Part V:
Minimizing the Legal Risk of Initiatives to Promote Diversity and Reduce Systemic Bias in Corporate America

The Equal Employment Opportunity Commission ("EEOC") has warned companies that programs designed to break down patterns of segregation and to open employment opportunities for targeted groups must not unduly burden the rights of non-targeted groups.[1] For example, a program cannot require that non-targeted employees be discharged and replaced with targeted employees, nor create an absolute bar to the advancement of non-targeted employees. Nor may a company establish quotas, which the EEOC refers to as "the inflexible reliance solely on numbers that ignore qualifications."[2] By contrast, Employee Resource Groups that foster mutual support among employees and provide targeted training opportunities will not subject employers to Title VII liability as a general matter, unless there is some other proof of the employer's discriminatory conduct.[3] However, Employee Resource Groups that operate as a "pathway to leadership," but are not open to all employees, could increase an employer's risk of Title VII liability by not providing equal access to resources that directly affect employees' opportunities for advancement.[4]

While there is little case law that specifically addresses private employers' implementation of systemic diversity and inclusion programs, these initiatives are not immune to legal challenges, such as lawsuits alleging "reverse discrimination" pursued under Title VII of the Civil Rights Act of 1964, which is a federal law that prohibits employment discrimination based on race, color, national origin, sex, and religion. Employees bringing such actions would assert "that their employers' interest in diversity caused them to unlawfully consider race, ethnicity, and/or gender in hiring, termination, and/or promotion decisions."[5]

Employers, however, are able to successfully defend a challenged employment action where they can present a "legitimate, nondiscriminatory business reason [for their action] unconnected to the candidate's race, ethnicity, and/or gender."[6] Also, private employers should be thoughtful about potentially overestimating the risk of a successful "reverse discrimination" discrimination suit by a majority-group plaintiff, because doing so could "stifle legitimate employment decisions to diversify and correct the historical imbalance for which Title VII was enacted."[7]

Aside from studies showing diverse teams are more productive,[8] research suggests a potential link between a lack of workplace diversity and discriminatory conduct. For example, the EEOC has concluded that discriminatory harassment is more likely to occur in workplaces that lack diversity.[9] In particular, racial or ethnic harassment has been found more likely to occur when one race or ethnicity predominates.[10] The EEOC has explained that, in homogenous environments, workers who are part of a minority demographic may feel isolated and be vulnerable to pressure from others.[11] Conversely, employees in the majority may feel threatened by those deemed "different" or "other," and may hold concerns that their job is at risk or that workplace culture may change due to the presence of minority employees.[12] As a result, promoting workplace diversity is not only the right thing to do, but can also work to minimize acts of discrimination that may result in an organization facing significant financial penalties and settlements, as well as reputational costs. Recent settlements of cases involving allegations of discriminatory conduct include Ford Motor Company agreeing to pay more than $10 million in 2017 to settle a sex and race harassment case investigated by the EEOC;[13] Bass Pro Outdoor World LLC paying $10.5 million in 2017 to settle a hiring discrimination and retaliation lawsuit brought by the EEOC alleging the company discriminated against Black and Hispanic individuals in hiring;[14] and Target Corp. settling with the EEOC for $2.8 million in 2015 in a case alleging that the company's hiring tests discriminated against applicants based on race, sex, and disability.[15] In other words, the legal risks associated with allegations of discrimination and the perpetuation of bias against underrepresented minorities may far exceed any risks associated with efforts to right those historical wrongs.

