

Workplace Diversity, Equity, and Inclusion Programs: Inclusive Environments and Diversity Promotion Programs

By ZACHARY MCCOY*

Introduction

DIVERSITY, EQUITY, AND INCLUSION (“DEI”) programs have become commonplace in the hiring process for many companies within the United States. The United States Supreme Court has indicated that, in certain circumstances, it is permissible for employers to consider an interest in increasing diversity while selecting an individual for a position in a particular workplace.¹ Meanwhile, multiple studies have been published that show companies with more diverse teams produce higher revenue because the large variety of ideas brought to the table by people with different backgrounds and life experiences lead to an increase in innovation in the workplace.²

* Zachary McCoy graduated Magna Cum Laude from USF School of Law in 2020. During his time at USF he also received the Pemberton Award for Excellence in the Study of Labor and Employment Law and a Certificate in Labor and Employment Law. He currently works in the field of elder law focusing on Conservatorships and Guardianships. He gives utmost thanks and gratitude to Professor Maria L. Ontiveros, his wife Isabel Callejo-Brighton, the members of the Spring 2020 Employment Law Seminar, and everyone from USF Law Review Volume 55, especially Bianca Velez. Without the help of all of you, this Article would not have been possible.

1. See *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979) (finding that a plan hiring one Black employee for each white employee is within the bounds of Title VII); see discussion *infra* Section I(B).

2. Vivian Hunt, Dennis Layton & Sara Prince, *Why Diversity Matters*, MCKINSEY & CO. (Jan. 1, 2015), <https://www.mckinsey.com/business-functions/organization/our-insights/why-diversity-matters> [<https://perma.cc/S5QT-ZWX6>] (explaining that companies in the top quartile for gender or racial and ethnic diversity are more likely to have financial returns above their national industry medians); Marcus Noland, Tyler Moran & Barbara Kotschwar, *Is Gender Diversity Profitable? Evidence from a Global Survey* (Peterson Inst. for Int’l Econ., Working Paper No. 16-3, 2016), <https://www.piie.com/system/files/documents/wp16-3.pdf> [<https://perma.cc/VB93-4KFQ>] (discussing how greater gender balance among corporate leaders is associated with higher stock values and greater profitability);

However, many companies with DEI programs have not managed to right past wrongs by creating diverse workplaces that reflect the demographics of the surrounding eligible population.³ In fact, while companies have made their programs appear more robust, the modifications to the programs are largely in the form of bells and whistles, which do not result in any real impact on the efficacy of current DEI programs.⁴ If research shows that increased diversity in the workplace improves profits and increases employee productivity, companies need to embrace a new type of DEI program—the type that will increase diversity in the workplace while also ensuring that diverse employees are comfortable and are given the same opportunities as their non-diverse colleagues—all while staying within the confines of Title VII of the Civil Rights Act of 1964 (“Title VII”).

In order for a DEI program to comply with Title VII, it must not discriminate against employees on the basis of sex, race, color, national origin, or religion.⁵ However, for a DEI program to work, a workplace must provide some form of affirmative action program within either the hiring process or in the workplace context after hiring. Affirmative action programs are supposed to ensure equal opportunity.⁶ The programs go beyond encouraging nondiscrimination and are supposed to require the organization implementing them to take affirmative steps designed to make their particular pool of employees reflective of the relevant labor pools.⁷ Affirmative action has been allowed in the workplace by the Court in several instances.⁸ Initially, the Court in *United Steelworkers of America, AFL-CIO-CLC v. Weber* allowed affirmative action in the selection of Black applicants to fill open positions in various Kaiser Aluminum and Chemical Corporation plants until the number of Black employees was equal to the corresponding

see, e.g., Rocío Lorenzo et al., *How Diverse Leadership Teams Boost Innovation*, BOS. CONSULTING GRP.: HENDERSON INST. (Jan. 23, 2018), <https://www.bcg.com/en-us/publications/2018/how-diverse-leadership-teams-boost-innovation.aspx> [https://perma.cc/UST2-WA6G] (increasing the diversity of leadership teams leads to more and better innovation and improved financial performance).

3. Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REV. (July–Aug. 2016), <https://hbr.org/2016/07/why-diversity-programs-fail> [https://perma.cc/33F2-DKER].

4. *Id.*

5. 29 C.F.R. § 1606.2.

6. 29 C.F.R. § 30.4(a)(1).

7. 29 C.F.R. §§ 30.4(a)(1)–(2).

8. See *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Johnson v. Transp. Agency*, 480 U.S. 616 (1987); *Ricci v. DeStefano*, 557 U.S. 557 (2009).

proportion of Black citizens within the local populations surrounding each of the various plants.⁹

In 1987 and again in 2009, the Court also seemingly approved certain affirmative action programs for employees who are already part of the workforce.¹⁰ In the first of these cases, *Johnson v. Transportation Agency of Santa Clara County*, the Court found that a plan that took the sex of the applicant into account did not run afoul of Title VII.¹¹ Over twenty years later, the Court decided *Ricci v. DeStefano*, which involved a group of firefighters who sued the city of New Haven when it threw out test results for fear of having a Title VII claim filed against it if it, certified the results.¹² The Court ultimately decided that an employer cannot take a race-based action under Title VII unless it can show that without taking the action it would be susceptible to liability.¹³ The converse of this is if an employer can show it will be susceptible to liability under Title VII without using criteria that include consideration of a protected class, then it can use this criteria post-employment to make decisions about promotions and other workplace policies.¹⁴

This Article argues that given the current legal landscape, DEI programs are not as ambitious as they need to be, and that this shortcoming is a hinderance to the modern-day workforce. Additionally, DEI programs are not doing all they are allowed under Title VII to encourage, facilitate, and ensure diversity in the workplace. While the use of diversity as a factor for hiring has been in place for a long time, employers have not kept up with what the Court seems to indicate would be allowed under the current confines of Title VII. In other words, employers have systematically failed to incorporate post-hiring DEI initiatives. In order for workforces to thrive in a society that is becoming increasingly diverse, employers must incorporate more post-hire DEI initiatives. Employers need to take the Court's lead and expand the scope of what their DEI programs actually do to increase diversity. This should not only be encouraged in the hiring process, but also in post-hiring decision-making, so that all levels of the workforce are representative of the surrounding eligible population, not just the entry-level workforce. Broadening the focus of DEI pro-

9. *Weber*, 443 U.S. at 208–09.

10. *See Johnson*, 480 U.S. at 641–42; *Ricci*, 557 U.S. at 563.

11. *Johnson*, 480 U.S. at 641–42.

12. *Ricci*, 557 U.S. at 561–63.

13. *Id.* at 563.

