

# **THE EVOLUTION OF WORKPLACE DIVERSITY**

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**CHAPTER 16.1**



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In the past, most companies believed that assimilating new hires into the organization required that employees be socialized to conform to the company's *existing* culture. For a variety of reasons, over the last 30 years, companies have realized that in many instances, the corporate culture itself must adapt if it hopes to attract and retain a competitive workforce. At many companies, this change has been driven by workplace diversity initiatives. This article discusses the history of diversity in the employment setting and how a cottage industry in diversity evolved from a possible misreading of a landmark study on economic and demographic trends. It explores the differences between diversity and affirmative action, and analyzes legal issues surrounding diversity programs. The article concludes with a discussion of generational diversity, the next wave of diversity efforts in the workplace.

## What Is Diversity?

*"It's hard to define what diversity is because everyone has an opinion."*

- Goldman Sachs diversity ad, 2000.

Although diversity initiatives are now common place in corporate America, the term "diversity" is almost never defined. When it is defined, diversity is often described in conclusory or circular terms that do little to cement a common understanding of the term. An exception is the University of Maryland Diversity Database which defines diversity as (1) "...the representation of multiple...groups within a prescribed environment, such as a...workplace," (2) "differences between cultural groups," and (3) "...respecting cultural differences by recognizing that no one culture is intrinsically superior to another..."<sup>2</sup> Scholars further distinguish between primary and secondary dimensions of (or influences on) diversity. Primary (also referred to as visible or immutable) dimensions of diversity include age, ethnicity, gender, physical abilities and race.<sup>3</sup> *Id.* Secondary dimensions of diversity are those that can be changed, including religion, education, marital status, parent status, socio-economic status, etc. *Id.*

Because white males have traditionally dominated corporate culture in America, diversity efforts initially focused on the representation of women and minorities in the workplace. Training involved shaming white males for benefiting from a culturally-installed bias toward male power, privilege and influence. This approach fermented resentment and resulted in an inevitable backlash by white males. In response to this backlash, as well as the inherent legal vulnerabilities of a narrowly-drawn definition of diversity,<sup>4</sup> diversity initiatives were expanded and repackaged as "cultural diversity." Cultural diversity made room for measures of diversity that were independent of race or gender (such as life experiences, socio-economic background, and language proficiencies) and therefore could include (and benefit) all employees, including white males. While the cultural diversity movement made strides in correcting the perception that diversity existed to benefit exclusively women and minorities, taken to an extreme, the application of cultural diversity has also occasionally created absurd results when, for example, employers are encouraged to view "[e]very employee [as] a minority of one,"<sup>5</sup> or when diversity has been watered-down to merely another "soft" management skill.<sup>6</sup>

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<sup>2</sup> University of Maryland Diversity Database, at [www.inform.umd.edu](http://www.inform.umd.edu).

<sup>3</sup> More recently, sexual orientation has been added as primary dimension of diversity.

<sup>4</sup> As discussed *infra*, limiting diversity initiatives to women and minorities may risk claims of reverse discrimination.

<sup>5</sup> See William Simpson, To Make an Organization Great, First Make it a Great Place to Work, at [www.workforcediversitynetwork.com](http://www.workforcediversitynetwork.com) ("Rather than restrict the definition of diversity to meeting the needs of minority groups, we expand it to a belief that diversity is an inclusionary concept. *Every employee is a minority of one...*") (emphasis added); Advertisement for the New York Times Diversity Challenge Job Fair, 1994 ("Diversity doesn't mean just gender, race or mental or physical handicaps. Today[,] it means lots of other differences like...*having a skill deficiency.*") (emphasis added).

<sup>6</sup> See Thiederman, Managing New Americans: Strategies for Making it Work, at [www.rochesterdiversitycouncil.com](http://www.rochesterdiversitycouncil.com), April 20, 2003 ("Many managers believe that managing a diverse workforce means you must twist your organization into a pretzel to accommodate the needs of *each* employee.") (emphasis added).