Affirmative Action Programs

Implementing protocols to improve the recruitment and hiring of Black Americans is generally permissible under Title VII if a company does not consider race or color when making an ultimate employment decision. Indeed, certain federal contractors are required to implement affirmative action programs to further equal employment opportunity for people of color and women, among others.[16] And, as expressed in *United Steelworkers of America, AFL-CIO-CLC v. Weber*, Title VII does not prohibit a private employer from *voluntarily* enacting a legally valid affirmative action program. An affirmative action program is more than passive nondiscrimination.[17] Instead, it contemplates that companies "take affirmative steps to encourage and promote equal opportunity, to create an environment free from discrimination, and to address any barriers to equal opportunity."[18] Courts and the EEOC have concluded that employers may adopt voluntary affirmative action programs to remedy a clear imbalance in a traditionally segregated job market.[19]

Companies should be mindful that affirmative action or diversity plans that include a pledge to increase the ranks of Black leaders in companies—by targeting specific goals—may receive additional scrutiny from government regulators, including the U.S. Department of Labor. But while Title VII prohibits employment decisions based on race, establishing and communicating aspirational hiring objectives is not per se unlawful.

In October 2020, the Department of Labor Office of Federal Contract Compliance Programs ("OFCCP") publicly raised concerns with Wells Fargo and Microsoft about whether the companies' commitments to diversity and inclusion—including doubling the number of Black managers and senior leaders in the U.S. workforce by 2025—constituted unlawful discrimination on the basis of race in violation of Title VII.[20] The Labor Department expressed an interest in understanding how the companies intend to implement their commitments without making race-based employment decisions.[21] In response, both Microsoft and Wells Fargo reiterated their commitments to increasing diversity in the workforce in full conformity with federal law.[22] Microsoft stated that it intends to focus on creating more opportunities, including through specific programs designed to cast a wider net for talent, and then hire and promote the most qualified person.[23] Wells Fargo indicated that it has already launched efforts to implement changes in the company to make it more diverse and inclusive, all of which, the company says, will comply with U.S. employment laws.[24] While companies may face legal challenges for establishing diversity plans, so long as the plans for increasing racial diversity do not include hiring quotas, set-asides, specific hiring numbers, or making individual employment decisions based on race, they should be able withstand such challenges.

The most effective way to minimize legal risk when establishing these recruitment and hiring plans may be to rely on long-standing precedent that asks the following:

(1) Is the diversity plan remedial in nature and therefore designed to correct a manifest imbalance in a traditionally segregated job category?;
(2) Does the plan unnecessarily trammel the interests of majority or male employees who would be adversely affected by the favoring of another protected group (for example, a plan that replaces an existing employee in favor of a protected group)?;
(3) Is the plan indefinite or is there a time when it will no longer be necessary?; and
(4) Does the plan focus on expanding the recruiting pool or otherwise expanding opportunity generally to persons in the protected class, while still allowing an individualized employment decision that is not based on a protected characteristic?[25]

Courts have not provided a bright line rule to explain what might constitute a historical racial imbalance in a traditionally segregated job market that would warrant an affirmative action plan for private[26] or public employers.[27] But case law provides some guidance. In *Shea v. Kerry*, a white Foreign Service Officer brought suit alleging that the hiring plan maintained by the U.S. Foreign Service violated Title VII because the plan required plaintiff to enter the Foreign Service at a lower level than would be the case if he was a minority candidate.[28] The Foreign Service's race-conscious plan provided a single advantage to minority applicants: minority applicants for mid-level positions could be considered without having to provide a certificate of need.[29] Here, the court concluded that the imbalance between white and non-white Senior Foreign Service Officers was overwhelming—of the 655 officers, 631 were white—and might even indicate that discriminatory practices were afoot.[30] Testimony before Congress also established evidence of pervasive historical discrimination in the Foreign Service as early as the 1960s.[31] The plan was deemed adequately tailored to address imbalances at senior levels because it focused on hiring mid-level positions.[32]

