



Corporate Diversity Initiatives:

Evaluating and Managing Relative Component Risk

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McGuireWoods LLP

- Am Law 100 firm, with roots dating back 180+ years
- 1000+ attorneys in 23 offices, including UK and Belgium
- 90+ labor and employment, employee benefits and immigration lawyers across the US and Europe
- 2017 U.S. News – Best Lawyers’ “Best Law Firms” Tier 1 for Employment Law – Management and Litigation - Labor & Employment
- Corporate Counsel’s “Who Represents America’s Biggest Companies”, 5th for labor and employment litigation and 7th for labor



Presenter - Brian Barger

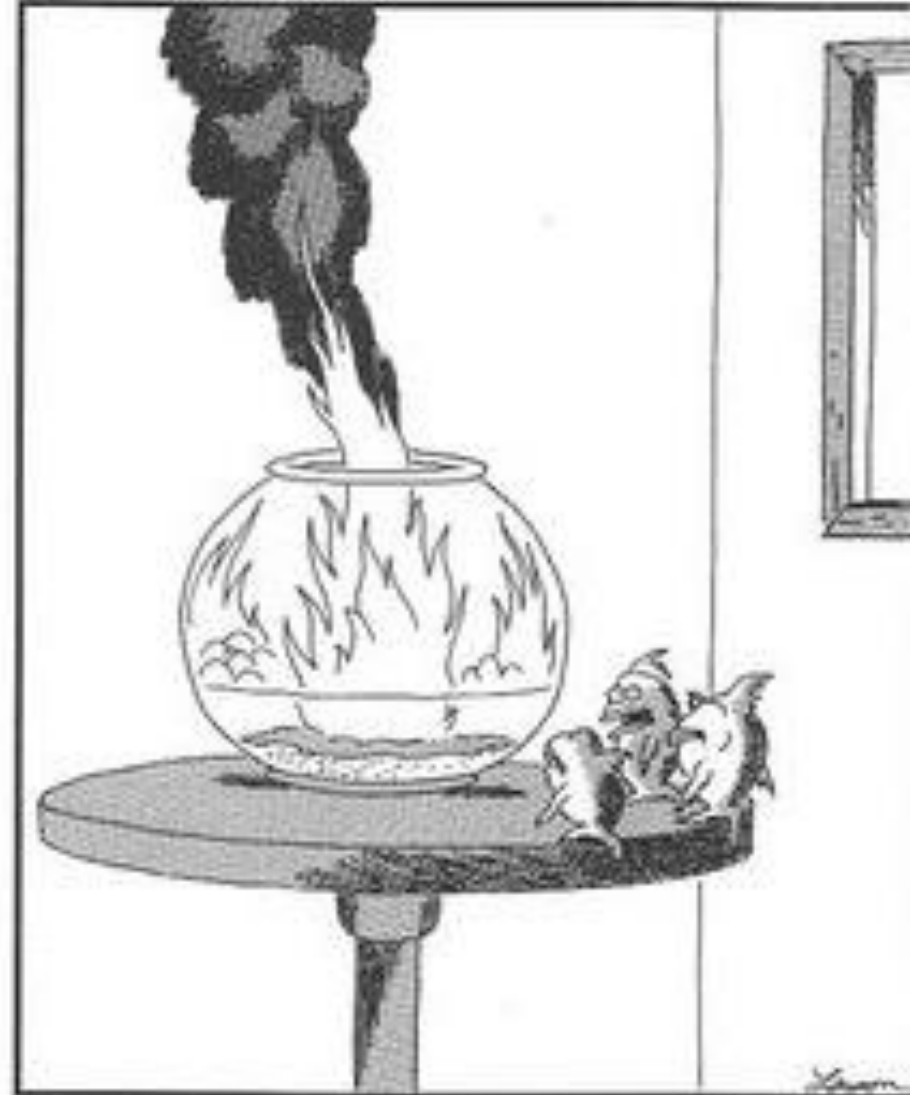
- Partner, McGuireWoods LLP, Charlotte, NC
- 25+ years experience
- Practice focused on:
 - Federal contractor defense and compliance
 - Corporate employment counseling / risk management
- University of Virginia (Phi Beta Kappa, Order of the Coif, Earl K. Shaw Labor & Employment Award)
- Best Lawyers in America, Litigation-Labor & Employment, Woodward/White, Inc.
- Born in the Blue Ridge mountains in Roanoke, VA; roots for the Carolina Panthers; loves NC BBQ; hates UNC and Duke basketball; attempts bluegrass



Diversity Goal Generally



The Goal Today. . . .



