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IMPACT OF THE UNIVERSITY OF MICHIGAN AFFIRMATIVE ACTION DECISIONS ON CORPORATE AND COMMUNITY DIALOGUE

Introduction

In its June, 2003 University of Michigan affirmative action decisions,[1] the U.S. Supreme Court concluded that the educational benefits that flow from a diverse student body constitute a "compelling state interest" that makes some race-based considerations in the admissions process lawful under the U.S. Constitution. The Court emphasized, however, that racial classifications may be used only to the extent that they are "narrowly tailored" to further that compelling state interest. Moreover, the Court clearly viewed the use of racial classifications in admissions as a temporary measure, emphasizing that "we expect that 25 years from now, the use of racial preferences will no longer be necessary."

In reaching its conclusions, the Supreme Court took note of the nation's "increasingly diverse workforce and society" and of friend-of-the-court briefs filed by the Equal Employment Advisory Council (EEAC) and others in which "major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." The purpose of this paper is to discuss the impact of the University of Michigan cases on the affirmative action and diversity programs of major private sector employers such as those that belong to EEAC, and to evaluate measures that can and are being taken by such organizations to hasten the day when "the use of racial preferences will no longer be necessary."

The analysis begins with a discussion of the post-University of Michigan legal "ground rules" which authorize companies to undertake certain race-conscious affirmative action and diversity measures, but only so long as they are narrowly drawn and do not unnecessarily interfere with the legitimate expectations of others.[2] No diversity consultant can responsibly advise clients on the substance of their diversity programs without being fully conversant in these ground rules.

The analysis then focuses on steps major companies are taking to harmonize their equal opportunity, affirmative action and diversity initiatives; integrate them into their annual business plans and reviews of performance; and, then use them to promote their long-range strategic business objectives. The expectation is that when such steps are understood by senior management to be essential to the accomplishment of the organization's long-term strategic

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[1] *Grutter v. Bollinger,* 539 U.S. 306 (2003) (the "law school" case); *Gratz v. Bollinger,* 539 U.S. 244 (2003) (the "undergraduate" case).

[2] For purposes of this analysis, it is not necessary to delve into the often-debated distinctions between "affirmative action" on the one hand and "diversity" on the other. Suffice it to say that for purposes of this discussion "affirmative action" measures are not those described by some as "band-aids" designed to serve as transitional relief *around* institutional barriers to equal opportunities, but rather steps designed to *confront and eliminate* those barriers. Whether speaking in terms of "affirmative action" or "diversity," the focus of this discussion is on steps employers can and are taking to address the diversity that already exists in the workforce and in society at large.

goals, the stage will effectively have been set for concluding that "the use of racial preferences [is] no longer necessary."

Post University of Michigan "Ground Rules" for Affirmative Action and Diversity

Any analysis of the impact of the University of Michigan cases must start with a recognition that the Supreme Court intentionally limited its approval of the use of race for the sake of diversity solely to educational settings, stressing that "context matters" and that higher education occupies a "special niche" because of our nation's strong traditions of academic freedom. Stated another way, there is nothing in the University of Michigan decisions that explicitly changed the pre-existing legal rules that governed affirmative action and diversity programs in private sector employment.[3] Indeed, perhaps the most significant aspect of the cases for private employers was that by endorsing diversity as a compelling state interest in the higher education context, the Court effectively mitigated the concerns of many that it might have used the cases as a platform for putting a stop to affirmative action efforts generally.

Keeping the Significant Issues in Focus

The renewed interest in race-conscious affirmative action and diversity programs in the wake of the University of Michigan decisions should not overshadow the fact that *most* of the things employers do in the name of affirmative action and diversity are race- and gender-neutral, and therefore do not present legal concerns.

<u>It Is Not All About Preferences</u>

Many EEAC member companies, for example, have received recognition for worklife programs, such as flexible scheduling, job-sharing, telecommuting, and part-time management tracks. These are effective affirmative action programs. They reduce obstacles that may block career opportunities for qualified individuals whose family responsibilities conflict with more traditional schedules. Such programs primarily benefit women, and thus promote diversity. But they do not give anyone preferential treatment. These programs generally are open to employees of both sexes on the same terms.

Similarly, many employers recruit at historically black colleges and universities, advertise job openings in Spanish-language newspapers, and/or seek referrals from women's professional associations. Typically, these methods are not exclusive; the employers use other recruiting sources as well. These kinds of affirmative action are aimed at increasing the number of qualified women and minorities in the applicant pool. Such programs do not exclude qualified nonminorities or males from consideration; they merely require them to compete against a larger applicant pool.