Courts may examine statistics concerning the presence of minorities in a workforce population to assess whether an imbalance exists. In *Higgins v. City of Vallejo*,[33] a white man filed a reverse discrimination suit against the City of Vallejo, California, alleging that the hiring of a Black man in a firefighter/engineer position, instead of plaintiff, violated Title VII and other laws.[34] The court upheld the affirmative action plan, relying on evidence from the California Fair Employment Practices Commission of past discriminatory practices by the City of Vallejo: only 11.4% of the municipal workforce included diverse minorities (compared to the city's 30% minority population), and 7.3% of the workforce was Black (compared to 17% of the population).[35] Records also showed a racial imbalance in the city's fire department—only three Black people, including plaintiff, ever served as firefighter/engineer in the history of the fire department.[36] The court considered a number of factors in finding that the plan conformed with Title VII, including: (1) the plan did not establish any rigid quotas or discriminatory exclusions; (2) plaintiff did not have an absolute entitlement to the firefighter/engineer position because the city manager had discretion to choose among the top three applicants, and each candidate had some hope of promotion, but no "legitimate expectation of promotion"; (3) when he was denied promotion, plaintiff retained his job as firefighter, his salary, his seniority, and his eligibility for future promotion; and (4) the city's plan "[was] a temporary program designed to attain racial balance.

Employers that already maintain a racially balanced workforce may not grant a non-remedial preference in employment decisions merely to promote "racial diversity" where the plan is not intended to remedy discrimination or effects of past discrimination. In *Taxman v. Board of Education*, budgetary concerns required a public high school in New Jersey to reduce its teaching staff by one; the school had to decide whether to fire an equally qualified and tenured Black teacher or White teacher.[37] Relying on the school district's affirmative action plan, the school retained the only Black teacher in the school's business department and terminated the White employee.[38] The Third Circuit concluded that the voluntary affirmative action plan violated Title VII because it was not adopted "with the intention of remedying the results of any prior discrimination or identified underrepresentation of minorities" within the school district.[39] Data suggested that in 1976 and 1985, the percentage of Black employees in the job category, including teachers, exceeded the percentage of Black people available in the workforce.[40] The court relied on two additional grounds to make its findings: first, that the plan was devoid of sufficient definition and structure, which left the school board free to grant racial preferences that did not promote the policy's claimed purpose, if the board chose to do so; and second, the layoff of the White employee unnecessarily trammeled the rights of nonminority employees.[41]

Reducing Bias in the Applicant Pool

The EEOC's April 2006 Compliance Manual clearly states that Title VII forbids recruitment practices that purposefully discriminate because of race. However, the EEOC has acknowledged that Title VII permits diversity initiatives designed to expand opportunities for all applicants. For example, Section 15 of the Compliance Manual provides that if an employer notices that prospective Black employees are not applying for jobs in the numbers that would be expected given their presence in the labor force, the employer can lawfully adopt strategies to expand the applicant pool of qualified Black candidates—such as by recruiting at schools with high Black enrollment.[42]

Employment practices that are designed to achieve some identified numerical representation of minorities warrant careful implementation under Title VII and other civil rights laws prohibiting discrimination on the basis of race. But setting specific hiring goals to increase the percentage of Blacks in the workplace generally does not violate federal law as long as the targets remain goals and *not* quotas or inflexible goals. The diversity plan must be sufficiently flexible to allow each candidate to compete against all other candidates.[43]

When establishing hiring practices, a company should avoid implementing policies that limit, rather than expand, the pool of candidates. Establishing diversity protocols, such as diversity-focused talent sourcing initiatives and implementing a Rooney Rule[44] counterpart will likely be deemed permissible under Title VII because these protocols increase the number of minority candidates in the hiring pool itself. While some critics have claimed that the Rooney Rule is a form of reverse discrimination, the rule and similar counterparts do not establish an impermissible quota or require that any hiring decision be made on the basis of race. Instead, policies like the Rooney Rule seek to eliminate the racial imbalance that has persisted in traditionally segregated job categories by increasing the number of diverse candidates who are able to reach beyond the first round of the hiring process.

