

PBPA Podcast Transcript
Episode 22 - Diversity, Equity & Inclusion Initiatives:
Keeping Your DEI Initiatives Legal
(31:31 minutes)



Sireesha ([00:00](#)):

DEI. Diversity equity and inclusion, whether your nonprofit has had DEI at its core since inception, or you are just now hearing about it for the first time, DEI programs should be evaluated both at conception and on an ongoing basis. Otherwise, these could intentions may sometimes have unintended and negative consequences for your organization. In this episode of the PBPA Podcast, Abby Larimer will speak to us about how to legally focus on diversity, equity and inclusion in your workplace.

Sireesha ([00:44](#)):

Hello and welcome to the PBPA Podcast. In each episode of the PBPA Podcast, we explore legal questions relevant to Georgia nonprofits. I'm your host Sireesha Ghanta, Counsel and Education Director at the Pro Bono Partnership of Atlanta. PBPA strengthens our community by engaging volunteer attorneys to provide nonprofits with free business legal services. We provide numerous free resources via our website, including articles and webcasts specific to Georgia nonprofits and their business legal concerns. We also provide direct legal services to our clients. For more information on client eligibility requirements, to apply to be a client or to access our vast learning center, visit our website at pbpatl.org. Before we jump into this episode's topic, keep in mind that this podcast is general information, not legal counsel, contact your attorney for guidance on your nonprofits' specific situation.

Sireesha ([01:56](#)):

Abby Larimar is a longtime PBPA volunteer and counsel at the law firm of Ford Harrison. Abby concentrates her legal practice on the representation and counsel of management in a broad range of matters related to employment law, which makes her a fantastic person to answer our questions today. Thanks for being here, Abby.

Abby ([02:18](#)):

Thank you for having me.

Sireesha ([02:20](#)):

So DEI initiatives are intended to create a better, stronger workplace, but sometimes they can lead to lawsuits. So to start us off, can you give us some very high level feedback on potential legal concerns around DEI programs?

Abby ([02:38](#)):

Absolutely. And I think that this is such a great question, cause it's something that organizations really need to think about before they're implementing a DEI initiative. When you're talking about DEI initiatives, obviously one of the main focuses is going to be on different protected groups, whether it's based on someone's race or gender, um, disability, sexual orientation, um, anything else that could be considered a protected group. So nonprofits or any company that is thinking about putting a DEI initiative in place needs to think about, uh, title seven and all of the issues that can come along with that or any other employment discrimination law and state, um, state basis as well,. All depending on what states you're located in. So keeping in mind that traditionally with disparate impact treatment, um, the

framework looks at intentional actions of discrimination, but one thing that comes up a lot in DEI initiatives. There's a focus on unconscious bias and implicit bias and how that factors into hiring and recruiting and then even promotion efforts in a company, Once someone is in the organization, typically courts have been reluctant to consider implicit bias evidence, um, as evidence of discrimination, but that is something that is starting to change right now. Uh, the EEOC also specifically includes in the definition of intentional discrimination, unconscious stereotypes about abilities traits or performance of certain racial groups or other protected classes. So that's definitely, you know, a huge thing to keep in mind, unconscious bias and implicit bias and educating your workforce on, on that. There are also some employment and privacy concerns that come in, for example, you know, some, uh, protected classes or protected groups, it may be obvious, but others may not. And then there's a reliance on employees to self-identify, uh, employees may not wanna do that because of again, different privacy concerns. And so that's something else to keep in mind that could give rise to some sort of legal action, you know, depending on what we're talking about here is a disability, sexual orientation, you know, race, even in gender as well. And so it's something, nickname for these. It's like the, the benevolent discriminator, someone who really is trying to do the right thing, but ultimately unfortunately ends up by not looking at the bigger picture, um, and keeping all of these different, um, objectives and criteria in mind.