In short, affirmative action is not all — or even mainly — about preferential treatment and "reverse discrimination." Employers can and do practice affirmative action and promote diversity in a great many ways that do not even arguably involve any race- or gender-based

[3] Nothing in this paper is intended to provide legal advice. Employers and their advisors are always well-advised to seek legal counsel in dealing with specific situations.

discrimination, and therefore pose no problems under the laws. The legal issues — and the rules summarized below — come into play only when an employer grants a preference or otherwise differentiates in treatment of individuals on the basis of race, gender, or some other protected characteristic.

Constitutional Limits Do Not Apply in the Private Sector; Title VII Does

It is important to be aware, too, that most of the court decisions addressing affirmative action — whether with approval or disapproval — have arisen in the public sector and involve constitutional restrictions that directly apply only to governmental action. The Supreme Court's *Weber* and *Johnson* decisions, discussed in more detail below, make clear that voluntary, private sector affirmative action is not subject to these constitutional restrictions.

Instead, private sector employers with 15 or more employees are subject to specific non-discrimination rules set forth in Title VII of the Civil Rights Act of 1964 (Title VII). Consequently, it does not necessarily follow that, because a court has ruled for or against a particular type of affirmative action in a public sector case, the court would reach the same conclusion in a case involving a similar program in a private employment context.

What Are the Ground Rules?

The basic legal rules governing private sector affirmative action practices that involve race- or gender-based decision-making in the employment context stem from Title VII. They were spelled out in the Supreme Court's decisions in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), and were reiterated and expanded upon in *Johnson v. Transportation Agency, Santa Clara Cty.*, 480 U.S. 616 (1987). Those principles also are codified in regulations issued by the Equal Employment Opportunity Commission (EEOC) in 1979, commonly known as the EEOC's Affirmative Action Guidelines, codified at 29 C.F.R. § 1608.

Title VII Controls

Title VII prohibits discrimination in employment on the basis of race, color, religion, sex and national origin. It protects nonminorities as well as minorities, and men as well as women. Thus, it provides a statutory basis for claims by nonminorities and men that they have suffered employment discrimination as a result of affirmative action.

As part of the Civil Rights Act of 1991, Congress amended Title VII to specify that an employer commits unlawful discrimination if it uses a protected factor such as race or gender as "a motivating factor" in making an employment decision, even if other factors also motivated the practice. During the debate on the 1991 amendments, it was pointed out that this language could be construed to prohibit certain forms of affirmative action.

To avoid that result, Congress specified that nothing in the 1991 amendments should be read to affect "court ordered remedies, affirmative action, or conciliation agreements that are in accordance with the law." Although the meaning of this provision is not absolutely clear, it seems reasonable to conclude that the phrase "in accordance with the law" refers to the law as it

existed when the 1991 amendments were enacted. If so, then Title VII effectively codifies the *Weber/Johnson* standards and the EEOC's Affirmative Action Guidelines.

Arguably, the effect of these two amendments to Title VII, taken together, is to freeze the law of affirmative action where it stood in 1991 barring new legislation by Congress. In any event, no court since 1991 has attempted to cut back or expand the *Weber/Johnson* standards or the EEOC guidelines, and thus they remain the legal rules that govern affirmative action in private sector employment today. We turn now to a summary of those rules.

The *Weber* and *Johnson* Standards

The *Weber* and *Johnson* decisions make clear that an employer subject to Title VII may take race and gender into account as factors in making employment decisions, provided that the employer does so in accordance with a "narrowly tailored plan" adopted to remedy "manifest imbalance in a traditionally segregated job category."

In *Weber*, the Supreme Court approved a training program in which 50 percent of the positions were set aside for African-Americans in order to remedy a severe underrepresentation of African-Americans in skilled craft jobs in the steel industry. In *Johnson*, the Court upheld an employer's choice of a qualified woman for promotion over a man who arguably was slightly better qualified, noting that the employer acted in accordance with a written affirmative action plan to increase the representation of women in a job category in which women were totally unrepresented.

Briefly, the criteria for lawful race- or gender-conscious affirmative action under *Weber* and *Johnson* may be summarized as follows:

- First, the employer must have identified a "manifest imbalance in a traditionally segregated job category." This ordinarily is done through statistics showing that the representation of minorities or women currently employed in the job category is significantly lower than one would expect it to be in the absence of discrimination, taking into account the number of available, qualified minorities or women in the relevant labor market.

- Having identified such a "manifest imbalance," the employer then may try to eliminate the imbalance through a "narrowly tailored" program in which race or gender may be considered in making employment selections, provided that all candidates are qualified and that race or gender is used merely as "one factor" — or as a "plus" — and not as the sole criterion for making selections.

