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Diversity and Inclusion from a Compliance Perspective

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I. INTRODUCTION and SUMMARY

In a perfect world, "diversity and inclusion" strategy should be a completely separate and distinct concept from "compliance" considerations. However, as a practical matter, most organizations relate the two to each other with some organizations even defining "diversity" to mean compliance with equal employment opportunity laws.

A hybrid approach is probably the best approach, and one with the greatest chance of gaining organizational traction and effectiveness. Understanding that "compliance" efforts are not optional, this approach looks first at compliance and then examines the application and advantages of diversity and inclusion strategy.

The benefits of such an approach, especially as they relate to litigation, can be most appreciated when viewed in the context of current employment law trends. Accordingly, this paper will: (A) highlight some of the recent employment law cases, including the steady rise of easier to prove "retaliation" claims and the expansion of "who can sue for what;" (B) set forth the key elements of a comprehensive diversity and inclusion strategic plan; and (C) explore the advantages of such a plan from a compliance perspective.

NOTE: The contents of this paper and the related presentation are not and should not be deemed to be legal advice.

II. SHIFTS IN THE LAW

A. Retaliation

While modern federal civil rights legislation was first passed in 1964, over the years we have seen the expansion of the coverage the basic non-discrimination protection -- from race, color, religion, national origin and sex to age, disability and pregnancy. Moreover, the area of "harassment" has developed through case law and agency guidance.

The growth in the scope of employee protection at the federal level is exceeded by the expansion of coverage at the state and local levels, which now protect employees from discrimination on the basis of sexual orientation, gender identity or expression, appearance, marital status, etc.

In addition to this fundamental expansion, there is also the rise in the number of filings with the Equal Employment Opportunity Commission ("EEOC") alleging "retaliation." Often, a claim of retaliation accompanies another substantive claim of discrimination, e.g., race discrimination, sex discrimination, etc. The number of retaliation claims filed with the EEOC has risen steadily from FY 1997, when such claims numbered 18,198 and accounted for 23% of all claims, to FY 2011, when retaliation claims numbered a staggering 37,334, or 37.4% of all claims filed.

To prevail on a claim for retaliation, a Charging Party (or plaintiff) must demonstrate the following:

1. That as an Employee, he/she engaged in protected activity;
2. That the Employer took an adverse employment action against the Employee; and
3. That there is a causal connection between the protected activity and the adverse employment action.

From a compliance standpoint, retaliation claims are highlighted because they are easier to prove than the underlying substantive claim (e.g., race discrimination), as illustrated by *Fischer v. UPS*, 390 F. App'x. 465, 2010 WL 2994002 (6th Cir. 2010). In *Fischer*, the plaintiff/Employee sued his Employer for race discrimination and lost the case at trial. When he returned to work from a medical-related leave, the Employee's work performance was deemed deficient and he was terminated.

Fisher then sued the Employer again, this time for retaliation -- claiming that he was terminated not for poor job performance, but instead in retaliation for bringing his race discrimination case. Not only did he win his retaliation case, he recovered $650,000 in compensatory damages and another $300,000 in punitive damages.

B. Expansion of the Statute of Limitations

Clearly a landmark decision and one viewed favorably at the time by Employers, *Lilly M. Ledbetter v. The Goodyear Tire & Rubber Company, Inc.*, 550 U.S. 618 (2007), set the stage for another shift in the law -- this time in connection with <u>when</u> a plaintiff may successfully file a discrimination case.

The key facts in this case show that Ms. Ledbetter was a 20-year employee with the Employer and was the only female area manager when she decided to retire.

At this time, she received an anonymous tip that she was being paid considerably less per month than her male counterparts. Ms. Ledbetter earned $3,700 per month, while her male peers were paid between $4,300 to $5,200 per month. Because her compensation affected her retirement income, etc., Ms. Ledbetter sued her Employer only to have the 11th Circuit and the U.S. Supreme Court rule that her complaint was too late.

Ms. Ledbetter's compensation was established years before she filed suit. To be timely, her complaint had to be brought, the Court said, within the applicable statutory filing period of 180 days.

The resulting shift in the law occurred almost two years later in 2009, when Congress passed the Lilly Ledbetter Fair Pay Act of 2009. This Act amended Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act of 1973, "to clarify that a discriminatory compensation decision or other practice that is unlawful under such Acts occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practices … ." As a result of this statute, Employers may be sued based on any unlawful compensation disparity within 300 days of an employee's last paycheck, or shorter applicable filing period.

C. Expansion of who can sue and for what

A third area where employment law cases have expanded is much more substantive. In recent cases, verbal complaints have been held to constitute protected activity for purposes of a retaliation claim. See *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011). Indeed, a formal complaint is not even necessary to trigger the protection against retaliation if the employee discloses objectionable conduct (e.g., harassment) during an internal investigation of another employee's complaint. See *Crawford v. Metro. Gov't of Nashville and Davidson County, Tenn.*, 555 U.S. 271 (2009). And an employer's adverse employment actions against the fiancée of an employee who complained of sex discrimination can bring a third-party claim for retaliation. See *Thompson v. North American Stainless*, 131 S. Ct. 863 (2011).

