Why Corporate Initiatives to Promote Inclusion Through Selection of Outside Counsel Can Co-Exist with Title VII

Another Look at Corporate Counsel Requests for Law Firm Diversity

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Law firm compliance with corporate client requests for diverse legal teams can be accomplished without violation of federal anti-discrimination laws. Title VII of the Civil Rights Act of 1964 was enacted to eliminate work-related racial segregation, by prohibiting discrimination in employment decisions.[1] This Act remains important today. With certain exceptions, employment decisions based solely on race and gender are illegal.[2] That much is clear. These exceptions are defined by case law and federal regulations.[3] What is less clear to many is the extent to which employers voluntarily may promote diversity in the workplace.

I. Does law firm compliance with corporate client requests for diverse legal teams violate federal anti-discrimination laws?

In 2004, Roderick Palmore wrote "A Call to Action,"[4] in which he stated that "all objective assessments show that the collective efforts and gains of law firms in diversity have reached a disappointing plateau." The Chief Legal Officers of many prominent companies endorsed Palmore's "A Call to Action" and pledged to reaffirm a commitment to diversity in the legal profession. Since the "Call," corporate America has responded with varying degrees of "action". Many companies have placed specific

[1] 42 U.S.C § 2000e *et seq.*
[2] *Id.*
[3] *See United Steelworkers v. Weber*, 443 U.S. 193 (1979) and the Equal Employment Opportunity Commission's (EEOC) Voluntary Affirmative Action Guidelines at 29 C.F.R Part 1608, Affirmative Action Appropriate under Title VII of C.R.A 1964, as amended.
[4] Roderick Palmore, Sara Lee Corporation's Executive Vice President, General Counsel and Secretary.

demands on the law firms that service them to increase diversity. Are these demands unlawful? Are the responses to the demands lawful?

A Corporation Can Foster Diversity in the Selection of Outside Counsel.

As a general rule a corporation exercising its business judgment may demand diversity from its legal services providers. Law firms that respond to corporate demands to diversify do have options. A law firm can decide not to offer its services to companies that ask it to demonstrate its diversity efforts, or the law firm can comply. There are a number of lawful ways to comply, but some entail greater risk than others.

In the absence of judicial order or consent decree, employers wishing to consider race or gender in their hiring decisions may do so by taking advantage of the narrow exception to Title VII's prohibition on race and gender-based decisions. As interpreted by the courts and the Equal Employment Opportunity Commission (EEOC), Title VII allows certain forms of "voluntary" affirmative action plans, but such programs must comply with the stringent requirements set forth in several decisions of the U.S. Supreme Court, and subsequently codified by the EEOC in its Voluntary Affirmative Action Guidelines.[5]

Utilizing the standard articulated in the Supreme Court's *Weber* decision, law firms will have to demonstrate that diversity efforts: 1) are being used to eliminate manifest imbalances in traditionally segregated job categories; 2) do not unnecessarily trammel interests of non-minority workers or create an absolute bar to advancement of

[5] *See*, 29 C.F.R Part 1608, Affirmative Action Appropriate under Title VII of C.R.A 1964, as amended.

non-minority employees; and 3) are temporary measures used to eliminate a manifest racial imbalance and are not intended to maintain racial balance.[6]

Case law and the EEOC Guidelines address different ways to satisfy the *Weber* standard. With respect to the elimination of manifest imbalances in traditionally segregated job categories, an employer may not act soley to increase the diversity of its workforce. Rather, the employer is obligated to show that its plan was adopted to remedy the effects of past discrimination. *See Taxman v. Bd. of Education of Piscataway*, 91 F.3d 1547, 1558 (3d Cir. 1996). Courts have found that employers can satisfy this burden and show "manifest imbalances" in several ways, through: (1) statistical evidence; (2) evidence that the plan was created in response to a finding by a governmental entity, or (3) an analysis of an internal investigation. Setser v. Novack, 657 F.2d 962 (8th Cir. 1981).

