I. INTRODUCTION

For more than 20 years, many employers have expended significant time and effort attempting to achieve workplace equality. The focus has not just been to eradicate race discrimination, but also to promote workforce assimilation and advancement of workers. Despite decades of varying approaches, the results are decidedly mixed. At the American Bar Association Section of Labor and Employment Law’s Ninth Annual Labor and Employment Law Conference, a group of esteemed individuals will address the issue of workplace equality and race, exploring questions of whether and how current events in America impact race relations in the workplace, why it has proven difficult to recruit and to retain a racially-diverse workforce, and ideas for improving the effectiveness of diversity and inclusion efforts. This seminar paper addresses some considerations concerning the roadblocks and routes for achieving a better racial equality outcome in the workplace.

II. DIVERSITY AND INCLUSION: A CORE VALUE AND BUSINESS IMPERATIVE

What is workplace diversity? Although there are many definitions,

[w]ork force diversity generally refers to an employer’s attempt to create a work force where men and women
of all ages, ethnic [or racial] backgrounds, creeds, and abilities are represented at all levels throughout the company and are given equal opportunities to develop their capabilities to the fullest. It also refers to an employer’s efforts to facilitate harmonious working relationships among employees, regardless of race color, religion, gender, national origin, age, or disability. In sum, workplace diversity is about acceptance of others based on their skills and the contributions they make in the workplace, not on their physical or personal characteristics, where they were born, or their religious beliefs.¹

A smart company will recognize that diversity and inclusion should be a core value and a business imperative for the company. There are many reasons for this, including but not limited to the following. First and foremost, it is the right thing to do. America was built on the concept of equality. Undeniably, America aspires to the creed that it holds

these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.²

Second, equal employment opportunity is the law.³

Additionally, a diverse workforce increases the likelihood of the company remaining competitive, especially as markets are expanding globally. Customers generally expect the company with which they do business to be, at the very least, representative of the American population. With employees from a diverse range of backgrounds and personal characteristics, the company is better suited to understand the wide-ranging needs and expectations of its customer base and


² The Declaration of Independence; see, e.g., Jack P. Greene, All Men Are Created Equal: Some Reflections on the Character of the American Revolution 5 (1976) (“Perhaps no single phrase from the Revolutionary era has had such continuing importance in American public life as the dictum ‘all men are created equal.’”).

³ See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (making it unlawful for an employer to discriminate against an individual because of that “individual’s race, color, religion, sex, or national origin”).
to interact with its customers in an effective fashion. A diverse workforce generally enhances creativity and fosters innovation. Many believe that "embracing a multiplicity of viewpoints and cultures drives innovation, improves decision-making, increases employee productivity and retention, and leads to better-served customers."

Finally, the bottom line is a reason for embracing diversity. Many studies show there is a strong and positive correlation between a diverse workforce and the financial success of the organization.

III. THE CURRENT BACKDROPP

Despite many corporation’s executives expressing the need for diversity and supporting their companies’ diversity initiatives, less than half of the employees “actually believe[] that their organizations are truly diverse and inclusive.” Whether this is the case and exactly why it is so are debatable questions. What is not debatable is that most employers can still do a better job with diversity and inclusion.


6 Id. (citations omitted).

7 For an interesting discussion of the impact of issues relating to diversity in the workplace, see the live discussion of racially-diverse leaders in major corporations as
As employers grapple with effectuating meaningful diversity and inclusivity in the workplace, many wonder what impact, if any, the current backdrop of race relations in the country has on the work environment or whether the racial tensions in America in some way foreshadow why employers are still struggling with workplace equality issues over a half-century after equal employment opportunity became the law in the United States. Although answering those questions is beyond the scope of this paper, this paper provides an overview for consideration in connection with diversity and inclusion programs.

IV. DIVERSITY AND INCLUSION BEST PRACTICES IN THE EARLY YEARS

To build a diverse workforce and achieve inclusivity, the prudent employer will look beyond compliance with the law and affirmative action goals (where applicable). Simply put, “[w]hen you bring together people of varying backgrounds, cultures, and belief systems, you bring with them a range of work styles, thought processes, and perspectives. Take advantage of all of these, and you can spark creativity, improve efficiency, and get closer to your customers.”

For a company serious about implementing diversity and achieving inclusivity in the workplace, it is important that the company’s diversity initiatives consider and, as appropriate, incorporate the best practices in diversity. A good starting place for identifying best practices is the information from the EEOC’s task force on diversity which “set out to look at noteworthy business practices” and “catalogue its findings in such a way that they will be useful to employers.”