“Well, thank God we all made it out in time. . . .Course, now we’re equally screwed.”

5 Key Take-Aways Re: DIs

Corporate diversity initiatives come in all shapes and sizes, but . . .

1. Why you pick a particular shape matters
2. Some shapes are riskier than others
3. Increasing applicant flow diversity creates its own built-in risk
4. Certain operational details can increase your risk
5. *Surprise for the big finish. . . .*

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OFCCP 2016 Sex Discrim. Regs

- Updated 41 CFR Part 60-20.1:

“[U]nder no circumstances will a contractor’s good faith efforts to comply with the affirmative action requirements of part 60-2 of this chapter [regarding general prohibitions] be considered a violation of this part.”



OFCCP 2016 Sex Discrim. Regs

- OFCCP Comments (FR 39144)

“In adopting its final rule, OFCCP emphasizes that it does not consider contractors’ good faith efforts to comply with their affirmative action requirements a violation of the final rule, thus clarifying that there is no need to dissolve affinity groups.”



And Yet The Law Remains. . . .

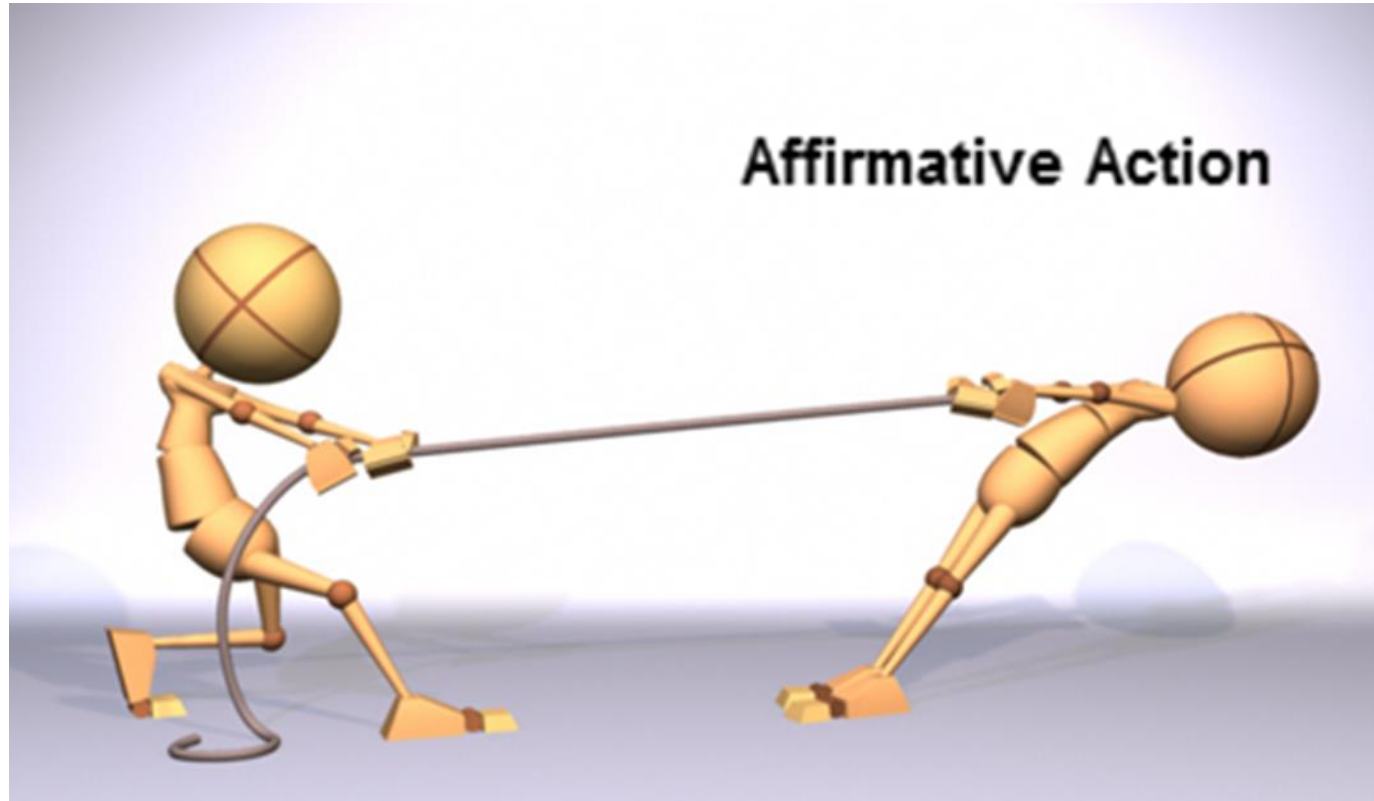
- Disparate Treatment Discrimination:
 - A decision-maker unlawfully considers a candidate's or employee's gender, race or other protected classifications in make hiring or other employment selections
- Disparate Impact Discrimination:
 - A neutral employment practice exists that has a negative, disproportionate impact on candidates or employees based on a protected classification where the practice lacks a corresponding legitimate business justification
- Both legal theories run both directions – for and against the minority and the majority