Sireesha (05:08):

Yeah. That's interesting. So for an organization that's reevaluating their hiring practice, do you have any suggestions for how to improve diversity hiring while still avoid legal pitfalls?

Abby (05:23):

Yeah, so I think the most important thing is to use objective criteria and make sure that's set in place. Having a job description in advance is certainly very helpful, cause that's gonna make the organization think about, you know, what are we really looking at? What are we trying to, you know, fill in this position and that can really help defend you against, a claim of discrimination. If someone tries to say, you know, it was actually someone's race. And we are seeing cases where, people are suing, you know, saying that they were passed over for a job because of their, they weren't in a protected category. So having that objective criteria and being able to rely on, you know, well, even if this person didn't have specific experience here, we felt like they were a better fit for this job because of X, Y, Z is really gonna really going to help, um, an organization.

Abby (06:13):

Being over inclusive. Considering, we've been talking about protected categories, but other things like first generation college graduates. You know, maybe someone has had an opportunity to volunteer at a lot of you know, nonprofits and take a lot of internships like that. And maybe that's because you know, they are from a wealthier family. That's been able to help support them while they've taken on these unpaid internships. So just thinking about all those sorts of things, when you're looking at someone's resume. Being conscious of your implicit bias. And looking at the, oh, this is the, you know, someone like me, um, that's sort of, where we have so much in common. And then that's one way that people of certain races classes and everything, you know, continue to go through an organization. So, keeping that in mind.

Abby (07:04):

Another big thing, when a lot of people think about diversity and inclusion, um, initiatives, they're thinking quotas. You do want to be aware of quotas and avoid quotas. They've been held to be illegal

under a lot of circumstances. So, the objective isn't necessarily just, okay, well, "we're going to hire 10 women in this position, 10 minorities into this position". So you don't want to structure your hiring practice around that, or similarly only focus on hiring minorities, and excluding individuals who may not be in the targeted group. Again, that goes back to the, potentially a, reverse discrimination claim. And you know, the EEOC, you know, has issued guidance being wary of the reverse nation too. That's something that courts have upheld in numerous circumstances: that if you are just targeting one particular group and bringing people on based upon, uh, that protected category, that itself is discrimination. I have seen that happen too. People say, "well, we want to increase our diversity initiative". So we just hired this person of their race. And then you're essentially admitting to intentional discrimination there. So, again, going, you know, back to that objective criteria, making sure that you are, you know, hiring and recruiting managers or employees have some training in implicit bias, unconscious bias, and that you really are being, again, over inclusive and looking at a wide, wide, range of people and candidates when you're trying to hire into an organization.

Sireesha ([08:50](#)):

Quick follow up question about that objective criteria you mentioned: you can develop that criteria for each new position that you're hiring for. Is that correct?

Abby ([09:01](#)):

Yeah, you can do that. Um, definitely for even positions that you already have in the organization, you know, you're always free to provide a job description. But definitely when you, when you're having someone coming in. I think it's really important to look at, what are the real qualifications that we need for this position. For example, a college degree might be a big thing or some other, um, work experience that may end up being a barrier to diverse candidates coming in. You know, what really are we going to be wanting this position, you know, the person in this position to do? And, you know, are there other, you know, personality factors that can come in. That's again, something where you have to be really careful about unconscious or implicit bias. But, you know, is this going to be, for example, a nonprofit, fundraising is something that's so important. So when you have someone in a fundraising position and is this really gonna be someone who's gonna be, you know, able to go out, talk to a lot of people. Are they gonna be too nervous, you know. Think really thinking about that. And I think it's helpful to do that. Um, like we were just saying before you're hiring for the position. So think about it before, you know, you start seeing candidates and you getting resumes in, but really thinking about, um, and that really, I think it helps guide the decision as well. I mean, that, and that's really important.

Sireesha ([10:25](#)):

And what about for existing staff? So far, we've talked about, um, DEI and how it might apply to hiring new staff. Abby, what are some considerations nonprofit should keep in mind as they develop DEI programs for their existing workforce?

