

Diversity and Inclusion Initiatives and Implementation Recommendations at the Workplace

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Introductions

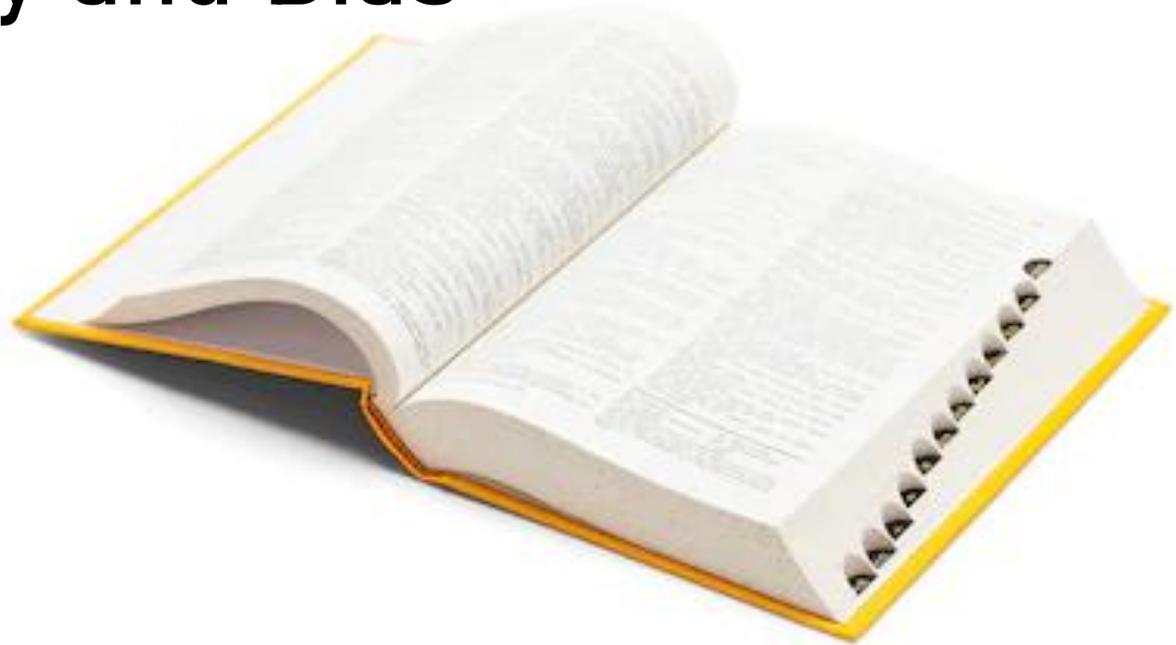
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Road Map

- What are our goals today?
 - The current state of D & I in the workplace
 - Important terms
 - Legal background
 - Why this all matters
 - Specific actions

Key Understandings of Diversity and Bias Education



Definitions

- **Explicit Bias**
- **Implicit Bias**

Definitions

- Stereotypes
- Diversity
- Inclusion

Diversity vs. Inclusion

DIVERSITY

- Diversity is the mix
- Diversity is a fact

INCLUSION

- Inclusion is getting the mix to work well together
- Inclusion is a choice we make as individuals and as leaders

What Causes an Implicitly Biased Response?

- Often not a reflection of our intentions or beliefs
- Fatigue, time constraints, brain overload, ambiguous, or incomplete information
- Our environmental influences



the brain creates pictures of people and things →
the brain sorts people and things into groups based on past experiences →
the brain remembers those experiences and images →
an unconscious response is triggered

Influences

- We typically exhibit biases that favor our own groups
- What is around us? Where do we live? Who do we go to lunch with?
- Examples:

Media

Family

Peers

Finances

Education

Relationships

Network

Interests

What Does Implicit Bias Look Like in Our Lives?