Finally, companies have realized that creating a diverse workplace is only the first step. Managing the relationships of a diverse workforce and ensuring that its members communicate and get along with one another is also essential. Accordingly, “inclusion” is the current focus of many corporate diversity initiatives.

## Origins of Diversity

It is difficult to pinpoint the origin of diversity initiatives in the workforce. Although the first modern equal employment legislation was introduced in Congress in 1943, it (and subsequent legislative initiatives proposed over the next 20 years) were generally non-starters. In 1948, President Truman signed Executive Order 9981 to desegregate the armed services which some scholars cite as the first diversity initiative in the workplace. On its face, Executive Order 9981 required equality of treatment and opportunity in the armed services, but did not expressly forbid segregation.<sup>7</sup> Both President Truman and the committee created to oversee the integration of the armed services (the President’s Committee on Equality of Treatment and Opportunity in the Armed Services), however, used Executive Order 9981 to require desegregation of the armed services. As a result, by 1953, 95% of African American Army soldiers were serving in integrated units.<sup>8</sup>

In the 1960’s, social and political changes resulted in the passage of civil rights legislation that prohibited discrimination on the basis of race, color, religion, sex,<sup>9</sup> national origin, and later<sup>10</sup> age.<sup>11</sup> Even at the outset, however, the legislative history of Title VII, for example, reflected a concern that a particular racial or ethnic composition of employees in the workforce should not be mandated:

It must also be stressed that the [Equal Employment Opportunity] Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty.<sup>12</sup>

Opponents of Title VII also feared that the Act could be interpreted to *require* employers with a racially imbalanced workforce to grant preferential treatment to racial minorities (or that employers would grant preferences even if not required to do so).<sup>13</sup> These concerns were addressed by the inclusion of Section 703(j) which provided that nothing in Title VII “shall be interpreted to *require* any employer...to grant preferential treatment...to any group because of the

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<sup>7</sup> Executive Order 9981, states in pertinent part:

It is hereby declared to be the policy of the President that there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin. [Note the lack of reference to “sex” among the protected categories].

See Executive Order 9981, “Establishing the President’s Committee on Equality of Treatment and Opportunity in the Armed Services,” July 26, 1948.

<sup>8</sup> See Truman Presidential Museum and Library, Desegregation of the Armed Forces Documents at [www.trumanlibrary.org](http://www.trumanlibrary.org).

<sup>9</sup> Representative Smith, Chairman of the House Committee on Rules (and not a proponent of civil rights laws) offered an amendment to add “sex” as a protected category in an attempt to defeat Title VII. See Francis J. Vaas, Title VII: Legislative History, VII Boston College Indus. & Comm. Law Review 431 (1966). The effort to derail Title VII by adding “sex” as a protected category failed. The amendment passed 168 to 133 in the House of Representatives with no hearings on the subject in either the House or the Senate and the House debate allotted only five minutes to consider this, as well as numerous other amendments. Id.

<sup>10</sup> During the Congressional debates over Title VII, amendments were proposed that would have also prohibited discrimination based on age. Although these amendments were defeated, Congress asked the Secretary of Labor to study the problem of age discrimination. In 1965, the Secretary of Labor issued The Older American Workers – Age Discrimination in Employment report which chronicled discrimination against older workers and later used the report as the basis to propose legislation that became the Age Discrimination in Employment Act in 1967.

<sup>11</sup> See 42 U.S.C. 2000e, Title VII of the Civil Rights Act of 1964, as amended, (“Title VII”); 29 U.S.C. 621, The Age Discrimination in Employment Act.

<sup>12</sup> Judiciary Committee Report, Additional Views on H.R. 7152 (1963).

<sup>13</sup> See Cong. Rec. 8618-8619 (1964) (remarks of Sen. Sparkman) cited in United Steel Workers of America v. Weber, 99 S.Ct. 2721, 2728 (1979).

race...of such...group on account of an imbalance” in the employer’s workforce relative to the available workforce.<sup>14</sup> As a result of the passage of the civil rights laws, interest in workplace diversity was revived and driven (at least initially) by a sense of moral obligation (i.e. equality of opportunity) and concerns about compliance with the new laws.