What Makes This Hard?



Affirmative Action



Title VII



1. Why You Pick a Particular DI "Shape" Matters



Johnson v. Transp. Agency

- A gender- or race-based *preference* must:
 1. Be justified by a “manifest imbalance” in “traditionally segregated job categories”
 2. Be temporary
 3. Not unnecessarily trammel the rights of non-preferred individuals or act as an “absolute bar” to their advancement
- Decisions must not be made by “reflexive adherence to a numerical standard”
- No set-asides or quotas are allowed



Common DI Support Bases

- Localized objectives tied to specific AAP goals / IRAs



- National corp. objectives tied to US-wide EEO-1 data v. US corp. availability

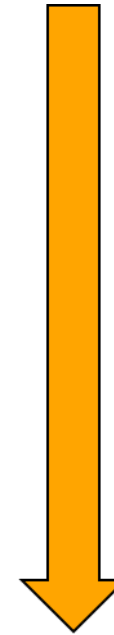


- Int'l corp. objectives tied to company-wide EEO data v. int'l corp. availability



- General desire to address “diversity” for specific groups

- **Least aggressive**



- **Most aggressive**



Separate Risk re: Target Identif.

- Class-action risk by the specific “target” group at issue that the company’s identification of a specific local, regional or national target is a self-admission that the group is (a) under-represented; and (b) “similarly situated”
- E.g., Increase hiring for US female retail personnel by X%
- E.g., Increase hiring for west region female non-management customer-facing retail personnel by X%



2. Some DI “Shapes” Are Riskier Than Others





General DI Efforts

- Inclusive



- Inclusive + Exclusive Mix



- Exclusive

- **Least aggressive**



- **Most aggressive**



General DI Action Points

- Internal environment



- Recruiting /outreach



- Selection decisions

- **Least aggressive**



- **Most aggressive**

Common DI Approaches

- Create a more inclusive corp. environment
- Review & modify barriers to hiring
- Leadership dev. & mentoring
- Targeted recruiting & outreach
- “Diverse slate” requirements
- Selections based on numeric outcome “goals”

• **Least aggressive**



• **Most aggressive**



DI Approach Examples

- Create a more inclusive corp. environment

- Diversity education, seminars and training for all employees
- Job advancement education / career path training
- Supplier diversity programs
- Internal diversity and inclusion “ambassadors”
- Internal “affinity” and networking groups
- Internal and external diversity awards and recognition
- Diversity newsletters
- Diversity teams and task forces
- Executive “diversity councils
- Diversity officer / team



DI Approach Examples

- Review & modify barriers to hiring

- EEO / non-harassment policies
- Job descriptions (e.g., travel, “face time” requirements)
- Flex-time and job sharing policies
- Reduced work hour / “summer hours” policies
- Work from home and telecommuting policies
- Work-life balance services (e.g., childcare, elder care, other home-life services)
- Paid maternity / paternity / bonding leave
- Employee diversity surveying and satisfaction polls
- New-hire “buddy” programs, with links to affinity groups



DI Approach Examples

- **Leadership development & mentoring**
 - Employee mentoring and “sponsorship”
 - Employee career development and design planning
 - Employee career support training
 - Manager skills development curriculum and related training
 - Leadership identification and coaching
 - Succession planning
 - High potential growth pipeline identification
- Seems inoffensive, unless not offered to....