With respect to the second *Weber* element, minimizing the adverse effects on non-minority workers, the courts have found that as long as "rigid" or "arbitrary" quotas are not created, voluntary action to remedy past discrimination does not unnecessarily trammel the rights of non-diverse employees. *See Johnson v. Transportation Agency, Santa Clara County, Calif., et al*, 480 U.S. 616, 626-627 (1987).

Finally, as to the third element, courts routinely hold that voluntary affirmative actions must be temporary and designed to attain, rather than maintain, balanced workforces. *See*, e.g., *Johnson, supra.* In *Johnson*, the Court refers favorably to methods of determining underutilization and setting goals to demonstrate manifest imbalances in traditionally segregated areas of the workforce utilized by federal contractors, which must set goals as a quid pro quo for receipt of government funds.

[6] *See United Steelworkers v. Weber*, 443 U.S. 193, 197 (1979).

Similarly, the methods used by federal contractors are also endorsed by the EEOC in its Guidelines.[7]

Since the adoption of Title VII, many employers have changed their employment practices to improve opportunities for minorities and women. To address challenges to employers' voluntary efforts as being inconsistent with Title VII, the EEOC issued its Guidelines governing employers' voluntary affirmative action plans which describe the circumstances under which a voluntary affirmative action plan may be adopted lawfully.

To begin, a voluntary affirmative action plan must contain three elements. First, an employer must conduct a reasonable self analysis, which should be in writing .[8] The protection of section 713(b) of Title VII, which affords employers a defense of good faith reliance on written EEOC interpretations and opinions will be accorded by the EEOC only if the self analysis and the affirmative action plan are dated and in writing, and the plan otherwise meets the requirements of section 713(b)(1).[9] In conducting a reasonable self analysis, the Guidelines identify predicate circumstances, at least one of which must exist for a voluntary affirmative action plan to be adopted lawfully. The circumstances are:

- **Adverse Impact.** An employer may take affirmative action where an analysis of its existing or contemplated personnel selection practices reveals information demonstrating actual or potential adverse impact in those practices; or,

[7] *Johnson v. Transportation Agency, Santa Clara County, Calif., et al*, 480 U.S. 616, 632-634 (1987).
[8] *See* 29 C.F.R § 1608.4
[9] *Id.*

- **Effects of Prior Discriminatory Practices.** An employer is endeavoring to correct the effects of prior discriminatory practices. The EEOC's guidelines suggest identifying such effects by making a comparison between the employer's workforce, or part thereof, and an appropriate segment of the public labor force; or,

- **Limited Labor Pool.** An employer may take affirmative action where its own "historic" restrictions (such as a low level of minority availability in the labor pool of the industry or surrounding region) have artificially limited employment or promotional opportunities for minorities.

Next, an employer must establish a reasonable basis for concluding such action is appropriate. The self analysis does not have to establish a violation of Title VII. A reasonable basis for creating a voluntary plan can exist without a formal finding or admission to a violation of Title VII. For example, the self analysis may reveal that employment practices tend to have an adverse affect on a particular group or that promotional opportunities for a group have been artificially limited.[10] Last, action must be taken that is reasonable to address the problems identified in the self analysis. Such reasonable action may include goals and timetables or other appropriate employment tools which recognize the race, sex, or national origin of applicants or employees. It may include the adoption of practices which will eliminate the actual or potential adverse impact, disparate treatment, or effect or past discrimination by providing opportunities for members of groups which have been excluded, regardless of whether the persons benefited themselves were the victims of prior policies or procedures which produced the adverse impact or disparate treatment or which perpetuated past discrimination.[11]

If the EEOC determines that an employer has satisfied the Guidelines, it will find that an employer had a basis for establishing a voluntary affirmative action plan

[10] *Id*.
[11] *Id.*

and advise the employer that it is entitled to protection under Section 713(b)(1) of Title VII. Significantly, this finding of protection is "itself an additional written interpretation or opinion of the Commission pursuant to Section 713(b)(1)," and therefore constitutes a defense.[12] Unfortunately, the Guidelines make no provision for determination of the lawfulness of a voluntary affirmative action plan before an administrative Charge of Discrimination has been filed against the employer in connection with the affirmative action plan or goals. Similarly, the Guidelines do not offer means to determine whether a voluntary affirmative action plan to eliminate perceived discrimination is adequate to accomplish that task. In fact, the EEOC warns that whether a voluntary affirmative action program is adequate "will remain a question of fact in each case." Therefore, a private claim still may be filed against the employer based on the voluntary affirmative action plan, since the EEOC's ruling may not be determinative. *See Solimino v. Astoria Federal Savings and Loan Association*, 501 U.S. 104 (1991); *Kremer v. Chemical Construction Corp*., 456 U.S. 461 (1982), 29 C.F.R. § 1608.11(a).

