.D.N.Y. 1999) (concluding the self-evaluative privilege is unavailable under federal law); *Wimer v. Sealand Serv.*, No. 96 Civ. 8730, 1997 U.S. Dist. LEXIS 9475, at *4-5 (S.D.N.Y. July 3, 1997) (noting the self-critical analysis has "led a checkered existence in the federal courts ... and its viability has been called into question by" numerous courts); *Flynn v. Goldman, Sachs & Co.*, No. 91 Civ. 0035, 1993 U.S. Dist. LEXIS 12801, at *3-4 (S.D.N.Y. Sept. 15, 1993) (granting defendant's motion for a protective order based on the self-evaluative privilege); *Hardy*, 114 F.R.D. at 641 (recognizing the self-evaluative privilege in an effort to encourage "candid self-examination").

¹²⁹ *Trezza*, 1999 U.S. Dist. LEXIS 10925, at *4.

¹³⁰ No. 83 Civ. 3716 (WCC), 1984 U.S. Dist. LEXIS 18166 (S.D.N.Y. Mar. 28, 1984).

¹³¹ *Id.* at *2-3.

¹³² *Id.*

¹³³ *Id.* at *9.

actual performance of its obligations under Title VII and other legal requirements would be inconsistent with that policy.”¹³⁴

The court required that factual material be produced while still protecting evaluative analysis from disclosure.¹³⁵ This strategy, the court concluded, appeared to be the most consistent with Title VII policies and further encouraged voluntary and regulatory compliance.¹³⁶ The court opined that applying the privilege to the purely *self-evaluative* portions of the defendant’s affirmative action plans, while ordering disclosure of all factual information, would have a “chilling effect” on an employer’s good faith effort to comply with equal employment opportunity laws.¹³⁷

Following on the *Mazzella* court’s heels was *Hardy v. New York News, Inc.* – an affirmative action case where the plaintiffs sought to compel discovery of documents relating to defendant’s employment of minorities and pending discrimination charges that had been filed against the defendant.¹³⁸ The documents in question reflected the defendant’s efforts to monitor and analyze the success of the company in meeting minority-related employment goals in a 1975 Affirmative Action Plan; the remaining documents were prepared for the company by outside consultants.¹³⁹

“[I]n the area of employment discrimination, virtually every court has limited the [self evaluative] privilege to information or reports that are mandated by statute or regulation.”¹⁴⁰ As such, the court held that “the interest of the plaintiffs’ in gathering the information necessary to prove their case, particularly to prove the element of discriminatory intent, outweighs the interest in fostering candid self-analysis and voluntary compliance with equal employment laws.”¹⁴¹ The court rejected defendant’s argument that disclosure of their voluntary affirmative action plan would deter the development of similar programs while simultaneously penalizing the defendant’s ambitious efforts.¹⁴² Rather, the court found that applying the privilege to the parts of the defendant’s diversity plans that are “purely evaluative” embraces the importance of an open process of self-evaluation and minority relations.¹⁴³

Troupin v. Metropolitan Life Insurance involved another employment discrimination action where the employee asserted age and sex discrimination claims against her former employer and compelled the disclosure of materials prepared by the employer regarding the

¹³⁴ *Id.* at *10.

¹³⁵ *Id.* at *12.

¹³⁶ *Id.* at *14.

¹³⁷ *Id.* at *13.

¹³⁸ *Hardy*, 114 F.R.D. at 635.

¹³⁹ *Id.* at 636.

¹⁴⁰ *Id.* at 641.

¹⁴¹ *Id.*

¹⁴² *Id.* at 642.

¹⁴³ *Id.* at 641-42.

hiring and promotion of females and employees over forty years of age.¹⁴⁴ The *Troupin* court held that MetLife “made the threshold showing that disclosure of the requested information could cause injury to [it] or otherwise thwart desirable social policies” because the reports at issue addressed views toward developing plans for the further advancement of women and minorities, which were prepared with an intention and understanding that the information would be kept strictly confidential.¹⁴⁵ While the court recognized the privilege, the plaintiff demonstrated that her specific need outweighed the “generalized harm” that could result from disclosure—namely the centrality of MetLife’s intent to discriminate.¹⁴⁶ As such, the court ordered production of only those portions containing factual information to which the plaintiff was entitled under normal discovery.¹⁴⁷