14. *See id.*

grams is necessary to ensure employers are not only getting diverse employees in the door, but also that they keep and promote those employees into all tiers of employment and leadership. The addition of inclusive environment and promotion programs is essential to ensure that this goal is achieved.

In Section I, this Article delves into what DEI programs are. This section also discusses whether DEI programs are currently meeting the goals they are meant to achieve. Section II discusses the current legal foundation for DEI programs in the context of various cases that the Court has handled on the matter. Section II also explains how certain programs could be implemented by employers and potentially be used as affirmative defenses to certain Title VII claims. The Article lays out a clear-cut rule that employers can follow in designing their policies. Section III discusses how modern plans should be designed to accomplish the most for both the employee and the employer. Such a plan will help companies in developing future DEI strategies while not running afoul of the current legal requirements. Finally, this Article concludes with a recommendation on how to move forward with the information discussed.

I. Diversity, Equity, and Inclusion Programs: What Are They, and Do They Work?

At first glance, the objectives of a DEI program seem fairly straightforward: to increase diversity in the workforce, to make the workplace more equitable, and to engender a feeling of inclusion among all employees in the workplace.¹⁵ But below the surface, DEI programs are complex and multifaceted, both in their goals and in what they actually achieve.¹⁶ While the workplace environment has improved drastically since the implementation of Title VII, the effectiveness of DEI programs must still be questioned. Before passing judgment on whether these programs work, they must first be properly defined.

15. Somen Mondal, *Diversity and Inclusion: A Beginner's Guide for HR Professionals*, IDEAL (Jan. 1, 2020), <https://ideal.com/diversity-and-inclusion/> [https://perma.cc/D6NR-X7SV].

16. See Jim Link, *The Difference Between Workplace Equity and Equality, and Why It Matters*, FORBES (Aug. 15, 2019, 8:00 AM), <https://www.forbes.com/sites/forbeshumanresourcescouncil/2019/08/15/the-difference-between-workplace-equity-and-equality-and-why-it-matters/#f18434c3d318> [https://perma.cc/8FCB-G4ZZ].

A. What Are Diversity, Equity, and Inclusion Programs?

In the field of psychology, diversity is typically looked at as any differences between individuals that cause the perception of difference.¹⁷ Workplace diversity, however, is perceived differently by different people.¹⁸ Some see workplace diversity as combining different people's experiences and taking advantages of the difference to innovate while others consider diversity to be equal and fair representation without consideration of demographics.¹⁹ Workplace diversity, for purposes of this Article, will mean understanding, accepting, and valuing differences between people, including, but not limited to those of different races, ethnicities, genders, ages, religions, disabilities, and sexual orientations.²⁰ Workplace diversity also takes into account differences in education, personalities, skill sets, experiences, and knowledge bases.²¹

Equity is commonly misconceived as only referencing the pay that each employee receives in a given position.²² Compensation is certainly a very important aspect of equity, but defining equity in a way that is quantifiable solely by pay or any other measure misses the point, and can also lead to counterproductive situations.²³ Additionally, the concepts of equity and equality are frequently confused with each other.²⁴ While the two concepts both exist on the same trajectory of workplace DEI programs, equality is only achieved when all employees are both empowered and comfortable bringing up their thoughts and ideas in the presence of the entire company—including their supervisors and coworkers.²⁵ As such, equality is really the end goal of any DEI program.

Diversity, equity, and inclusion must all be present before equality can exist. Equity, on the other hand, is the process of putting all employees on equal footing in the workplace.²⁶ What equity means is also dependent on each particular workforce; by proxy, this means

17. Daan van Knippenberg & Michaéla C. Schippers, *Work Group Diversity*, 58 ANN. REV. PSYCH. 515, 517 (2007).

18. Mondal, *supra* note 15.

19. *Id.*

20. *Id.*

21. *Id.*

22. *See* Link, *supra* note 16.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

that equity changes as the diversity of each workforce changes.²⁷ Some considerations for equity include “learning and development opportunities and opportunities for growth, success and promotion . . . parity in the way projects are divvied up and assigned can [also] go a long way to[wards] ensuring equity.”²⁸ Lastly, to ensure that equity is actually achieved, it is important to make sure that the managerial and supervisory staff are all aware that the company is implementing DEI measures and that they are all in agreement about the way the DEI program will be implemented and used moving forward.²⁹

The last definition needed before beginning the assessment of current programs is the definition of inclusion. Inclusion, in the simplest definition, means “the act of including[] [or] the state of being included;” however, when the term is viewed more carefully, it becomes increasingly complicated and varies from institution to institution.³⁰ While inclusivity varies between institutions, the Chief Executive Officer of Stack Education,³¹ Peggy Yu, solicited some insights from former students of the program on what inclusivity might mean to them.³² The results included the following: all gender-friendly bathrooms; a nursing room for mothers; “using gender neutral language throughout company benefits and policies;” “including non-alcoholic beverages at company events;” ensuring that executives and top management reflect the diversity the organization seeks; providing tampons and pads in all bathrooms; “providing a quiet, meditative, no-technology, no-talking space where weary introverts can go to restore and rejuvenate;” and acknowledgment of “all religious and cultural holidays celebrated by the organization’s employees.”³³

While this list is far from comprehensive, it begins to trace the edges of what employers should consider before deeming their DEI program complete, or, for that matter, successful.

Now that the terms DEI programs tout as their goals have been defined, the impact of these programs can be assessed in order to

27. *Id.*

28. *Id.*

29. *Id.*

30. Peggy Yu, *What Should Inclusion Really Look Like in the Workplace?*, FORBES (Jan. 17, 2018, 12:04 PM), <https://www.forbes.com/sites/peggyyu/2018/01/17/what-should-inclusion-really-look-like-in-the-workplace/#2d05566f53f0> [https://perma.cc/U6RG-FDR9].

31. *See generally* Peggy Yu, *Peggy Yu: About*, FORBES (Apr. 26, 2019), <https://www.forbes.com/sites/peggyyu/#25739b3f1650> [https://perma.cc/L8AU-ETJN]. Stack Education is dedicated to closing the gap between what higher education institutions teach and what the job market actually demands of its workers. *Id.*

32. Yu, *supra* note 30.

33. *Id.*

determine whether they have been successful in achieving these goals, or if DEI programs have fallen short of the goals set forth and need to be modified in order to achieve success in the future.

At their most basic, DEI programs—as discussed above—are designed to increase diversity in the workplace. Modern day programs are more attuned to the selection process, and they focus on trying to get employees in the door. In order to really be successful, DEI programs need to make a fundamental shift from being selection-only programs to being programs that also take action to promote the long-term success of all employees. The initial shift must allow diverse employees to be more comfortable in the workplace, then eventually the shift will create more opportunities for diverse candidates in management and executive roles.