### A Diversity “Industry” is Born

In 1987, Secretary of Labor, William Brock commissioned a study of economic and demographic trends by the Hudson Institute. This study became the landmark book Workforce 2000 – Work and Workers in the Twenty First Century (“Workforce 2000”). Workforce 2000 highlighted five demographic factors that would impact the U.S. labor market, and with it, the motivation for diversity initiatives in the workplace:

1. The population and the workforce will grow more slowly than at any time since the 1930s.
2. The average age of the population and the workforce will rise, and the pool of young workers entering the labor market will shrink.
3. More women will enter the workforce.
4. Minorities will be a larger share of the new entrants into the labor force.
5. Legal and illegal immigrants will represent the largest share of the increase in the population and the workforce since World War I.<sup>15</sup>

To some, these demographic trends – particularly those that impacted labor pool composition and availability – suggested that diversifying the workforce was an economic imperative if companies were to remain competitive and able to attract workers, and spawned a diversity industry. As a result, companies began focusing their efforts on creating the “business case” for their diversity efforts. Companies sought to measure diversity (or alternatively, the costs to the company if it did not appreciate diversity) in terms of turnover, retention, productivity, succession planning, public image, revenue/market share and even stock value. Diversity initiatives were broadened dramatically to include flexible schedules, emergency daycare, flexibility in dress requirements, non-standard career paths, phased retirement and domestic partner benefits, to name a few.

Companies also began applying diversity principles to areas outside the workforce context, and particularly to their customers. For example, as the population of minorities in the United States has increased over the past decade, their buying power has also grown dramatically. The gay and lesbian community has also been targeted as a source of expanded marketing opportunities because of the significant amount of discretionary income they control. These and other demographic trends showed companies that there were opportunities to expand their markets by selling to new customers or by creating new products to capitalize on niche markets. Companies also began to include suppliers as a part of their efforts and to tie diversity in the supplier’s workforce to the supplier’s eligibility to continue to receive the company’s business.

### Was Workforce 2000 Misread?

In their follow-up to Workforce 2000 (entitled Workforce 2020 – Work and Workers in the Twenty-First Century (“Workforce 2020”)), the authors conceded that they never anticipated that their report would spawn a diversity industry.<sup>16</sup> The authors further stated that the diversity entrepreneurs misread Workforce 2000 in two

<sup>14</sup> 42 U.S.C. 2000-e2(j) (emphasis added). The United States Supreme Court would later rely on the legislative history and language of Section 703(j) to hold that Title VI’s prohibitions against discrimination do not prohibit all private, voluntary affirmative action plans that included racial preferences, provided certain requirements were met. See Weber, 99 S.Ct. at 2729 and the requirements for voluntary affirmative action plans discussed *infra*.

<sup>15</sup> See Richard W. Judy and Carol D’Amico, Workforce 2000 – Work and Workers for the 21st Century, Hudson Institute (1987).

<sup>16</sup> Richard W. Judy and Carol D’Amico, Workforce 2020 – Work and Workers in the Twenty-First Century, Hudson Institute (1997).

significant ways: The first misreading was that there was a scarcity of white male entrants to the workforce.<sup>17</sup> In fact, white males (still) make up the largest absolute number of new entrants into the market. The white males entering the workforce, however, are only replacing the same number of white males leaving the market each year. To the extent the workforce is growing, all the growth in the labor pool is the result of more women and minorities entering the workforce. Therefore, while white males are still the dominant group in terms of their representation in the workforce and in the gross number of new entrants, women and minorities entrants are fueling all the growth in the labor markets. Because of this phenomenon (i.e. the stagnate growth of white males), as more women and minorities enter the workforce, they dilute (however slightly) the percentage representation of white males in the workforce.<sup>18</sup> As a result of this misinterpretation, the authors of *Workforce 2020* concluded:

the impact of diversity was exaggerated: too much attention was paid to the women and minority net new entrants, too little to the white males among the total entrants.”<sup>19</sup>

