

Employers' DEI Takeaways From the NFL Discrimination Case

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The Rooney Rule and the Flores Allegations

In 2002, the National Football League designed the Rooney Rule to increase the recruitment of ethnic minorities in head coaching positions, and in 2018, the rule expanded to create additional opportunities for diverse candidates. The rule is an example of affirmative action, even though there is no hiring quota or hiring preference given to minorities, only an interviewing quota. From the beginning, the rule received stark criticism. Many opponents claimed that the rule is a form of reverse race discrimination in violation of Title VII of the Civil Rights Act of 1964. Despite the initial criticism, the rule's impact has extended beyond the football field as numerous industries have since adopted their own version of the Rooney Rule in hopes of creating more equitable and diverse professions. In fact, variations of the rule are now in place in some of the best-known companies including Amazon, Facebook and Xerox.

Now, roughly 20 years later, a renewed challenge to the Rooney Rule has risen in the form of a class action lawsuit brought by former Miami Dolphins head coach Brian Flores against the NFL and all 32 of its teams. In the lawsuit, Flores alleges racial discrimination in hiring. Specifically, he claims that the New York Giants and the Denver Broncos conducted "sham interviews" as an act of diversity window dressing. Flores also alleges that "while racial barriers have been eroded in many areas," the NFL "lives in a time of the past" and "remains rife with racism, particularly when it comes to the hiring and retention of Black head coaches, coordinators and general managers. ... In fact, the racial discrimination has only been made worse by the NFL's disingenuous commitment to social equity." Flores' lawsuit has since drawn the attention of both employees and employers outside of the professional sporting context, as hierarchical business structures have long faced the predicament of racial imbalance in their higher ranks. While minority employees are typically represented in lower-tier or entry-level jobs, they are often absent in upper-tier or management positions.

Voluntary Affirmative Action Plans and Potential for Blowback

While the NFL teams have denied the allegations, the lawsuit raises important questions about how employers will manage diversity initiatives and hiring practices moving forward. These are particularly sensitive issues in a time when organizations are struggling with a dichotomy. On the one hand, organizations are striving to promote diversity and equity in the workplace. At the same time, companies must manage the risk of reverse race discrimination claims. Recently, there has been a string of high-profile cases against YouTube, Google and

Starbucks, where white employees claimed unfavorable treatment. In 2021, a jury issued a \$10 million verdict in *Duvall v. Novant Health*, Civil Action No. 3:19-cv-00624 (W.D.N.C. Oct. 26, 2021), when they found the plaintiff's race (white) and sex (male) were motivating factors when the employer terminated his employment.

Companies must be aware that race or gender-based hiring and promotion quotas are unlawful. While there is a limited exception to this rule for voluntary affirmative action plans, these plans are not without risks and can create massive compliance issues. Absent such a plan, Chief Justice John Roberts aptly summarized the current state of the law: "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race." See *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 748 (2007). That does not mean that employers cannot take certain steps to increase diverse applicant pools, but they should do so carefully.

The Legal Landscape

Although permissible now, voluntary affirmative action plans may be under attack, and an impending U.S. Supreme Court discussion on affirmative action may have a trickle-down effect on the Flores litigation as well as anticipated "Me Too" lawsuits. The court will again hear cases regarding affirmative action that could end race-based admissions for colleges and universities. Despite similar challenges, the Supreme Court has upheld affirmative action in the past. Race-based affirmative action has been a critical factor in promoting diversity on college campuses and has helped institutions create greater equity in their admission practices. However, the addition of two conservative justices on the court (Justices Brett Kavanaugh and Amy Coney Barrett), combined with the consolidation of two cases from Harvard University and the University of North Carolina, indicates a willingness to revisit previous precedent on the topic.