1. What Diversity, Equity, and Inclusion Programs Currently Are and What They Are Meant to Achieve: The Selection Process

Diversity training programs are currently in place at many Fortune 500 companies in the United States.³⁴ The programs are designed to increase diversity in the workplace and ensure that companies hire a representative population of employees based on the surrounding eligible workforce pool.³⁵ The goals of these programs are typically implemented through hiring procedures, by looking at the diversity of an applicant as one factor when hiring new employees for openings at the company.³⁶ This measure is taken during the recruitment, hiring, and selection process for new employees.³⁷

However, once an employee is in the door there is often little to no support for his or her continued success in the company.³⁸ The employee often becomes the token-diverse employee at a business, and the business does nothing more to support the candidate.³⁹ Tokenism is the practice of doing something only to prevent criticism and to give the appearance that a company treats all employees and

34. See Dobbin & Kalev, *supra* note 3.

35. See *id.*

36. See *id.*

37. See *id.*

38. Kara Sherrer, *What Is Tokenism, and Why Does It Matter in the Workplace?*, VAND. UNIV. (Feb. 26, 2018), <https://business.vanderbilt.edu/news/2018/02/26/tokenism-in-the-workplace/> [<https://perma.cc/JH4V-5V2A>].

39. *Id.*

applicants fairly.⁴⁰ A key component of tokenism, according to Consuela Knox,⁴¹ is also the employer's intent, which is often difficult to ascertain.⁴² The issue could be many things, including: that the employer is hiring a token; that the employer truly wants diversity and their program is just beginning; or that the employer truly wants diversity, but past programs have been unsuccessful.⁴³ Ideally, DEI programs would prevent the issue of tokenism altogether by creating a welcoming culture at every company.⁴⁴ If companies implement successful DEI programs, tokenism would ideally cease to exist.

Some people think DEI programs result in the promotion of diverse individuals solely on the basis of diversity. Many who support this idea feel that when employers use affirmative action in making any hiring, admissions, or promotion decisions with diversity as a factor, employers and educational institutions minimize the individual success of diverse candidates.⁴⁵ These critics of affirmative action posit that by taking diversity into account when making these types of decisions, the actual qualities and accomplishments of any diverse candidate selected are automatically subject to scrutiny by coworkers and other members of society.⁴⁶ This scrutiny is based on the argument that the diverse individuals chosen for a given position were *only* chosen for their identity or diversity and not because of their capabilities.⁴⁷

Both of the above views hold merit. Individuals promoted for their diversity are certainly subject to tokenism as some employers seek to appear diverse by hiring employees from differing backgrounds. Equally possible is the chance that a diverse employee's merits in a given position are questioned when a DEI program is used in a given workplace. Because of this possibility, it is important to note that the use of diversity as a factor in any DEI program should be just that—a factor. The sole decision should never be based on diversity alone, as that type of decision just reinforces both of the above lines of thinking. By ensuring that all employees are qualified when promoted

40. *Id.*

41. *Id.* Consuela Knox is the Director of Admissions Operations and Diversity Recruiting Manager at Vanderbilt University, Owen Graduate School of Management. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. Shelby Steele, *A Negative Vote on Affirmative Action*, N.Y. TIMES MAG. (May 13, 1990), <https://www.nytimes.com/1990/05/13/magazine/a-negative-vote-on-affirmative-action.html> [<https://perma.cc/EE3Q-F283>].

46. *Id.*

47. *Id.*

and only using diversity as one factor in decision-making, DEI programs will work effectively, avoid tokenism, and dispel doubts about the work ethic or efficacy of work product of the candidates promoted.

DEI programs today tend to focus more on numbers and appearances rather than their actual successes.⁴⁸ Because the focus of these programs tends to be superficial, the actual message of the program does not take root at the core of companies' beliefs and practices.⁴⁹ When these values are not embraced by all employees, all management, and all executive officers, the programs cannot achieve the goals they are designed to accomplish.

2. What Diversity, Equity, and Inclusion Programs Need to Be: Post-Hiring Measures That Ensure Equal Success for All in the Workplace

The models discussed above are used by the majority of U.S. employers who consider diversity as a goal of their employee workforce.⁵⁰ While these models have been largely successful in the previous decades, their usefulness has come to an end. Today's workforce needs to not only have baseline diversity at the entry level but needs diversity throughout all levels of the workplace structure. The only way that this can happen is for employers to fully embrace what the courts allow and implement new measures in their post-hiring practices.

Various courts have allowed employers to push the envelope when it comes to what they can do to ensure employee success and promotion. Post-hiring programs come in two varieties.⁵¹

The first type of post-hiring DEI program is relatively easy to implement and is also easily visible both internally and externally. This Article refers to this type of program as a promotion-based diversity program. Promotion-based diversity programs are internal promotion programs. Promotion-based diversity programs either consider diversity when promoting internal employees or when hiring managerial or

48. Dobbin & Kalev, *supra* note 3.

49. Glenn Llopis, *Diversity Management Is the Key to Growth: Make It Authentic*, FORBES (June 13, 2011, 7:41 AM), <https://www.forbes.com/sites/glennllopis/2011/06/13/diversity-management-is-the-key-to-growth-make-it-authentic/#2ac6c4d266f3> [https://perma.cc/5JGK-SM8H].

50. *The New Frontier of DEI Programs*, SIXFIFTY (2020), <https://www.sixfifty.com/the-new-frontier-of-dei-programs/> [https://perma.cc/6CRK-VEE4].

51. See *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Johnson v. Transp. Agency*, 480 U.S. 616 (1987); *Ricci v. DeStefano*, 557 U.S. 557 (2009).

senior employees from outside of the organization.⁵² For example, an employer could implement a fellowship or mentorship program that fosters internal promotion.

The participants of the promotion-based diversity program could be chosen based on a range of factors including talent, current success in the workplace, and diversity. The diversity factor needs to be multi-faceted and should include race, gender, religious beliefs, socio-economic status, and sexual orientation. This is not an exhaustive list of factors that should be considered when determining diversity within a workforce. Any factor that allows an employee to bring a different viewpoint to the workforce should be considered when making decisions based on diversity.

Assuming that an employer who implements a promotion-based diversity program is already making entry-level employment decisions centered on diversity, promotion-based diversity programs should aim at developing senior and managerial teams that mirror the diversity of the local eligible workforce and the diversity of the workplace itself.

The second type of post-hiring DEI program is more difficult to implement, explain, and detect both internally and externally. This type of program does not necessarily promote or hire individuals using diversity as a factor. Instead, employers should take measures to make sure that existing diverse employees feel a sense of belonging.

