



How to Talk About Affirmative Action

The Fight Against Rampant Misperceptions





What is BCGi?

- 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!!