- To be considered "narrowly tailored" for these purposes, the program must be carefully limited so it does not "unnecessarily trammel" the rights of those outside the group it is designed to protect. For example, the program must be structured so it does not create an absolute bar to the advancement of persons outside the protected group. Also, the program cannot be indefinite in duration; it must be designed to eliminate race or gender imbalance, not to perpetuate balance once it has been achieved.

In sum, the *Weber/Johnson* standards allow employers to take race and gender into account to counteract the effects of historic, societal discrimination against minorities and women, but not to use race- or gender-based preferences in a casual or reckless way that impinges on the legitimate job expectations of nonminorities or males.

The EEOC's Affirmative Action Guidelines

The EEOC's guidelines on affirmative action closely parallel the *Weber/Johnson* standards. Importantly, the guidelines not only endorse the right of employers to take appropriate affirmative action, but provide a *defense against liability* for employers who do so in good faith and in conformity with the guidelines. Specifically, the guidelines state that "[t]hese Guidelines constitute a 'written interpretation and opinion' of the Equal Employment Opportunity Commission as that term is used in section 713(b)(1) of Title VII." Section 713(b)(1) in turn provides that an employer cannot be held liable for any action taken "in good faith, in conformity with, and in reliance on any interpretation or opinion of the Commission."

The guidelines go on to state that if an employer is charged with discrimination, but is able to show that it took the action in question pursuant to, and in accordance with, an affirmative action program that conforms to EEOC's guidelines, the EEOC will issue a determination of "no reasonable cause." Moreover, if the affirmative action plan is written and was in effect at the time of the challenged employment action, the EEOC "will state that the [no cause] determination constitutes a written interpretation or opinion of the Commission under [Title VII]." Such a determination should provide a basis for summary judgment in the employer's favor if the individual subsequently sues in court on a "reverse discrimination" claim.

AAP Approved by OFCCP Automatically Deemed by EEOC To Meet the Elements of a 713(b)(1) Defense

Significantly, the EEOC's guidelines state that if an affirmative action program (AAP) has been approved by the Labor Department's Office of Federal Contract Compliance Programs (OFCCP) under Executive Order 11246, then it automatically will be deemed to contain the elements necessary to prevail on a 713(b)(1) defense, which are (1) a reasonable self-analysis; (2) a reasonable basis for concluding that affirmative action is appropriate; and (3) reasonable action.

These first two elements roughly equate to a determination of "manifest imbalance" under the *Weber/Johnson* standards, or of "underutilization" under Executive Order 11246. The guidelines state that if an employer's self-analysis reveals practices that have adverse impact or "leave uncorrected the effects of prior discrimination," then the employer has a reasonable basis for concluding that affirmative action is appropriate. It is not necessary that the self-analysis establish a violation of Title VII, nor that the employer admit, or be found guilty of, unlawful discrimination.

In describing the third element of a valid affirmative action plan — *i.e.*, "reasonable action" — the EEOC's guidelines state that the action must be "tailored to solve the problems

which were identified in the self-analysis ... while avoiding unnecessary restrictions on the opportunities for the workforce as a whole." This element mirrors the *Weber/Johnson* requirement that a plan must be "narrowly tailored" so as not to "unnecessarily trammel" the rights of nonminorities or males.

Affirmative Action May Include Race- and Gender-Conscious Steps

The EEOC's guidelines make clear that, when an employer has determined through self-analysis that its practices have adverse impact or "leave uncorrected the effects of prior discrimination" (whether by the employer or society), the employer may take "steps to remedy the situation ... which in design and execution may be race, color, sex, or ethnic 'conscious.'" Such steps "may include goals and timetables or other appropriate employment tools which recognize the race, sex, or national origin of applicants or employees."

Thus, like the *Weber/Johnson* standards — which they closely parallel — the EEOC's guidelines afford employers latitude to take race and/or gender into account in a careful, limited way, as long as the employer is doing so for the purpose of eliminating and remedying underutilization or workforce imbalance.

The guidelines list several illustrations of appropriate affirmative action, including:

- Training plans and programs, including on-the-job training, which emphasize providing minorities and women with the opportunity, skill, and experience necessary to perform the functions of skilled trades, crafts, or professions;

- A recruitment program designed to attract qualified members of the group in question;

- The initiation of measures designed to assure that members of the affected group who are qualified to perform the job are included within the pool of persons from which the selecting official makes the selection; and

- A systematic effort to provide career advancement training, both classroom and on-the-job, to employees locked into dead-end jobs.