These programs should strive to create a workplace culture in which all employees feel welcome and included. Measures should be taken to ensure not only a feeling of culture and inclusivity but also the long-term success of all employees within the workplace. This can range from teaching cultural awareness to implementing a worry-free way for employees to lodge complaints. These changes are more subtle and should be designed to ensure that all employees are equally welcomed and valued in their workplace environment.

B. Are Diversity, Equity, and Inclusion Programs Working?

Generally speaking, each of the above definitions should be taken into account when measuring the success of DEI programs. The ideal DEI program would incorporate all three definitions to the fullest and would have a workforce that is representative of the surrounding labor pool at the entry level and in high-level, long-term positions, such as managerial staff. The institution would, ideally, have a diverse labor pool in all layers of the organization and all employees would feel

52. See generally Dobbin & Kalev, *supra* note 3.

welcome, at ease in their working environment, and comfortable sharing thoughts and concerns with fellow employees as well as with the supervisory staff.

However, each employer will have different goals for their DEI program based on a number of factors, including: the industry they are in; their current workforce; and the surrounding population of eligible workers.⁵³ Additionally, a DEI program's success cannot be determined with a cursory look at employee demographics. If a company appears exceptionally diverse on paper, it is important to look at the numbers in depth. For example, if the DEI program numbers were at a private school, it would be important to determine whether all of the diverse employees work in certain positions, such as cafeteria and janitorial staff or if the diverse employees are more spread out and included in teaching staff and the principal's office. If the majority of diverse employees are lower on the pay scale and in lower-level positions in the school, then the DEI program is not working at a satisfactory level. Finally, another factor to consider is the tenure of each employee at the institution. If the diverse employees that are in higher-ranked and higher-paid positions are relatively new, and there is a high turnover rate among employees of that class, then it is likely that the equity and inclusion pieces of the DEI program are failing.

Depending on which study is examined, DEI programs are either succeeding with fantastic results or failing miserably.⁵⁴ Measuring the success of a DEI program is very specific to the location and industry of each employer. The composition of a plumbing company in Oklahoma City, Oklahoma will, by necessity, be very different than that of an information technology office in Palo Alto, California. How-

53. See generally *Corporate Diversity Programs in 2019: What's Working and What's Not*, APERIAN GLOBAL (Mar. 14, 2019), <https://www.aperianglobal.com/companies-making-diversity-programs-priority-2019/> [<https://perma.cc/B4RK-FXN6>].

54. See Patsy Doerr, *Four Companies That Are Getting Diversity & Inclusion Right - and How They're Doing It*, FORBES (Nov. 5, 2018, 3:35 PM), <https://www.forbes.com/sites/patsy-doerr/2018/11/05/four-companies-who-are-getting-diversity-inclusion-right-and-how-they-re-doing-it/#4ab19ff57a2b> [<https://perma.cc/6WZQ-UVMT>] (discussing the positive outcomes for companies that have implemented DEI programs in a successful manner and how they came about doing so); Sheila Callahan, *The One Critical Element Missing from 92% of Diversity and Inclusion Strategies*, FORBES (July 25, 2019, 8:11 AM), <https://www.forbes.com/sites/sheilacallahan/2019/07/25/the-one-critical-element-missing-from-92-of-diversity-and-inclusion-strategies/#7376b3b74508> [<https://perma.cc/3JTY-R7FD>] (discussing the fact that most DEI programs are not successful because they focus on race, gender, and other factors while simultaneously failing to consider the impact that age has on the success of their programs); Mondal, *supra* note 15 ("The issue stems from the fact that 70% of companies believe they are effective at attracting and retaining diverse employees, yet only 11% actually understand what [diversity] is.").

ever, the measure of whether their DEI programs are successful should remain constant. If the employees at all levels of a given company reflect the local eligible population for work, then the program is succeeding.

Unfortunately, many DEI programs are failing to meet the mark on this front.⁵⁵ For example, banking industry companies such as Morgan Stanley and Merrill Lynch spent hundreds of millions on sex and race discrimination cases in the 1990s and 2000s.⁵⁶ Since then, these companies have made some changes to their DEI programming.⁵⁷ However, these programs had very limited and, in some cases, negative results.⁵⁸ While Hispanic managers at commercial banks in the United States rose over 1% in eleven years, white women's representation fell by 4% in the same period of time.⁵⁹ Furthermore, the representation of Black men in management of these banks fell by .2%, which seems like a lesser concern until the realization is made that the total number of Black male managers only totaled 2.3% in 2014.⁶⁰ It is also important to note that between 1985 and 2014, Black male management increased overall by .3%, from 3% to 3.3%.⁶¹ From 1985 to 2000, white women in managerial positions rose by 7%, from 22% to 29%.⁶² However, the numbers stagnated after 2000 for white women and after 2014 for Black men.⁶³

In short, the DEI programs currently used by employers are not increasing diversity in the workplace.⁶⁴ In many instances, the company creates these programs for the appearance of diversity in the workplace, and many of these programs are slightly reshaped from the programs existing in the 1960s.⁶⁵ The primary issue with this is that society, and our population, have changed drastically in the last sixty years. Despite these drastic changes, employers continue to use the same three criteria from the 1960s: diversity training to reduce bias on the job, hiring tests and performance ratings to limit bias in recruit-

55. *See* Dobbin & Kalev, *supra* note 3.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

ment and promotions, and grievance systems that are supposed to give employees a way to challenge their managers.⁶⁶

While these archaic programs have many drawbacks, the most important include: the positive effects of diversity training rarely last more than a day or two and can sometimes even cause more bias or backlash in the workplace; often times, hiring tests are applied selectively so that the manager still retains the power to hire the individuals they prefer; and finally, grievance procedures tend to allow an employee to report a situation, but that employee often then suffers from retaliation due to the complaint they filed.⁶⁷ In 2016, Harvard Business Review conducted a study on the impacts of these programs on different categories of diverse applicants and employees.⁶⁸ The impact among managers was significant for all but white men.⁶⁹ The data shows vast disparities in management among diverse employees.⁷⁰

Poor Returns on the Usual Diversity Programs

The three most popular interventions make firms less diverse, not more, because managers resist strong-arming. For instance, testing job applicants hurts women and minorities—but not because they perform poorly. Hiring managers don’t always test everyone (white men often get a pass) and don’t interpret results consistently.

