



Ep. 38: NFL's Rooney Rule: The Flores Discrimination Suit's Impact on DEI initiatives

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The NFL designed the Rooney Rule in 2002 to increase the recruitment of ethnic minorities in coaching positions. But recently, former Miami Dolphins head coach, Brian Flores, filed a collective action lawsuit against the NFL and all 32 of its teams alleging racial discrimination in hiring. What impact does this discrimination case have on diversity, equity and inclusion initiatives moving forward?

Andrew Albritton: Hey everyone, I'm **Andrew Albritton**. I am an Associate attorney in McGlinchey's New Orleans office. I'm joined by my colleague, **Camille Bryant**, a Member of the firm who is also based in New Orleans and practices in the firm Labor and Employment practice group.

So, Camille, I know you've had your fair share of experience with diversity initiatives, both as an employment attorney and as a DEI professional. When you think about the Rooney Rule, what's so unique about it that's causing so much criticism?

Camille Bryant: That's a really good question, Andrew. And actually, I don't know that there's anything all that particularly unique about the Rooney Rule. But I will say as an avid sports fan and a Saints season ticket holder, I do find all of this very intriguing. Just for some color and some background, the Rooney Rule actually started about 20 years ago with the intention of increasing diversity. In a sense, it's sort of a form of affirmative action. And so even though there's no hiring quota or hiring preferences given to minorities, in sort of the traditional sense when we think of affirmative action plans, it does have that same sort of genesis behind it.

From the beginning, the rule has received a lot of criticism on both sides. On one hand, there are a lot of opponents who claim that the Rooney Rule and variations of it are, in essence, a form of race discrimination. And so Andrew, you know, working in labor and employment as well, that you can't discriminate on the basis of race, sex, gender, or any other protected class. And so that's one of the things that a lot of people have been adamant, with respect to the Rooney Rule, against, is that they feel that it sort of takes the counter-effect of that. And then on the other hand, we have the Flores lawsuits who

are essentially saying that, "well, yeah, you have this rule, but it's not actually doing anything. It's really just lip service and you're not at actually advancing these causes."

And so we've got two polar opposite ends of the spectrum, sort of how people think and are viewing the specific rule, and how we move forward. I guess the bright spot is that, you know, even despite all of this criticism, the rule has actually had some far reaching impacts beyond the football field and in a wide range of industries. Even when we think about the legal profession and we have the Mansfield Rule, which is sort of a variation of the Rooney Rule. We've also seen lots of businesses that have created their own version of the rule. Even though there have been a lot of strides in the realm of diversity, equity, and inclusion, this has long been a predicament with respect to imbalances, particularly when we think about the higher ranks within various organizations. Even some of the most well-known organizations that we think about today, whether it's Amazon or Facebook or Xerox, they all have some form of this rule. And so it's definitely going to be something that organizations have to contend with moving forward.

Andrew Albritton: You definitely touched on a lot of hot button issues there, but I know that affirmative action right now specifically is going up to the U.S. Supreme Court, where they've taken up a challenge in the higher education context. How do you think that the Court's decision in that case could wind up affecting other types of employer DEI initiatives going forward, like you mentioned the Rooney Rule or the Mansfield Rule?

In the past, affirmative action has been challenged and the court has, each time, upheld it in most respects. But now we're faced with a different composition of the bench, and that could have a sway on what happens with affirmative action, and the trickle-down effect.

Camille Bryant: Yeah. That's really going to depend on how broadly the Court really looks at affirmative action. Affirmative action plans traditionally define an employer's standard for recruiting and hiring, mostly with regards to women and minorities and differently-abled individuals as well as veterans. That's another category that's generally viewed with respect to affirmative action plans. In the past, affirmative action has been challenged and the Court has, each time, upheld it in most respects. But now we're sort of faced with a different composition of the bench, and that could have a sway on what happens with affirmative action, and then the trickle-down effect. And so even though affirmative action plans generally don't apply to private employers, we've seen it with regards to sexual harassment and sort of "me too" spinoffs. And so we could sort of see some of the same things with respect to DEI.

And so even though private employers may not necessarily be too concerned with how the court rules on affirmative action, any private employer that does business with the federal government, if you're a federal contractor or subcontractor, you're going to want to take note. Because those things could have a direct impact on those employers that are engaged in federal contracts, because those employers do actually have to have affirmative action plans as part of their work with the government. And so that's

something that's going to be really important. But when we think about private employers, which is really sort of the bulk of people that are doing business, those organizations can't have affirmative action plans because of some of what we talked about with regards to the reverse race discrimination and some of those concerns. Even when we look back to 2007, Chief Justice Roberts really commented on this, "the best way to really stop discrimination on race is to stop discriminating on race."

All of those things really still hold true today. And so private employers can voluntarily engage in affirmative action plans. But there's definitely ways that it has to be done. And it has to be very carefully crafted to make sure that employers are not engaging in that reverse race discrimination that we talked about.

Andrew Albritton: I know that you and I definitely deal in this area a lot. You give, certainly more than I do, presentations to employers on how to implement diversity, equity, and inclusion efforts. And that's definitely something that I think all employers are concerned about right now. It's a major area that employers are trying to improve in. It seems like we're kind of giving employers conflicting advice, giving them kind of a Catch-22. On one hand we want them to increase their diversity, equity, and inclusion efforts, and hire more diverse candidates, and improve the inclusion of diverse candidates in their management and hiring process. But at the same time, if they're doing so on paper, through an affirmative action plan, this could subject them to claims of reverse race discrimination. So what's your expert advice on how employers should manage and balance those two important issues?