How Do These Rules Apply to Diversity Programs?

For purposes of this discussion, it is important to understand how these ground rules apply to the day-to-day implementation of corporate diversity programs. As noted earlier, however, the Court has approved race-conscious measures undertaken to achieve diversity — as opposed to those undertaken to eliminate manifest imbalance or remedy past discrimination — *only* in the context of higher education. At least for now, the legal rules governing diversity programs in the context of employment have not changed. What, then, are those rules?

Inclusive, Nondiscriminatory Programs Generally Lawful

As with traditional forms of affirmative action, diversity initiatives may include a wide array of different programs and practices, *most* of which are nondiscriminatory and clearly lawful. For, again, most of these programs simply involve ways of making a company's qualified applicant pools more inclusive and its employment practices and working conditions more hospitable to populations that have not been well-represented before. Thus, as with traditional affirmative action, diversity programs typically pose no legal problems as long as they do not involve any race- or gender-based employment selections or differences in treatment of employees.

Use of Race/Gender Allowed Only Where Weber/Johnson Standards Are Met

To the extent, if any, that diversity programs *do* involve race- or gender-based employment actions or practices, the federal courts thus far have been unanimous in holding that the programs must satisfy the *Weber/Johnson* requirements. That is, the programs must be *remedial* in purpose and *narrowly tailored* in design and implementation. The courts repeatedly have indicated that the goal of fostering diversity, in and of itself, is not remedial and cannot justify action that otherwise would violate Title VII.

Implementing Diversity Goals in the Absence of "Manifest Imbalance"

Under the law as it exists today, an employer seeking to foster workforce diversity in the absence of statistics showing a "manifest imbalance" in a "traditionally segregated job category" must proceed with caution. For in this situation, the *Weber/Johnson*-EEOC guidelines defense discussed above is not available. Consequently, the employer may not lawfully take race or gender into account in hiring, promotion, or other employment decisions, *even as only one of several factors* used in selecting among qualified candidates.

Employers whose diversity goals are not tied to documented underutilization should, therefore, keep close track of the means and methods their managers and supervisors use to meet the goals. Inclusive, nondiscriminatory methods are fine and laudable, but selections based in whole or in part on race or gender in this context could lead to liability.

Effect of the "Narrowly Tailored" Requirement on Diversity Programs

Employers also should bear in mind that, even in job categories where there *is* "manifest imbalance" (*i.e.*, underutilization), any use of race or gender for the sake of diversity also must be "narrowly tailored." That is, as with any race- or gender-conscious affirmative action, the employer's actions must be carefully limited so as not to impinge unduly on the legitimate expectations of persons outside the group the employer seeks to benefit. Nor should an employer ever set aside a fixed number or percentage of positions in any job category that must go to candidates of a particular race or gender.

The requirement that race- or gender-conscious measures be "narrowly tailored" may limit an employer's efforts to maintain diversity when implementing layoffs and downsizings. The employer may wish, for example, to retain recently-hired or promoted minorities or women in order to preserve affirmative action gains and avoid reverting to a non-diverse workforce. But other employees legitimately may expect that any layoffs or terminations will be based on nondiscriminatory factors — *e.g.*, seniority, performance, etc. — and not on race or gender. An employer facing such circumstances should consult with counsel and explore alternatives. Perhaps the employer can find nondiscriminatory layoff or termination criteria that it can use to make selections that will not undermine its diversity achievements.

Finally, because many corporate diversity initiatives are rooted in the belief that diversity is a business asset or necessity, such programs often are *permanent* in nature. The idea is not simply to achieve workforce diversity, but to maintain and foster it on an ongoing basis. Yet, as we have seen, the Supreme Court's decisions require that any use of race- or gender-conscious affirmative action in the employment context be *temporary* — *i.e.*, designed to eliminate imbalance, not to preserve balance in the workforce. For, under the logic of *Weber* and *Johnson*, once an historic imbalance in a job category has been eliminated, there is nothing left to "remedy" and, therefore, there is no justification for continuing to use race- or gender-conscious measures.

We do not mean to suggest that employers cannot have ongoing programs to maintain diversity. A review of the legal requirements indicates, however, that once minorities and women are "fully utilized" in a given job category, the employer may not use race- or gender-conscious means to maintain diversity in that job category. Rather, from that point on, at least, or until the law changes, the employer's diversity efforts should be confined to race- or gender-neutral methods, such as the inclusive, nondiscriminatory programs and practices described at the outset of this analysis.