A. The EEOC’s Task Force on Best Practices in Diversity.


8 See, e.g., Beth N. Carvin, The Trayvon Martin Effect and Managing Race Issues in the Workplace, cited at n.5, supra.

9 See n. 4, supra.

10 See Executive Summary of task force report at http://www.eeoc.gov/eeoc/task_reports/best_practices.cfm.
begins with an Executive Summary that makes clear it was “not an easy task” to determine exactly what a best practice involves:

The Task Force recognizes that reasonable persons may differ on the question [of what is a best practice]. Nevertheless, the Task Force concluded that most stakeholders should be able, at least generally, to agree with the framework.

In the view of the Task Force, a “best” practice comports with the requirements of the law, as manifested in the Commission's statutory mandates: Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, the Equal Pay Act of 1963, and the applicable sections of the Civil Rights Act of 1991. A best practice promotes equal employment opportunity and addresses one or more barriers that adversely affect equal employment opportunity. Not only does a best practice present serious commitment from management to EEO objectives, but it also addresses management accountability for equal employment opportunity. Effective communication between management and the intended beneficiaries of the practice, as well as with all other employees, is another consistent best practice trait. A best practice embraces fairness to all employees. Finally, a best practice is implemented conscientiously and shows noteworthy results.11

The task force report listed the following items as best practices of a diversity program:

- **Training.** Conduct training for all employees. Educate them in equal employment opportunity rights and responsibilities.

- **Support Groups.** Encourage support group formation. Allow, encourage, and employees to form groups diversity lines (sex, minorities, disabilities, age, and religion) and enable those groups to participate with the company.

11 See [http://www.eeoc.gov/eeoc/task_reports/best_practices.cfm](http://www.eeoc.gov/eeoc/task_reports/best_practices.cfm) (Executive Summary: C. What is a best practice?).
• **Diversity Council.** Establish a diversity council, which includes representatives of interested organizations groups, for the purpose of discussion equal employment opportunity matters.

• **Top-Level Participation.** Encourage high-level executives to participate in the company’s diversity efforts and foster employee access to management.

• **Cultural Recognition.** Consider events and programs that recognize and highlight contributions that come from diverse cultural and social heritages.

• **EEO Publications.** Publicize equal employment opportunity rights and responsibilities in writing and make it available to employees. Include information about diversity and affirmative action programs.

• **Diversity Assessment.** Assess equal employment opportunity/diversity effectiveness through employee surveys and other measures, seeking input from employees on what is working and what needs improvement.

• **Suggestion Box.** Encourage and accept suggestions for improvement, and act upon worthy ideas.

• **Minority (and-Other) Business Relationships.** Establish relationships in the business world with businesses that are minority, disability, and women-owned.

• **Goodwill.** Engage in efforts to facilitate goodwill and pride within the company.

• **Community Involvement.** Encourage community residents to work for the company.

• **Strategic Partnerships.** Partner with organizations such as educational institutions, professional groups, civil associations, government, advocacy groups, and the like generally for the purpose of facilitating equal employment opportunity initiatives.

• **Expert Assistance.** Involve experts as appropriate.\(^\text{12}\)

\(^{12}\) See CCH-HRCL P 42,405 (CCH), 2012 EL 5469074 (citing the EEOC task force report).
The EEOC’s task force report is extensive and contains a wealth of information on the subject of best practices in diversity initiatives.13

B. The GAO’s Study.

The U.S. Government Accountability Office (GAO) also identified leading diversity practices among its agencies that ranked in the top ten with respect to successful implementation of diversity practices, noting the following as best practices:

- **Leadership Commitment at the Top.** Top-level management must demonstrate a vision of diversity and communicate that vision throughout the organization.

- **Inclusion in the Strategic Plan.** Diversity must be a strategy within the organization’s strategic plan. The diversity strategy should be developed and aligned with the organization’s overall strategic plan.

- **Performance Linkage.** The more diverse and inclusive the work environment is, the more it will yield greater productivity and help improve organizational and individual performance. Therefore, it is important to embrace and foster diversity.

- **Assessment.** The successful organization with measure, both qualitatively and quantitatively, the overall impact of its diversity program.

- **Management by Objectives:** Leaders are responsible for diversity, and they must be held accountable for the success of the diversity program. There must be a means to measure the leaders, and their performance assessment and compensation should be linked to the organization’s progress with its diversity initiatives.

- **Future Planning.** The success of an organization’s diversity efforts also turns on succession planning. The organization must constantly engage in a strategic process that identifies and develops diverse candidates to be potential future leaders of the organization.

- **Robust Recruiting.** The successful organization will work hard to attract a pool of qualified, diverse applicants for employment.