It's definitely a catch-22, and there is no one size fits all strategy for any particular industry or any particular employer for that matter. It really boils down to, what are the organizational objectives?

Camille Bryant: Well, it's definitely a Catch-22, and there is no one size fits all strategy for any particular industry or any particular employer for that matter. It really boils down to, what are the organizational objectives? And there have been a lot of high profile cases that have come out recently against some of the biggest companies that we think about. Whether it's YouTube, Google, even, you know, Starbucks, they've all been faced with some of these claims that have been brought by employees alleging unfavorable treatment. Even just last year, there was a \$10 million jury verdict against a healthcare company brought by a plaintiff who alleged that they were the victim of reverse race discrimination. And in that case it was a white male.

And so these are things that companies are really having to contend with, because to continue to do business, more and more employees are advocating for diverse and equitable populations within the workforce. More and more investors are advocating for these things. But at the same time, if you're an organization and you see that somebody down the street just got hit with a \$10 million verdict because they were advocating for DE&I efforts, then you may be a little bit hesitant and you may think twice about, is this really something that we want to engage in to the fullest extent

possible? And so really, the first step is to have a clear picture of what is the compliance landscape with respect to any DE&I plan around those laws. Because most employers, in some respect, are going to have some sort of law that they're going to have to abide by, whether it's the EEOC and equal opportunity laws that they have to contend with, whether it's the affirmative action plans, obligations that an employer may have to contend with, if they are engaged in government contracts. There's a multitude of things that employers are going to be faced with. So it's really important to understand the landscape from a compliance standpoint, and then building out any sort of DEI plan from that sort of notion of "these are what our legal obligations are."

And so a properly developed and implemented DEI initiative really should be fashioned to comply with anti-discrimination, anti-harassment laws, because the goal of DEI is not to exclude any particular group. It's just the opposite. And so by complying with those laws, you're actually making sure that those objectives are being done.

Andrew Albritton: And so of course, we know that the NFL teams have denied the allegations. They're fighting this issue in court. But the lawsuit raises really important questions about, like we were talking about, how employers can manage diversity, equity, and inclusion initiatives, and hiring practices moving forward. Before we sign off, do you have any best practices for employers moving forward?

Oftentimes, companies are using the term "equity," when in actuality, what they really mean to use is "equality." Whereas equality is giving everyone the same thing at the same level, equity is giving people the resources that they need.

Camille Bryant: One thing that really comes to mind is language. Language and messaging. You really can't focus on that enough, because it is really important how things are being communicated to employees, as well as how things are being communicated externally. Oftentimes a company will engage with a PR organization or they may work with HR, but yet HR isn't talking to legal. And so, oftentimes when public promises are made with regards to race, or let's say an organization may have an aim of, "we want to increase our percentage of African Americans by 30%" or something along those lines, that can really sort of get an organization into trouble.

Something else that we're seeing a lot of pushback on is with respect to the language front is the notion of equity. Oftentimes, people get equity and equality very confused and companies are using the term equity, when in actuality, what they really mean to use is equality. Whereas equality is giving everyone the same thing at the same level, equity is giving people the resources that they need. And so it may appear as if one person is getting something that another person isn't, and when there's that appearance, then that leads to litigation. And so we can have a whole other conversation on "equity" in and of itself. And how to make sure that equity is adequately advanced without creating that legal liability. But that's definitely something that employers should focus on is their language and their messaging with respect to DEI initiatives.

One other thing for thought is really just how organizations are handling diversity audits, as well as diversity self-assessments. You know, there's been a rise of ESG, or environmental, social, and governance, factors. And a lot of organizations are really pushing all of these efforts from an investor standpoint. And so they're doing a lot of inward reflection and thinking, and part of that is taking the temperature of employees and doing self-assessments. But with that, we're also sort of seeing some issues with some of the language that's used in those self-assessments. One company was alleged to have a question with regards to a "white privilege checklist," which they got some backlash on that. And so it's really important to make sure that these assessments are handled carefully, particularly if you're ever concerned that this is something that's going to get out as part of litigation. And so taking any efforts to the extent possible to keep that information privileged is something else that organizations should be mindful of going forward.

So I know that I threw a lot at you. I know that we discussed a lot, but I think these are really important issues. I think that organizations moving forward are really going to have to strike a fine balance between advocating for diversity, equity, inclusion and managing those risks and all of the compliance for factors that employers have to deal with, the multitude of employment laws that they're faced with moving forward.

Andrew Albritton:

And of course the best step forward for employers when implementing diversity equity inclusion efforts is to consult with a member of McGlinchey's Labor and Employment team. So thank you so much, Camille, for talking to us. Thanks to our listeners, and we'll see you next time.

Thanks for tuning into this episode of "More with McGlinchey." If you have a question or would like to propose a topic, we'd love to hear from you at podcast@mcglinchey.com. For additional resources on this topic, please visit mcglinchey.com. On behalf of the law firm that brings you more, we hope you'll join us next time.



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