Designing a program consistent with the *Weber* decision and EEOC Guidelines may be viable options for law firms. However, as a condition precedent to utilizing the *Weber* standard and EEOC Guidelines, law firms must admit wrongdoing. They must acknowledge on some level that discrimination exists in their employment practices. Such an admission may be prove to be problematic for many firms.

Another alternative for law firms that are federal government contractors is to base any diversity program on existing affirmative action obligations. A federal contractor already is required to prepare certain statistical analyses and often maintain EEO or diversity programs without first admitting possible discrimination.

[12] *Id* at § 1608.10(b)(1)(2); § 1608.4(d).

Goal-specific or quantitative diversity programs which are not created in conjunction with an affirmative action plan may cause employers to face claims of "reverse discrimination." Employers also may be challenged by the groups the programs were designed to protect, if goals or quantitative objectives are not met. Despite legal challenges, increased diversity in the workplace can be achieved successfully. There are practical steps, as discussed in section V, below, which employers, including law firms, can take to ensure compliance with the law.

In a research paper released on March 12, 2007, and recently circulated to corporate general counsel, attorney Curt Levey wrote that law firms who comply with client preference for diverse legal teams may be risk breaking the law.[13] Specifically, the paper addresses Fortune 500 companies that place demands on outside counsel. Levey posits that law firms that acquiesce to corporate demands violate federal anti-discrimination laws.[14]

Levey's arguments are flawed. To be sure, potential legal risks are associated with using race and gender as factors in employment decisions, including hiring, promotion and assignment. However, Levey assumes that compliance with client requests for diversity primarily is about race and gender and that it amounts to no more than unlawful acquiescence to customer preference. He omits discussion of business reasons for having diverse legal teams. Moreover, Levey fails to address qualifications law firms seek that transcend the issue of race and gender. Lastly, Levey's argument appears to be based on the canard that minorities who are hired by law firms are fundamentally unqualified.

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[13] *See* Curt A. Levey, The *Legal Implications of Complying with Race and Gender-Based Client Preferences* (March 12, 2007).
[14] *Id* at 2.

II. Looking Beyond Race and Gender to Diversify Legal Teams.

In order to begin assessing client diversity requests and whether they are legal, one must understand what is being sought. Diversity can be defined in many ways. To some, diversity simply is the more "socially accepted" relative of affirmative action. Others, however, view diversity as a metaphor for inclusiveness. There is no universally accepted definition of diversity, but no definition seeks to exclude white males, as the Levey paper suggests. The implication of Levey's paper that diversity is being used as an exclusionary tactic is unreasonable. Consider statements from the following companies:

> **General Electric**: "As a global Company with operations in more than 100 countries, diversity isn't merely a noble idea — it's the reflection of our business. Every day, GE works to ensure that all employees, no matter where they work today or where they come from, have an opportunity to contribute and succeed. Encompassed in that goal are traditional ideas of diversity, including ethnicity, race and gender, and exploring more contemporary concepts like inclusiveness.[15]

> **HSBC**: Diversity is a source of opportunity, whether in employment or customer markets. Appreciation of the rich mosaic of difference within the workforce fuels group dynamic and helps create an environment where teams can perform to their full potential. A generalized market approach will not reach the many pockets of value to be found in diverse groups of customers. Competitive edge can be gained from the variety present in