% CHANGE OVER FIVE YEARS IN REPRESENTATION AMONG MANAGERS

Type of program	White		Black		Hispanic		Asian	
	Men	Women	Men	Women	Men	Women	Men	Women
Mandatory diversity training				-9.2			-4.5	-5.4
Job tests		-3.8	-10.2	-9.1	-6.7	-8.8		-9.3
Grievance systems		-2.7	-7.3	-4.8		-4.7	-11.3	-4.1

NOTE GRAY INDICATES NO STATISTICAL CERTAINTY OF A PROGRAM'S EFFECT.
 SOURCE AUTHORS' STUDY OF 829 MIDSIZE AND LARGE U.S. FIRMS. THE ANALYSIS ISOLATED THE EFFECTS OF DIVERSITY PROGRAMS FROM EVERYTHING ELSE GOING ON IN THE COMPANIES AND IN THE ECONOMY.
 FROM "WHY DIVERSITY PROGRAMS FAIL," BY FRANK DOBBIN AND ALEXANDRA KALEV, JULY-AUGUST 2016 © HBR.ORG

Diversity in the management team leads to a more diverse workforce.⁷¹ In turn, the atmosphere created by a more diverse management team leads to a more authentic DEI program because the management team holds the values being emphasized as core beliefs.⁷² If a DEI program must incorporate real and long-lasting diver-

66. *Id.*
 67. *Id.*
 68. *Id.*
 69. *Id.*
 70. *Id.*
 71. See Llopis, *supra* note 49.
 72. *Id.*

sity into its managerial team in order to cultivate long-term benefits to the organization, then it naturally follows that current DEI programs are not performing to their highest potential, and in some cases are actually causing long-term detriment to companies.⁷³

When looking at the diversity of the population of the United States and comparing that to the percentage of individuals in management or the C-Suite (CEO, CFO, etc.), it rapidly becomes clear that DEI programs are not meeting their apparent purpose.

II. Diversity, Equity, and Inclusion Programs: Is Affirmative Action Prohibited or Allowable in the Workplace?

The previous section discussed what DEI programs currently are doing and what they should be doing. In an ideal world, employers would make hiring and promotion decisions with diversity at the forefront of their consideration with no reproach. However, Title VII and the Court have put limitations on what employers can and cannot do. While these decisions were initially made to prevent overt racism and sexism (just to mention a couple reasons), the same decisions now sometimes stand in the way of creating the most diverse and effective workforce possible.⁷⁴

A. What is Affirmative Action?

To its critics, affirmative action is both a euphemism for discrimination against white men and a system that bureaucratizes the entire society at the cost of meritocratic decision making; it is a symbol for all that has gone wrong with American society since the sixties. To its supporters, it is a first step towards remedying the crime of slavery and eliminating the discriminatory preferences that have guaranteed white men the easiest paths to wealth and power; it is a symbol of justice, and a promise of a future of hope.⁷⁵

Affirmative action, whether you are a fervent supporter or a critic, is necessary especially in the United States because it provides a remedy for past and continuing effects of societal discrimination in a broad range of activities ranging from slavery to issues of gaining promotion in the workplace.⁷⁶ While slavery was officially abolished in

73. *Id.*

74. Louis Menand, *The Changing Meaning of Affirmative Action*, *NEW YORKER* (Jan. 13, 2020), <https://www.newyorker.com/magazine/2020/01/20/have-we-outgrown-the-need-for-affirmative-action> [https://perma.cc/TXX5-39B8].

75. David Benjamin Oppenheimer, *Distinguishing Five Models of Affirmative Action*, 4 *BERKELEY WOMEN'S L.J.* 42, 42 (1988-89).

76. MARIA L. ONTIVEROS ET AL., *EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE* 882 (9th ed. 2016).

1865 with the Thirteenth Amendment, the vestiges typically continue to impact the successes of African American individuals in society and in the workplace.⁷⁷ These difficulties, while unique due to their relation to slavery, are faced by all minorities in the United States.⁷⁸ Affirmative action is one very necessary step towards helping to correct these inherent inequalities. Further, it is essential for this process to be incorporated by employers because without affirmative steps toward correction, these historic inequalities will not correct themselves.

Affirmative action is difficult to pin down with only one definition. This is largely because of the varying impressions of what affirmative action is, as seen above.⁷⁹ The range of views moves from the idea that affirmative action is simply a quota-driven numbers system while others view affirmative action as any range of outreach or recruitment effort.⁸⁰ Individuals also react differently to affirmative action programs based on how the definitions are presented to them.⁸¹ A majority of people who oppose quotas were supportive of affirmative action without strict quotas.⁸²

David Oppenheimer identified five models of affirmative action.⁸³ Within the identification of these models, two of them are more often discussed in judicial opinions.⁸⁴ The first of these two models involves an employer implementing a preference system in which women or minorities are given some preference over white men.⁸⁵ These systems, as discussed above, are very common in many fields of employment but do not substantially impact the higher tier of employees such as managers or C-suite employees.⁸⁶ These programs may fail to have long-term impact when employers simply hire a di-

77. Juliana Menasce Horowitz, *Most Americans Say the Legacy of Slavery Still Affects Black People in the U.S. Today*, PEW RSCH. CTR.: FACTTANK (June 17, 2019), <https://www.pewresearch.org/fact-tank/2019/06/17/most-americans-say-the-legacy-of-slavery-still-affects-black-people-in-the-u-s-today/> [https://perma.cc/W66V-ZX2M].

78. Katherine W. Phillips, Tracy L. Dumas & Nancy P. Rothbard, *Diversity and Authenticity*, HARV. BUS. REV. (Mar.-Apr. 2018), <https://hbr.org/2018/03/diversity-and-authenticity> [https://perma.cc/9XLJ-6F6H].

79. See *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Johnson v. Transp. Agency*, 480 U.S. 616 (1987); *Ricci v. DeStefano*, 557 U.S. 557 (2009); see generally Dobbin & Kalev, *supra* note 3.

80. Menand, *supra* note 74.

81. JAMES P. STERBA, AFFIRMATIVE ACTION FOR THE FUTURE 31 (2009), <https://www.jstor.org/stable/10.7591/j.ctt7v6t2> [https://perma.cc/6C7K-UP9N].

82. *Id.*

83. Oppenheimer, *supra* note 75.

84. ONTIVEROS ET AL., *supra* note 76.

85. Oppenheimer, *supra* note 75.

86. See Dobbin & Kalev, *supra* note 3.

verse employee to give the appearance that people are being treated fairly and then feel that they have met diversity goals and no longer need to consider diversity when hiring.⁸⁷

The second type of affirmative action programs that are often examined in judicial opinions are “self-examination plans in which the failure to reach expected goals within expected periods of time triggers self-study, to determine whether discrimination is interfering with [the] decision-making process.”⁸⁸ These approaches are less visible since they are not actively using a particular classification to make certain decisions. Since there is no decision being made based on any protected category under Title VII, lawsuits are rarely brought into courts. The primary issue with this type of affirmative action is that it does not ensure any change because it allows employers to look at their goals, to recognize they have not been met, to discuss why that might be, and then continue hiring as they have been all along.