DI Approach Examples

- Targeted recruiting and outreach

- “Diverse” media outlets and job board
 - “Diverse” professional organizations (e.g., SWE)
 - “Diverse” colleges and universities
 - “Diverse” job fairs /career panels / hiring events
 - “Diverse” national organizations and charities
 - “Diverse” local community organizations and charities
 - Overall job group target candidate pool growth
- Seems inoffensive, unless IRAs indicate statistical selection disparity....



DI Approach Examples

- “Diverse slate requirements”

- Mandatory “diverse” class percentage minimums for each position pool
 - E.g., X% of all candidates in the hiring pool for an executive level opening must be women before proceeding to paper screening or interviews
- “Rooney Rule” regarding position screening
 - E.g., X% of all applicants actually considered for an executive-level opening must be female
- “Rooney Rule” regarding position interviews
 - E.g., X% of all applicants interviewed for an executive-level opening must be female



DI Approach Examples

- Selections based on numeric outcomes / goals
 - Specified “diversity” as a factor in selection decisions
 - E.g., weighted scoring in candidate evaluation
 - Specified “diversity” as an explicit or implicit set-aside
 - E.g., X positions are specifically designated for new executive level female hires
 - Specified “diversity” as an explicit or implicit quota in selection decisions
 - E.g., X% of all new executive level hires must be women



3. Increasing Applicant Flow Diversity Creates Its Own Risks



DI Goals vs. IRAs / AIAs

- **Goals** = who you are v. what is expected
- **IRAs** = what you've actually done
- Careful: (1) goals commonly measure job group analysis v. "availability"; (2) IRAs measure who applied vs. rate of selection
- *Careful: In working to achieve No. 1, you can create legal issues in No. 2*