[15] http://www.ge.com/en/citizenship/employees/diversity.htm

> our workforce and customer base, and specific attention to market variation, in, for example:[16]
>
> - Age (length of) experience
> - Gender, sexuality
> - Race, religion, culture, nationality
> - Outside, non-employment activity and interests
> - Personality
> - Educational background
> - Regional or other accents
>
> **Goodyear**: "Diversity makes good business sense for a global company such as Goodyear that is committed to continued growth and maintaining its position as the world's tire industry leader. Goodyear has embraced diversity throughout the organization -- from its world headquarters in Akron, Ohio, to all its facilities and markets around the globe. As the workplace and technology bring associates together in pursuit of common objectives, personal bonds are created beyond whatever racial, ethnic or cultural differences exist in society. A diverse and inclusive workforce provides the strategic advantage to successfully conduct business in multi-cultural marketplaces globally, and Goodyear's diverse mindset has enabled it to respond to change much quicker than its competitors."[17]

A commitment to diversity does not equal discrimination. On the contrary, it generally entails taking steps to ensure that minorities, women and others are given opportunity for access to positions that historically have been denied to them or in which they currently are underrepresented. Race and gender are simply elements of diversity. They represent an aspect of the search for talented people who may succeed in employment, but might otherwise be overlooked.

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[16] www.hsbc.com/hsbc/careers/diversity

[17] http://www.goodyear.com/careers/careers_diversity.html

III. Diversity and Inclusion are about Business, not Skin Color.

In its ruling in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Supreme Court reaffirmed the need for diversity in today's business environment. The court stated:

> Major American businesses have made 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.

In September, 2000, the Congressional Commission on the Advancement of Women and Minorities in Science, Engineering and Technology Development published, *Land of Plenty, Diversity as America's Competitive Edge in Science, Engineering and Technology.* The report highlighted the importance of diversity in the workforce if America wanted to sustain its preeminence in the global economy.[18] The Commission made many recommendations to Congress and then-President Clinton. To illustrate the importance of diversity in promoting economic success, the report stated the following:

> Beyond the demographic reality that skilled workers must be drawn from an increasingly diverse domestic population, there are other compelling reasons why a workforce that includes more women, underrepresented minorities, and persons with disabilities helps to strengthen business, academe, and government.[19]
>
> A recent survey of Fortune 100 human resource executives found that increasing diversity is desirable for the following five reasons: better utilization of talent; increased marketplace understanding; enhanced breadth of understanding in leadership positions; enhanced creativity; and increased quality of team problem solving. Another recent survey conducted by the American Management Association of more than

[18] Congressional Commission on the Advancement of Women and Minorities in Science, Engineering and Technology Development published, *Land of Plenty, Diversity as America's Competitive Edge in Science, Engineering and Technology*. (September 2000).

[19] *Id.*

> one thousand of its members found that heterogeneity —a mixture of genders, ethnic backgrounds, and ages in senior management teams—consistently correlated with superior corporate performance in such areas as annual sales, growth revenues, market share, shareholder value, net operating profit, worker productivity, and total assets.[20]

A plaintiff in a Title VII discrimination claim has the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff.[21] Given the totality of the circumstances, the plaintiff must prove to a reasonable fact finder that defendant treated the plaintiff less favorably because of race.[22]

Knowledge of data relevant to diversity in a workforce alone is not sufficient to show discrimination. In *Reed v. Agilent Technologies, Inc*., 174 F. Supp. 2d. 176, (2001), the U.S. District Court found evidence that an employer which maintained a statistical awareness of diversity in the workplace did not show discrimination. The court stated:

> Unless an employee can demonstrate that an employer's approach to diversity has some negative impact upon his individual employment situation, the mere existence of a policy promoting diversity awareness is not evidence of discrimination. Merely producing anecdotal evidence regarding the aspirational purpose of an employer's diversity policy, and its intent to ameliorate any underutilization of certain groups, is not sufficient. Instead, the employee must show that such policies were actually relied upon in deciding to terminate his employment.

The court recognized the need for diversity awareness programs. The court explained that:

> such programs are necessary to remedy past discrimination against or under representation of minorities and women. Further, they ensure that companies have the ability to hire a workforce that will enable it to service effectively an increasingly diverse customer base. This is to say nothing of the laudable goal of

[20] *Id.*
[21] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
[22] *Iadimarco v. Runyon*, 190 F.3d 151, 163 (3d Cir. 1999).