B. Diversity, Equity, and Inclusion: Selecting Candidates to Create a Diverse Workplace

Following a selection process that considers diversity as a factor has been approved by the Court in *Weber* when looking at the protected category of race.⁸⁹ If selection with one protected category in mind falls within the confines of Title VII, then surely all protected categories can be used as a factor when hiring or selecting employees for positions.

Weber was decided in 1979 and arguably laid the foundation for all DEI programs that modern-day employers use. In the majority opinion, Justice Brennan carefully describes the reasoning behind the implementation of Title VII and explains why affirmative action programs by private employers are necessary to further the objectives of Title VII.⁹⁰

Weber looked at whether a collective bargaining agreement (“CBA”) between the United Steelworkers of America (“USWA”) and the Kaiser Aluminum & Chemical Corp. (“Kaiser”) was allowed to contain race-consciousness selection criteria or whether the use of this selection criteria was a violation of Title VII.⁹¹ Specifically, the CBA contained an affirmative action plan that was designed to eliminate

87. Sherrer, *supra* note 38.

88. Oppenheimer, *supra* note 75.

89. *United Steelworkers v. Weber*, 443 U.S. 193, 207 (1979).

90. *Id.* at 202–08.

91. *Id.* at 197–98.

conspicuous racial imbalances at Kaiser.⁹² This portion of the CBA was agreed upon because Kaiser's craft-workforces were nearly exclusively white, and they wanted to increase the number of Black craftworkers.⁹³

The goals set in the CBA were specifically to have the Black craft-worker percentages in the plant to reflect local labor forces.⁹⁴ Prior to 1974, 1.83% of skilled craftworkers at one plant were Black, despite the fact that 39% of the local workforce was Black.⁹⁵ The discrepancies in the workforces occurred because the craft-worker unions excluded Black members for the majority of their histories; therefore, there were very few qualified Black employees.⁹⁶ Finally, USWA and Kaiser implemented this CBA specifically to eliminate historical racial imbalances.⁹⁷

The Court held that the program was not prohibited by Title VII; Justice Brennan stated, "[t]he very statutory words intended as a spur or catalyst to cause 'employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.'" ⁹⁸ Justice Brennan further explained that, since the goal of Title VII was to eliminate historic discrimination, affirmative action plans should not be interpreted as an absolute "prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy."⁹⁹

The language that the Court used in *Weber* not only allowed the USWA and Kaiser to keep their affirmative action plan in place, it also laid the foundation for modern-day DEI programs. The Court emphasized that affirmative action in hiring did not cut contrary to the interests of white employees because the plan did not rely on the discharge of white employees to make room for new Black hires.¹⁰⁰

The *Weber* Court's holding provides a clear rule for employers when making hiring decisions. An employer is allowed to use a protected category in making a hiring decision as long as that decision is made in an attempt to eliminate historical imbalances in the

92. *Id.* at 198.

93. *Id.*

94. *Id.*

95. *Id.* at 198–99.

96. *Id.* at 198.

97. *Id.* at 197.

98. *Id.* at 204 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975)).

99. *Id.*

100. *Id.* at 208.

workforce. Employers can push diversity in hiring decisions until their workforce is representative of local populations, as the *Weber* Court allowed.¹⁰¹

C. Affirmative Action in the Form of Post-Selection Inclusive Environment Programs

Inclusive environment programs represent a middle ground between using diversity in the selection process and using diversity as a factor when making promotional decisions. There is little case law on this front because it includes programming that employers already often include in the hiring and orientation process. Inclusive environment program trainings are typically centered around anti-harassment and occasionally include some diversity training.¹⁰² However, these trainings generally end in the first weeks of employment along with the orientation training.¹⁰³

Inclusive environment program trainings should be expanded in two ways. First, the types of programs that employers offer need to be expanded to include more diversity training on information such as cultural competence, unconscious bias, civility, and workplace sensitivity.¹⁰⁴ Second, programming needs to be consistently offered on a regular basis.¹⁰⁵ By implementing inclusive environment programs into the everyday workplace, an employer increases the likelihood that a diverse employee will feel like, and actually be, a valued member of the workforce.¹⁰⁶

The purpose of diversity training is to increase cultural awareness, knowledge, and communication in the workplace.¹⁰⁷ If the training is done correctly it can help an organization prevent Title VII

101. *Id.*

102. Dock David Treece, *The 8 Best Diversity Training Programs of 2020*, BALANCE SMALL BUS. (Sept. 17, 2020), <https://www.thebalancesmb.com/best-diversity-training-programs-4843059> [<https://perma.cc/5MKQ-BYVA>].

103. *How Long Are the Training Hours and How Many Weeks Is Training*, INDEED (Apr. 24, 2017), <https://www.indeed.com/cmp/24-7-Intouch/faq/how-long-are-the-training-hours-and-how-many-weeks-is-training?qid=1behni3thb877f0h> [<https://perma.cc/YP54-KE49>].

104. *Diversity Training in the Workplace: What It Is and Why It's Important*, TRALIAN: COMPLIANCE (Oct. 18, 2018), <https://www.traliant.com/blog/2018/10/18/diversity-training-what-it-is-and-why-its-important/> [<https://perma.cc/GK3E-46NV>].

105. *Why Your Organization Needs a Diversity Training Program in 2018*, BIG THINK EDGE (Nov. 9, 2017), <https://www.bigthinkedge.com/why-your-organization-needs-a-diversity-training-program-in-2018/> [<https://perma.cc/B7T5-XKCL>].

106. *Id.*

107. *Diversity Training in the Workplace: What It Is and Why It's Important*, *supra* note 104.

charges and increase the inclusivity of the workforce.¹⁰⁸ In order for inclusive environment programs to actually have an impact on the workforce, there needs to be full commitment from all levels of management and the training needs to be provided to all employees.¹⁰⁹ These diversity trainings should also emphasize the importance of inclusion. When executed properly, inclusive environment programs help to ensure that all employees have a voice in the workplace and because of this, diverse employees are more likely to feel like they are actually part of the workforce.¹¹⁰

As employers become more attuned to the needs of their workforces, they will realize that to be a successful company in the twenty-first century, they will have to incorporate inclusive environment programs.

The second way inclusive environment programs need to be changed is straightforward. After implementing the new programming discussed above, employers need to offer annual training programs that encompass harassment training and diversity training.¹¹¹ By implementing an annual or biannual training program, the employer can ensure that all employees are not only given top-rate training upon entering the company, but that as years go by the theories are reinforced.¹¹² Often times, the reason these trainings fail is because employees embrace the training initially, but as time passes, the lessons fade into the background and employees slowly forget the practices taught by the training.¹¹³

While employers may claim that holding annual trainings will be cost-prohibitive as training programs can be very expensive if done annually, the benefits of the training will outweigh any expenditure it may incur.¹¹⁴ This is because, as discussed above, there are significant productivity and financial benefits associated with having a diverse workforce.