"Probably Permitted" Versus "Probably Prohibited" Employer Practices

In light of the *Weber/Johnson* standards, the EEOC's Affirmative Action Guidelines, and the additional, indirect light shed on this subject by the Supreme Court and lower federal courts in cases involving various public sector affirmative action and diversity programs, EEAC has prepared a chart that classifies a number of different types of affirmative action and diversity-related programs and practices on the basis of whether they are "probably permitted" or "probably prohibited" under the law, as it currently stands. The chart is included as an attachment to this paper.

Having articulated what we believe the current legal ground rules to be, it should be acknowledged that some companies will, consciously, elect to be more assertive in their affirmative action and diversity programs. Indeed, such companies may look to the University of Michigan Law School itself as an example of an organization that consciously went beyond the previously understood limits of affirmative action and prevailed. Some private sector organizations may choose to adopt for themselves a similar role in the context of private sector employment. The discussion of the current legal ground rules, however, hopefully will serve to assist such companies in evaluating their alternatives and making an informed business decision.

Employer Contributions To Setting the Stage for Rendering Preferences Unnecessary

Even in the context of higher education, where it approved the limited use of race as a factor in admissions for the sake of student body diversity, the Supreme Court reaffirmed that "race-conscious programs must have reasonable durational limits." Because of the deference it felt compelled to give to the University of Michigan Law School in order to preserve academic freedom, however, the Court was willing to "take the Law School at its word" that it "will terminate its race-conscious admissions program as soon as practicable." The Court's observation that "we expect that 25 years from now, the use of racial preferences will no longer be necessary" has drawn a good deal of attention. This comment should not be read as suggesting that any program lasting less than 25 years will be considered "narrowly tailored" in terms of duration, particularly outside the context of higher education. But it does give rise to the question what, if anything, can our nation's institutions, including private sector employers, do to hasten the day when race, gender, or ethnic preferences are no longer necessary?

Fundamentally, the use of employment preferences is rooted in the fact that employees are inherently "different" from one another — different in terms of race, ethnicity, gender, age, disability status as well as a variety of other immutable characteristics — and that those differences in the past have caused differential treatment in the workplace. Preferences have been viewed as a vehicle for addressing the grievances of those who have been disadvantaged. Employers, of course, cannot eliminate the differences between employees. Employers can, however, seek to establish and maintain a workplace environment in which these differences do not serve to inhibit accomplishment of either the employees' career aspirations or the company's strategic business objectives. In such an environment the need for preferential treatment dissolves. In recent years, EEAC member companies have undertaken a number of initiatives designed to create such an environment. A summary of these initiatives follows.

Eliminate Emotionally Charged Terminology and Inefficient Management Structures

Like it or not, it must be acknowledged that for many individuals, terms such as "EEO," "affirmative action," and "diversity" are emotionally charged. For some, they reflect progressive, inclusive employment practices; for others they reflect unfair, exclusive preferential treatment. Even among supporters, the terms often carry different connotations: "EEO" and "affirmative action" obligations, for example, are mandated by government regulations protecting the rights of women and minorities, while "diversity" initiatives are voluntary and are intended to address issues that extend far beyond race and gender.

These differences in perception often are reinforced by the reality that in some organizations responsibility for EEO and affirmative action "compliance" is lodged in one department (not infrequently the legal department), while responsibility for the company's diversity initiatives is lodged in another (often with a direct reporting relationship to the CEO). Significant differences in funding levels and access to senior management often create a strained relationship between the compliance and diversity functions.

Recognizing that such artificial constraints do not serve the broader interest of de-emphasizing differences and extending equal opportunities to all employees, some organizations have replaced the emotionally-charged "EEO," "affirmative action," and "diversity" labels with more benign terms such as "workplace fairness," "workforce effectiveness" or "workforce strategies."

Moreover, there often is a recognition that the traditionally separate and distinct "compliance" and "diversity" functions *both* can make valuable contributions to a company's overall employee strategy. Indeed, as discussed further below, the employment-related statistical data traditionally generated and maintained by the compliance function often can serve as the basis for calculating progress in accomplishing the organization's diversity initiatives. Accordingly, it is becoming increasingly common for individuals with titles such as "Director, Workplace Fairness," "Director, EEO, Recruiting and Workforce Strategies," or "Vice President, Workforce Effectiveness" to be responsible for both the compliance and diversity functions.

While such changes may be criticized as amounting to mere form over substance, it is undisputable that in this particular area of employee relations perceptions matter — and every employee has a perception and that perception is determined by his or her unique circumstances. If the preferred perception is that when it comes to employment opportunities, differences in race, gender and ethnicity do not matter, then it is best to use terminology and organizational relationships that reinforce rather than contradict that perception.

