

Diversity, Equity and Inclusion (DEI) and employee activism

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Focus of this presentation

- The legal framework of DEI initiatives – limitations and possibilities
- Risks – examples of cases and case law
- Monitoring the impact of DEI initiatives – limitations and possibilities
- Employee activism – how to balance the ESG/DEI agenda with employees' freedom of expression?

Examples of DEI initiatives

- Unconscious bias and diversity training
- Establishing a diversity and inclusion board
- Employee networking groups (for specific minority groups)
- Tie executive compensation to diversity goals
- Mentoring/talent/leadership programmes that support the attraction, retention, education and promotion of minority groups
- Targets for specific minority groups in recruitment, promotion, etc.
- Equal pay initiatives
- Monitoring of diversity progress

DEI initiatives

- Increased number of cases in the US where it is claimed that certain DEI initiatives constitute **reverse discrimination**, or that they contribute to a **presumption of discrimination**, in the context of decisions on recruitment, promotion and dismissal
- In Denmark – as in the US – we have a fairly high number of discrimination cases, and there are several similarities between US and Denmark in this area of law, because the scope of positive discrimination is limited in both countries
- For this reason, there is a risk that this development will spread to Denmark as well as other jurisdictions

The legal framework of DEI initiatives

Limitations and possibilities

Protected criteria in Denmark

- Gender
- Race
- Skin colour
- Religion or belief
- Political opinion
- Sexual orientation
- Age
- Disability
- National, social or ethnic origin
- Gender identity, gender expression and gender characteristics

Protected criteria

- Prohibition of discrimination in relation to
 - Recruitment
 - Dismissal
 - Relocation
 - Promotion
 - Determination of pay and working conditions

Positive discrimination – possibilities

- The possibilities of positive discrimination are very limited in Denmark
- Positive discrimination constitutes direct discrimination and would thus require a clear exception in the law; otherwise, the positive discrimination is unlawful
- When does an initiative constitute positive discrimination, thus being potentially unlawful?
 - "Back-of-the-napkin" test or "just reverse the language"

Positive discrimination – possibilities

The Equal Treatment Act (gender)

- Legal basis for positive discrimination on the grounds of pregnancy and childbirth-related leave
- **Obtaining a specific exemption** – if for certain types of professional activities and education/training, it is of decisive importance for the person concerned to be of a particular gender and this requirement is proportionate to the professional activity in question, the relevant minister may decide that the principle of equal treatment may be derogated from (section 13(1))
- **Obtaining a general exemption** – the relevant minister may authorise measures to promote equal opportunities for men and women in order to affect the access to employment, education, etc. (section 13(2))

Positive discrimination – possibilities

- The Equal Treatment Act (gender) – executive order on initiatives to promote equal treatment
 - Employers can introduce **initiatives for a period of up to 2 years** in order to attract the underrepresented gender
 - It is a condition that the gender in question is **represented by 25% or less** in the area and no preference may be given in the context of recruitment/admission
 - When **advertising vacant positions, it is permitted to encourage the underrepresented gender to apply** for employment. However, it must be clearly stated that all applicants can apply and that the underrepresented gender is not given preference in recruitment

Positive discrimination – possibilities

- The Anti-Discrimination Act
 - Employers may not in connection with or during the employment of a worker request, obtain, receive or make use of information about the worker's **race, skin colour, religion or belief, political affiliation, sexual orientation, gender identity, gender expression or gender characteristics or national, social or ethnic origin** (section 4)
 - Thus, the prohibition **does not extend to age and disability** (however, information on an applicant's age may not be requested when submitting, sending, uploading and entering a job application)
 - Very few possibilities under the Act to introduce positive discrimination (e.g. policies to promote the retention of senior employees)

Risks

Examples of cases
and case law

Risks – DEI initiatives

- Examples of cases/case law from the US
 - Starbucks Corp executives and directors sued by conservative think tank for *”setting hiring goals for Blacks and other people of color, awarding contracts to diverse suppliers and advertisers, and tying executive pay to diversity”*
 - Former recruiter for Google and YouTube claims he was unlawfully dismissed because he did not reject white and Asian male job candidates, which he said the companies pressured him and other recruiters to do for diversity purposes

Risks – DEI initiatives

- Examples of cases/case law from the US
 - Coca-Cola and Disney have both made headlines in the media because of the content of their DEI training
 - In the DEI training in Coca-Cola there was a direct instruction to the employees to *"be less white"*
 - In the DEI training in Disney there were suggestions to reject "equality" and instead strive for "equity", e.g. by building *"a leadership team with people of color at the helm ..."*