Another reason an employer may not want to implement so much training is the potential of a reverse racism claim under Title VII. As mentioned, the courts have not addressed this type of programming in the realm of Title VII. There are a couple of guidelines

108. *Id.*

109. *Id.*

110. *Id.*

111. *Why Your Organization Needs a Diversity Training Program in 2018*, *supra* note 105.

112. *Id.*

113. *Id.*

114. *Id.*

that employers can rely on if they are concerned about a suit or if they become subject to a suit.

The first rule in this category is drawn from Section B above.¹¹⁵ Employers can certainly implement these programs in an attempt to remedy historic discrimination against a certain class of individuals. While this has historically only applied to selection programs (as seen above) and promotional situations (see below), there is no reason the Court would not extend the same practice to inclusive environment programs.

Alternatively, an employer can rely on the programming as an affirmative defense. While this approach has not been applied in this exact area of the law, it is allowed in the context of workplace harassment. The concept transfers nicely to inclusive environment programming. The implementation of programming was labeled as a potential affirmative defense in *Burlington Industries, Inc. v. Ellerth*.¹¹⁶ For the purpose of this Article, the facts of *Ellerth* are not important. What is important is the affirmative defense that the Court approved. Justice Kennedy elaborated on this defense, stating that an employer can successfully raise the affirmative defense if the employer can show by the preponderance of the evidence that it exercised reasonable care to prevent and promptly correct sexual harassment and that the employee unreasonably failed to take advantage of any preventive or corrective opportunities that the employer offered.¹¹⁷

Using this same line of reasoning, an employer implementing an inclusive environment program can defend against a Title VII claim by showing that they put programs in place to prevent potential issues in the workplace. Further, if an employer has these programs in place an individual employee is unlikely to succeed in a Title VII lawsuit because before they sue, they are required to seek employer intervention.¹¹⁸ Successful DEI programs should put measures into place that allow all employees recourse within the company before seeking outside recourse. If an employer accomplishes this, according to the law outlined in *Ellerth*, that employer should be able to avoid any liability resulting from external recourse.¹¹⁹

115. See discussion *supra* Section II(B).

116. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

117. *Id.*

118. *Filing a Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/filing-lawsuit> [<https://perma.cc/PKF7-QB3F>].

119. *Ellerth*, 524 U.S. at 765.

Using the above framework, an employer can, theoretically, implement an inclusive environment program that falls within the confines of current Title VII law and can lay clear defenses to any suits brought against them for this programming. By implementing inclusive environment programs, the employer ensures increased diversity and inclusion in the workplace while improves the productivity and success of the business. This impact is emphasized long-term when an employer implements training practices that occur annually, thereby improving the workplace environment beyond what would be accomplished by only requiring the inclusive environment programming once per employee. Inclusive environment programs play as important of a role in the success of a business as do selection and promotion programs. As such, employers should do everything possible to ensure the inclusion and success of all employees.

D. Affirmative Action in Post-Selection Promotions

Affirmative action in the form of selection programs, as seen above, was accepted by the Court and is common in many corporate workplaces. The next natural step for an employer to take is to begin using protected categories as a factor for internal promotions. However, many employers might be reluctant to take this step because it seems very likely to be a violation of Title VII. The use of a protected category may pass court muster for the introduction of an employee into the workplace, but employers are rightfully concerned about using the same criteria for internal promotions.

The hiring process does not displace internal employees, but instead displaces prospective employees who are not owed anything by the employer when they apply. The biggest difference being that a current employee already has a relationship with their employer and would be more likely to consider a lawsuit against their employer if an individual with a lower test score or less seniority is promoted, and the individual's diversity was a factor in that promotion.

Two Court cases have considered the efficacy of affirmative action plans in the post-hiring promotion context. The first was in 1987 when the Court decided *Johnson v. Transportation Agency of Santa Clara County*.¹²⁰ The most recent was in 2009 when the Court decided *Ricci v. DeStefano*.¹²¹ Both of these cases grapple with what employers can

120. *Johnson v. Transp. Agency*, 480 U.S. 616 (1987).

121. *Ricci v. DeStefano*, 557 U.S. 557 (2009).

and cannot do with workplace affirmative action plans when it comes to making promotional decisions in the workplace.

1. *Johnson v. Transportation Agency of Santa Clara County*

Johnson was decided in 1987.¹²² The lawsuit was brought by Johnson against the Transportation Agency after the agency implemented an affirmative action plan that considered minority status, gender, and disability in making promotional decisions.¹²³ This case specifically focused on the employer's consideration of the candidates' sex when making a promotional decision.¹²⁴ Female employees had been historically underrepresented in the transportation agency, and in an effort to correct this, the agency implemented their affirmative action plan.¹²⁵ This lawsuit was brought when Mr. Johnson scored a seventy-five on his promotional interview, and Ms. Joyce scored a seventy-three.¹²⁶ Despite the score discrepancy, Ms. Joyce was promoted.¹²⁷

Ultimately, the Court held that the promotional decision was permissible under Title VII.¹²⁸ The Court made this decision using a couple of criteria. The first assessment the Court looked at was based on their decision in *Weber*.¹²⁹ When looking at the criteria discussed in *Weber*, the Court found that the program had been put into place in order to remedy historical underrepresentation of minorities in a traditionally segregated job category.¹³⁰ However, the Court also recognized a further complication in this case than was present in *Weber*. In *Johnson*, the affirmative action plan was designed to use diversity as a factor when making promotion decisions rather than only making hiring decisions.¹³¹ Because of the differences between the two cases the Court developed a more robust test in order to determine whether diversity could be considered in both contexts.

The test articulated in *Johnson* follows the *Weber* test of righting historical underrepresentation but adds an additional layer—a plan put into place which considers diversity when assessing internal promotions must not unnecessarily trammel the interests of other em-

122. *Johnson*, 480 U.S. 616.

123. *Id.* at 625.

124. *Id.* at 620–21.

125. *Id.* at 621.

126. *Id.* at 623–24.

127. *Id.* at 624.

128. *Id.* at 619–20.

129. *Id.* at 627.

130. *Id.* at 627–28.

131. *Id.* at 621.

ployees. Here, the other employees who were potentially trampled were white males.¹³² The Court ultimately stated that the Agency's plan was fully consistent with Title VII because it sought to embody voluntary employer action that helps eliminate the vestiges of discrimination in the workplace.¹³³

This decision creates a clear-cut rule for modern-day employers. Employers can use the diversity of a candidate in making promotional decisions as long as the employer can show the decision is an attempt to eliminate historical imbalances in the workforce *and* that the use of diversity as a factor in promotion does not unnecessarily trammel the rights of current employees. However, this is not the only option the Court has given employers when making promotional decisions.

