



**Employment Law Traps
in Diversity Programs**

Maya Salah, Ballard Spahr LLP
Chandra Kilgriff, Robins Kaplan LLP



April 24 – 27, 2018 • Hollywood, FL

Agenda

- Equal Employment Opportunity Laws
- Diversity & Inclusion: A Short History
- Hiring & Assignments
- Employee Resource Groups & Mentoring
- Complaints
- Q & A

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Down History Lane



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Fair Access to Employment

- On March 6, 1961 President John F. Kennedy issued Executive Order 10925, which included a provision that government contractors **"take affirmative action" to ensure that to ensure that hiring and employment practices are free of racial bias.**

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Civil Rights Movement

- **CIVIL RIGHTS ACT of 1964:** The most sweeping civil rights legislation was signed into law by President Lyndon Johnson.
- **Title VII** of the Civil Rights Act prohibits discrimination of all kinds based on race, color, religion, sex or national origin.

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Workplace Policies

- Equal Employment Opportunity laws prohibit specific types of job discrimination in certain workplaces.
- Many employers have equal employment opportunities (EEO) policies that prohibit discrimination and retaliation; and outline procedures for reporting complaints.
- May be incorporated into an employee handbook.

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Diversity

- Supreme Court's pivotal ruling in *Regents of the University of California v. Bakke* (1978) declared the goal of **creating diversity**, including racial diversity, on a university campus is a compelling justification for properly designed racial selectivity in admission.

Business Case

- Starting in the late '90s the diversity rationale moved from academia to the workplace and gained greater influence in the business world.
- The mantras have been:
 - “diversity is our strength”
 - “diversity is good for business”
 - “diversity brings creativity”

The screenshot displays a corporate website with a focus on diversity and inclusion. The main header features a navigation menu with items like 'HOME', 'ABOUT', 'RESEARCH', 'NEWS', 'CONTACT'. Below the navigation, there's a large graphic with the text 'WE PROMOTE A CULTURE THAT IS INCLUSIVE OF ALL'. To the right, a section titled 'DIVERSITY AND INCLUSION' includes a quote: 'Diversity is at the very core of our ability to serve our clients well and to maximize return for our shareholders. Diversity supports and strengthens the firm's culture, and it reinforces our reputation as the employer of choice in our industry and beyond.' Below this, there's a section for 'Ballard Spahr' with a sub-header 'Diversity and Inclusion' and a brief description of their commitment to diversity. The footer of the page includes 'ROBINS & KAPLAN' and 'Ballard Spahr' logos, along with contact information and a footer note: '2018 NALP Annual Education Conference April 24 – 27, 2018 • Hollywood, FL'.

Hiring Hypothetical

- A firm’s trial group chair asks their Recruiting Director to find an attorney of color to fill a lateral attorney position.
- Can the firm state a preference for hiring attorneys of color?
- What kinds of statements in the job posting or to applicants are acceptable?

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Assignment Hypothetical

- The firm hires Eric, who identifies as Black. To ensure Eric gets immediate professional and business development opportunities, the D&I Director asks for Eric to be staffed on an important matter for a key client, an opportunity that would typically go to a more senior associate.
- Can staffing decisions be made for diversity reasons?
- What if the client indicated diversity was an important consideration for them?

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TECH
YouTube Hiring for Some Positions Excluded White and Asian Men, Lawsuit Says
A former employee alleges tech firm set quotas for hiring minorities



A Google spokeswoman said the company will vigorously defend itself in the lawsuit against YouTube. PHOTO: JAAP AP/REUTERS/DAVID J. PHILLIPS

By Kirsten Grind and Douglas MacMillan
Updated March 1, 2018 8:03 p.m. ET

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What Does the Law Say?

- It is a violation of Title VII of the Civil Rights Act to make hiring decisions based upon race.
- Exceptions:
 - Business need
 - Bona fide occupational qualification (BFOQ)
- In the case of race – no exceptions!

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Hypothetical

- As the D&I Professional, you often get POC attorneys requesting to share confidential information. Wendy, an Asian-American associate, comes to your office and complains that partners often confuse her with Sarah, another Asian-American associate.
- Wendy believes some negative comments in her recent performance review were based on a partner confusing her with Sarah.

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Best Practices

- Diversity awareness and communication skills
- Diversity Professional reporting responsibilities
- Managerial role vs. staff role
- When to escalate to HR

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Hypothetical

- As part of its corporate diversity program, XYZ employer encouraged the formation of employee resource groups (ERG) with memberships of various self-selected types of employees. In response to the forming of the LGBTQ group, some employees approached HR wanting to form the Straight Women's Group.
- How should HR respond?
- What about the Straight Men's Group? Is that different?

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Best Practices

- Any 'affinity' group can form an ERG
- Promote inclusive participation
- If excluding (for example religion), understand reason
- Training on anti-harassment and anti-discrimination

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"Our goal is to establish language that is gender-neutral, ethnic-neutral, and age-neutral, while celebrating our spirit of diversity."

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Q&A



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Contact Information

Maya Salah Associate Ballard Spahr LLP 612-371-3213 salahm@ballardspahr.com	Chandra Kilgriff Chief Talent & Diversity Officer Robins Kaplan LLP 612-349-0885 ckilgriff@robinskaplan.com
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Federal Equal Employment Opportunity Laws

Equal employment opportunity (EEO) laws are designed to create equal opportunity in employment by prohibiting employment discrimination. The primary federal laws are:

- **Title VII of the Civil Rights Act of 1964** (Title VII) prohibits discrimination on the basis of race, color, sex (including amendments by the Pregnancy Discrimination Act and the Civil Rights Act of 1991), national origin, and religion.
- **Title I and Title V of the Americans with Disabilities Act (ADA)** prohibit discrimination on the basis of disability (including amendments by the Civil Rights Act of 1991 and the Americans with Disabilities Act Amendments Act (ADAAA)).
- **The Rehabilitation Act** (Rehab Act) prohibits discrimination on the basis of disability in federal employment and by employers with federal contracts or subcontracts that exceed \$10,000. The protections under the Rehab Act are mostly the same as the protections under the ADA.
- **The Age Discrimination in Employment Act (ADEA)** prohibits discrimination on the basis of age (40 and over).
- **The Genetic Information Nondiscrimination Act (GINA)** prohibits discrimination on the basis of genetic information.
- **The Uniformed Services Employment and Reemployment Rights Act (USERRA)** prohibits discrimination on the basis of past, current, or prospective military service.
- **Section 1981 of the Civil Rights Act of 1866** (Section 1981) prohibits discrimination on the basis of race, color, and ethnicity in the area of contracts.
- **The Equal Pay Act (EPA)** prohibits sex-based wage discrimination against men or women performing substantially equal work in the same establishment. Substantially equal work means that the jobs require equal skills, effort, and responsibility, and that the jobs are performed under similar working conditions.
- **The Immigration Reform and Control Act (IRCA)** prohibits citizenship discrimination, national origin discrimination by certain employers, and over-documentation in the employment eligibility verification process.

All U.S. states and many municipalities have also adopted anti-discrimination laws related to employment, with protection against discrimination based on similar factors as the federal laws and other additional factors such as sexual orientation, public assistance status, service on a Human Rights Commission, etc. Ballard Spahr's Labor and Employment lawyers advise on compliance with state and federal laws and provide advice, counsel, and training on hot-button issues faced by employers.