Because minority status is not the deciding factor in the hiring decision, courts have found similar rules to be valid under Title VII.[45] For example, in *Mlynczak v. Bodman*, four White male plaintiffs brought a discrimination suit alleging that the Department of Energy's affirmative action policy reflected a sub-culture of "reverse discrimination" that resulted in intentional discrimination against White males.[46] The plan stressed the active recruitment of women and minority candidates, but it did not contain quotas[47] and expressly prohibited decisionmakers from basing hiring and/or promotion decisions on race, ethnicity, and/or gender.[48] The plan also did not authorize management to give preference to less-qualified female or minority applicants for jobs or promotion.[49] The Seventh Circuit upheld the affirmative action plan as lawful under Title VII because it was designed to promote workplace diversity and expanded the pool of candidates for hiring and/or promotion.[50] The court concluded that an interest in ensuring a diverse applicant pool justified the active recruitment of non-White and women candidates notwithstanding the prohibitions on considering gender and race under Title VII.[51]

Tying Executive Compensation to Efforts to Promote Diversity and Inclusion Initiatives

To minimize the legal risk of tying executive compensation to diversity initiatives, compensation should reward diversity-related efforts, not results. A program that assesses executive performance and compensation with reference to diversity goals is not per se unlawful under Title VII. However, there is an increased risk of employer liability if an employee can demonstrate that the incentives under the compensation or evaluation policy caused a decisionmaker to impermissibly consider race when making a hiring, promotion, or termination decision.[52] For example, a White male plaintiff brought a discrimination suit against Walmart, alleging that a Hispanic woman was promoted instead of him due to Walmart's diversity placement goals and the evaluation of managers on efforts to support diversity. But the court held that "[a]lthough ten percent of a manager's job evaluation was based on attending one annual diversity event," the plaintiff had not presented evidence to demonstrate that managers were "influenced by [the diversity] policies" in making the challenged employment decisions.[53]

Therefore, in designing and implementing such a plan, *compensation incentives should not cause decisionmakers to unlawfully consider race when making individual personnel decisions*. But designed appropriately, such a compensation program can foster diversity and the inclusion of Black employees without significantly increasing legal risk to the company. Initiatives can avoid tying compensation to numerical hiring or promotion goals, and instead link compensation to diversity efforts, such as serving as an executive sponsor of an employee resource group, being a cross-cultural mentor, participating in regular implicit bias evaluations and training, identifying and remedying evaluation and development processes that may facilitate bias, or attending diversity events.[54]

Board Diversification Efforts

Decisions about who will be added to a Company's board generally carry less legal risk because directors are typically elected by shareholders and are not employees. Guidance issued by the EEOC supports this view. For instance, the EEOC Compliance Manual notes that "[i]n most circumstances, individuals who are partners, officers, members of boards of directors, or major shareholders will not qualify as employees."[55] Indeed, the test for whether an individual is a covered person under Title VII focuses on "whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control" and "[i]f the individual is subject to the organization's control, s/he is an employee."[56]

By their very nature, directors are often independent and are not controlled by the company, as their role is to oversee the company's executives and management. Therefore, companies may have the opportunity to be more aggressive in their board diversification efforts. The specter of shareholder derivative lawsuits also provides further incentive for board diversification efforts. These suits, which highlight a lack of diversity and request specific changes to corporate personnel or practices, also raise reputational risks.

Although decisions relating to the composition of a board of directors are not employment decisions and therefore are not covered by the anti-discrimination framework of Title VII, making board composition decisions based on a racial preference may raise potential concerns under Section 1981 of the Civil Rights Act of 1866, which prohibits discrimination on the basis of race, color, or ethnicity when making and enforcing contracts.[57] Thus, even in the absence of an employment relationship, a board member's relationship with a company may be deemed to be a contractual relationship that triggers Section 1981 coverage.[58] As a result, establishing a race-based quota could arguably constitute a facial violation of Section 1981,[59] although a plaintiff asserting a Section 1981 claim must prove that race was the "but-for cause" of the alleged injury—a very high burden, particularly if a board diversity plan does do not dictate that a company select any director based solely on their race.[60]

In short, although board members are not employees and thus not subject to protection under Title VII, there remains some risk under Section 1981 when making board composition decisions based on racial preference. Companies should provide clear guidance in board diversity proposals or plans that support aggressive efforts to diversify their boards, while mitigating against the potential risks of establishing quotas.

