

# THE NATIONAL LAW REVIEW

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## Enhancing Workplace Diversity and Dispelling Myths Regarding Reverse Discrimination Claims

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As wise employers focus strategic initiatives to enhance diversity and inclusion in the workplace, we periodically receive questions about limitations for proactive approaches in this area. To be clear, companies that conduct business with the federal government (and the OFCCP knows who you are) likely are subject to regulatory obligation to ensure and, where necessary, take affirmative action regarding the placement of women, minorities, protected veterans and persons with disabilities in relation to their availability for respective positions. Similarly, companies subject to a consent decree, conciliation agreement with the EEOC or some other legal finding or settlement involving a disparity affecting persons in protected classes would be subject to obligation of proactive steps to remedy such disparity.

But what of the company that engages in a “voluntary affirmative action policy” or merely seeks to put additional teeth to its diversity initiatives by attaching a qualitative scorecard to progress? The potential concern is that such efforts lead to vulnerability for a reverse discrimination claim.

In reality, employers have a great degree of latitude to devise, learn from, enhance and formulate long-term strategic development around their diversity initiative. Irrespective of size, location or mission – employers are free to evaluate whether there is underrepresentation of diverse persons in various job groups and to consider initiatives to remedy that imbalance. Even where an employer has no statistically demonstrated imbalance, a company may focus policies and practices to recruit employees from a more diverse applicant pool or encourage the development of a diverse management team.

External counsel can be helpful to this process in a number of ways, whether evaluating the impact of a reduction in force on diversity or conducting an assessment to determine how operations, human resources, supply chain and succession planning are succeeding or failing on diversity goals. Attorney-client privilege is important this area in consideration of potential discovery in litigation. A [recent appeals court decision](#) from the D.C. Circuit provides positive support for protection of documents where a significant purpose of the communication was obtaining or providing legal advice.

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