The second misreading of *Workforce 2000*, according to its authors, concerned the nature of the skills gap faced by new entrants in the market. *Workforce 2000* warned that the shift to a service economy required that new entrants have higher skills (including the ability to read, follow directions and use mathematics) that the education system was simply not providing. Instead of addressing these tangible skill deficiencies at the worker level, the authors contended that the diversity industry instead focused on training managers to be culturally sensitive. The authors observed:

What new workers principally need – whether they are white and male or female or minority – are the skills that education must provide, not managers trained in diversity and sensitivity.”<sup>20</sup>

Whether *Workforce 2000* was truly misinterpreted or simply “spun” to benefit the growing diversity industry is unclear. What is clear, however, is that the American workplace is becoming increasingly diverse, that such “sensitivity training” is beneficial in such an environment, and that the momentum in corporate America for diversity initiatives has shown no signs of waning in the ten years since these “misinterpretations” were brought to light. In addition, as the baby boomers retire, companies may become more acutely aware of the skills gap highlighted in *Workforce 2020* which has received significantly less attention and resources than diversity.

### Diversity and Affirmative Action Compared

Diversity is often confused with, or referred to interchangeably with, affirmative action. As a result, diversity suffers from some of the same negative perceptions as affirmative action. The differences in the concepts, however, are significant.

As a threshold matter, it is not a violation of Title VII if an employer’s workforce does not reflect the racial or gender composition of the surrounding area. Likewise, an employer has no affirmative obligation<sup>21</sup> to correct any such imbalance in its workforce and its failure to act is not, in and of itself,<sup>22</sup> an act of discrimination. While affirmative action and diversity seek, in their own ways, to address imbalances in the workforce, the concepts differ

<sup>17</sup> *Workforce 2020* at pp. XIV – XV.

<sup>18</sup> *Workforce 2020* at p. XV.

<sup>19</sup> *Workforce 2020* at p. XV (emphasis added).

<sup>20</sup> *Workforce 2020* at p. XV (emphasis added).

<sup>21</sup> Title VII, however, does not prevent the Executive Branch from imposing conditions under which it will enter into contracts, including (as in Executive Order 11246) a contractual duty to require that an employer-contractor attempt to alter any racial, ethnic or gender imbalance in its workforce. *Contractors Ass’n of Eastern Pa. v. Department of Labor*, 442 F.2d 159 (3<sup>rd</sup> Cir. 1991); 41 C.F.R. 60-1.4.

<sup>22</sup> In spite of the language in Section 703(j) that an employer is not required to correct an imbalance in its workforce, the Supreme Court has held that comparisons of an employer’s workforce to the racial and ethnic composition of the area population are admissible and probative of a pattern or practice of discrimination. *International Brotherhood of Teamsters v. United States*, 97 S.Ct. 1843 (1977).

considerably from one another in three key ways. First, affirmative action is remedial and is often imposed on an organization involuntarily.<sup>23</sup> Diversity, however, is a voluntary and deliberate undertaking meant to provide specific, tangible business benefits, with the change in the racial or gender composition of the workforce merely a by-product of the process. Second, the focus of affirmative action is on the hiring process, while hiring is but one of several processes and aspects of the business to which diversity is applied. Finally, affirmative action is limited to race or gender issues, while most progressive diversity initiatives are “inclusive of all group identities (including white males).”<sup>24</sup>

### Reverse Discrimination in Affirmative Action and Diversity

The most common criticism levied against affirmative action and diversity (because it is often confused with affirmative action), is that it results in reverse discrimination. While affirmative action permits preferential hiring in very limited circumstances (as discussed above and *infra*), diversity, in its purest sense, does not. This difference is most easily illustrated in comparing *voluntary* affirmative action and diversity initiatives in the hiring process.