Abby ([10:44](#)):

This is such a great question. I think that this is, um, actually where a lot of companies run into issues it's with existing staff. I think the first thing is you really want to actively communicate what you're doing with, um, your DEI initiatives and program, um, and make sure that current employees understand this. What you don't want is for. Um, and this is another area where we see litigation, current employees will start saying, "well, I wasn't promoted, considered for this position because they're just bringing in minority candidates or candidates of this protected group". And so, you know, act first. Actively

communicating, you know, making sure your current employees understand what the company is trying to do, and why it's important to have a diverse workforce is something very big. And then going back to those objective criteria. When those are in place, it makes it easier to have these sorts of conversations with which, you know, certainly can be very difficult with your current staff.

Abby ([11:48](#)):

As well as actively communicating, you want to make sure that your employment policies and trainings have all been updated. In Georgia, particularly. There was a huge Supreme court case, and this was nationwide. This was Bostock, but affected Georgia as a state that did not have any, um, statewide protections for, uh, gender identity and sexual orientation. So you also wanna make sure that, um, you know, now that this is considered a protected class in light of title seven, that employees are aware of this, that they understand there's no discrimination, no retaliation based on those protected categories. So that's something that I think is pretty big. Also with your employment policies, you know, keep your training. I know it's something that's not, not really fun, um, except for the employment lawyers like me, but most people do not consider employment law training fun. But it really is important for your staff, making sure that your training is relevant, that, you know, workplace harassment training is up to date, your bias training EEO, equal employment opportunity training. Particularly for your managers, again, anyone that's sort of in the line of fire with employees.

Abby ([13:01](#)):

Something else that we've seen that can be really helpful. Our employee resource groups. And implementing these throughout the organization can really help with the existing employees. So that might be a, you know, a women's initiative group, a black woman's initiative group. Maybe you have a resource group for disabled employees. And so, that can really help employees, you know, that are already with the organization, start to feel that inclusion as well. You know, that it's not just, "oh, we're bringing in other people to up our diversity quota". You know, they're actually looking at us and want to make us feel like we're part of the group and the company. Um, so I've seen those be very successful just in terms of also giving visibility to diversity within an organization and, and just being a resource for other employees in that protected category.

Abby ([13:51](#)):

And another thing to, you know, certainly keep in mind, maybe obvious/ may not be obvious. But certainly don't just start actively discharging the non-target employees or withholding them back from promotion. As we just talked about, reverse discrimination, claims are out there and they can get some traction. And so, just to, if you're trying to increase diversity again, one way to do it, you don't just go fire, if maybe you're at an organization that has a lot more women than men, you shouldn't just go fire all the women just to make room for more diverse employees. So that is something to keep in mind too. And part of the, you know, increasing diversity, but, you know, the inclusion part of it, making sure that all employees do feel like part of the group. And so again, you want to be very aware that you're not just making certain individuals feel like they're on the outs now, that they're gonna be targeted. So that's just, you know, something really important to keep in mind to. And again, that's where we do see a fair amount of EEOC charges or can eventually turn into litigation. So, you know, being mindful of your existing employees and not just making your efforts recruiting and hiring new diverse employees,

Sireesha ([15:07](#)):

Abby, let's talk about a specific example now out about DEI programs in the workplace. And you kind of alluded to this in your answer to the first question. What if an organization wants to conduct a diversity audit and collect information about their current staff or board. These metrics may provide an understanding for an employer not just about are they currently stand, but that information may even be requested as part of a grant application or for board recruitment. What should a nonprofit keep in mind if they're considering a diversity audit?

