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Legal Considerations and
Best Practices for
Diversity Hiring Initiatives
in Higher Education

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Presenters



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Topics

- Introduction to Diversity Hiring Programs
- Required Affirmative Action Plans
- Legal Considerations
- Best Hiring Practices

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Introduction



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What is a Diversity Hiring Program?

- A commitment to more equitable and inclusive hiring practices
- An Affirmative Action Hiring Plan



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Diversity in Higher Education

- 45% of undergraduate students identify as people of color
- Nearly 75% of full-time faculty are white
- Over 80% of administrators are white
 - 58% of college and university presidents are white men
 - 5% of college and university presidents are women of color
- Majority of university staff are white
 - 25% of office and clerical staff identify as people of color
 - 42% of service and maintenance staff identify as people of color

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Diversity in the Workplace

- **67%** of job seekers consider workplace diversity an important factor when considering employment opportunities.
- More than **50%** of current employees want their workplace to do more to increase diversity.



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Affirmative Action Plans

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Executive Order 11246

The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship

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Executive Order 11246

- Requires certain government contractors and subcontractors to implement affirmative action plans *if* a workforce analysis demonstrates the underrepresentation of people of color and/or women in the workplace
- Affirmative Action Plans must include:
 - An EO policy statement
 - Workforce analysis and identification of under-represented areas
 - Placement goals
 - Action-oriented programs

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VEVRAA

- Requires certain government contractors and subcontractors to “take affirmative action to employ and advance in employment qualified protected veterans.”
- Requires annual hiring benchmarks



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Rehabilitation Act

- Requires certain federal contractors and subcontractors to “take affirmative action to employ and advance in employment qualified individuals with disabilities.”
- Sets an “aspirational utilization goal” of 7%
- Requires contractors to invite applicants to self-identify at the pre-offer stage and the post-offer stage

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Legal Considerations

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Relevant Laws

- Equal Protection Clause
 - Applicable to public employers
 - Covers wide range of protected classifications
 - Standard of judicial review varies based on specific classification at issue
- Title VI
 - Applies to entities receiving federal financial assistance, public or private
 - Prohibits discrimination on the basis of race, color, or national origin



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Relevant Laws

- Title VII
 - Applies to both public and private entities
 - Prohibits discrimination based on race, color, religion, sex, sexual orientation, gender identity, and national origin
 - Also applies to practices not intended to discriminate but that have disproportionate impact
- Title IX
 - Prohibits discrimination on the basis of sex by entities receiving federal financial assistance

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Relevant Laws

- Americans with Disabilities Act & Section 504
 - Protect individuals with disabilities
- State Constitutions and Statutory Schemes

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Race- or Ethnicity-Focused Initiatives



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Potential Challenges

- Constitutional Challenges (Equal Protection)
- Title VI
- Title VII



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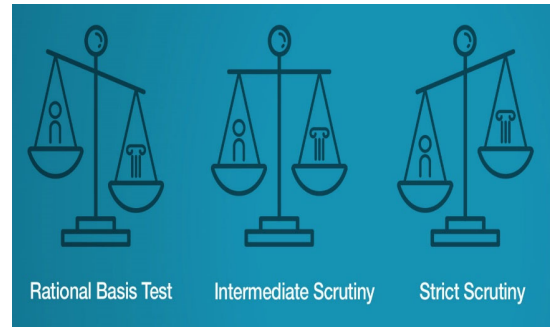
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Potential Challenges – Constitutional and Title VI Claims

- Race or ethnicity-based plans are subject to “strict scrutiny”
- Two-step analysis:
 - Compelling interest
 - Applied in a narrowly tailored fashion



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Other Compelling Interests in Higher Education

Applicable to Hiring

- Remedying discrimination where there has been a judicial finding of discrimination

Not Applicable to General Hiring

- An interest in diversity within a student population at an institution of higher education
- Need for diversity in a large metropolitan police force
- Law enforcement's operational needs

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Strict Scrutiny – Compelling Interest

- Remedying a manifest imbalance with respect to an employer's own historic patterns can be a compelling interest
 - Must be able to demonstrate a disparity between representation of a racial group in the qualified candidate pool compared to current personnel
- But remedying societal imbalance is not currently recognized as a compelling interest
 - Neither is "mirroring" racial representation in society

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Strict Scrutiny – Narrowly Tailored

- Practices considering race as the determinative factor in job searches and hiring or promotion decisions are consistently found to be unconstitutional
- If race is considered as one factor among others, must show that there is not a neutral way to increase diversity
 - Or that there is not a strategy that would accomplish goals while placing less weight on race

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Strict Scrutiny – Narrowly Tailored

- Race conscious plans face difficult but not impossible path
 - These strategies consider race as a factor, but not a pre-requisite
- Racially exclusive plans face harshest challenges
 - These strategies condition an employment benefit on racial classification
 - Unclear if such plans are capable of passing strict scrutiny
 - Examples includes racially-based quotas or limitations for positions

