



Measure Twice, Cut Once: Blueprint for Constructive Diversity, Equity, and Inclusion Initiatives

2020 Employment Law Seminar
Day 3: Social Justice & Discrimination in the Workplace



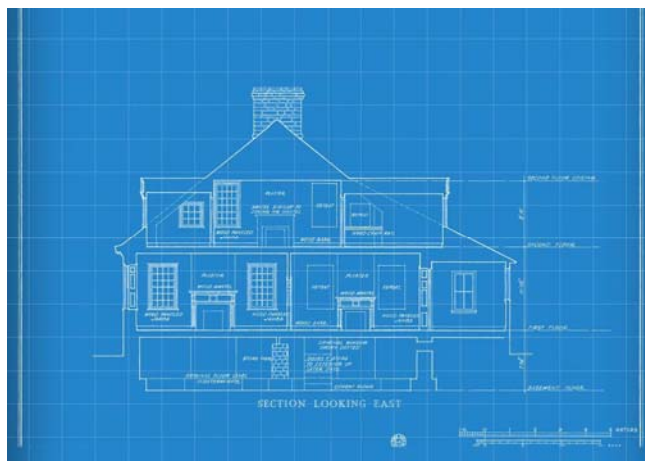
Speaker Introductions

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Guidelines for Implementing Diversity, Equity, and Inclusion Initiatives



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General Discrimination Principles

- Disparate treatment: intentional discrimination
- Disparate impact: discrimination caused by facially neutral policies or practices
- Title VII
- State law

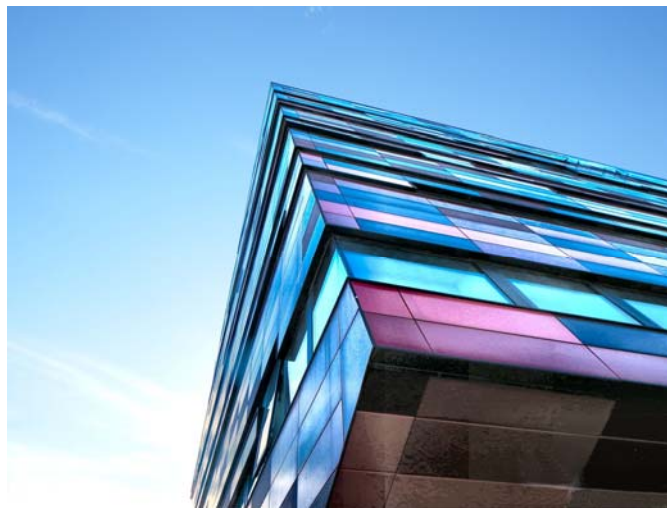


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Situations Where Discrimination May Arise

- Prohibited discrimination risks exist throughout employment relationship.
- Different treatment is not always unlawful discrimination
- Reverse discrimination claims
 - *Higuera v. City of Portland*—May 2020

DEI Initiatives Risks and Pitfalls?



Diversity and Inclusion Trainings

- Increased focus on DEI policies and diversity trainings in 2020
- EO 13950—White House Executive Order on Combating Race and Sex Stereotyping
 - Bars use of federal funds for trainings that promote “race or sex stereotyping or scapegoating” or “divisive concepts”



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Divisive Concepts Examples

- Any race or sex is inherently superior to another
- Any individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously
- Any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex

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DEI Trainings: Best Practices

- Skilled experienced trainers
- Training tailored to specific workplace
- Diverse groups involved in planning
- Buy-in and participation from top management
- Trainings should be part of broad DEI strategy



Diversity Training Risks and Pitfalls?



Implicit Bias

- Unconscious stereotypes or associations about other people or groups
- Activated involuntarily and without the individual's awareness or intentional control



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What Courts Are Saying About Implicit Bias

“It is well established that **implicit bias** affects almost every decision that people make.”

Pavel v. Univ. of Oregon (D. Or. 2018)

Plaintiff “never explained how testimony regarding **implicit bias** would be helpful to the jury in a disparate treatment case requiring evidence of intentional discrimination.”

White v. BNSF Ry. Co. (9th Cir. 2018)

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How Can Employers Recognize and Address Implicit Bias?



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Designing DEI Initiatives

- Steps to consider at each stage of employment
 - Hiring
 - Promotion
 - Training
 - Affinity groups
- Measuring progress



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Implementing DEI Initiatives

- **Do not** use quotas
- **Do** ensure diverse candidates are being considered
- **Do not** use race, age, gender, or any other protected class in hiring, firing, discipline or promotion decisions
- **Do** apply neutral and objective criteria



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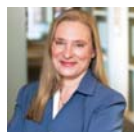
Can Employers Create Meaningful DEI Initiatives?



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Thank You!

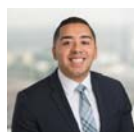
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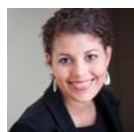
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