
DE
DirectEmployers
Association

Doing Right the Right Way: Making Lawful Race, Gender & Ethnicity Preferences in Employment

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AGENDA

ABBREVIATIONS

- D&I =Diversity & Inclusion
- Ee = Employee
- Er = Employer
- KOR = Contractor
- OFCCP = Office of Federal Contract Compliance Programs

THE TENSION BETWEEN HR AND LEGAL

- The country is now in the third or fourth mad rush to “do the right thing”
- We are seeing a lot of mistakes being made opening companies to much potential financial liability and adverse publicity
- We are here today not to tell you “No,” but rather to **discuss “how to do the right thing the right way”**
- This is legally difficult because whites and men are protected groups, along with many other groups
  - So, you cannot unlawfully discriminate at hire against Hispanics to favor African Americans, or fire men to make-up for past unlawful discrimination against women

THE TENSION BETWEEN HR AND LEGAL (Con't)

- We will discuss today real world situations and how to handle and explain the limits and permissions of the law as we go
- Candee and Shannon will join the discussion about half-way through to provide practical HR practices consistent with the legal limits
- We will answer questions at the end which we have not otherwise discussed in our remarks

THE “ROONEY RULE”

- Many recruiters, for example, are discussing whether to adopt and use the so-called “Rooney Rule” to recruit senior management talent

What is the Rooney Rule?

- Named after Art Rooney, former owner of the Pittsburgh Steelers and former Chair of the NFL’s Diversity Committee

THE “ROONEY RULE” (Con’t)

- National Football League policy since 2003 has required NFL teams to interview (not hire) at least one minority candidate for head coaching positions and senior football operations jobs

- Credited for having increased ethnic head coaches in the NFL from one to five

- So, if you imported the Rooney Rule into your private or public place of employment, would that violate Title VII / Executive Order 11246?

THE “ROONEY RULE” (Con’t)

Q. First: Would making a recruitment decision “based on race” or “based on ethnicity” trigger Title VII/EO 11246 concerns?

A. Absolutely!

Q. Does Title VII reach “recruitment” decisions in the workplace?

A. Yes. (Imagine if your recruiters visited only the White High Schools) or did not visit HBCUs (Historically Black Colleges & Universities)?

Q. Is the Rooney Rule unlawful under Title VII / EO 11246?

A. It depends on how it is implemented…see the following slides

THE “ROONEY RULE” (Con’t)

Example 1: Unlawful

- Assume that the company/institution has a past practice of interviewing the top three candidates for a job
- Assume further that the company/institution fairly ranks the top 5 candidates and ranks the sole Black candidate #4
- Advancing the Black candidate ahead of the #3 (White) candidate would violate Title VII / EO 11246 because the company accomplished “adverse action” based on race by not interviewing the more qualified White candidate “based on his/her race” without a showing, thus far, of the necessary legal predicate to allow a preference based on race

THE “ROONEY RULE” (Con’t)

Example 2: Lawful

- Assume the Affirmative Manager advises his/her recruiters to re-set the final interview cut-off limit of the top three most qualified candidates to the top four (thus eliminating any “adverse action” to the White #3 candidate)

- NOTE: No “adverse action:” merely lowering the “cut-off score” to expand (not constrict) the applicant pool

THE “ROONEY RULE” (Con’t)

Example 3: Lawful

- Assume the Affirmative Action Manager advises her recruiters to “throw the net more broadly” and to source more female candidates than the **20%** who have thus far applied since the AAP for the hiring establishment reports **32%** availability

- NOTE: No “adverse action:” merely expanding the applicant pool

PREFERENCES RACK-UP

- Let's Practice: Do any of the below preferences cause "adverse action" potentially violative of Title VII?

Favoring Blacks	Favoring Whites	Favoring Hispanics	Favoring Asians	Favoring Native Americans	Favoring Women	Favoring Men	Favoring Veterans	Favoring Individuals with Disabilities	Favoring Spouse of Active Duty Military	Favoring those over 40

PREFERENCES RACK-UP (Con't)

- Does the preference cause "adverse action"?

Favoring Blacks	Favoring Whites	Favoring Hispanics	Favoring Asians	Favoring Native Americans	Favoring Women	Favoring Men	Favoring Veterans	Favoring Individuals with Disabilities	Favoring Spouse of Active Duty Military	Favoring those over 40
This one.*	This one.*	This one.*	This one.*	Could be.**	This one.*	This one.*	Not this one.***	Not this one.	Not this one.	Not this one.****

*This preference would be unlawful absent a successful affirmative legal defense.
** Title VII/EO11246 allows for an "Indian preference" if the at-issue Native American Applicant / employee lives on "or near" an Indian reservation. See 41 CFR Section 60-1.5(a)(7).
*** Some pundits have theorized that Veterans Preferences may "adversely impact" women.
**** But beware those states which have statutes protecting the young.

PREFERENCES RACK-UP (Con't)

NOW, WHAT DO YOU DO IF YOUR EMPLOYMENT PREFERENCE DOES CAUSE "ADVERSE ACTION"?

THE LAW OF PREFERENCES IN A NUTSHELL

Government Employers

The three legal permissions to discriminate lawfully based on a Protected Status: Supreme Court Decisions finding a "compelling state interest" predicate to uphold the use of race-preferential classifications by state or federal government actors (in any legal context)

For Reasons of National Security	To Remedy Past Discrimination for Which the State was Responsible	To Achieve Educational Benefits Flowing from a Diverse Student Body
Korematsu v. U.S.	Richmond v. J.A. Croson Co.	Grutter v. Bollinger
323 U.S. 214 (1944)	488 U.S. 469, 504 (1989)	539 U.S. 306 (2003)

LAW OF PREFERENCES (Con't)

The two ways to have "the (legal) predicate" necessary in the **private sector** for an employment preference are to show either:

1) "A MANIFEST IMBALANCE;" AND/OR

2) "A STRONG BASIS IN EVIDENCE"

A company may take "self-help" while it is still subject to a potentially timely claim of unlawful discrimination to remedy unlawful discrimination: the company need not wait for the class action to be filed or an OFCCP audit to bust it for its unlawful discrimination

What about the Grutter preference authorization ("to achieve educational benefits flowing from a diverse student body")?