Abby ([15:44](#)):

This is another great question. Um, diversity audits became huge. I think, this is one of the things that as employment attorneys, maybe after COVID, we were talking about so much last year in light of #MeToo movement, George Floyd. These really were pushed to the forefront. So there's a few things that, you know, an organization should keep in mind. I mean, you may already be collecting some information through your EEO1 report if you're required to file those. However, those probably are not gonna really have a lot of the, they don't really dig deep into really getting to the meat of what you really want to look at, I think for, for a real diversity audit. So one keep in mind, it, it is possible one of the biggest legal issues. I think let's say you do conduct, did a diversity audit under certain circumstances that potentially could be something that would be discoverable in a lawsuit about discrimination. Um, so let's say you do a diversity audit. Maybe you find out that, "oh, wow. Actually we haven't promoted any minorities within the organization in the last five years". And then you get an EEOC charge. You know, that could be an issue. So one way, and I know that this is maybe more difficult for a nonprofit to do, but working with an attorney. There may be some sort of privilege that can attach to it. And that could be I think very helpful if you are worried about the metrics of your organization., mean, I don't, to the extent you're able to find someone to help you pro bono? But just something to keep in mind. If you have like a written report versus sometimes there's just an oral report, but keeping in mind that yes, it is possible that a diversity audit could come up in a lawsuit. So if you are doing a written report, you know, maybe not, "it appears we've had a history of discriminating against this type of". Phrasing it, something like "Our goals and areas of focus are X, Y, Z group", or something like that. So be being careful about the language that you might use. So that's a big one.

Abby ([17:57](#)):

So, something else I think, looking at the way that affirmative action plans, and these are typically plans that companies do when they are working as a, a government contractor, mostly as a federal contractor, but also on the state or even city level. And these are a good way to think about doing a diversity audit too, because again, they're not focusing on necessarily specific quotas in a position. I mean, they are looking at the numbers, people in protected groups that are in a position, but the focus on an affirmative action plan is something I just referenced. You're looking at, what is your, your focus, what are your goals for where you want to see see your organization? So again, rather than maybe focusing on historical discrimination that you haven't been able to fill a position with minorities or women you're looking on. Okay, you know, we're noticing that, um, there might be a, a gap in our numbers here. And another thing that AAP plans do affirmative action plans, they're usually compared with data from the local population. So, so that's important too. If you're an organization that's just in Atlanta. I mean, you want to look at, you know, what are what's the population like in Atlanta and is our workforce accurately reflecting, not just demographics nationwide, because that can be difficult, but the demographics of our city. And so that's a more accurate benchmark and way to set your goals, looking at your specific population.

Abby ([19:27](#)):

But again, affirmative action plan. There's not gonna be, you don't wanna have a quota, like what we just talked about, oh, we're gonna fill X number of people, but "Okay, we wanna focus on filling this position with more people with disabilities. And so what are we going to do in terms of our outreach and recruiting efforts? Are we going to look for local organizations, work with individuals who have disabilities to help put them in place?" Veteran recruiting is big with AP plans. Maybe something different for a nonprofit, but something to use as a good model for a diversity audit. I do think it's very important for companies to be doing these because as you mentioned, it, this could be something that is requested as part of a grant application or board recruitment. I think this is something that is becoming, um, more common. I mean, even in law firms, we're seeing a lot of companies don't want to work with law firms unless they can show that they're diverse and that they're gonna have diverse attorneys on it.

Abby ([20:27](#)):

So it's really something that's everywhere, not just nonprofit. I mean, to a certain extent stuff, your organization is what it is. I mean, you can't fake these numbers. You can't suddenly make up that you have diverse people when you don't. And I think, companies are starting to be aware of, oh, we're good. You know, I'll have all these diverse candidates that have only been with the company for six months. What does this tell us? So on one hand, you know, you do kind of wanna start looking at these things before you're presented with, oh, here's this huge grant that we were up for, but we're not even gonna be eligible to apply for it because we don't have our numbers in place. And so it really is something that's, that's so important, but again, you know, to, I think, it is what it is. You can't go and just, you know, magically change your numbers. So start looking at it. And again, focus on your recruiting and, you know, your efforts there, what, what are we doing to get more diverse people coming in? So I think that that is really helpful.