In contrast to *mandatory* affirmative action (discussed above), the law also contemplates that some employers may want to undertake voluntary affirmative action efforts. In United Steel Workers of America v. Weber, 99 S.Ct. 2721 (1979), the United States Supreme Court held that while Title VII prohibits racial discrimination (including discrimination against Caucasians), it does not condemn all voluntary, race or gender-conscious affirmative action.<sup>25</sup> Specifically, the Supreme Court has adopted a two-part test to determine if a voluntary affirmative action plan is valid: First, the purposes of the plan must mirror the *remedial* purposes of Title VII to end discrimination and the segregating effects of discrimination. That is the plan must seek to *remedy* “conspicuous racial [or gender] imbalances in traditionally segregated job categories.”<sup>26</sup> Second, the voluntary affirmative action plan cannot “unnecessarily trammel the interests of white employees” by, for example, requiring the discharge of white workers and their replacement with African-American hires or creating an absolute bar to their employment or advancement.<sup>27</sup> *Id.* In addition, the plan must be a temporary measure meant to eliminate a manifest imbalance, not to maintain a racial or gender balance.<sup>28</sup>

Diversity (in the hiring process), on the other hand, has as its purpose to expand the pool of candidates and to increase competition. Diversity, in its purest sense, is not aimed at the selection process. “The crucial distinction [between diversity and affirmative action] is between expanding the applicant pool and actually selecting from that pool.” Shuford v. Alabama St. Bd. of Educ., 897 F.Supp. 1535, 1553 (M.D. Ala. 1995). Accordingly, affirmative

<sup>23</sup> When violations of the law are found, Title VII allows courts to “order such affirmative action as may be appropriate.” 42 U.S.C. 2000e-5(g). This has been interpreted to allow courts to order racial hiring practices (i.e. specific numeric goals and timetables that use race and national origin) but only in very limited circumstances. Specifically, racial hiring practices are appropriate only where there is evidence of “widespread, systemic and egregious” violations of the law. Evidence of illegal conduct or a statistical imbalance between the workforce and the surrounding population is insufficient. Moreover, such a remedy must be reasonable in that it cannot “unnecessarily trammel the interests of white employees,” such as requiring the termination of white workers in order to permit the hiring of minorities. Wygant v. Jackson Bd. of Educ., 106 S.Ct. 1842 (1986).

<sup>24</sup> Steven A. Ramirez, The New Cultural Diversity and Title VII, 6 Mich. J. Race & L. 127, 141 (2000).

<sup>25</sup> Weber, 99 S.Ct. at 2730. In fact, the plaintiff bears the burden of proof to establish the *invalidity* of voluntary affirmative action plans under Title VII. See Conlin v. Blanchard, 745 F.Supp. 413, 420 (E.D. Mich. 1990) citing Johnson v. Transportation Agency, 480 U.S. 616 (1987).

<sup>26</sup> In each of the Supreme Court cases addressing these issues, the plans in question documented the imbalances. In Weber, the plan sought to remedy the imbalance of African-Americans in its craft worker positions. The plan noted that 39% of the local labor force was African-American, while only 15% of the company’s work force, and less than 2% of the crafts workforce, were African –American. Weber, 99 S.Ct. at 2724. Likewise, in Johnson, the plan noted that women were represented in numbers far less than their proportion in the available workforce in the Agency as a whole and in the skilled craft worker job category. In fact, there were no women among the 238 positions in the applicable job category. Johnson, 480 U.S. at 621, 634. Voluntary affirmative action, however, does not require proof (or an admission) of specific past discrimination by the employer in question, only that a conspicuous racial imbalance exists for whatever reason.

<sup>27</sup> This has been interpreted to mean reasonable hiring ratios (i.e. 50% of openings in an internal training program were reserved minorities as in the Weber decision) or that race or gender is considered as *one* factor in the selection process for making promotions into positions within a traditionally segregated job classification (as in Johnson). Weber, 99 S.Ct. at 2724; Johnson, 480 U.S. at 621-622. In any event, rigid quotas, requiring that a minimum number of minorities be hired, or the total exclusion of non-minorities or male applicants for all opportunities has been rejected. Johnson, 480 U.S. at 630.