EMPLOYMENT PREFERENCES IN A NUTSHELL

U.S. Supreme Court case name	Issue	Claim	Description	Preference Upheld?
United States Steelworkers of America v. Weber	Hiring	Title VII	Reverse discrimination challenge: selection to craft training program: 1-for-1 white/black quota The imbalance: Available = 39% Blacks Incumbency = 1.8% Blacks (20 x 1)	**Yes, if:** a) Predicate (discrimination or persistent manifest imbalance); b) Voluntary; c) Temporary; and d) No "trammeling" (1-for-1 quota)

EMPLOYMENT PREFERENCES (Con't)

U.S. Supreme Court case name	Issue	Claim	Description	Preference Upheld?
Ricci v. DeStefano	Promotion	Title VII Court did not reach Equal Protection Clause issue since the case resolved under Title VII	City failed to certify promotion test results (and thus denied test-taker promotions) because 19 White candidates and 1 Hispanic candidate passed the test, but no Black candidates scored sufficiently high to be promoted	**No:** a) Before an employer may lawfully engage in intentional discrimination based on race, it must have a "strong basis in evidence" to believe it will be subject to liability before enacting a remedial scheme (in this case by not promoting successful White and Hispanic test-takers) due to an unfounded fear of a lawsuit from the unsuccessful Black candidates; b) City not subject to disparate impact liability, in fact, because test in question was "job-related and consistent with business necessity"

PREFERENCES PROBLEM-SOLVING

- What do you tell the CEO who says:

"I am fed up with the lack of progress around here in diversity. Just go out and hire some Black and female employees. Just get it done."

\- Or -

- "I don't care what the law is. We are going to hire a Mexican to head our Mexican Marketing Division and I want a Japanese national in place by the end of next month here in our San Francisco headquarters to head our Japan operations. Is that understood? Have I been sufficiently clear?"

PREFERENCES PROBLEM-SOLVING (Con't)

First Scenario: Frustrated at lack of quick progress:

- Tell him/her what the law requires and permits…which will draw this predictable rejoinder from the CEO:

  "Don't tell me what I can't do. Tell me what I can do!
  So, solve this for me!"

- Take the job off-shore? (see 41 CFR Section 60-1.5(a)(3): "Work outside the United States.") OFCCP lacks jurisdiction if the candidate is:

  – recruited outside the U.S. ***and*** works outside the U.S.

  * Does not work for Title VII if you hire off-shore through a wholly-owned subsidiary your US-based company controls

- Customize the job description to help lawfully narrow the field? (i.e. require ability to read/write Japanese? Five years residency in Japan, or equivalent cultural immersion?)

PREFERENCES PROBLEM-SOLVING (Con't)

Second Scenario: Highly Scientific Positions

- Think long-haul
- Create availability
  - Build Internships/apprenticeship programs (a la Monsanto)
- Interdict Middle Schools (a la Hewlett-Packard)
- Financially sponsor African American/Hispanic students
- After Middle/HS tutorials (a la Google in Oakland schools)
- Baby Steps: Build Professional Relationships
  - at the University (a la Jones Day law firm)
  - at scientific conferences
  - create collaborative research projects

PREFERENCES PROBLEM-SOLVING (Con't)

Third Scenario: "Damn the Torpedoes; Full Speed Ahead"

- Warn CEO you may have to go to the Board if s/he insists on violating state/federal law?
- Warn of potential for punitive damages?
- Open final interview list sufficiently (i.e. go deeper on the forced ranking list to increase number of interviews = no adverse action) to capture Mexican and Japanese nationals?
- Advertise opening in Mexico/Japan?
  - Advertise ONLY in Mexico/Japan? **No.** Why?
    - Repeats Black & Decker's targeted and exclusionary recruiting decision found unlawful
      - *[Abron v. Black & Decker, 654 F.2d 951, 4th Cir. (1981)]*

CONDUCTING A "PREDICATE ANALYSIS" FOR EMPLOYMENT PREFERENCES

- If your company wants to make lawful a preference causing adverse action based on a protected status (race/gender/ethnicity, etc.), you have to undertake either an appropriate "Manifest Imbalance Analysis" or "identify a strong basis in evidence" to serve as the legal predicate for your confessed discrimination. (Or, try to stretch the *Grutter student admissions process* to employment decisions).
  - First, is there a "Manifest Imbalance" between those employed and those available a la ***Weber v. Steelworkers***?
    - This is NOT a common-sense off-the-cuff HR judgment. This is a technical statistical and legal conclusion a lawyer would formally provide.

CONDUCTING A "PREDICATE ANALYSIS" (CONT'D.)

- Second, is there a "strong basis in evidence" that a company policy or practice is unlawful such that the company now wants to undertake self-help and repair its prior (still timely) unlawful discrimination?

  - This is NOT a common-sense off-the-cuff HR judgment. This is a technical statistical and legal conclusion a lawyer would formally provide ala ***Ricci v. DeStefano.***

FINAL THOUGHTS

Your plans to rectify perceived problems and bring more diversity to your workplace is a laudable goal…just be very careful in how you do it.

GO OUT THERE AND BE AFFIRMATIVE!

THE RIGHT WAY!

Thank You

QUESTIONS?

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