2. *Ricci v. DeStefano*

Ricci was decided in 2009 and gives employers another rule to follow when pursuing DEI programs and when making promotional decisions with diversity in mind.¹³⁴ In *Ricci*, the fire department in New Haven, Connecticut held an objective examination to determine which firefighters were qualified for promotion to the rank of lieutenant or captain.¹³⁵ When the test was administered in 2003, white candidates outperformed minority candidates by a large margin.¹³⁶ The mayor and other local officials held a public debate that ended with firefighters arguing about the validity of the results.¹³⁷ One set of firefighters argued that the results should be invalidated because they were discriminatory, while the other group of firefighters argued that the results were valid.¹³⁸ Both groups of firefighters threatened discrimination lawsuits.¹³⁹ The city's hands were tied, and in the end they invalidated the test results.¹⁴⁰

After the results were thrown out, a group of white and Hispanic firefighters sued alleging that discarding the test results violated Title VII.¹⁴¹ One of the white firefighters had the financial resources to take long periods of time off of work in order to study, and he also re-

132. *Id.* at 630.

133. *Id.* at 642.

134. *Ricci v. DeStefano*, 557 U.S. 557, 562–63 (2009).

135. *Id.* at 563.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 563.

ceived the materials in advance because many of his family members took the test in the past.¹⁴² Ultimately, the Court held that before an employer can engage in intentional discrimination for the purpose of avoiding or remedying an unintentional disparate impact, it must have a strong basis in evidence to believe that they will be subject to disparate-impact liability if it fails to take a race-conscious, discriminatory action.¹⁴³ In other words, employers can use otherwise protected categories under Title VII to make employment decisions in the workplace, as long as they are avoiding a potential discrimination claim by doing so.

Once again, the Court lays out a clear rule for employers to follow in order to remain within the confines of current Title VII jurisprudence. If an employer can demonstrate that it would be subject to a lawsuit without making a decision, while being conscious of a protected category, then it can intentionally make decisions based on one of those categories.¹⁴⁴

Looking more deeply into both *Johnson* and *Ricci*, it becomes apparent that employers can do more than they currently are with DEI programming. Using the rules laid out by the Court as recently as 2009, employers can make promotional decisions with the diversity of a candidate in mind.¹⁴⁵ As long as an employer remains within the guidelines the Court has provided, a DEI program can be pushed to extremes. Goldman Sachs is a recent example of how far the envelope can be pushed without an employer being sued. In January, the company stated that it would no longer take companies public unless they had a least one “diverse” board member.¹⁴⁶ For now, the aim is mostly to increase the number of women on corporate boards.¹⁴⁷ While this announcement is still fairly recent, as of the date of this Article’s publication, Goldman Sachs has not been sued for their decision despite the fact that it requires the use of protected categories in promoting individuals into the corporate board of a company.

142. *Id.* at 613–14.

143. *Id.* at 585.

144. *See id.*

145. *See Johnson v. Transp. Agency*, 480 U.S. 616 (1987); *Ricci*, 557 U.S. 557.

146. Kim Elssesser, *Goldman Sachs Won't Take Companies Public if They Have All-Male Corporate Boards*, FORBES (Jan. 23, 2020, 2:30 PM), <https://www.forbes.com/sites/kimelssesser/2020/01/23/goldman-sachs-wont-take-companies-public-if-they-have-all-male-corporate-boards/#6285de9a9475> [https://perma.cc/HCZ6-3A5X].

147. *Id.*

III. How Does an Employer Build a Diversity, Equity, and Inclusion Program That Works Without Violating the Law?

Given the caselaw discussed above, employers can, and should, strive to create more dynamic and in-depth DEI programs. To begin, companies should continue to use diversity as a factor in the selection process for new employees. If the local work-eligible population is not mirrored by diversity numbers in the workplace, employers can rely on *Weber* when making hiring decision in order to right past injustices and rebalance their workforce to make it more reflective of the community.

After employees are in the door, employers need to have more than just basic training and orientation. Harassment training, while both important and commonplace, is not enough for new hires. Diversity training should be incorporated in the workplace. Diversity trainings can give employees a deeper appreciation for their diverse colleagues, emphasize the importance of listening, and allow employees to feel more welcome in the workplace. In this environment, employees will be less likely to make colleagues feel alienated. Employers should want this for their businesses. Diversity increases profitability, and happy employees do better work.¹⁴⁸ By implementing diversity training and revisiting that training on a regular basis, an employer is designing their business in a way that will maximize both employee inclusivity and business profitability.¹⁴⁹ Employers can defend against potential lawsuits on this front by relying on the programming as an affirmative defense to potential Title VII lawsuits.

Finally, the use of diversity in promotion decisions is necessary to continue pushing society towards overall inclusion and equity. Applying *Johnson*, employers can create programs that encourage diversity in the promotion process, as long as they are still trying to correct a historical imbalance, and they are not trammeling other employees' rights.¹⁵⁰ This gives companies a great deal of latitude in making promotional decisions. Additionally, if an employer fails to show the program is valid under *Johnson*, the employer can rely on *Ricci* to argue that it would have been subject to a Title VII lawsuit without the decisions it made. With two ways to avoid being sued for making promo-

148. Hunt, Layton & Prince, *supra* note 2; Noland, Moran & Kotschwar, *supra* note 2; *see e.g.*, Lorenzo, *supra* note 2.

149. *Why Your Organization Needs a Diversity Training Program in 2018*, *supra* note 105.

150. *See generally Johnson*, 480 U.S. 616.

tional decisions, it becomes clear that employers can push DEI programing further than they have thus far.

Conclusion

In 2009, the *Ricci* Court stated, “Title VII does not prohibit an employer from considering . . . how to design [a] test or practice in order to provide a fair opportunity for all individuals”¹⁵¹ As this Article shows, DEI programs are grossly inadequate compared to what is allowable under current Title VII law. Society needs employers to take the helm on correcting the historical and modern injustices suffered by members of diverse identities. Not only do employers have sufficient protections in Court caselaw to avoid or successfully defend potential discrimination lawsuits when implementing more robust and ambitious DEI programming, but those very same employers can see substantial financial gains by doing so.

Goldman Sachs *requires* diversity on all corporate boards before taking them public.¹⁵² If other companies follow, our workforces can begin to better match surrounding eligible populations, and this will continue to push our society closer to the inclusion and equity we all deserve.

151. *Ricci v. DeStefano*, 557 U.S. 557, 585 (2009).

152. Elsesser, *supra* note 146.