<sup>28</sup> Weber, 99 S.Ct. at 2730; Johnson, 480 U.S. at 621-622.

outreach efforts by an employer to recruit minorities and women as part of a diversity initiative are neutral with respect to candidate selection, and therefore don't require any justification or rationalization for their implementation, as is required by affirmative action.<sup>29</sup> The only "harm" to white males in a diverse hiring environment is the competition against a larger pool of qualified applicants, which courts have declined to sanction as actionable.<sup>30</sup> As a result, reverse discrimination claims premised on diversity *awareness* initiatives or affirmative *recruitment* have been rejected.<sup>31</sup>

Only when diversity initiatives seek to direct the selection process (or cease to be facially neutral), do they risk being evaluated under the more rigorous standards of voluntary affirmative action plans. In Taxman v. Board of Educ., 91 F.3d 1547 (3<sup>rd</sup> Cir. 1996), cert. dismissed, 118 S.Ct. 595 (1997), a white teacher challenged a school board's use of a non-remedial affirmative action plan under Title VII to prefer minority over non-minority teachers in layoff decisions when the teachers were equally qualified. The school board had invoked the plan to layoff a white teacher in lieu of an African-American teacher, both of whom had equal seniority because they had started their employment on the same day nine years earlier.

In striking down the affirmative action plan, the Court found that it did not have *any* remedial purpose. Specifically, African-American teachers were not underrepresented in the school district, and in some years the percentage of African-American teacher in the job category that included teachers exceeded the percentage of African-Americans in the workforce.<sup>32</sup> Instead, the plan was adopted and invoked in the layoff decision at issue to promote diversity as an educational benefit. In examining the legislative history of Title VII, the Third Circuit could find no Congressional recognition of diversity as one of the purposes or objectives of Title VII. The plan (although its purpose was laudable), therefore, failed to meet the first prong of the Supreme Court test that such plan be remedial.<sup>33</sup>

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<sup>29</sup> Shuford, 897 F.Supp at 1553.

<sup>30</sup> Duffy v. Wolle, 123 F.3d 1026, 1039 (8th Cir. 1997); Donaldson v. Exelon Corp., No. 05-1542, 2006 U.S. Dist. Lexis 66071 at \*12 (E.D. Pa., Sept. 14, 2006) (declining to certify a class of all white male employees because the fact that the company had diversity programs and sought to diversify its workforce was, by itself, not a legally cognizable injury to non-diverse employees); but see Gavenda v. Orleans Cty., No. 97-CV-0074E(Sc), 1998 U.S. Dist. Lexis 3413 at \*11 (W.D. N.Y., Mar. 19, 1998) (allowing a Caucasian plaintiff to amend his complaint to allege "associational loss" under Title VII for his employer's alleged discrimination against others based on allegations that his employer failed to provide a "diverse work environment.")

<sup>31</sup> Duffy, 123 F.3d at 1038 (administrative office's interest in obtaining a diverse pool of applicants could not support a finding of pretext), cert. denied, 118 S.Ct. 1839 (1998); Iadimarco v. Runyon, 190 F.3d 151 (3<sup>rd</sup> Cir. 1999) ("diversity memo," in and of itself, was insufficient to establish a prima facie case of discrimination); Silver v. City Univ. of New York, 947 F.2d 1021 (2<sup>nd</sup> Cir. 1991) (internal memo which stated that the list of candidates for a position "should include a very significant representation of minorities and females," was not evidence of discriminatory intent where it indicated only those who would be considered, and did not suggest that the appointment would be race or gender-based); Reed v. Agilent Tech., 174 F.Supp.2d 176 (D. Dela. 2001) (the mere existence of a policy promoting diversity awareness is not evidence of discrimination); Lutes v. Goldin, 62 F.Supp.2d 118 (D.D.C. 1999) (diversity speeches (as well as occasional references to NASA's workforce as "too frail, too pale, too male and too stale") showed a desire to remove barriers for women and minorities, not to erect them for Caucasian males or to cause males to be disadvantaged); Blanke v. Rocjester Telephone Corp., 36 F.Supp.2d 589 (W.D. N.Y. 1999) (declining to find that plaintiff's termination as part of a corporate downsizing was a pretext to promote management's broad objective of seeking to increasing the number of minority employees where there was no suggestion that white employees would be terminated in order to effectuate the diversity goals); Brown v. Time, Inc., No. 95 Civ. 10081, 1997 U.S. Dist. Lexis 6227 at \* 4 (S.D. N.Y., May 7, 1997) (statements by company chairman expressing a commitment to diversity did not suggest a policy of discrimination against white males); Payne v. Northwest Corp., 911 F.Supp. 1299, 1305-1306 (D. Mon. 1995) (memo which recommended increasing the number of women and minorities in certain positions, as well as the fact that the company had diversity goals and kept statistics on the number of minorities employed at managerial levels "does not even rise to an inference" that a particular white male plaintiff was fired because of his race), aff'd in part and rev'd on other grounds in part, 113 F.3d 1079 (9<sup>th</sup> Cir. 1997).

