Orange County
Industry Liaison Group

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

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AGENDA

1. THE TENSION BETWEEN HR AND LEGAL

- **The country is now in its 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 also protected groups, along with many other groups…so employers are on a high tightrope charged to protect the rights of all

1. THE TENSION BETWEEN HR AND LEGAL (con't)

- 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
- Nor can one lawfully say automatically: "Make the next three hires Black."
  - That is "direct evidence" of an unlawfully discriminatory decision "based on" race
    - "Direct evidence" is one of the five major types of evidence used to prove unlawful discrimination cases. Direct evidence cases are the easiest to prove because there is no doubt about the intent of the actor to discriminate "based on" a protected group status (i.e. "let's not hire any pregnant women")….leaving open only the legal question whether the actor has an "affirmative defense" to allow the discrimination

1. THE TENSION BETWEEN HR AND LEGAL (con't)

- We will discuss today real world situations and how to handle the limits and permissions of the law as we go
- We will focus on the affirmative defenses you have to make decisions "based on race," or based on sex," or "based on ethnicity"
- We will answer questions at the end which we have not otherwise discussed in our prepared remarks

2. 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

2. 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, at one time, from one to five (currently three)

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

2. 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! (if exclusionary to any Protected Group)

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)?

2. THE "ROONEY RULE" (con't)

❑ **Title VII Makes Exclusionary Recruiting for Jobs Unlawful Employment Discrimination:**

- **42 U.S.C. § 2000e-3(d)** [unlawful employment practice for employer to print or publish notices or advertisements supporting prohibited preference, limitation, specification, or discrimination based on protected category unless a bona fide occupational qualification for employment]

2. THE "ROONEY RULE" (con't)

❑ Case Decisions Prohibiting Recruitment Discrimination

- ***Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647, 658-661 (5th Cir. 1983)** [in failure to hire and failure to promote case, employer's past recruiting advertisements indicating a preference for males in management openings and females in non-management positions, and placement of such advertisements in corresponding male or female help wanted newspaper columns, was probative evidence to establish employers' motivation and intent to discriminate in hiring based on sex]

2. THE "ROONEY RULE" (con't)

❑ Case Decisions Prohibiting Recruitment Discrimination (con't)

- ***United States v. City of Warren*, 138 F.3d 1083 (6th Cir. 1998)**
  [Court held U.S. Department of Justice established public employer's recruiting practices had a disparate impact on Black applicants for all municipal positions based on city's advertisements of employment opportunities in newspapers with circulations in Macomb County, which was overwhelmingly White, as opposed to any newspapers with significant circulation in Detroit, which was overwhelmingly Black and immediately adjacent to Macomb County]

2. THE "ROONEY RULE" (con't)

❑ Case Decisions Prohibiting Recruitment Discrimination (con't)

- [***United States v. Pasadena Independent Sch. Dist.*, 1987 U.S. Dist. LEXIS 16912 (S.D. Tx. April 18, 1987)**] [Court found *prima facie* proof of unlawful discrimination in recruitment where Black teachers constituted only 5.2% of applicant pool as a result of School District's practice of delivering teaching vacancy notices only to nearby predominantly white universities, failing to enter into student-teacher contracts with the predominantly Black Texas Southern University nearby, and using "word-of-mouth" referrals from existing teachers and administrators who were predominantly white]

2. THE "ROONEY RULE" (con't)

❑ **Case Decisions Prohibiting Recruitment Discrimination (con't)**

- ***Barnett v. W.T. Grant Co.*, 518 F.2d 543, 549 (4th Cir. 1975)** [word-of-mouth hiring as a primary method of recruitment can be discriminatory based on its tendency to perpetuate an all-white work force] (Citations omitted)

- ***Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 426-427 (8th Cir. 1970)** [as a matter of law, Company's system of recruiting new workers based on employee referrals operated to discriminate against Blacks prior to February 1967]

2. THE "ROONEY RULE" (con't)

❑ Case Decisions Prohibiting Recruitment Discrimination (con't)

- ***Thomas v. Washington County School Board*, 915 F.2d 922 (4th Cir. 1990)** [Court permitted plaintiff's disparate impact claim to proceed based on word-of-mouth recruiting practices and the School Board's practice of posting openings only in its school buildings occupied primarily by White employees]

2. THE "ROONEY RULE" (con't)

❑ **Case Decisions Prohibiting Recruitment Discrimination (con't)**

- ***United States v. Frazer*, 317 F. Supp. 1079, 1089 (M.D. Ala. 1970)** [holding that defendants consistently discriminated in their recruitment practices by administering State examinations for employment at 15 locations, 14 of which were located in predominantly white neighborhoods; not mailing advertisements to newspapers or radio stations with predominantly Black clientele; and not seeking to hire graduates of predominantly Black schools despite actively recruiting at predominantly White schools]

2. THE “ROONEY RULE” (con’t)

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

A. It depends on how it is implemented…see the following slides demonstrating lawful and unlawful recruitment practices currently in vogue in response to the Black Lives Matter movement

B. Distinguish between “inclusion” (non-discriminatory, because no “adverse action” and no decision “based on” a Protected Status) and “exclusion” based on a Protected Status (discriminatory)

2. 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

2. THE “ROONEY RULE” (con’t)

Example 2: Lawful

- Assume the Affirmative Action 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

2. THE "ROONEY RULE" (con't)

Example 2: Lawful (con't)

- Is it lawful to expand the Applicant pool, either BEFORE or AFTER the company has identified the Applicant pool?
- ABSOLUTELY!
  - *Shuford v. Alabama State Bd. Of Educ.*, 897 F. Supp. 1535, 1553-1554 (M.D. Ala. 1995) ["Reopening the process to include more women, like recruiting, expands the pool of applicants and increases competition. The purpose of both of these provisions is to increase the number of applicants considered in order to obtain the best candidates. The provisions are not aimed at the actual selection process. The crucial distinction is between expanding the applicant pool and actually selecting from that pool. Expanding the pool is an inclusive act. No one can rightly complain because he has been passed over for a more qualified candidate even if that candidate was recruited from a women's college. Exclusion occurs if, for example, the best candidate from the expanded pool fails to get the job because he was passed over for a woman. This can only happen at the selection stage, which occurs after the pool expansion process."]