Align Affirmative Action Plan and Diversity Goals

Federal contractors are required to prepare written affirmative action plans (AAPs) for each of their establishments and update them annually. The regulations pertaining to the required ingredients of acceptable AAPs are quite specific. Among other things, they specify standards to be used in conducting statistical analyses of minority and female utilization patterns including:

- Standards for grouping employees for purposes of analysis (determining "job groups");
- Standards for using Census or other external labor force data to estimate the percentage of women and minorities in the external labor market available for employment (external "availability");
- Standards for using internal workforce data to estimate the percentage of women and minorities in the contractor's own workforce available for promotion or transfer into a job group (internal "availability");
- Standards for determining when current utilization patterns in a job group are lower than anticipated, thereby triggering an obligation to establish a placement rate goal; and
- Standards for determining what that placement rate goal should be.

As can be seen, AAP placement rate goals are not percentages plucked arbitrarily out of thin air, but rather are determined in accordance with a rather precise formula rooted in figures that reflect the true "availability" of women and minorities in the external and internal sources from which jobs are filled. It is precisely because such goals are required only in job groups where there is a statistical imbalance in women and/or minority utilization, and such goals are set

at levels that reflect the availability of qualified candidates, that the EEOC has been willing to stipulate that OFCCP-approved AAPs are sufficient to constitute a defense to a claim of discrimination under Section 713(b)(1) of Title VII.

Over the years, many federal contractors also have established goals for their diversity programs. Often these "diversity goals" are separate from — and frequently higher than — the company's AAP goals. In addition, the goals often are established not with reference to actual labor market availability figures, but rather with reference to utilization patterns the company wants to have or feels it could achieve given a sufficiently aggressive diversity program.

Diversity goals that are separate from AAP goals and predicated upon entirely unrelated considerations often are confusing to managers who are expected to accomplish both, and tend to keep employment attorneys awake at night. While the AAP goals can be justified by reference to actual labor market data, the same cannot always be said of diversity goals. Because of this concern, several EEAC member companies have taken steps to align and harmonize their AAP and diversity goals by calculating both sets of goals on the basis of the same labor market availability data.

In these circumstances, the company employs the same data and methodological principles which underlie its AAP availability calculations, but rather than perform these calculations by AAP and job group, does so instead by organizational units (such as lines of business, functions, geographical regions, divisions, etc.) and employee groupings (such as management bands, job families) that will be most relevant to how the company manages its workforce and chooses to evaluate and hold its managers accountable for performance.

This approach to establishing employment goals frees employers of the artificial constraints to managing their workforces imposed by the OFCCP regulations, but yet assures that the diversity goals and the AAP goals are aligned and consistent with one another because they both are rooted in the same labor market data.

Integrate Diversity-Related Metrics Into Regular Evaluations of Performance Results

Companies routinely evaluate business-related performance results in a wide variety of areas. Performance results may be evaluated for the enterprise as a whole; for major lines of business; for individual functions or departments; or, indeed, for individual managers. Evaluations may focus on such issues as bottom-line financial results; return on investment; or shifts in sales or market penetration. The list is virtually endless; but most things valued within an organization are somehow evaluated and measured on a regular and ongoing basis.

Employment results, of course, are no exception. Organizations seeking to institutionalize notions of inclusion in their workforces are using a variety of creative techniques to include diversity-related metrics in their evaluation of performance results. As with other measures, they may be calculated for major segments of the business, for specific departments or functions, or for individual managers and executives.

Some EEAC member companies have experimented with "diversity scorecards" or "dashboards." They usually provide for evaluation with respect to specific objectives identified by the organization. Generally, the measurements relate not only to diversity in workforce representation, but also in other critical human resources transactions as well such as recruitment, staffing and placement, retention, and advancement. Taken together, such measures often tell a rather complete story about an organization's (or individual's) diversity performance. Examples of typical measurements might include the following:

- *Utilization Benchmark*: a measurement that compares an organization's diversity-related performance against the company's overall AAP calculations of female and minority availability.

- *Industry Benchmark*: a measurement that compares an organization's representation against representation in a specific, predefined industry.
- *Recruitment Benchmark:* a measurement that evaluates the overall effectiveness of the organization's diversity recruitment efforts, analyzing the demographic characteristics of those who express an interest in working for the organization versus a specified benchmark.
- *Staffing/Placement Benchmark*: a measurement that analyzes staffing and placement performance by comparing hires and other placement demographics with relevant internal and external benchmarks.
- *Retention Benchmark*: a measurement that evaluates the organization's performance in retaining employees.
- *Pipeline/Advancement Benchmark*: a measurement that evaluates the diversity within the company's talent pipelines for senior executive positions.
- *Workplace Climate Benchmark:* a measurement that evaluates employee perceptions of the organization's performance in the areas of diversity and workforce fairness as reflected in employee opinion and similar surveys.