Laws Governing Diversity

- Discrimination based on race
 - Title VII of the Civil Rights Act of 1964 (42 US Code Section 1981)
 - New York State Human Rights Law (New York Executive Law Section 296)
 - New York City Human Rights Law (New York City Administrative Code Section 8-107)
- Race-based discrimination is the unfavorable treatment against a job applicant or employee based on his/her race or color (including race-related characteristics such as skin tone, hair texture or facial features)

Laws Governing Diversity

- **Disparate treatment:** Employer intentionally takes protected status into consideration when making employment-related decisions. Disparate treatment includes harassment claims.
- **Disparate impact:** Employer adopts a policy or practice that seems neutral and nondiscriminatory but has a disproportionately negative effect on members of a protected class

“We conclude that race-based action like the City’s in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action [of engaging in disparate treatment by rejecting the results of a firefighter examination], it would have been liable under the disparate-impact statute.”

Ricci v. DeStefano, 557 U.S. 557 (2009)



Implications of Title VII



“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”

Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007) – **NOT A TITLE VII CASE**

- Courts have held that Title VII and other anti-discrimination laws also protect members of majority or historically privileged group.

Affirmative Action

- Affirmative action plans may be required (government contractors) and/or permitted in certain circumstances. However, affirmative action plans cannot set quotas or reserve employment opportunities exclusively for certain groups.
- Supreme Court: “While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota[.]” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

Voluntary Affirmative Action

- The Supreme Court, *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979), allows voluntary affirmative action (i.e., limited race-conscious actions) if:
 1. The preferences are intended to “eliminate conspicuous racial imbalances in traditionally segregated job categories” (i.e., must be intended to remedy discrimination rather than promote diversity),
 2. The rights of nonminority employees are “not necessarily trammled,” and
 3. The preferences are temporary in duration.
- Examples: Rooney Rule, Mansfield Rule
- Tread carefully (and with legal counsel)

Other Laws Affecting Diversity: Social Media

- First Amendment: “Congress shall make no law...abridging the freedom of speech, or of the press...”
 - Protects right of public employees to speak as citizens about matters of public concern. This right is balanced against the right of a public employer to control its workforce.
- National Labor Relations Act
 - Section 7: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other **concerted activities** for the purpose of collective bargaining or other mutual aid or protection...”

Other Laws Affecting Diversity: Retaliation

- Most Employment Laws Contain Prohibitions on Employer Retaliation:
 - **Title VII:** prohibits an employer from taking an adverse action against an employee for engaging in legally protected activity
 - **ADA/ADEA/FMLA:** prohibits an employer from taking an adverse action against an employee or applicant because s/he has opposed a practice that is unlawful under the ADEA/ADA/FMLA
 - **OSHA:** prohibits an employer from taking an adverse action against an employee who complains about unsafe or unhealthful conditions
 - **New York Labor Law 740:** prohibits an employer from taking adverse action against an employee who reports the employer's fraudulent conduct

Other Laws Affecting Diversity

- New York Labor Law 201-d: Prohibits employer from refusing to hire or employ, or terminating or otherwise discriminating against an individual because of his/her...

(1) political activities

(2) legal use of consumable products

(3) legal recreational activities

...outside of working hours, off of the employer's premises and without use of employer's equipment or other property.

- Exceptions: activities that create a material conflict of interest or are illegal or constitute misconduct

Why Are Diversity and Inclusion Important in the Legal Profession?

- Increase innovation
- Improve work culture
- Public credibility
- Attracts younger generations

Current Events

- The effects of a recession
- The effects of the pandemic

Bias Interrupters



Implicit Bias Neutralizers

- More social contacts
- Community involvement
- Education
- Top-down approaches
- Formal policies
- Transparency

Best Practices for Leadership and Human Resources

- Evaluate and reevaluate
- Track/audit the results/effects
- Expand candidate pools
- Use consistent hiring protocols and neutral criteria
- Create a clear record of all decisions

Best Practices for Leadership and Human Resources

- Invite universal participation in programming, etc.
- Continual training
- Exit interviews
- Publish information
- Make it a priority!

What to Avoid

- Decisions based upon protected characteristics
- Narrowing focus in creating candidate pool
- Regularly skipping disciplinary measures

Mentoring

- Encourage participation
- Concrete examples to illustrate goals
- Frequent check-ins
- Make introductions
- Review business development plans
- Ask what your mentee needs to be successful

Focus on the process, not the
outcomes

Questions?