



# How to Talk About Affirmative Action

The Fight Against Rampant Misperceptions

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- Biddle Consulting Group Institute for Workforce Development
  - Education and training arm of the Biddle Consulting Group
  - First-of-its-kind, free, online compliance encyclopedia
    - <https://portal.biddle.com/bcgi/resources>
  - Tools, guides, templates, and checklists that are actually useful
  - All-new training library with an all-new approach
- Biddle Consulting Group <https://biddle.com/>
  - AAP software and consulting
  - Test development and validation
  - Robust compensation analyses



# Talking About Affirmative Action

- This is your task (whether you like it or not)
  - HR/Compliance gets to talk about the hard stuff
    - Lots of “rules” to follow
      - What to say
      - What *not* to say
      - Etc.
    - Much of the “humanity” can get lost
- And we’re not very popular
  - HR/Compliance viewed as the “vice principal” of the organization
    - People are usually defensive and guarded



# Talking About Affirmative Action

- Two basic scenarios:
  - Talking about affirmative action in general
    - Largely company-wide training
  - “Personal” affirmative action discussions
    - Individuals who may (or may not) represent a “hurdle”
- Two basic types of people to target:
  - “Jimmy down at the bar”
    - Is against the whole thing for... reasons
  - “Ethan down at the farmers’ market”
    - Is a little too whole hog



# What *IS* “Affirmative Action?”

- Quotas, point systems, set asides
  - What most people think when they hear “affirmative action”
    - Jimmy thinks those things are bad
    - Ethan thinks those things are good
    - Jimmy is right
  - These are absolutely forms of affirmative action
    - But they are not the *only* forms of affirmative action
    - In fact, they are relatively rare (because they are generally *illegal*)
  - They are forms of *corrective* affirmative action
    - What happens when things go wrong



# Corrective Affirmative Action is Harmful

- Quotas, point systems, set asides, etc. not good for anyone
  - People on the “losing end” of the quota are harmed
  - People on the “winning end” are harmed, too
    - Have to carry the mantle of “affirmative action hire”
      - Not selected because of their skills and experience
      - Hard stigma to shake and terrible to live with
- So why do we do it?
  - Ask the Supreme Court (they’re the ones who invented it)
  - Have to encourage people to abide by the law
    - Spreading the suffering around meant to help poke people in the right direction





# What About Things Like the “Rooney Rule?”

- *Voluntary* corrective affirmative action?
  - Rare outside of universities and colleges, but it can be done right
  - Supreme Court precedent requires showing:
    - Problem with illegal discrimination (admitting to breaking the law)
    - Other potential solutions that don’t break the law not effective
    - Choose the thing that violates the law the least
    - Implement it only as long as absolutely necessary
  - NFL Rooney Rule is a prime example
    - Basically a diverse interview slate initiative
      - Initially highly effective
      - Expanded into “front office” positions
      - Some “backsliding,” so rule still in effect and “tinkered” with



# Corrective Affirmative Action is Rare

- Have to understand “reporting bias”
  - Just because something is reported a lot does not necessarily mean it is either common or even relatively important!
    - “If it bleeds, it leads” not something associated with the “historical record”
  - Car accidents – extremely common
    - Not reported unless they’re sensational
  - Aviation accidents – extremely rare
    - *Always* sensational, so always reported
- Corrective affirmative action is “sexy”
  - The affirmative action you and I practice is not :(





# Preventative Affirmative Action is Common

- But not well understood (even by people who practice it)
  - Title VII just says “don’t discriminate”
    - Prohibitive => reactive
  - E.O. 11246 says “and make sure you’re not”
    - Must be *proactive*
- Preventative affirmative action is just what it sounds like
  - All about *avoiding* the need for things like quotas
  - It is for *everyone*, not just “certain groups”
  - Everyone wins and nobody loses!
    - Unlike corrective affirmative action where everyone loses



# Explaining Preventative Affirmative Action

- Illegal discrimination is, well, illegal
- Our “Affirmative Action Plan” is designed to prevent and stop illegal discrimination in the first place
  - It is not actually about creating a diverse workforce
    - Despite all appearances!
  - It protects women *and* men
  - It protects POC *and* Whites\*
- Encourage people to raise their hand
  - Encourage critical questions

\*BCGi adopts the same convention as the EEOC when referring to the defined race/ethnicity categories, capitalizing them all, regardless of whether or not they contain a proper noun.



# Placement Goals

- They're not "goals" in the way we think of that term
  - Not something we try to achieve in the moment
- They are benchmarks for measuring the effectiveness of various efforts
  - That is not a distinction without a difference
- Explain the process
  - Looking for "suspicious demographics"
  - Investigating to figure out the cause
  - Benchmarks tell us what a well-running machine should look like
  - Not allowed to cheat, though.



# Stop Using the Term Placement Goals!

- But it's a "regulatory term," we have to use it!
  - Are you sure about that?
  - When talking to the OFCCP in an audit, sure
    - Otherwise, though, it is entirely up to you
- What to call them instead?
  - "Flags" seems to work well for many
    - More consistent with the underlying ideology, less misleading
  - Do we even have to talk about them at all?
    - Regulations require us to "report out" about our AAPs
    - Regulations do not say *how*



# What Do People NEED to Know?

- People are watching
  - There is value in knowing your work will be scrutinized
- AAP compliance is mandatory
  - These are not “hoops” set up for our amusement
    - There are very real potential legal consequences for noncompliance
- Documentation is absolutely critical
  - It is how we determine whether an indicator is actually a problem
  - If there is a problem, it’s how we identify what it really is (so we can fix it)



# “Affirmative Action for Women and Minorities”

- Regulations only require us to set “flags” for women and people of color
  - True!
  - But if you’re not checking for potential issues regarding men or Whites, you are potentially vulnerable
    - OFCCP will check (trust me)
      - Won’t write up a technical violation for not setting flags for men or Whites
      - They’ll just skip right to an investigation of potential discrimination!
- Remember:
  - “Technical” violations here or there are not that big of a deal
  - “Discrimination” violations, however, are a very big deal





# General Messaging

- Two types of affirmative action:
  - Corrective – which is bad
  - Preventative – which is good
- Our AAP is exclusively about *preventative* affirmative action
  - It is all about *avoiding* corrective affirmative action – which is bad
- Our AAP is for *everyone*
  - If you don't think it is for you, raise your hand



## “The Needle”

- Everyone is always talking about “moving the needle”
- But Title VII and the Supreme Court have been very clear:
  - Keep your hands off the needle!
- I don’t know where the needle should point, and neither do you
  - Needs to be able to move to where it needs to be on its own
  - NOT fixed in place where I (or you, or someone else) decides it should be
- OFCCP’s regulations directly support this
  - It’s all about removing “artificial barriers”
  - Making sure the company is not getting in the needle’s way



# I Don't Care If You're A Racist (or Sexist)

- I don't care much for labels one way or the other
  - They're generally not productive
  - They're usually hypocritical
- We all struggle with things we don't understand
  - We all have to make a conscious effort here
    - Be suspicious of people who think they don't!
  - We will all slip from time to time
- I don't care how you "feel" about the law, either
  - Feel your feels if it makes you feel better
  - But compliance with the law is not up for debate



# Final Word On Documentation

- OFCCP's regulations:
  - Document! Document! Document!
- Employers' tendency:
  - Whatever you do, don't write it down!
- Documentation will shed light
  - Question is, when do you want that light shed?
    - Earlier, before things grow teeth?
    - Later, when real damage is done?



# Final Thoughts



# Questions?

- Feel free to circle back with questions:  
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THANK YOU!!