Other potential areas for performance measurement, depending upon the organization's priorities, might include training, implementation of performance appraisal systems, EEO-related grievance and complaint activity, workforce vs. client or customer demographic profile comparisons, or use of diverse suppliers or vendors.

The significance of such measurements is that managers and executives begin to conceive of their EEO/affirmative action and diversity responsibilities not just as a requirement of yet another "HR special program," but rather as an integral component of the organization's everyday, ongoing method of conducting business. Performance expectations in this area thus become no different than performance expectations in any other aspect of running the business.

Link EEO/AA/Diversity Objectives With Strategic Business Objectives

It is all well and good to have compliant EEO/AA programs and innovative diversity programs. But if those programs are not aligned with — and actually promoting — the company's strategic business objectives, they are not realizing their full potential. Success comes when it can be established that the company's employment programs are contributing significantly to the accomplishment of senior management's business objectives.

Aligning diversity programs with strategic business objectives is not always an easy or self-evident task. What those strategic objectives are may differ dramatically from one company to another. In some organizations, for example, the strategic business objective to be served by diversity may be the avoidance of undesirable consequences such as employment discrimination lawsuits or adverse publicity. In others it may be the accomplishment of desired financial goals. Whatever the strategic objectives may be, however, the alignment process is likely to require EEO/AA and diversity specialists to venture into territory that may be largely unfamiliar to them.

First, the alignment process will require a thorough understanding of the company's business. Not from an organizational point-of-view, but from an operational point-of-view. How are the company's products or services designed; how are they manufactured or developed on a day-to-day basis; how are they marketed; and how are they sold?

Second, the alignment process also will require an understanding of the company's strategic business plans. Access to this often sensitive information may be hard to come by in some organizations, but diversity programs cannot be aligned with the business plans without knowing in detail what they actually are.

Third, the components of the workforce most vital to the success of the strategic business plans must be identified. Such identification requires an extensive understanding of both the business plans and the workforce. This is an area where the traditional EEO/AA compliance specialists have much to offer the traditional diversity specialists.

Fourth, once the key components of the workforce have been identified, the linkage between diversity in those segments of the workforce and accomplishment of the company's strategic business objectives must be articulated. Moreover, the connection must be articulated with sufficient precision and persuasiveness that it becomes self-evident to those members of senior management who are determining the direction of the enterprise.

Finally, a process must be created to provide regular and routine reporting of progress over time in attaining the stated strategic objectives. Hopefully, a correlation between the diversity of the workforce and the rate or degree to which the strategic objectives are accomplished can be demonstrated.

If the performance measures contained in the "dashboards" or "diversity scorecards" discussed earlier tend to "push" management in the direction of diversity accomplishments, then leveraging diversity to further the enterprise's strategic business objectives would tend to "pull"

management in that same direction. Once it is understood that diversity contributes to the "bottom line" success of the organization, the day when "the use of racial (or gender or any other) preferences will no longer be necessary" will be on the horizon.

While employers cannot, on their own, be expected to eliminate all tensions that exist between their employees, they can manage their workforces in a manner that demonstrates that differences in race, gender or ethnicity do not matter when it comes to employment opportunities. Hopefully, through the types of programs described above currently being used by many EEAC member companies, the stage can be set for the day when the technical distinctions between EEO, affirmative action, and diversity cease to be important; preferences become a relic of the past; and, the simple notion of fundamental fairness for all employees — regardless of their race, gender or ethnicity — becomes a driving force for American business.

PRACTICING AFFIRMATIVE ACTION WITHIN THE LAW

"PROBABLY PERMITTED" VERSUS "PROBABLY PROHIBITED" PRACTICES

The chart is not intended as specific legal advice and should not be relied upon as such. Employers should consult counsel before engaging in any race- or gender-conscious employment action, practice or program.