In a legal sense, affirmative action was designed to eliminate unlawful discrimination, remedy the effects of prior discrimination and prevent future discrimination. Given the importance of affirmative action in creating educational equity for Black, indigenous and Latinx students, educational institutions must start preparing now for ways to ensure they continue equitable admission practices even without affirmative action. The same sentiment applies to other industries and government contractors who have adopted variations of the Rooney Rule or other voluntary affirmative action plans.

Your DEI Plan: Communication and Implementation Are Key

Undoubtedly, diversity and equity initiatives remain relevant, meritorious and necessary. With the rising risks surrounding such initiatives, companies looking to avoid costly litigation and potentially chilling verdicts should seize the opportunity to take a closer look at the implementation and communication of their initiatives. Employers cannot eliminate all risk in this area but must carefully evaluate their activities to ensure that legitimate objectives combine with effective risk management strategies to minimize overall risk while fostering meaningful progress in this area.

Organizations find themselves tasked with advancing meaningful diversity principles while remaining alert and responsive to the evolving compliance obligations and risks. The following is a reflection on three key risk management considerations for employers.

Analyze your compliance ecosystem.

When considering the motivations driving its diversity initiatives, an organization must fully define the formal anti-discrimination, equal employment opportunity (EEO), and affirmative action obligations that apply given its respective industry, footprint, and other circumstances. Nearly all organizations are covered by one or more anti-discrimination laws. Certain organizations, such as federal contractors and subcontractors and those receiving federal financial assistance, are required to comply with formal federal EEO or affirmative action requirements. Some covered organizations must establish an “approved” affirmative action plan, while others may elect to participate by establishing a “voluntary” or “unapproved” plan. A properly developed and implemented DEI initiative, fashioned in accordance with applicable anti-discrimination, anti-harassment, EEO, and affirmative action obligations, is a critically important risk management tool for employers.

Watch your language.

Often a company's PR department issues diversity statements that are not properly vetted, which can inadvertently create liability. Public promises of race-based hiring quotas, for instance, could lead to liability. The word “equity” has also caused strife for many employers. “Equity” has erroneously become understood to mean some protected classes of employees must be favored over other classes of employees to achieve true fairness. In actuality, “equity” focuses on outcomes by allocating resources and opportunities on to those who need them to reach an equal outcome. “Equality,” on the other hand, means each individual or group of people is given identical resources or opportunities.

The debate will continue regarding “equity,” as businesses are legally prohibited from using protected characteristics in employment decisions. The Supreme Court, however, has decades-old precedent about what is permissible when it comes to programs that promote these principles. Companies are allowed to implement proactive plans to address areas where there have been racial inequality issues, as long as they don't have an exclusionary effect on a White or male person. For example, in 1987, the Supreme Court decided *Johnson v. Transportation Agency* in which an employer was permitted to include sex as one factor in determining whether to promote an employee. The Johnson decision represents a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in an employer's workforce, and is fully consistent with the protections of Title VII.

Carefully handle diversity audits and self-assessments.

With the rise of environmental, social, and corporate governance (ESG), diversity audits and self-assessments are more common and frequent within organizations. Companies, however, should confer with counsel before undertaking these efforts to ensure compliance and protection of the attorney-client privilege, where necessary. Audits and self-assessments can create unintended liability and should be conducted carefully—as was demonstrated by the case of Disney's alleged “white-privilege checklist.” Further, companies seeking to measure

the success of diversity efforts may create EEO data that provides the very statistical evidence needed to prove “reverse discrimination” allegations. Likewise, racially segregated “affinity groups” risk potential claims such as those brought by a group of Stanford professors.

There has been a significant increase in the size of aggregate class-action settlement recoveries, particularly last year, and that trend is expected to continue. Flores’ lawsuit highlights that the semblance of equality is not the same as actual equality. Diversity initiatives can help “bridge the gap” between an employer’s stated goals for inclusion, but implementing such initiatives requires careful thought and consideration. Legal counsel can assist with vetting potential DEI programs to comply with employment laws and reduce a company’s exposure.

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