• **Training.** Management and employees must be informed and trained on the organization’s diversity efforts.

• **Employee Buy-In.** Employees must accept, embrace, and contribute in driving the organization’s diversity goals.  

V. **DIVERSITY AND INCLUSION BEST PRACTICES IN 2015: WHAT NEEDS TO BE CONSIDERED?**

There are countless articles on diversity programs, including best practices. The lists vary but they all have some basic components including those highlighted above by the EEOC and the GAO. What is notable in 2015 is not so much what are the long-standing best practices but what are new best practices that should be considered or prior best practices that merit further consideration. Although not a comprehensive list, the following ideas warrant deliberation:

• **Diversity and Inclusion Must Be Promoted From the Top-Down and Bottom-Up: Diversity and Inclusion Should Also Be a Board Objective.** Best practices have always dictated that diversity and inclusion must be a top-down initiative, one that has the full-fledged support of the company’s chief operating officer. But diversity and inclusion should actually start with the corporation’s Board of Directors, as many experts believe the Board should include diverse members.  

  “A wide range of perspectives, not merely token representation, is critical to effective corporate governance[,]” and “Boards become greater advocates for diversity as they have more direct beneficial experiences with it.” Diversity should likewise be addressed “in every aspect of talent management.” And diversity should be promoted “from the top down and the bottom up—ensuring that a culture of inclusivity is encouraged at every level and in every corner of [the] company.”

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16 See *id.* (summarizing anecdotal findings).

17 See n.4, *supra*.

18 See n.4, *supra*. 

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• **Define The Company Brand to Include Diversity.** The best way to spread the word that an organization embraces diversity and inclusion is to include diversity in the company’s branding and image. Provide information that highlights the company’s efforts and its commitment to be flexible and provide the tools for individuals to succeed.\(^{19}\)

• **Help People Network.** It is not good for workers to feel isolated and uninvolved in the workplace. By providing venues and opportunities for networking, mentoring, socializing, and the like, the company enhances the likelihood of employee engagement and helps to minimize turnover.\(^{20}\)

• **Have the Right Culture Focus.** Many diversity programs attempt to fit diverse members “into the existing culture,” rather than “focusing also on helping the culture adapt to take advantage of” the qualities and skills diverse workers can provide to the company.\(^{21}\)

• **Balance.** Diversity programs that fail to have a balanced membership may not be as effective. For example, a program that focuses only on one subset of employees (e.g., women) rather than including a broader group (e.g., men) may inhibit the program’s success.\(^{22}\)

• **Organizational Structure, including Funding.** Diversity and inclusion programs need to be assigned to people with the time to devote to the program, must be well-funded, must consider benchmarking information

\(^{19}\) See n. 4, *supra*.

\(^{20}\) See *id*.


\(^{22}\) See *id*. (hypothesizing that women’s leadership and diversity inclusion programs should not just improve the skills of women but also should help men to “develop strong and versatile leadership cultures”).

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from other organizations, and must focus on tracking metrics for success.\textsuperscript{23} In response to its 2015 diversity report,\textsuperscript{24} which showed that the company is “not where it want[s] to be when it comes to diversity,” Google remains committed to diversity and is dedicating significant funding ($150 Million) towards its diversity efforts.\textsuperscript{25}

\textbullet \ Change and Increase Hiring Efforts. When it comes to hiring, diversity programs need to be more innovative.\textsuperscript{26} For example, it is important to identify new talent pools.\textsuperscript{27} Google announced that its diversity efforts will now include having Google engineers recruit at a wider variety of schools including historically black universities and offering scholarships to “students of color, women, students with disabilities, and veterans in its bid to invest in promising talent even before they graduate.”\textsuperscript{28} Google is also “commissioning research to get to the root of the problem” and figure out what, for example, drives young women to computer science and how to change the perception of computer science.\textsuperscript{29} It is also funding programs designed to expose “underrepresented students” to computer science.\textsuperscript{30}

\textbullet \ Focus on Retention and Foster a Fair and Inclusive Company. Many programs place substantial effort on the recruitment of the diverse

\textsuperscript{23} See id. (suggesting that some programs falter because of being assigned to busy individuals and because of underfunding, lack of benchmarking information from other organizations, and a failure to track the metrics).

\textsuperscript{24} See http://www.google.com/diversity/.

\textsuperscript{25} See Pariji Kavilanz, Google: Still Mostly White Men Work for Us, CNNMoney (New York) (June 2, 2015) (“In May, Google announced an ambitious $150 million plan to attract more women and minorities, and said that the money would go to outside organizations and communities, while the other half would be used internally to make Google more inclusive.”), at http://money.cnn.com/2015/06/02/technology/google-diversity-report/.