Supplier Diversity Commitments

In general, making commitments to spend a certain amount on Black-owned suppliers or only engage accounting/law firms that meet certain diversity targets presents few legal risks to companies. Companies (and individuals) are generally entitled to enter into contracts or transact with third parties based on the factors that they consider important, whether that is a long-term relationship with the supplier, the price, the perceived quality, or corporate social responsibility metrics such as Black ownership. That said, the same legal considerations around acceptable parameters of diversity-enhancing programs will be pertinent to the suppliers, who will bear the attendant risks in this area and should avoid basing hiring and other employment decisions on race.

Companies are equally entitled to include supply chain diversity requirements in the conditions contained in requests for proposals, as there are no federal or state laws prohibiting the inclusion of such contractual conditions. A company's decision to include supply chain diversity requirements as one condition that must be met by potential suppliers is unlikely to open it to liability under Section 1981. As noted above, the Supreme Court held in 2020 that "[a] [§1981] plaintiff bears the burden of showing that [the plaintiff's] race was a but-for cause of its injury."[61] The mere inclusion of supply chain diversity requirements would likely be viewed as just one factor permissibly considered by the contracting company and therefore not a but-for cause of any injury sustained by a supplier who does not win a contract.

On the other hand, a company lacking a supplier diversity program can be foreclosed from certain government contracting opportunities. Specifically, the U.S. government's Small Business Subcontracting Program requires certain federal contractors (any contractor whose federal contract is expected to exceed $700,000 (or $1.5 million for construction projects)) to define and meet certain spending thresholds on goods or services subcontracted out to companies owned by underrepresented groups, including Black-owned businesses.[62]

Endnotes

[1] Best Practices of Private Sector Employers, U.S. Equal Employment Opportunity Commission (website).
[2] Id.
[3] Sinio v. McDonald's Corp., 2007 WL 869553 (N.D. Ill. 2007) (holding that the existence of an African American Employee Resource Group and evidence of more favorable treatment of African American employees, was sufficient to raise triable issue of fact on disparate treatment claim brought by Asian American employee).
[4] Stacy Hawkins, "How Diversity Can Redeem the McDonnell Douglas Standard: Mounting an Effective Title VII Defense of the Commitment to Diversity in the Legal Profession," *Fordham Law Review* 83 (2015): 2456.
[5] Id.
[6] Id. at 2472.
[7] Ryan Mainhardt and William Volet, "The First Prong's Effect on the Docket: How the Second Circuit Should Modify the McDonnell Douglas Framework in Title VII Reverse Discrimination Claims," *Hofstra Labor & Employment Law Journal* 30 (2012): 259-260.
[8] *See* Sundiatu Dixon-Fyle, Kevin Dolan, Vivian Hunt, and Sara Prince, "Diversity Wins: How Inclusion Matters" (McKinsey and Co., May 2020); Paul Gompers and Silpa Kovvali, "The Other Diversity Dividend," *Harvard Business Review*, July-August 2018; David Rock and Heidi Grant, "Why Diverse Teams Are Smarter," *Harvard Business Review*, November 4, 2016; David Rock, Heidi Grant, and Jacqui Grey, "Diverse Teams Feel Less Comfortable – and That's' Why They Perform Better," *Harvard Business Review*, September 22, 2016.
[9] U.S. Equal Employment Opportunity Commission, "Select Task Force on the Study of Harassment in the Workplace," Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic (June 2016).
[10] Id.
[11] Id.
[12] Id.
[13] "Ford Motor Company to Pay up to $10.125 Million To Settle EEOC Harassment Investigation," August 15, 2017, U.S. Equal Employment Opportunity Commission.
[14] "Bass Pro to Pay $10.5 Million To Settle EEOC Hiring Discrimination and Retaliation Suit," July 25, 2017, U.S. Equal Employment Opportunity Commission.
[15] Significant EEOC Race/Color Cases, U.S. Equal Employment Opportunity Commission (website).
[16] Separate from voluntary affirmative action programs, certain federal contractors are required to implement affirmative action programs pursuant to three laws: Section 503 of the Rehabilitation Act of 1973 (applies to contractors with 50 or more employees and contracts over $50,000); the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (applies to contractors with 50 or more employees and a contract of $150,000 or more); and Executive Order 11246 (applies to federal contractors and subcontractors with 50 or more employees who have entered into at least one contract of $50,000 or more). Affirmative Action Program Requirements, Employment and Training Administration, U.S. Department of Labor.
[17] Affirmative Action Program Requirements, Employment and Training Administration, U.S. Department of Labor.
[18] Id.
[19] Id.
[20] Dev Stahlkoph, "Responding to the OFCCP on our June Diversity Commitments," October 6, 2020, Microsoft.
[21] Id.
[22] Kristopher J. Brooks, "Microsoft and Wells Fargo Committed to Diversity – the Feds Say Not So Fast," *CBS News*, October 9, 2020.
[23] Id.
[24] Clare Duffy, "Plans at Microsoft and Wells Fargo to Increase Leadership are Under Scrutiny from the Labor Dept.," *CNN Business*, October 7, 2020.
[25] United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193, 208 (1979); Patrick D. Smith and Katherine E. Anderegg, "Employer Diversity Initiatives: Where Are the Legal Risks," 2018, Bradshaw Law.
[26] "[P]rivate employers' affirmative action plans (1) must respond to a manifest imbalance in the work force; (2) must not 'unnecessarily trammel[ ]' the rights of members of the non-preferred class or 'create an absolute bar to their advancement'; and (3) must do no more than is necessary to attain a balance." Sharkey v. Dixie Electric Membership