> expanding the horizons of opportunity for more and more members of this great pluralistic society.[23]

In *Brown v. Time, Inc.*, 1997 U.S. Dist. LEXIS 6227 12-13 (S.D.N.Y. 1997), a case involving alleged failure to promote and retaliation, the plaintiff introduced as evidence of supposed discrimination, a company newsletter which stated that, "We must make staff diversity a reality. . . . We must do as well at recruiting, retaining and promoting minorities as we have with women in publishing." The court, however, found that the plaintiff failed to demonstrate that the company's express commitment to diversity suggests a policy of discrimination.

In yet another example, *Blanke v. Rochester Tel. Corp.*, 36 F. Supp. 2d 589, 597-598 (W.D.N.Y. 1999), a Title VII plaintiff who disputed his termination pointed to a memo which expressed the employer's intent "to introduce programs that improve the 'Diversity' of the organization such that the trend over a 5 year horizon will result in the composition of our workforce matching the composition of the markets we serve." The plaintiff argued this bespoke an unlawful objective, but the court concluded that the company's diversity initiative was insufficient evidence of Title VII discrimination to permit the case to survive summary judgment.

Levey's universe limits diversity to race. But, companies have gone beyond viewing diversity only through the lens of race, and even gender. From a business perspective, diversity is about the bottom line, which means hiring individuals who bring competitive advantage to the enterprise.

[23] *Reed v. Agilent Technologies, Inc*., 174 F. Supp. 2d. 176, 187 (2001).

Levey likens diversity efforts to the proposed but rejected amendment to Title VII, which would have permitted employers to discriminate on the basis of race whenever skin color was a "bona fide occupational qualification."[24] Arguably, increasing opportunities for women and minorities in the workplace creates no barrier to white males. If corporations are asking law firms to demonstrate diversity efforts to ensure that women and minorities are not being excluded from projects or being prevented from playing a substantive role on those projects, then there appears to be no legal basis to find discrimination. However, as discussed earlier, law firms may face legal exposure if race and gender are the sole factors in assigning or promoting employees.

IV. Hiring criteria: Are minorities and women being judged by different standards?

Underlying the argument that diverse legal teams are illegal is the assumption that law firms which hire minorities or women are lowering their hiring standards and are doing so to comply with corporate directives. Also present is the flawed premise that white male hires always possess a consistent set of credentials that include higher grades, etc. and set the standard of achievement by which everyone else should be judged. The fact is that not all white hires possess these credentials and neither do all minority hires. Hiring criteria cannot be simply reduced to a formula that is consistently applied. The hiring process is full of subjectivity. If grades and law school reputation were reliable indicators of success, why bother to interview?

Some law firms determine that law school reputation, grades, G.P.A, and class rank will be factors they consider in hiring, but often make exceptions when making hiring decisions. Exceptions abound for all groups because to the overwhelming majority

[24] *See* Levey *supra* n. 4, citing 110 Congress Rec. 2550 (1964).

of law firms, the foregoing factors are not solely determinative of success. Citing UCLA law professor Richard Sander, Levey contends that racial preference in hiring leads to disparities in expectations and performance and eventually decreases the firm's diversity.[25] Levey implies that law firms who hire minorities have done so because of an exception (i.e., a lower standard) and that the attrition rate for minorities at law firms stems from their lack of qualifications. What Levey or others ignore is that exceptions are made regardless of race.

Just What are "Qualifications"?

Law firms look for all types of qualifications. This may include grades, law school reputation, class rank, etc. However, research indicates that success at law firms may have nothing really to do with many of these factors.[26] The pedigree of a law school is an important factor in hiring decisions for any law student or attorney for whom law school performance is the only calling card, because he or she has little or no experience practicing law.[27] Once an attorney has experience as a practitioner, law school reputation and the lawyer's scholastic performance prove less relevant during the selection process, primarily because the attorney now has a body of work from which he or she can be judged.[28] However, all interviewees agreed that what makes a successful attorney is not immediately discernable from a resume, transcript or twenty- minute interview.[29]

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[25] *See* Levey, *supra* n. 4. citing Richard Sanders, The Racial Paradox of the Corporate Law Firm, 84 N.C.L Rev. 1755, 1780-87 (2006).
[26] *The Myth of Meritocracy: A Report on the Bridges and Barriers to Success in Large Law firms*, Minority Corporate Counsel Association, 2003.