Abby ([21:22](#)):

And one last thing on that, don't come up with goals that, you know, you can't keep, you see that sometimes too people say, you know, okay, well, we're gonna try to, to get this grant. We're gonna say, this is our goal. And, and you just know you're not gonna be able to keep it, and that's just setting yourself for up for failure. So really try and be realistic with what you think you can do.

Sireesha ([21:43](#)):

Those are all really fantastic pointers, but what if an employee does not want to participate in a diversity audit or is hesitant about divulging information on a questionnaire, whether it's because they haven't even disclosed it generally to anyone at the office or for other reasons. What should an employer do in that kind of a situation?

Abby ([22:07](#)):

This is, is another one that's really big. And I think, I mean, a lot of times we still think of protected groups as being very obvious, you know, that you could see someone's race or gender tell that, you know, right away. That a disability could be obvious. And that's just not that it's just not true at all. And so, yeah, I mean, certainly, you know, given that protected groups have had, you know, a history of systemic discrimination country, world, um, people are very concerned about self-identification. Um, and so this could include, it not only includes gender race, but also, veteran status, disability status, um, sexual orientation and gender identity. Self-identification is legally, generally, this is optional for an employee to do. And you as an organization, you may have a legal obligation to report what, how employees are self-identifying.

Abby ([23:02](#)):

So this could be, again, we were just talking about federal contractors and one sort of interesting pitfall that can happen with federal contractors that you can't overrule, how an employee self identifies either generally under those purposes. So if some employee, you know, they say, well, I don't have a disability, but, you know, maybe you think otherwise, I mean, you can't go in and say, no, your self-identification is wrong. So, how an employee self identifies is how they're going to self-identify. If they don't want to participate in a diversity audit, you know, it's possible, uh, depending on the context that you could discipline them, but I would really encourage an employer not to do that. I don't think that really sets the right tone that you want for your diversity and inclusion program. And so, you know, that is sort of a struggle.

Abby ([23:51](#)):

Um, so what the other things that I think an employer can do to encourage self-identification. To the extent anything there could be an anonymous avenue for reporting an anonymous survey or some for employees to, to report any sort of diverse identity. I think that's really helpful, but it's not always possible, particularly in smaller organizations, but that's something that you can try. Also communicating the benefits of self-identification and how it's important to the company's goals of diversity and inclusion. You know, saying it really does matter to the company that you provide this information to us, and also stressing that it will be kept confidential as much as possible. And I think also telling, telling employees who will have access to the data is also also very helpful. I think a lot of times employees think, ""well, this survey, they're gonna be asked to fill up this questionnaire and it's gonna go directly to their supervisor. And a lot of times, if you're doing a diversity audit, that's not true. I mean, it could be going to, you know, someone in HR who does, has never even met this person before, or it's going to a consultant. So, explaining that to employees can help encourage them to self-identify if they don't think, they know that their supervisor isn't going to get to see that information. Or even their coworkers. I mean, they might think, I don't want, you know, this person who sits in the cubicle next to me to know, so relaying all that information, you know, definitely diversity training, any time that any time that the company is doing anything to message how important diversity and inclusion is, is going to help people, you know, again, feel comfortable stepping up. That it's not, that they're not being targeted, that the company really wants to know about their diverse identity to take it into, you know, into account to the company and how the company can help make them feel more included.

Abby ([25:42](#)):

So I think that that is really, you know, those are really because that is, you know, if you don't get that information, that's gonna make you doing your diversity audit, um, and, and make your efforts really hard. And we mentioned employee resource groups earlier. Those are also a good way if employees see visibility with other individuals and that the company is supporting, you know, okay, this is great. We have this an organization for, see that the company is being supportive of them. That can really encourage people to self-identify and to feel more comfortable speaking up about something that they otherwise would not have.