Corp., 262 F. App'x 598, 604 (5th Cir. 2008) (citing Doe v. Kamehameha School/Bernice Pauahi Bishop Estate, 470 F.3d 827, 840 (9th Cir. 2006)).

[27] *Shea v. Kerry*, 796 F.3d 42, 57 (D.C. Cir. 2015).

[28] Id. at 46.

[29] Id. at 49–50.

[30] Id. at 59.

[31] Id.

[32] Id. at 64. Over a span of three calendar years, only sixteen minority candidates were hired into the mid-level roles through the affirmative action plan. Id. This data suggests a modest effect on the hiring process, and a plan that is limited in the extent to which it could trammel on plaintiff's rights "unnecessarily." Id.

[33] Higgins v. City of Vallejo, 823 F.2d 351 (9th Cir. 1987).

[34] Id. at 352.

[35] Id. at 356. When determining whether an affirmative action plan is established in response to a manifest imbalance in a traditionally segregated job category, courts may consider statistical disparities between the racial makeup of the employer's workforce and that of a "comparator population." Kerry, 796 F.3d at 57.

[36] *Higgins v. City of Vallejo*, 823 F.2d at 356.

[37] *Taxman v. Bd. Of Educ*., 91 F.3d 1547, 1550 (3d. Cir. 1996).

[38] Id. at 1550.

[39] Id. "Given the clear antidiscrimination mandate of Title VII, a non-remedial affirmative action plan, even one with a laudable purpose, cannot pass muster." Id.

[40] Id. at 1551–52.

[41] Id. at 1564.

[42] Cf. *Duffy v. Wolle*, 123 F.3d 1026, 1038-39 (8th Cir. 1997) ("An employer's affirmative efforts to recruit minority and female applicants [do] not constitute discrimination. An inclusive recruitment effort enables employers to generate the largest pool of qualified applicants and helps to ensure that minorities and women are not discriminatorily excluded from employment. This not only allows employers to obtain the best possible employees, but it is an excellent way to avoid lawsuits.") (citations and quotation marks omitted).