Similarly, in *Trezza v. Hartford Financial Services*, the Southern District of New York recognized the self-evaluation privilege in a discovery dispute where an employee demanded disclosure of documents addressing the plaintiff’s concerns of employment discrimination and documents compiled by the employer to evaluate the extent of the discrimination alleged by plaintiff.¹⁴⁸ The court concluded that the documents were subject to the privilege and were “precisely the type of evaluative and analytical exercise in which the public has a strong interest in encouraging corporations to engage.”¹⁴⁹

The fear of disclosure of diversity planning materials can stiffen the dialogue that is necessary to determine diversity needs. Without the self-evaluation privilege, businesses are likely to be less inclined, absent what is legally required, to monitor and thoroughly evaluate their internal procedures or processes in fear that documents may be used against them in various proceedings or in litigation. The ability to engage in self-evaluative behavior is also in the best interest of the public. Many private employers who are not subject to regulatory control will be less inclined to take voluntary efforts to increase diversity, which is a public policy issue. Conversely, application of the privilege will encourage businesses to take an active role in monitoring their own practices.

In light of the bleak history and inconsistent application of the self-evaluation privilege and limitations on applying the attorney-client privilege to such audits, organizations that adopt affirmative action plans, engage in diversity planning efforts, or prepare self-critical audits may find themselves questioning whether the rewards of implementing diversity initiatives are worth the associated risks. Nonetheless, the Court in *Ricci* noted that it did not wish to deter voluntary compliance efforts, which it deemed were “essential to the statutory scheme and to Congress’s effort to eradicate workplace discrimination.”¹⁵⁰ The majority in the *Ricci* opinion made clear that employers are free to make such affirmative efforts to ensure that all employees have an

¹⁴⁴ 169 F.R.D. 546, 546 (S.D.N.Y. 1996).

¹⁴⁵ *Id.* at 549.

¹⁴⁶ *Id.* at 550.

¹⁴⁷ *Id.*

¹⁴⁸ *Trezza*, 1999 U.S. Dist. LEXIS 10925, at *6.

¹⁴⁹ *Id.* at *6-8.

¹⁵⁰ *Ricci*, 129 S. Ct. at 2676.

equal opportunity to gain promotions before choosing a particular test or procedure. Therefore, the best practice is to fully vet all business and employment practices prior to implementing them to ensure that they will not disproportionately impact certain protected groups.

V. CONCLUSIONS AND POLICY CONSIDERATIONS

As all of the above illustrates, the patchwork of competing and conflicting laws may be working to impede diversity initiatives that might have greater and faster impact on the workplace. It is clear that substantial progress toward workplace equality has been made since the passage of Title VII. Yet, disparities in the workplace persist, which might cause some to argue that additional changes to the law are needed to compel or protect more aggressive diversity efforts by employers. On the eve of the 50th anniversary of Title VII, the Committee urges policymakers to consider:

- Has progress toward parity in the workplace been too slow?
- What should be the pace of change?
- What impact has the pace of change and persistent barriers to complete meritocracy had on our nation's standing in the world and on the global competitiveness of U.S. businesses?
- Is the law an impediment to change and, if so, how?
- Is favoritism ever warranted and if, so, what are the larger and long-term ramifications of policies and laws that allow favoritism?
- What constitutes a history of past discrimination for purposes of engaging in affirmative action?
- Can employment laws effect changes in individual attitudes and conduct?
- Should the law provide safe harbors for employers whose policies are designed to increase opportunities for historically underrepresented populations?
- Should employers have a safe harbor from disclosure to permit them to assess the diversity of their work forces and consider past barriers to advancement?
- Would laws focused on other aspects of our society, such as education and poverty, be more impactful than regulation of employers?
- What considerations, if any, should be given to the changing demographics of our nation in the formulation of future policy?
- What time limitations, if any, should be placed on diversity initiatives?
- What are the appropriate criteria for determining achievement of diversity goals?

- Should diversity initiatives involve special treatment or favoritism?

The Committee does not profess that it has the answers to these complex, multi-faceted questions. We hope, however, that this Report will be used as a resource by policymakers who, perhaps, can give clearer guidance to employers and foster greater opportunity for all.

Katharine H. Parker, Chair

Contributing Authors:¹⁵¹

Martin W. Aron	Amy F. Melican
Jyotin Hamid	Bertrand B. Pogrebin
Matthew W. Lampe	Victoria Richter
	Margaret L. Watson

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