Sireesha ([26:17](#)):

And let's finally talk about board recruitment, Abby. You've given us a lot of great insight on hiring practices and working on DEI programs within your existing workforce, but board recruitment is another area that a lot of nonprofits are focusing on as they're trying to diversify their board of directors. Um, what are some considerations for boards as they seek to diversify?

Abby ([26:44](#)):

Yeah, this is huge. I mean, certainly this is something that we're seeing a lot, even in for-profit sector. We're obviously in Georgia. California, just for example, has put in some requirements about having females on board. This is huge. And also, you know, I'm probably, this audience will probably know this without convincing, but there's been all studies that have come out that have stressed, you know, having a more diverse board is actually gonna make your company more successful, more financially successful. So it, it is just so important. Um, I think, you know, we were just talking about diversity audits. Knowing the composition of your organization is gonna really help with your board. You know, are there large gaps, you know, does, how much does our, the composition of our board line with the composition of our organization? And then also the population that we're trying to serve in our nonprofit does our, is our board reflective of that? Are we a racial justice organization that is really lacking minority involvement on the board? So that's sort of the first thing I think. Really, you know, looking at the, at who is, who is on the board and how does that line up with the organization and your goals.

Abby ([27:53](#)):

Expanding the pipeline. This is something with including employees, but with boards as well. I think a lot of times people say, oh, well, you know, our board is like this, cuz these are the only people, you know, we can find stop using that as an excuse. I mean, get out, maybe go to, you know, local MBA programs or other, you know, um, graduate, um, programs throughout the city to look for qualified people who could become members of the, the board who are more, um, more diverse. One suggestion that I've seen, you know, one issue that a lot of boards have is that there's low turnover. People can hold board seats for a really long time.

Abby ([28:31](#)):

And another thing to think about a lot of nonprofit boards have get, or give requirements or some other sort of background qualifications. I mean, obviously these are important. Nonprofits need fundraising need money. But are there get, or give requirements that are in place that may prevent more diverse candidates, from being on your board because that's gonna be prohibitive. So, you know, maybe look at that evaluate that, would there be other ways to get funding that we don't require it from from the board and, and see has that historically prevented us from getting more diverse candidates. Or again, background qualifications too. Do we have some background, you know, qualification maybe as someone has to be employed for 10 years or something before in this particular field, before they can be on the board, is that going to really limit the recruiting for the board? So considering something like that too.

Abby ([29:24](#)):

You know, again, I just can't stress how important it is to make sure that there's diversity on your board. Um, KPMG put out a board diversity disclosure benchmarking tool. I mean, that's really obviously designed for, for profit companies, but if you are, if you're really focusing on your board, it might be just helpful to look at some of those materials and just look at what's out there to help. What resources are out there for nonprofits and other companies to increase board diversity? And, and again, I think that it's, it's really hard to say that you are focusing on DEI initiatives when whoever is at the top, does not reflect diversity. So I think it's a great place to start. Um, and you know, I, and then you're gonna need those voices to help guide your other diversity efforts. And I think it's really hard to have just one group of people trying to, you know, say how we're gonna make everything diverse when, when they're not

actually diverse. So, I think looking at the board is a great place to start and a great place for a nonprofit to focus when they're starting with their DEI initiatives.

Sireesha ([30:28](#)):

Wow. Abby, this was a lot of great information you shared with us. Not only important legal considerations, but there was also a lot of good, practical insight in there as well. So we appreciate you taking time to share your knowledge and expertise with us. Thanks, Abby.

Abby ([30:45](#)):

All right. Thank you so much.

Sireesha ([30:49](#)):

We hope that you found this episode of the PBPA Podcast to be informative and helpful. We add new episodes every month with short conversations about general, yet important legal information for Georgia nonprofits. Remember that this is not legal counsel. Talk to your attorney about your organization's specific concerns. Thanks for tuning into the PBPA Podcast. And to all nonprofits listening out there, thank you for all the good work you continue to do in our community.