[43] EEOC, Section 15, available at https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination#N_111_/.

[44] The Rooney Rule is a policy of the National Football League requiring every team with a head coaching, general manager, or equivalent front office vacancy to interview at least one diverse candidate.

[45] The EEOC has cautioned, however, that as the workplace becomes more diverse and voluntary efforts are made by companies to recruit and hire from all groups, white males or other groups who traditionally have been the predominant employees of a particular workforce or occupation may perceive a direct threat to their employment opportunities. These individuals may attempt to impede the prospects of others. Best Practices of Private Sector Employers, U.S. Equal Employment Opportunity Commission (website).

[46] *See* Mlynczak v. Bodman, 442 F.3d 1050 (7th Cir. 2006).

[47] Quotas establish a fixed number or proportion of opportunities reserved exclusively for certain minority groups.

[48] See Mlynczak v. Bodman, 442 F.3d 1050 (7th Cir. 2006).

[49] Id.

[50] Id.

[51] Id.

[52] Stacy Hawkins, How Diversity Can Redeem the McDonnell Douglas Standard: Mounting an Effective Title VII Defense of the Commitment to Diversity in the Legal Profession, 83 FORDHAM L. REV. 2456 (2015).

[53] *Coppinger v. Wal-Mart Stores, Inc.*, No. 3:07cv458, 2009 WL 3163211 (N.D. Fla. Sept. 30, 2009); *see also Bajor v. Wal-Mart Corp.*, No. 08-12401, 2010 WL 779240, at *6–8 (E.D. Mich. Mar. 8, 2010).

[54] Stacy Hawkins, How Diversity Can Redeem the McDonnell Douglas Standard: Mounting an Effective Title VII Defense of the Commitment to Diversity in the Legal Profession, *Fordham Law Review* 83 (2015): 2456.

[55] EEOC Compliance Manual, Section 2 Threshold Issues, § 2-III.A.1.d, U.S. Equal Employment Opportunity Commission.

[56] Id.

[57] 42 U.S.C. § 1981. The U.S. Securities and Exchange Commission is currently considering a Nasdaq proposal to have companies publicly disclose and increase the diversity of their corporate boards. Alexander Osipovich, "Ruling on Nasdaq Diversity Plan for Boards Is Delayed by SEC," Wall Street Journal, March 10, 2021. The proposal requires, among other things, that at least two board members be diverse. Id. In the past, however, a similar proposed rule

(which was not ultimately adopted) drew criticisms that it could violate Section 1981. Specifically, a 2009 comment to a proposed rule by the SEC, the Center for Equal Opportunity stated: "Usually 'diversity' is understood to include racial and ethnic diversity. We strongly oppose any consideration of race or ethnicity in selecting individuals for a position on a corporate board. Such discrimination is wrong. It is also illegal. For a company to engage in racial or ethnic discrimination would violate 42 U.S.C. section 1981, which forbids such discrimination in any contractual relationship, which would include the relationship between a board member and a corporation. If board members are considered company employees, then it would also violate Title VII of the 1964 Civil Rights Act, 42 U.S.C. section 2000e et seq.").

[58] Such protection may exist even without an express written contract because of the board member's fiduciary duty to the board.

[59] In September 2020, Governor Gavin Newsom enacted AB 979, which requires California-headquartered public companies to have at least one director on their boards who is from an underrepresented community by the end of 2021. "Underrepresented" is defined as "an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender." Although companies in theory could potentially face some liability under Section 1981 for board quotas, even if mandated by California law, it does not appear that any companies have been subject to such a lawsuit since the enactment of AB 979. In addition, the California law has been challenged under the Equal Protection clause of the U.S. Constitution as well as provisions of the California Constitution. As such, the potential legal liability implications of AB 979 for corporations remains unclear.

[60] *See* Comcast Corp. v. National Association of African American-Owned Media, 140 S. Ct. 1009, 1014 (2020).

[61] Id.

[62] FAR Subpart 19.7.