[27] *Id*.
[28] *Id*.
[29] *Id*.

Attributes such as leadership, the ability to network, business savvy, and the use of sound judgment may not be revealed in law school grades. What makes a successful attorney is not necessarily reflected in the narrow criteria historically used by hiring committees to screen applicants.[30] For example, in a study conducted by Minority Corporate Counsel Association, of the 1833 partners surveyed, almost 40 percent did not attend a top 20 law school, approximately 80 percent did not have law review experience, approximately 75 percent did not graduate with honors, almost 87 percent did not have a clerkship, and approximately 92 percent were not inducted into Order of the Coif.[31] Based on these statistics, the conventional wisdom concerning "qualifications" are not necessarily correct predictors of achievement at firms, as measured by the ability to progress to the highest level: partnership. Levey's myopic but widely shared view of qualifications imply that law firms should only seek candidates from privileged, homogenous backgrounds. Law firms like other employers, should be allowed to adapt their recruitment strategies to fit the current needs and objectives of its workforce.

After all, isn't that what is indeed happening? As law firms diversify and seek new talent from traditional and non-traditional venues, and incorporate different but still legitimate criteria, the "qualified" pool expands and changes. In fact, what corporate America is saying to law firms is to try new approaches to hiring because the "old approaches" are not working. There is an adage that the definition of insanity is when you keep doing the same thing over and over again and expect different results. Seeking diversity is a sane approach.

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[30] *Id*.
[31] *Id.*

Case precedent suggests that courts are likely to view an employer's diversity recruitment efforts as a legitimate exercise of business judgment with which they are reluctant to interfere. In *Duffy v. Wolle*, 123 F. 3d. 1026, 1038-39 (1997), the U.S Court of Appeals for the Eighth Circuit stated:

> An employer's affirmative efforts to recruit minority and female applicants does not constitute discrimination. An inclusive recruitment effort enables employers to generate the largest pool of qualified applicants and helps to ensure that minorities and women are not discriminatorily excluded from employment. This not only allows employers to obtain the best possible employees, but it, "is an excellent way to avoid lawsuits." The only harm to white males is that they must compete against a larger pool of qualified applicants. This….does not state a cognizable harm.

V. How to achieve diversity and be in compliance with the law?

Aggressively pursuing diversity in the workforce may present legal risks, but is possible. Employers have to ascertain the purpose of their diversity programs and implement those programs prudently. Corporations may request that outside counsel demonstrate their diversity efforts. However, law firms that comply with those requests by making gender or race-specific assignment or promotions still may run afoul of the law. Courts have recognized an employer's ability to have effective diversity initiatives that are not discriminatory. Law firms can even set goals and express preferences provided they do so within the legal framework set forth in the *Weber* trilogy of case law and as codified by the EEOC in its Guidelines. A less risky alternative, of course, is to dovetail diversity goals with existing federal contractor affirmative action obligations, if they exist. Short of setting goals, there are other initiatives that law firms can undertake.

A. It is Entirely Legal to Broaden Recruitment Efforts and Identify Minority Recruitment Sources

Employers who recruit from the same sources repeatedly limit the pool of individuals from whom they have to choose. Casting a wider recruitment net ensures that all groups, including minority groups, are informed about job openings or promotions. For example, many employers contact minority organizations and groups or industry-specific associations when openings become available. It is always essential, however, that a minority applicant's qualifications, and not his or her race, are the reason for his or her selection. Recruitment efforts broaden the number and variety of applicants from whom to choose. This holistic approach will enable employers to avoid focusing on a single characteristic like race or gender.