2. THE “ROONEY RULE” (con’t)

Example 2: Lawful (con’t)

- *Duffy v. Wolle*, 123 F.3d 1026, 1038-1039 (8th Cir. 1997, abrogated in part by *Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011) [“An employer's affirmative efforts to recruit minority and female applicants does not constitute discrimination. [citations omitted] 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. See id. This not only allows employers to obtain the best possible employees, but it "is an excellent way to avoid lawsuits." Id. The only harm to white males is that they must compete against a larger pool of qualified applicants. This, of course, "is not an appropriate objection," id., and does not state a cognizable harm.” fn omitted]

2. 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

  – Better to not decide to throw the net more broadly **AFTER** HR notices few Blacks in the pool (do you review your AAP calculation of availability????)

  – Otherwise, a reviewing court ***could*** deem the decision to expand the recruitment pool to have been "based on race"

3. 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

3. 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. Government KORs: please also see 41 CFR Section 60-1.5(a)(7). [authority preferences for Native Americans]**
***** Some pundits have theorized that Veterans Preferences may "adversely impact" women.**
****** But beware those states which have statutes protecting the young.**

3. PREFERENCES RACK-UP (con't)

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

4. THE LAW OF PREFERENCES IN A NUTSHELL

Public 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 – But, how far back?	To Achieve the Educational Benefits Flowing from a Diverse Student Body
Korematsu v. U.S. 323 U.S. 214 (1944)	**Richmond v. J.A. Croson Co.** 488 U.S. 469, 504 (1989)	**Grutter v. Bollinger** 539 U.S. 306 (2003)

4. LAW OF PREFERENCES (con't)

Public Employers (con't)

Proposition 209 is unique to California Public Institutions

California Constitution

Article I - Declaration of Rights

Section 31.

> "(a) The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." * * *

Thus, in California, in addition to the other prohibitions and permissions as to race–based decision-making, Proposition 209 adds another strict prohibition.

4. LAW OF PREFERENCES (con't)
Private Employers

The two ways to have "the Private Employers (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 rationale ("to achieve educational benefits flowing from a diverse student body")? Will the Courts hold that a diverse workforce authorizes race/gender-based preferences? Seems self-affirming???

5. EMPLOYMENT PREFERENCES PROBLEM-SOLVING

Case Decisions Regarding "Predicate" for preferences

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-to-1)	**Yes, if:** a) Predicate (discrimination or persistent manifest imbalance); b) Voluntary; c) Temporary; and d) No "trammeling" (1-for-1 quota)

5. PREFERENCES PROBLEM SOLVING (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" (i.e. "validated")

5. PREFERENCES PROBLEM SOLVING (con't)

What do you tell the CEO who says:

- "I am fed up with the lack of progress around here on 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 Marketing Division in Mexico 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?"

5. 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.

  * Title VII hiring restrictions apply 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 (if those requirements serve an ER's "legitimate" needs)

5. 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/High Schools (a la Hewlett-Packard)
- Build out an educational tuition reimbursement program for employees
- After-school Middle/HS tutorials (a la Google in Oakland, CA schools)
- Baby Steps: Build Professional Relationships
  - at the University level (a la Jones Day law firm) before grad school
  - at scientific conferences
  - create collaborative work projects to help "paper" an "up and comer"

5. 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? (EXTREME situation. You hope this NEVER happens!)
- 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 ONLY in Mexico/Japan?
  - **No** (unless that was always the business plan)**.** Why?
    - Repeats targeted and exclusionary recruiting decisions Courts have repeatedly found unlawful

6. CONDUCTING A "PREDICATE ANALYSIS" FOR EMPLOYMENT PREFERENCES

- If your [private sector] company wants to undertake a lawful 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 permission* to employment decisions).

- First, is there a "Manifest Imbalance" in availability/hires ala ***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.

    Why?

    You are admitting you are discriminating based on race. (this is a "direct evidence" case under Title VII = *punitive* damages!)

6. CONDUCTING A "PREDICATE ANALYSIS" (con't)

- Second, alternatively, 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.*** (i.e. the kind of legal memo the SCOTUS found missing in the *Ricci* case)

6. CONDUCTING A "PREDICATE ANALYSIS" (con't)

IMPORTANT!

If your Company cannot identify a **"manifest imbalance"** or a **"strong basis in evidence,"** your Company has done nothing legally wrong.

Thus, there is nothing for you "to fix."

- You have reached Nirvana!

- Breathe deep!

Exult in life!

BE HAPPY!

You have good D&I results!

7. FINAL THOUGHTS

Your plans to rectify perceived problems/bring more diversity to your company are laudable…just be very careful as to how you implement them

- **A diverse workplace may provide many benefits:**
  - A variety of perspectives in problem-solving
  - Increased creativity
  - Increased productivity & profits
  - Improved performance
  - Improved employee engagement & loyalty
  - Reduced costly turnover
  - Boosts your brand's reputation

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8. GOING FORWARD

GO OUT THERE AND BE AFFIRMATIVE!

THE RIGHT WAY!

Thank You

QUESTIONS?

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