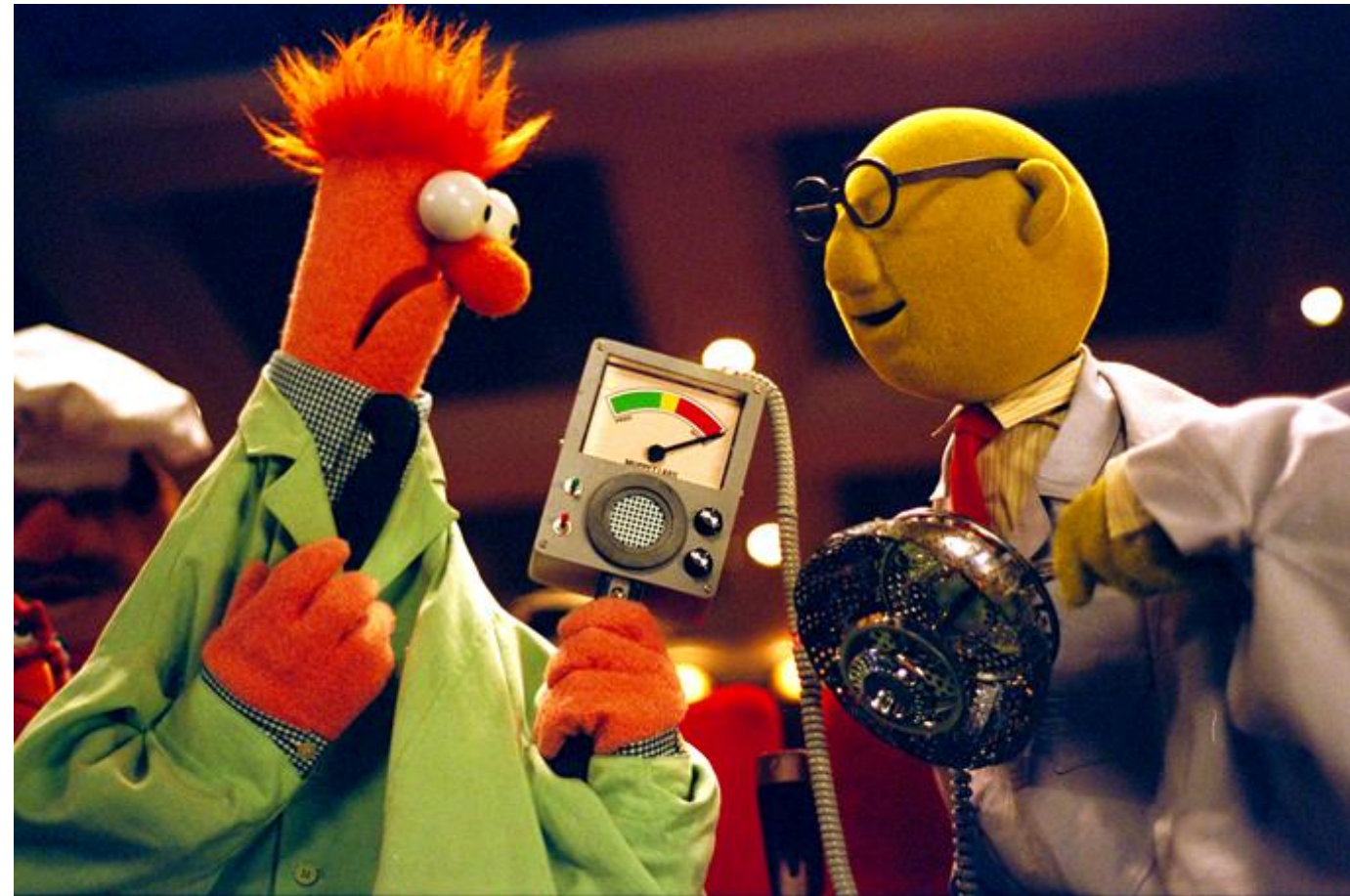
Increased Pool Example



	Pool	Hires	Rate	Std. Dev.
Men	500	9	1.8%	
Women	250	1	0.4%	1.57 SD

	Pool	Hires	Rate	Std. Dev.
Men	500	9	1.8%	
Women	500	1	0.2%	2.54% SD

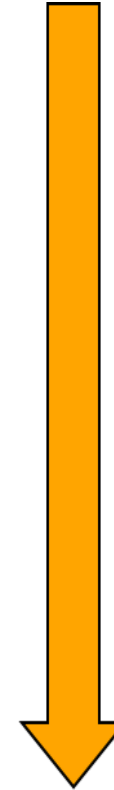
4. Certain Operational Details Can Increase Your Risk



DI Metrics

- Good faith efforts and diversity “satisfaction”
↓
- Process implementation and participation
↓
- Numeric outcomes re: pool representation
↓
- Numeric outcomes re: group or class representation
↓
- Numeric outcomes re: hires, promotions, etc.

• **Least aggressive**



• **Most aggressive**



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DI Management Accountability

- Internal communication of objectives



- Outcomes a *general factor* in perf. evaluation / not tied to goals

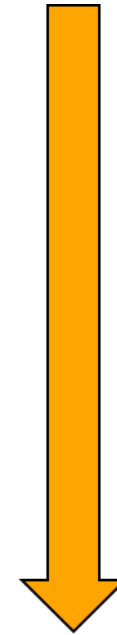


- Outcomes a *specific factor* in perf. evaluation tied to goals



- Separate bonus or dept. \$ tied to numeric outcomes

- **Least aggressive**



- **Most aggressive**





5. What Happens on the Ground Can Kill You



Examples

- After review of his department scorecard (which identifies challenges with respect to X diversity), Manager A advises hiring managers and staffing team members that:
 - The next 10 unit hires need to be X (which, by the way, matches the reported unit “shortfall”)
 - She doesn’t care how it happens but the unit better be out of the red on the scorecard by the end of the next quarter or there will be consequences
 - The unit should use a lower cut-off selection score for X versus Y (e.g., for testing, panel interviews, etc.) with respect to unit hires
 - If all things are generally equal with respect to qualifications, a candidate’s status as X should be used as a tie-breaking positive factor in unit hire selection



Practical Tips

- Evaluate your organization's risk using the factors noted – where are you on the relative scale for different DI components; is management OK with that?
- Evaluate litigation and OFCCP enforcement action risk vs. *other* risks specific to you (e.g., customer / shareholder PR; unionization; etc.)
- Be clear in internal and external communications that diversity targets are aspirational goals only
 - Add disclaimers to key materials
 - Expressly state that diversity targets don't override overall non-discrimination commitments



Practical Tips

- Be very clear in management and HR training that diversity targets are not a minimum selection quota, a maximum ceiling, or a set-aside
- Check your newsletters, online postings, diversity summaries, recruiting materials, internal reports, etc. re: language used that may imply a quota, ceiling or set-aside
- Evaluate current management / HR / recruiting performance evaluation materials and compensation tie-ins to diversity goals and outcomes



Questions / Ideas / Musings

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