Employers may require managers to identify minority recruitment sources within a specified period and provide written documentation concerning contacts with these sources. In this documentation, the managers should be required to state: (i) why the recruitment source is considered to be a likely source of qualified minority candidates; (ii) the nature of the discussions with the recruitment source representatives; (iii) a description of how the manager communicated the qualifications sought by the employer to the recruitment source; (iv) a framework for alerting the recruitment source to newly available positions; and (v) a schedule for "follow up" with the recruitment source (including a regular written report describing the results of the follow up).

B. It is Entirely Legal to Support Minority Organizations and raise the profile of your law firm as a potential employer

Employers who donate money or time to minority organizations (as well as other organizations) send a message to employees (and applicants) that the

advancement of minorities is important to the firm. Managerial participation in or initiation of contact with such organizations could be recorded and rewarded.

C. It is Entirely Legal to Develop a Mentoring Program

Mentors can also help employees advance in an organization, and can provide any excellent source of information on in-house talent. A mentor usually is someone at a higher-level position than the "mentee," who provides advice, suggestions, and access to resources and individuals that the mentee otherwise might not have. Employees sometimes have a tendency to gravitate towards coworkers or managers who are similar to themselves. As a result, mentor relationships may develop between similar individuals, thereby excluding minorities if upper management does not include a significant number of minorities. These relationships can, of course, prove invaluable in advancing an employee's career. To prevent the exclusion of minorities from such relationships, employers can institute a mentoring program in which employees are either given the choice to be paired with another employee (generally in a higher-level position, though not necessarily someone in their department) or be paired by the firm. This approach ensures that all employees have the opportunity to develop relationships with individuals in higher-level positions. Pairing new talent with relationship partners can be an especially effective way to assist in retention.

D. It is Entirely Legal to Develop or Expand Internship Programs

Another avenue employers may use to increase minority representation is to begin recruitment efforts before a prospective employee applies to enter the workforce. Internships provide both the company and the student intern an opportunity to learn about

each other without a commitment of indefinite employment. If the company determines the student is a good candidate for a permanent position, but does not have all of the necessary qualifications for a full-time position, the employer can make recommendations to the student regarding further coursework. The employer also will be exposed to a larger number of candidates because internship programs are generally short (one semester). Of course, internships should not be based solely on race.

E. It is Entirely Legal to Create "High-Growth" Profiles

Firms may require partners to identify and compile profiles of "high-growth" and potential "high-growth" employees (including minority and non-minority employees) in their practice areas for training or advancement. These profiles may include: i) performance strengths, weaknesses, and areas requiring improvement; ii) the next planned or anticipated position for the employee and the anticipated availability of positions over the next five years; and, iii) a five-year development plan to chart a path from the employee's present position through his or her anticipated progression. This allows employers to focus on individual growth needs, rather than on the advancement of a "group."

F. It is Entirely Legal to Monitor Turnover and act when turnover rates for any underrepresented employee demographic are disproportionately higher than other groups

Practice area leaders may be instructed to monitor "turnover" of employees in their work areas and account for such turnover. Practice area leaders who reduce turnover (for all employees generally or those in specific titles or areas, not just those within certain protected classes) should be rewarded. Employers may also monitor whether minority turnover is disproportionately greater, being careful to recognize that

identification of such disparate impact could be an admission of discriminatory practices. For example, where turnover is occurring at a greater rate than placement, this can be viewed negatively because of its potential net effect upon representation. It certainly should trigger investigation into the causes of such an unexpected attrition rate.

G. It is Entirely Legal to Evaluate Partners and monitor work assignments to ensure fair distribution of work

Partners may be evaluated based upon the extent and creativity of their recruitment (including use of the job posting process), placement, training, and retention efforts (not purely upon the statistical impact of those efforts). Partners also can be evaluated upon the success of their subordinate managers' efforts to meet those criteria (in addition to their own involvement in specific programs or initiatives).

Workplace diversity in an increasingly global society is not disappearing. Employers must be cognizant of the challenges to diversity programs and be able to defend their necessity. Does this mean that law firms have to cease diversity efforts or ignore client requests for diverse legal representation? No, it means that law firms, as well as other employers, should be aware of the changing breadth of diversity, beyond the scope of race and gender, and be prepared to support any decisions made regarding diversity policies and practices.