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Potential Challenges – Title VII Claims

- Prohibits intentional and unintentional discrimination
 - Including strategies that create a disparate impact on individuals based on race
- Challenges are subject to a burden-shifting analysis
 - Challenger must show *prima facie* case inferring discrimination
 - If met, burden shifts to the employer to show legitimate, non-discriminatory reason for decision
 - Burden shifts back to challenger to show legitimate reason offered by employer is not the true motivation

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Potential Challenges – Title VII Claims

- Typically, challenges to racially-conscious diversity hiring initiatives are based on disparate impact
 - A practice creates an unintentional impact based on race and an employer cannot show the practice is job-related or aligns with a business necessity; or
 - A less impactful strategy exists that the employer has not adopted
- Business Necessity
 - Some employers require candidates to have a record of inclusivity or demonstrable commitment to equity as part of job requirements for a position

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Potential Challenges – Title VII Claims

- Strategies that do not directly affect employment decisions are viewed more favorably
 - Inclusive outreach to prospective candidates
 - Seeking candidates with record of inclusion or training to promote diversity
- Plans that specifically consider race need to be focused on remedying imbalance specific to the employer
 - Should also be supported by data comparable to strict scrutiny requirements

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Gender-Based Initiatives



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Gender-Based Initiatives

- Subject to at least "intermediate scrutiny" under the U.S. Constitution
 - Some courts have held that affirmative action programs should be subject to a higher level of scrutiny
- Intermediate scrutiny: must substantially relate to the achievement of an important governmental objective

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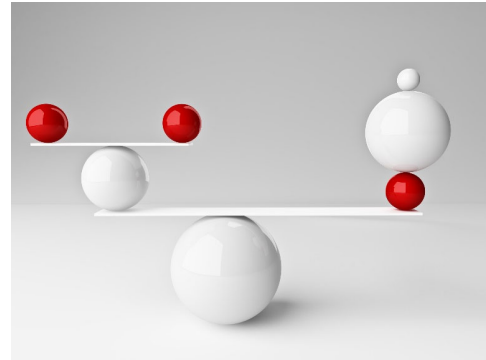
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Important Government Interests

- Manifest imbalance that reflected the underrepresentation of women in traditionally segregated job categories
- Interest in avoiding employment decisions that have a disparate impact on women



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“Substantially Related”

- Must be based on a “sufficient evidentiary foundation”
 - Actual evidence of discrimination by the employer; or
 - Societal evidence of an imbalance
- Cannot rely on “archaic and stereotypic notions”
- Cannot “unnecessarily trammel[] the rights of male employees or create[] an absolute bar to their advancement.”

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Johnson v. Transp. Agency, **480 US 616 (1987)**

- Court upheld a gender-based affirmative action plan under Title VII
 - Sex was one of numerous factors
 - No persons were automatically excluded from consideration
 - “intended to attain a balanced work force, not to maintain one”
- Plans must be temporary
 - If there are “set aside” positions, the plan must have an “explicit end date”

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Plans based on non-suspect classes



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Rational Basis Review

- Any government action that draws distinctions based on non-suspect or non-quasi suspect classes must satisfy rational basis review
 - Suspect classes: race, ethnicity, national origin, or religion
 - Quasi-suspect classes: sex or gender
- Rational basis review: must rationally relate to a legitimate government interest
 - “any reasonably conceivable state of facts that could provide a rational basis for the classification”

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Consideration of Disability in Hiring

“An employer is allowed to hire someone because he or she has a disability, and a rejected applicant cannot sue an employer for discrimination based on the fact that he or she does not have a disability.”



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Hiring: Consider Every Stage

Job Description

- Minimum requirements
- Skills based

Job Posting

- Where
- How long
- Advertisements

Assessments

- Which assessments and why

Screening

- Blind review
- Consistent criteria

Interview

- Panel

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Implicit Bias Impacting Process

Heuristics

Groupthink

Saliency Bias

Confirmation Bias

Availability Bias

Anchoring Bias

Halo Effect

Sunk-Cost Fallacy

Overconfidence Bias

Disaster Neglect

Loss Aversion

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Implicit Bias Training



RECOGNIZING BIAS IS
CRITICAL



HOWEVER...



TRAINING ALONE WILL
NOT IMPROVE OUTCOMES

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Remove Environmental Barriers

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Data and Accountability

- Who monitors this process?
 - Once it is someone's full-time job to monitor diversity and inclusion, that person will help make progress towards diversity goals. If no one is accountable, change is unlikely.
- Set goals, collect data, examine change over time and compare to other organizations
- By collecting and analyzing data on diversity over time, comparing those numbers to the numbers at other organizations, and sharing them with key stakeholders, institutions can increase accountability and transparency around diversity issues
- Strategy will only work if the data are appropriately analyzed, progress and roadblocks are continually identified, and key stakeholders are able to weigh in to chart a path forward

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Questions?



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