\textsuperscript{26} See, e.g., http://www.tcg.org/pdfs/conference/ProductionDeptDiversity.pdf (discussing innovative ideas for recruiting).

\textsuperscript{27} See n.4, supra (identifying the importance of reaching out to veterans as a source of talent).

\textsuperscript{28} See nn.24 & 25, supra.

\textsuperscript{29} See n.24, supra.

\textsuperscript{30} See id.
employee but fail to have a robust plan to retain the diverse employee. It is advisable to create an environment where the diverse employee feels “understood, appreciate, and respected.”31 In an effort to make its environment more fair and inclusive, Google has announced that it is: a) “empowering” employees to address unconscious bias; b) tailoring benefits to serve the diverse needs of its workforce; c) “infusing diversity in [the company’s] people processes”; and d) encouraging employees to have celebrations of diversity and inclusion.32

• Change How the Company Does Business. In connection with its diversity efforts, Google announced that it is going, among other things, to: a) train underrepresented communities to use its product successfully; b) equip suppliers with opportunities and training to foster a more diverse supplier base; c) promote entrepreneurship “in underrepresented communities”; and d) make its website “and products more accessible”.33

• Share Results. In an effort to be more transparent and to increase accountability, some companies, such as Google and Apple, are releasing diversity reports to the public, even if the news is not good.34 Making such information public has its downsides. But Apple believes that its report is part of its commitment to diversity, as CEO Tim Cook’s letter makes clear:

A message from Tim Cook.

Apple has always been different. A different kind of company with a different view of the world. It’s a special place where we have the opportunity to create the best

31 See, e.g., G. M. Filisko, Just Like Everyone Else, ABA Journal (February 2010), p.42 (commenting on making gay, lesbian, bisexual, and transgender lawyers feel more “understood, appreciated, and respected” in a law firm with the “expectation that they will be more creative and productive and less likely to move on”).

32 See n.24, supra.

33 See id.

34 See, e.g., nn.24 & 25, supra (on Google’s second annual diversity report), and http://thinkprogress.org/economy/2015/06/08/3667054/apple-ceo-says-blame-diversity-snapchat-says-isnt-cool-keep-numbers/ (regarding Apple’s self-assessment). Employer self-assessments are a subject of some controversy and entail some degree of risk relating to the results. Any such project should be undertaken with considerable planning and the advice of internal and external counsel.
products on earth — products that change lives and help shape the future. It’s a privilege we hold dear.

Diversity is critical to innovation and it is essential to Apple’s future. We aspire to do more than just make our company as diverse as the talent available to hire. We must address the broad underlying challenges, offer new opportunities, and create a future generation of employees as diverse as the world around us. We also aspire to make a difference beyond Apple.

This means fostering diversity not just at Apple but throughout our entire ecosystem, from the customers we welcome in our stores to the suppliers and developers we work with. We are committed to fostering and advancing inclusion and diversity across Apple and all the communities we’re a part of. As one example, we’re proud that our spending on women- and minority-owned businesses exceeded $650 million last year.

We want every person who joins our team, every customer visiting our stores or calling for support to feel welcome. We believe in equality for everyone, regardless of race, age, gender, gender identity, ethnicity, religion, or sexual orientation. That applies throughout our company, around the world with no exceptions.

Last year we reported the demographics of our employees for the first time externally, although we have long prioritized diversity. We promised to improve those numbers and we’re happy to report that we have made progress. In the past year we hired over 11,000 women globally, which is 65 percent more than in the previous year. In the United States, we hired more than 2,200 Black employees — a 50 percent increase over last year — and 2,700 Hispanic employees, a 66 percent increase. In total, this represents the largest group of employees we’ve ever hired from underrepresented groups in a single year. Additionally, in the first 6 months of this year, nearly 50 percent of the people we’ve hired in the United States are women, Black, Hispanic, or Native American.
As you can see, we’re working hard to expand our recruiting efforts so we continue hiring talented people from groups that are currently underrepresented in our industry. We’re supporting education with programs like the Thurgood Marshall College Fund to help students at historically black colleges and universities find opportunities in technology. ConnectED is bringing our technology to some of the most economically disadvantaged schools and communities in the United States, so more people have the opportunity to pursue their dreams. We’re also hosting hundreds of students at our annual developer conference, and we’re setting up new programs to help students learn to code.

We are proud of the progress we’ve made, and our commitment to diversity is unwavering. But we know there is a lot more work to be done.

Some people will read this page and see our progress. Others will recognize how much farther we have to go. We see both. And more important than these statistics, we see tens of thousands of Apple employees all over the world, speaking dozens of languages, working together. We celebrate their differences and the many benefits we and our customers enjoy as a result.