<sup>32</sup> Taxman, 91 F.3d at 1550-1551; see also Cunico v. Pueblo School Dist. No. 60, 917 F.2d 431 (10<sup>th</sup> Cir. 1990) (school district's decision as part of a reduction in force to layoff a white social worker in lieu of a less senior African-American made pursuant to an affirmative action plan and aimed at retaining the district's only African American administrator, violated Title VII in the absence of evidence of past discrimination against African Americans by the school district or a statistical imbalance in the district's workforce).

<sup>33</sup> The Third Circuit also noted that in another case, the Supreme Court had already rejected (albeit under equal protection standards, rather than Title VII) an employer's "role model" justification for race-conscious state action because it would have allowed the employer to make discriminatory hiring and layoff decisions well beyond the point necessary for a remedial purpose.

The Third Circuit also concluded that the plan “unnecessarily tramm[ed]” non-minority interest because it was “an established fixture of unlimited duration” (having been in existence for more than 13 years), that was devoid of any goals or standards and was subject to being invoked at the school board’s whim.<sup>34</sup> The Court also found it significant that in Weber and Johnson, the non-minority plaintiff’s retained their jobs, but that the plaintiff in Taxman suffered a substantial and severe loss by being laid off.<sup>35</sup>

### Practical Considerations in Drafting Diversity Plans

Because few diversity plans limit their efforts to merely expanding the applicant pool, but also seek to influence (to varying degrees) the selection of candidates, diversity initiatives are likely to be evaluated like voluntary affirmative action plans. As a result, diversity plans should be carefully drafted to ensure that they include a discussion of the remedial basis for the initiative. Broad initiatives based on amorphous business benefits the company hopes to enjoy from diversity, or its desire to reflect the demographics of its customers, may be difficult to justify in particular employment decisions.<sup>36</sup>

Diversity initiatives should also guard against schemes that require the termination of non-minorities or that result in their job loss in order to reach diversity objectives. Diversity plans should avoid tying managers’ financial incentives or bonuses to their reaching or maintaining specific diversity goals as this can create the perception that the program is a “numbers game” and/or be cast unfavorably in litigation.<sup>37</sup>

### Advantages and Challenges to Implementing Diversity Initiatives

Seeking to change corporate culture is no small task and it is not unusual that efforts to do so will involve some growing pains and adjustments along the way. Like many training efforts, diversity training can cause an increase (at least initially) in discrimination claims as employee awareness of company policy and discrimination laws increases. Because employees suffer from preconceived notions about diversity in particular (which training may or may not dispel) and because these opinions are often very strongly held, the incidence of claims (particularly reverse discrimination claims) following diversity training may be higher than with other kinds of training. Other, more subtle forms of backlash can also occur if white males do not have a place in the diversity initiative.

In addition to reverse discrimination claims by white males, complaints by non-Black minorities and African Americans are also possible according to a recent study that revealed that approximately half of non-Black minorities believe that only African Americans benefit from diversity and 37% of African Americans believe that diversity initiatives have not done enough.<sup>38</sup> Companies may also risk class action claims based on assembled statistics gathered as part of a culture survey to help formulate a diversity initiative that addresses the issues particular to that company. Specifically, discrimination claims could be brought if such statistics show an under-representation in certain categories and the company either wholly fails to act on the information, or introduces a diversity initiative or sets internal goals which they fail to achieve. Finally, communication problems, resentment and conflict can occur in the workplace if inclusion is not made part of the diversity initiative.

