International Law Office

EMPLOYMENT & IMMIGRATION - USA

Reverse discrimination risks to consider in managing ESG aspirations

AUTHOR

Ludia Kwon

02 June 2021 | Contributed by McDermott Will & Emery

Introduction
Permissible versus impermissible affirmative action
ESG guidance

Introduction

Environmental, social and corporate governance (ESG) efforts are important but create unique risks for multinationals with US operations due to the risk of reverse discrimination litigation under US law. A recently filed lawsuit, *Kafiti v Electrolux* (WD NC), highlights that risk.

Kafiti is a male attorney who held the position of interim vice president, general counsel, secretary and compliance officer for Electrolux North America. He is sueing not only the US subsidiary that directly employed him, but also its Swedish parent because he was not promoted to general counsel permanently.

Kafiti alleges reverse sex discrimination driven by the parent's strategic initiatives reflecting a preference for women in leadership positions. Kafiti references the parent's publicly available 2019 sustainability report, reporting the percentage of women in leadership and setting a goal to increase women in those roles to 35% by the end of 2020.

This lawsuit highlights a risk in implementing ESG efforts in the United States because US employment discrimination laws swing both ways. For example, the prohibition against sex discrimination protects men as well as women. This means that ESG efforts involving employment must be pursued more thoughtfully.

ESG is undeniably important but requires a risk assessment.

Permissible versus impermissible affirmative action

This tension between advancing the employment of underrepresented groups and the obligations of non-discrimination laws is called the 'affirmative action' issue in the United States. There have been multiple decisions from the US Supreme Court but none offer a bright line of demarcation between permissible and impermissible affirmative action efforts.

The most recent of those cases was *Ricci v DeStefano* (2009), in which an exam determined the pool of candidates to fill positions with the City of New Haven. After the test scores were posted, the city discarded these results because "too many whites and not enough minorities would be promoted were the lists to be certified".

Disappointed, successful test takers sued over losing a test-based promotion. The Supreme Court found that the city's good-faith belief that the use of the exam results would have resulted in discrimination lawsuits from candidates with low scores was insufficient to justify its transparently race-based decision.

Despite such case law, affirmative action plans are required of those doing business with the federal government under a series of executive orders. Those plans, which are monitored by the Office of Federal Contract Compliance Programmes (OFCCP), may provide the best clues for multinationals seeking to mesh their ESG efforts with US law.

OFCCP plans are built on outreach – for example, on recruiting talent from sources that likely contain a higher percentage of underrepresented workers such as women's colleges and historically black colleges. Likewise, OFCCP plans often include career advancement training, both classroom and on the job, to develop a large pool of more diverse talent.

Such affirmative action plans include aspirational goals calibrated on projected vacancies and projected

availability of women and minority candidates, but never quotas. There is no selection requirement of the unqualified or unneeded. Rather, efforts are directed at expanding the pipeline through flexible recruiting and training programmes instead of quotas.

This affirmative action/reverse discrimination tension is further complicated by recent legislation in California, where public companies headquartered in California will now be required to have a certain number of women and minorities on their board or be subject to monetary penalties.

Outside board members are not employees, but inside directors are. Thus, numerical quotas for board representation based on specific characteristics create no risks for employment lawsuits if handled exclusively through outside directors. But, public statements regarding a company's diversity goals for directors can lead to another risk: shareholder derivative lawsuits.

City of Pontiac General Employees' Retirement System (Derivatively on behalf of Cisco Systems, Inc) v Wesley G Bush (ND CA) highlights that risk. In this case, a shareholder claimed that Cisco's "public statements about its belief in, and commitment to, diversity and inclusion were necessarily false and misleading" because it had no black directors.

Simply stated, ESG efforts will never be risk free in the United States.

ESG guidance

Quotas are an attractive solution: they are easy to implement and easy to quantify, and it is easy to make rapid structural changes. Yet, quotas also make it too easy to be sued for reverse discrimination. Every announcement of a quota or anything that resembles a quota creates risks for reverse discrimination claims such as *Kafiti*.

Corporations are beginning to announce that bonus eligibility will be based on human capital metrics. Done inartfully, this becomes a quota in disguise with individual managers using sex or color as the basis for hiring or promotion in order to qualify for such bonuses. Done more artfully (eg, basing the metric on aiding in the retention of existing diversity), there is less danger.

In contrast to quotas or bonuses for hitting human capital metrics, focusing on process may be both safer and more effective in pursuing ESG efforts. For example, the American football profession addressed the lack of minority head coaches by creating a rule that there must be one minority interviewed for each such opening. Similarly, law firms in the United States are now embracing a similar rule that 30% of candidates for leadership roles will be women. Both focus on process rather than results, which is far safer in avoiding the risk of reverse discrimination claims.

Finally, process changes are more likely to produce a lasting impact. Quotas can be met but meeting those quotas fails to alter how the company recruits and promotes. Quotas are a short-term fix that fail to address the underlying reasons for underrepresentation .

The Harvard Law School Forum on Corporate Governance found that 62.5% of responding businesses reported that the social factor of ESG receives more of their attention now than ever before. Companies truly serious about making lasting changes on that front will be focusing on process: it is legally safer given US litigation risks and promises a far more lasting effect.

For further information on this topic please contact Ludia Kwon at McDermott Will & Emery by telephone (+1 310 277 4110) or email (lkwon@mwe.com). The McDermott Will & Emery website can be accessed at www.mwe.com.

The materials contained on this website are for general information purposes only and are subject to the disclaimer.