Tim Cook
CEO, Apple Inc.35

VI. A WORD OF CAUTION

When establishing and implementing the company’s diversity program, a company must proceed appropriately so that it does not increase its risk of negative effects, including but not limited to poor employee morale or polarization, bad publicity, and legal exposure.

When introducing diversity initiatives within the company, a company may encounter some “backlash and resistance.”36 Additionally, “special programs

35 See https://www.apple.com/diversity/.

36 See n.1, supra, at Section 2.144 (Potential backlash).
benefitting only one particular group can lead to polarization of the work force—the opposite result of what an employer is intending to achieve.\textsuperscript{37}

An ill-conceived diversity program and/or poor implementation of diversity initiatives may result in a negative public and employee perception. Additionally, corporate policies that are inconsistent with the company’s commitment to diversity also may come under extreme media scrutiny and have a negative impact. Recent examples abound. Just one instance in the last few months shows the backlash that a company can face. In May 2015, protesters – who call themselves “concerned community members” – picketed AT&T in Dallas, Texas “hoisting anti-discrimination signs” and a flyer surfaced seeking additional protestors to demonstrate against what they call the company’s “racist business tactics.”\textsuperscript{38} According to a news report, the protesters were apparently “fueled by recent revelations of a racist text by [a] former AT&T U-verse president” and “say they’re speaking out against racial inequalities they believe exist within AT&T’s culture.”\textsuperscript{39} The situation ultimately led to the executive’s termination and AT&T’s public apology stating:

[The official] has been terminated. There is no place for demeaning behavior within AT&T and we regret the action was not taken earlier.\textsuperscript{40}

Poorly executed diversity programs and initiatives can also result in litigation and potential exposure for legal liability in connection with reverse discrimination claims. The early case of \textit{Frost v. Chrysler Motor Corp.}\textsuperscript{41} illustrates a potential pitfall with an ill-conceived diversity initiative. The plaintiff in \textit{Frost} alleged she was discriminated against because of her race (Caucasian) in violation of, among other things, Title VII of the Civil Rights Act of 1964, claiming that she was not hired because of her race. She had 14 years of car dealership experience and applied for a dealership position at a Dodge dealership. Apparently, the car company had rejected the applicant because it was reserving the position for an African-American trainee who was part of the company’s special training program designed to increase minority-ownership of independent

\textsuperscript{37} See \textit{id.} at Section 2.144 (Implications for employers’ diversity efforts).

\textsuperscript{38} See \url{http://www.bizjournals.com/dallas/blog/techflash/2015/05/say-what-this-is-why-protesters-are-stationed.html}.

\textsuperscript{39} See \textit{id.}.

\textsuperscript{40} See \textit{id.}.

dealerships. The court found that Chrysler had engaged in “reverse discrimination” because its extensive recruitment program was for African-Americans only and that no other group was recruited in a similar fashion.

Another more recent example illustrates the pitfalls of reverse discrimination and balancing potential liability from disparate treatment vs. disparate impact claims. In *Ricci v. DeStefano*, forty-two seventeen white firefighters and one Hispanic firefighter challenged the New Haven Fire Department’s decision to ignore test results in making promotions because of New Haven’s fear over the test’s disproportionate exclusion of certain racial groups. The firefighter plaintiffs had taken and passed the test necessary to be promoted to a management position, but New Haven declined promotion for these individuals. Concerned with the potential for disparate impact litigation, New Haven had invalidated the test results because no black firefighter scored high enough to be promoted. In 2009, the U.S. Supreme Court held in a 5-4 decision that New Haven had violated Title VII of the Civil Rights Act of 1964 when it made the decision to ignore the test because it lacked a “strong basis in evidence” that it would have been subjected to disparate impact liability had it promoted the plaintiffs instead of black firefighters.

*Frost* and *Ricci* are but two examples of the liability exposure an employer may face for poorly executed decisions relating to diversity efforts. The prudent employer will recognize the importance of diversity but it also will make sure it is in compliance with the law and will avoid policies or practices that exclude non-minorities.

**VII. CONCLUSION**

Diversity and inclusion are important concepts that have changed the American workforce for the better, but much room for improvement still remains. The foregoing thoughts and resources provide an excellent overview of considerations that employers should consider relating to this area. Nonetheless, before embarking on any self-analysis or on a new diversity initiative, it is always wise to obtain specific legal advice regarding the contemplated approaches. The prudent employer will understand that applicant and employee differences should generally be embraced and that these differences can increase its likelihood of success by employing a diverse workforce and leveraging the differences.

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