Despite these drawbacks, diversity initiatives can create closer ties among the company, its employees, customers and the communities it serves. These ties can generate synergies that create market growth opportunities

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Taxman, 91 F.3d at 1560-1561 discussing Wygant, 476 U.S. at 270-78, 284-93 (O’Connor, J., concurring in part and concurring in the Court’s judgment), 294-295 (White, J., concurring in the Court’s judgment).

<sup>34</sup> Taxman, 91 F.3d at 1564.

<sup>35</sup> Id.

<sup>36</sup> Employers may also want to examine the objectives behind their diversity efforts to ensure that they are not too narrowly drawn or are based exclusively on race and sex. For example, a company that wants to penetrate the Asian market might characterize its diversity initiative as a desire to have a sales force that reflects its customer base (i.e. Asian sales people). If the company examined its objective more closely, however, it might more precisely be to have sales people who are knowledgeable of the Asian customer market. A Caucasian candidate who has lived and taught English in Asia may be better or equally qualified to an Asian candidate, and by refining their objective, the company can gain diversity on a broader basis.

<sup>37</sup> Frank v. Xerox Corp., 347 F.3d 130 (5<sup>th</sup> Cir. 2003) (“balanced workforce initiative” that identified explicit racial goals for each job and grade level, that created reports which stated that African Americans were over-represented and whites were under-represented in almost every job and grade level, and that evaluated managers on how well they met the goals was direct evidence of discrimination that precluded summary judgment on plaintiff’s disparate impact claims).

<sup>38</sup> Martha Frase-Blunt, *Thwarting the Diversity Backlash*, H.R. Magazine (June 2003) citing a 2002 survey by Novations/J. Howard & Associates.

for the company's products and deepen loyalty in the community. Diversity initiatives can broaden the candidate pool, reduce attrition and improve succession planning. Diversity initiatives also benefit from the belief that they are "the right thing to do," and can improve the company's public image and, according to some scholars, the stock price.

### **Generational Diversity or Catching "Age Wave"**

In 2008, the first baby boomers will be eligible to collect social security, but their retirement will also begin an erosion of expertise in the workforce. Companies will face the loss of experienced workers and, for employees who have been with their employer for a long time, the employees' institutional knowledge of the company. Lower fertility rates will mean fewer younger workers will enter the worker force, and companies faced with a shortage of skilled workers may need to reexamine the role of older workers.

According to the American Association of Retired people ("AARP"), 79% of Americans plan to work in some capacity after traditional retirement age. Some will need to work past retirement because they do not have enough resources to retire, are concerned about the long term viability of Social Security and pension plans, or need health benefits. Because work is less physical, and people are generally healthier and living longer productive lives, many older workers are physically and mentally able to continue working and desire to remain engaged in the working world.

Whatever the reason for working past traditional retirement age, many older workers will seek flexibility in their work arrangements such as phased retirement, part-time employment, casual, project or consulting arrangements, part-year or seasonal employment, job sharing, or telecommuting. Others may seek the opportunity to take sabbaticals, participate in mentorship programs or need flexibility in their day-to-day schedule to deal with care-taking responsibilities of parents or spouses. In fact, the 2005 White House Conference on Aging included among its resolutions numerous proposals concerning job flexibility to create incentives for older workers to continue working. It also recommended that legislatures address the current disincentives to working beyond retirement including laws that reduce pension benefits and social security benefits for working seniors.

### **Conclusion**

Although it has undergone several transformations, workplace diversity appears well-entrenched in corporate America. Despite an entire industry devoted to applying diversity principles to change corporate culture, diversity remains an ambiguous and misunderstood concept to most that can clearly benefit from continued frank and thoughtful dialogue.

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