

## Diversity – Law Firms

# Systemic Racial Bias

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### Introduction

In March 2006, the EEOC published its Systemic Task Force Report in which the EEOC concluded that identifying, investigating and litigating systemic discrimination should become “a top priority.”

One month later, in April 2006, the EEOC published a policy section for its Compliance Manual on “Race and Color Discrimination.” Many of the issues addressed in the policy section relate to potential systemic discrimination.

In February 2007, the EEOC announced its E-RACE Initiative, which is designed to improve the EEOC’s efforts to ensure workplaces are free of race and color discrimination. Specifically, the EEOC will “identify issues, criteria and barriers that contribute to race and color discrimination, explore strategies to improve the administrative processing and the litigation of race and color discrimination claims and enhance public awareness of race and color discrimination in employment.”

It is against this background that this article focuses on potential areas for systemic bias on account of race or color in the selection process. Particular attention is paid to unconscious bias and how employers can consciously minimize it.

### Setting The Job Requirements

As a general rule, an employer has the right to establish the requirements for a particular job, so long as the requirements are EEO-neutral. However, even race-neutral job requirements may violate Title VII if they have an adverse impact on a racial group as statistically demonstrated.

More specifically, if a job requirement is shown to have a statistically significant adverse impact on a racial group, the employer generally must show that the requirement is job-related and consistent with business necessity. To meet this burden, the employer also must demonstrate that there is not a reasonable alternative that would achieve the employer’s business objective but with less of a disparate impact, a difficult burden indeed.

There are a number of pre-employment processes that may have an adverse impact on certain racial and ethnic groups. For example only, many organizations perform credit checks for employees who handle money or who have access to confidential financial information. The purpose of the credit check is usually legitimate; however, the impact may be to exclude a disproportionate number of racial and ethnic minorities.

For example, in a 2004 study involving more than two million people, the Texas Department of Insurance found that

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African-Americans have an average credit score that is between 10% to 35% lower than Whites and that Hispanics have an average credit score that is between 5% and 25% lower than Whites.

This potential disparity may become even greater as a result of the sub-prime crisis. According to “The Impending Rate Shock,” published by ACORN Fair Housing, nationally, African-American home purchasers were 2.7 times more likely to be issued a high-cost sub-prime loan than White borrowers, while Latinos were 2.3 times more likely to be issued a high-cost sub-prime loan than White borrowers.

This does not mean that employers should eliminate credit checks from their pre-employment checks. What it does mean is that employers need to focus on how high is high enough in terms of credit scores. Setting the passing score too high not only exposes the employer to legal risk but also exposes the employer to business risk to the extent quality applicants are eliminated from consideration.

Another area in which there is potential for disparate treatment is the amount of senior-level experience required for senior management positions.

Due to societal discrimination, both historic and current, some highly qualified racial minorities may not yet have the number of years of experience asked for if the requirements are unnecessarily high. In other words, you cannot have the necessary experience if prior discriminatory obstacles deprived you of it.

This does not mean that employers should or must reduce requirements. What it does mean is that employers must determine what is truly required in terms of years of experience and when additional experience is merely extra.

### Word-of-Mouth Referrals

Bias also may affect the composition of the application pool. More specifically, for cost and other reasons, some employers rely heavily on word-of-mouth recruiting. While the intent may be fine, the impact may be problematic.

According to the EEOC, “while word-of-mouth recruiting in a racially diverse workforce can be an effective way to promote diversity, the same method of recruiting in a non-diverse workforce is a barrier to equal employment opportunity if it does not create applicant pools that reflect the diversity in the qualified labor market.” Compliance Manual 15-VI. A. 2.

Employers need not eliminate word-of-mouth recruiting, which can be very valuable in identifying potential candidates. What employers ordinarily should not do is rely exclusively or primarily on word-of-mouth recruiting.

More specifically, employers are well advised to take affirmative efforts to use heterogeneous recruitment sources. Ideally, this also should include some targeted recruiting aimed specifically at racial minorities.

If an employer wants to supplement its general recruiting with targeted recruiting, the employer is advised to include such targeted recruiting as part of its initial



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recruiting efforts as opposed to waiting to see how diverse the applicant pool may be. Engaging in targeted recruiting only after initial efforts have failed to produce a diverse applicant pool may, in conjunction with other factors, carry with it an inference of discrimination. See *Rudin v. Lincoln Land Community College*, 420 F.3d 712 (7th Cir. 2005).