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Preventive Strategies and Positive Solutions for the Workplace

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Upon graduation from law school, Ms. Diulus-Myers was an associate attorney with Buchanan Ingersoll Rodewald Kyle & Buerger, where she was a member of the Litigation and Labor Law departments. She then joined Murphy Taylor & Adams, where she defended cases regarding primarily products and professional liability claims. She went on to serve as Vice President and Legal Counsel for the Greater Canonsburg Health System, where she was responsible for all legal matters for the System while functioning as the head of its Department of Human Resources. In 1988, she opened her own private law practice in which she concentrated in the area of labor and employment law litigation and tried numerous cases to verdict. She was recruited by Jackson Lewis in 1996 to fill a need for jury trial expertise.

Ms. Diulus-Myers obtained her Juris Doctor, graduating cum laude from the University of Pittsburgh School of Law in 1980 and served on the appellate moot court advocacy team. She graduated summa cum laude from the University of Pittsburgh, where she received her B.S.N. and a lifetime membership in the national nurses honor society of Sigma Theta Tau. She is also a Major in the U.S. Army Nurse Corps Reserves. Ms. Diulus-Myers is admitted to practice law in all Pennsylvania State Courts, all Ohio State Courts, all West Virginia State Courts, U.S. District Courts for the Western District of Pennsylvania, Eastern District of Pennsylvania, Northern District of Ohio, Southern District of Ohio, and the Southern District of West Virginia, Third Circuit Court of Appeals, Seventh Circuit Court of Appeals and the United States Court of Federal Claims. Ms. Diulus-Myers is a member of the Allegheny County Bar Association (Health Law Council member, Civil and Employment Litigation Sections member), was a barrister with the American Inns of Court and has been inducted into the Fellows Program for the Allegheny County Bar Foundation. She is a lecturer for PBI and bar associations speaking on employment issues, and she is a participant in the Special Masters Program for the Courts of Allegheny County. She has been appointed as a mediator and early case evaluator in the ADR program for the U.S. District Court for the Western District of Pennsylvania. She also is a member and supporter of the Minority Corporate Counsel Association. Ms. Diulus-Myers' published articles include: "New U.S. Supreme Court Rules on Workplace Sexual Harassment," Pittsburgh Legal Journal, July 17, 1998; "Noncompete Agreements, How the Courts Approach Restrictive Covenants," Smart Business Magazine [Pittsburgh], June, 2006; "Avoiding Liability, How to Legally Administer Corporate Wellness Programs," Smart Business Magazine [Pittsburgh] February, 2007; "Diversity Best Practices, What Law Firms Are Doing to Attract and Retain Minority and Female Attorneys," Smart Business Magazine [Pittsburgh] April, 2007.

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Mr. Watkins received his undergraduate degree from Yale University in 1974 and his J.D. from Fordham Law School in 1978. In 2000, he received the Ruth Whitehead Whaley Award from the Fordham Law School Black Law Students Association.

Mr. Watkins is admitted in the New York State Courts, New Jersey State Courts, United States District Courts of the Southern and Eastern Districts of New York, the Second and Sixth Circuits of the United States Court Of Appeals and the United States Supreme Court.

Mr. Watkins was appointed First Deputy Commissioner of Investigation of the New York City School District in 1991 and served in that capacity from 1991 to 1995. Previously, from 1982-1983, he served as Deputy General Counsel for the New York City Department of Consumer Affairs. Mr. Watkins is also an Employment Arbitrator for the American Arbitration Association.

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Jackson Lewis LLP represents management exclusively in workplace law and related litigation. Our attorneys are available to assist employers in their compliance efforts and to represent employers in matters before state and federal courts and administrative agencies. For more information, please contact **A. Patricia Diulus-Myers (412-232-0180), Matthew B. Halpern (631-247-4603), Lakeshia Highsmith (631-247-4655), Roger S. Kaplan (631-247-4611), LeRoy J. Watkins (973-451-6343),** or the Jackson Lewis attorney with whom you regularly work.