"PROBABLY PERMITTED" VS. "PROBABLY PROHIBITED" PRACTICES

Probably Permitted	Probably Prohibited
AAPs that conform to EO 11246 and its regulations.	AAPs that deviate substantially from EO 11246 standards, if they accord race/gender preferences.
Inclusive affirmative action that ensures that women and minorities are among those considered.	*Exclusive* affirmative action that provides consideration or benefits to members of a protected group (*e.g.*, women or minorities) to the exclusion of other groups.
Availability estimates based upon empirical studies or valid statistical measures.	Inflated availability studies or availability studies tied to factors not relevant to the workforce.
Declaration of underutilization based upon two of OFCCP's three standard criteria: • 80% rule; and • Statistical significance.	Underutilization based upon OFCCP's "any difference" standard *might* not pass the manifest imbalance test necessary to justify preferential practices.
Percentage placement rate goals equal to availability and (depending upon how they are implemented) numerical goals that reflect percentage placement rate goals.	Percentage placement rate goals that exceed availability; numerical goals and "diversity" goals unrelated to availability; "make up" goals or "remedial" goals designed to accelerate the utilization of the group covered by the goal.
Informing recruitment sources that you are an AA employer interested in qualified minority and female candidates; recruiting through women's or minorities' professional associations (provided these are not the only sources used).	Telling recruitment sources to refer only minority or female candidates; using recruitment sources that engage in discriminatory practices in screening candidates — whether or not the basis of such screening is affirmative action; paying recruitment source fees for minorities and/or women only.
Recruiting from electronic databases obtained from interest groups, minority or women-owned vendors, etc.	Using key word searches that may screen out members of protected groups.
Seeking to expand pool of qualified applicants through early-identification programs, support for urban schools, etc.	Recruiting exclusively from schools selected because of race/gender composition.
Recruiting at historically Black colleges and women's colleges — so long as entry into the company's workforce is not limited to minorities or women.	Limiting college recruitment to minorities and women only, or recruiting exclusively or preferentially through campus organizations that limit their services to minorities and women.

Probably Permitted	Probably Prohibited
Hiring the best qualified; hiring a qualified affirmative action candidate from a group of similarly qualified candidates in order to correct underutilization.	Hiring unqualified candidates on the basis of their race or sex; advising supervisors that when candidates are equally qualified and company is below its goals in the job category, they must hire/promote minorities or women.
Raising starting salaries or reclassifying positions into higher pay-grades to make positions attractive to a wider, more diverse pool of candidates.	Paying minorities or women higher starting salaries unrelated to differences in qualifications, experience, etc.
Providing services to encourage minorities and women to come to work for your company, such as: • Child care services; • Encouraging minority businesses to establish place of business in your company's town; • Leave for child rearing; • Flexible schedules; • Part-time management tracks; and • Special employment programs for disadvantaged people.	Limiting any program services *related to employment* on the basis of race or sex. (Note, encouraging minority businesses would not be prohibited because it is not related to employment.)
Supporting scholarship programs for minorities or women who are not employees or dependents of employees.	Providing scholarships to minority or female employees or dependents of minorities and women only.
Providing support to organizations designed to improve the employment opportunities of minorities or women.	(No prohibition — Support for community programs is not covered by the private sector civil rights laws.)
Providing internships through organizations that exclusively refer minority or female candidates, so long as the exclusive program is not the only way to gain an internship.	Internship programs limited to minority or female students only — especially if the interns work in areas that are not underutilized.
Mentoring programs open to all employees.	Mentoring programs limited to minorities or women.

Probably Permitted	Probably Prohibited
Affirmative action in promotions when taken to correct underutilization and when: • Based upon a reasonable estimate of availability; • Based upon a reasonable determination of underutilization; • Limited to an extent necessary only to correct underutilization; • Carried out at a placement rate equal to availability; and • Limited to qualified candidates.	Preferential promotion programs designed to increase the representation of minorities and women at higher levels without regard to their availability, their qualifications, or their representation among those promoted.
Job-posting and self-nomination systems.	Advising employees against competing for promotions because positions are earmarked to be filled through affirmative action programs.
Analyses to ensure that termination programs (such as layoffs) are carried out without adverse impact against women or minorities who have qualifications similar to their white or male counterparts.	"Affirmative action" termination measures designed to maintain a particular race or sex balance or to retain set percentages or minorities and women among those remaining after the layoff.
Cultural awareness programs designed to educate employees about the diversity in the company's workforce.	(None — Cultural awareness programs are not covered by the federal civil rights laws.)
Establishment of groups designed to address the needs of minority or female employees — so long as participation in the groups and the benefits derived from participation is not limited to minorities or females and so long as the groups do not segregate through "separate but equal" criteria.	Employee groups in which participation and benefits are limited to specific race or sex groups.
Minority or female advisory groups or "Boards of Directors" whose functions are limited to advising management on relevant issues.	Exclusive groups whose ostensible purpose is advisory but from which participating employees derive some career-enhancing benefit.