However, there may be times when the decision of whom to hire effectively has been made before any recruiting (general or targeted) has taken place.

In these circumstances, recruiting to increase the diversity of the applicant pool may do nothing more than increase the legal risk by inviting into the process individuals whose expectations will not be met. Process for the sole sake of process not only increases the employer’s ultimate legal risk but also unethically wastes the time and efforts of qualified applicants who are improperly used.

### Screening Of Applicants To Interview

Even if employers achieve a diverse applicant pool, potential bias still may affect which applicants are interviewed from the diverse pool.

“Are Emily and Brendan More Employable than Lakisha and Jamal?” summarizes a 2002 experiment in which more than 5,000 resumes were submitted in response to 1,300 advertisements in Boston and Chicago newspapers for myriad positions. Resumes of persons with names more common among Whites were 50% more likely to result in interviews than equally impressive resumes of persons with names more common among Blacks.

In the policy statement itself, the EEOC gives an example of conscious bias in the screening process – eliminating from consideration resumes with applicants with zip codes from predominantly Black or Latino geographic areas. 15-VI. A. 4. Ex.10.

Employers may wish to take affirmative steps to ensure that neither conscious nor unconscious racial or other bias affects the screening process by eliminating from the resumes that are forwarded to hiring managers the names and addresses from which racial and other EEO-related characteristics may be gleaned, consciously or unconsciously.

If and when managers ask for the missing information, this provides an opportunity to discuss (but not by e-mail) why the managers think the information is necessary.

### Interview Process

The EEOC references in its Compliance Manual its prior Best Practices Task Force Report’s discussion of “like me” bias to describe one of the key general barriers to equal employment opportunity: “It is an axiom of human nature that people often like to associate with other people who are like themselves. This enhances a comfort level in working relationships. Such ‘like me’ bias may be conscious or unconscious. Nevertheless, the ‘like me’ syndrome can lead to a tendency to employ and work with people like oneself...” 15-IX fn.161.

Employers can minimize the likelihood that there will be “like me” bias by having a diverse interview team select candidates. If a diverse team does the selecting, the diversity of the interviewing team will

make less likely that the team can hire anyone person’s mirror image.

Employers can further minimize the likelihood that there will be “like me” bias by having a structured interview process in which all applicants are asked, at least initially, the same job-related questions. In the absence of uniform questions, different questions may be asked to different applicants based on the interviewer’s comfort level.

It is also recommended that employers provide training to decision-makers on how racial bias can rear its hideous head in the decision-making process. The training as it relates to race and color should focus on not only “like me” bias but also racial stereotyping.

With regard to “like me” bias, employers need to explain the concept of “guilty” without bad intent. In this regard, employers should emphasize both the legal and business costs of such bias.

With regard to racial stereotyping, the message should be crystal clear: racial stereotyping is not only illegal but also unethical and any evidence of racial stereotyping will be met with strong disciplinary and other corrective action.

### Review

However, even with training, bias in decision-making still may exist without any conscious consideration of race or color. For example, talented applicants of color may be excluded because of “cultural fit.”

Cultural fit may be a red flag for the EEOC as well as private plaintiffs’ lawyers since it may be a mask for “like me” bias. On the other hand, cultural fit is not necessarily impermissible. An applicant’s experience or expectations may make her a bad fit for legitimate reasons (e.g., she prefers to work alone but would have to work closely as part of a team).

Where cultural fit is the issue, an employer should not automatically characterize the purported basis for rejection as racist. Employers also should not automatically accept the business justification as legitimate.

Where the reason for rejection is highly subjective, such as cultural fit, the organization’s human resource professionals need to assess the basis for the conclusion. To do so, human resources needs to go beyond the conclusion and focus on the basis for it: what did the applicant say or do that led to this conclusion?

If it is just a general feeling without supporting examples, then racial bias may be contributing to the feeling. However, if the decision-makers can point to specific things that the applicant said or did and how they relate to the organization’s structure and culture, then the conclusion may be legitimate.

Where the decision involves a senior position, in-house counsel may want to become involved in the review process. In addition to the potential application of the attorney-client privilege, the involvement of in-house counsel may also carry with it the imprimatur of the law.

However, the involvement of in-house counsel in the review process is not without legal risk. In litigation, if the employer wishes to rely on the review process, the employer will need to waive the attorney-client privilege. How limited the waiver will be, however, is far from clear.

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