Against this backdrop of major shifts in employment law, we should distinguish between "compliance" and "strategy."

III. "COMPLIANCE" vs. "STRATEGY"

A. A Distinction with a Difference

Simply put, "compliance" means just that -- compliance with all applicable laws, regulations, and organizational policies. The responsibility for compliance is an important one, but it is generally approached from a reactive standpoint. For

example, does Action A comply with our company policy and applicable law. Compliance is a near-term matter that is typically focused on the present.

On the other hand, strategy, more specifically "diversity and inclusion strategy," addresses business matters and takes a long-term approach. Generally, diversity and inclusion strategy is broad-based and is tied to an organization's core mission. It is comprehensive, proactive and continual.

In this author's view, to the extent an organization is successful with compliance efforts, especially with respect to workplace and employment laws, the employer will be successful utilizing diversity and inclusion strategies to its advantage.

B. Key Elements of a Comprehensive Diversity and Inclusion Strategic Plan

While strategic plans generally, and even more so diversity and inclusion strategic plans, are necessarily organization specific, there are several key elements that most successful plans have in common.

First, they are driven from the "top." Executive "buy-in" is essential. Grassroots efforts to work on diversity and inclusion strategy are excellent in the short-term and from an implementation standpoint. However, from a development standpoint, and especially over the long term, an organization's leadership must be committed to the strategy.

Second, a diversity and inclusion strategy must be tied to the mission of the organization. The organization must be able to articulate a "business case" or "organizational justification" for the strategy.

Third, the strategy should be comprehensive. As mentioned previously in the context of "compliance" vs. "strategy," some organizations limit work on diversity and inclusion to representation, equal employment opportunity, or other work force issues. A comprehensive strategy also includes efforts in the areas of workplace issues and marketplace opportunities.

Finally, a sound strategy will be supported by a communications strategy, which could include elements of training for internal audiences and pubic relations for external audiences.

IV. A PROACTIVE APPROACH

A. Employment Law 101

The steps outlined below represent how an organization might incorporate "diversity and inclusion strategy" into what otherwise might be a compliance effort. Consider the follow approach for decision-making in the employment context:

1. Thoroughly investigated
2. Well documented
3. Objective decision-making
4. Against a back drop of sound HR policy, training, and consistent enforcement
5. Buttressed by a diversity and inclusion strategy.

B. Advantages of a Proactive Approach

As we have seen from the current trends in employment law, employers need to be vigilant regarding employment practices. With monetary damages assessed against large companies ranging in the millions of dollars, employers are understandably concerned about their reputation, good will, and the bottom line.

Utilizing an effective and comprehensive diversity and inclusion strategy, Step # 5 above, may yield the following benefits:

1. Enhanced credibility of the organization
2. Demonstration of "good faith" efforts
3. Creation of employee engagement
4. Creation of community and supplier/vendor support
5. Mitigation against claims for workplace discrimination, harassment and/or retaliation and the attendant claims for compensatory and punitive damages.

While the case law is still developing in this area, at least one court has recognized a remedial advantage associated with diversity. In *Griffin v. Harrisburg Property Services, Inc.*, 421 Fed. App'x 204, 2011 WL 1227784 (3rd Cir., Apr. 4, 2011), the court found that the an employer's institution of diversity training was adequate remedial action. In these circumstances, the employer was able to avoid liability for damages, including punitive damages.

V. CONCLUSION

Development and implementation of an effective, comprehensive diversity and inclusion strategy is a journey -- one that begins with "awareness," followed by "understanding" resulting in "valuing" the benefits of such strategy.

Used proactively, the benefits of a diversity and inclusion strategy can include both addressing an organization's compliance obligations and furthering the organization's overall mission and goals.

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Elizabeth is an attorney and diversity practitioner with a successful record of working with business leaders, executives and teams to accomplish organizational goals. In her role as Partner and Chief Diversity Officer, she is responsible for the development and implementation of the diversity and inclusion components of the firm's strategic plan. She collaborates with the firm's Labor and Employment Section attorneys and is a frequent speaker, training facilitator and author on the topic of diversity and inclusion and related employment law topics.

She works closely with the chairs of the firm’s Diversity Committee and the Women’s Initiative Team, and is a member of the Recruiting, Professional Development and Associates Committees. She also collaborates with the firm’s marketing professionals to drive marketing and branding strategies; the Community Relations partner to identify opportunities to support community-based endeavors that align with the firm's strategic goals; human resources professionals to develop human capital strategies for all employees; and accounting professionals on the firm's supplier/vendor diversity pursuits.

Elizabeth is active in her community and sits on four non-profit boards: National Diversity Council; Texas PTA (Chair, Inclusiveness Committee); UNCF - Houston Leadership Advisory Council (Vice Chair); and Houston Urban Debate League (Chair).

During her career, Elizabeth has worked in the areas of administrative and employment law both in law firm and in-house counsel settings, and has led human resources, employment relations and diversity and inclusion strategies at large corporations. Before joining Andrews Kurth in February 2007, Elizabeth

served as Vice President of Employment Relations and Corporate Diversity Officer for ARAMARK in Philadelphia, Pennsylvania.

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