Risks – DEI initiatives

- Examples of cases/case law from the US
 - In *Weaver v. Ohio Farmers Insurance Co.* (Ohio Court of Appeal – 8 August 2022), a dismissed male employee claimed he was dismissed due to his gender and he referred to the company’s DEI policy, alleging that it proved the company “*engaged in discrimination by emphasizing the need to increase the number of women and minorities in leadership roles*” and claimed the policy was essentially a “*quota*”
 - The court found that the employer had legitimate business reasons for its decisions and the DEI policy was not in itself enough to prove unlawful discrimination based on gender
 - The court therefore ruled in favour of the company

Risks – DEI initiatives

- Examples of cases/case law from the US
 - In *Duvall v. Novant Health, Inc* (W.D.N.C. 26 October 2021), the jury found that the termination of the employee (SVP) *”was part of an overall promotional tactic aimed at increasing diversity within the employer’s leadership ranks”*
 - The DEI plan included a long-term-incentive plan for senior leadership members who could demonstrate they improved DEI in various areas. In fact, 50% of the LTI plan was specifically dependent on senior leadership’s ability *”to meet their underrepresented minority hiring targets”*
 - The employee was awarded USD 10 million in punitive damages

Risks – DEI initiatives

- A decision by the Board of Equal Treatment illustrates the problem in a Danish perspective
- Decision of 31 October 2022 from the Board of Equal Treatment
 - The case concerned a fund management company that had a ratio between male and female employees of 67.5% and 32.5%, respectively
 - The company decided to organise an event specifically targeted at female university students, where female employees would give presentations on their work and where information would be provided on the company's recruitment process

Risks – DEI initiatives

- Decision of 31 October 2022 from the Board of Equal Treatment
 - The event was advertised on the company's website via an online recruitment system and in a closed Facebook group for a year group of university students
 - When registering for the event, students had to upload CVs and transcripts of grades
 - A male student filed a complaint about the initiative to the Board of Equal Treatment, claiming that he did not have the opportunity to participate in the event – and was thus also excluded from possible employment solely because of his gender
 - The company submitted that the event was a networking event not aimed at recruiting students for specific vacant positions, and that the event therefore fell outside the scope of the provision in the Equal Treatment Act on advertisements

Risks – DEI initiatives

- Decision of 31 October 2022 from the Board of Equal Treatment
 - The Board referred to the fact that it may be permitted, as part of an advertisement, to encourage the underrepresented gender to apply for employment
 - However, the condition for such encouragement is that it is made clear that **all applicants have access to applying, and that it is also made clear that the underrepresented gender does not have a preferential position in recruitment**

Risks – DEI initiatives

- Decision of 31 October 2022 from the Board of Equal Treatment
 - A majority of the members of the Board found that the event was in fact a recruitment event and that the company had acted in breach of the prohibition on advertising for persons of a particular gender for employment, as it had not done so within the scope of the exceptions provided for by the legislation
 - The event was therefore not in compliance with the Equal Treatment Act

Questions for the panel

- Do you see any reason for a similar legal concern regarding employers' DEI initiatives in your jurisdiction?
- Have you seen any examples of this in case law?

Questions for the panel

Potential dos and don'ts?

- Diversity requirement in the recruitment panel?
- Diversity requirement in the group of applicants selected for interviews - for example, a requirement for a balanced representation of men and women?
- Mentoring programmes, talent programmes, etc. only available to a specific group of employees belonging to a protected category?
- Setting target figures for specific groups belonging to a protected category?
- Diversity targets as a KPI in management bonus plans?
- Implementing binding quotas?

Monitoring the impact of DEI initiatives

Limitations and possibilities

Monitoring the impact of DEI initiatives

- The Equal Treatment Act
 - Information on gender may be registered and the impact of otherwise lawful DEI initiatives on the underrepresented gender can therefore easily be monitored
 - However, it should be noted that general reference to the results of the monitoring could be used as evidence in any cases where employees claim that there has been a breach of the prohibition of gender discrimination

Monitoring the impact of DEI initiatives

- The Anti-Discrimination Act
 - Prohibition against employers requesting, obtaining or receiving and making use of information about employees' **race, skin colour, religion or belief, political opinion, sexual orientation, gender identity, gender expression or gender characteristics, or national, social or ethnic origin** and this means that in practice it is very difficult to monitor the impact of DEI initiatives in relation to these minority groups in Denmark
 - It is possible to purchase a special report from Statistics Denmark which, based on the information on employees held in Statistics Denmark, describes the ethnic profile of a company

Monitoring the impact of DEI initiatives – questions for the panel

- Do you have similar restrictions in your jurisdiction?
- How do employers generally approach the wish to monitor the impact of DEI initiatives in your jurisdiction?
- Will employers be able to collect this type of information from the employees themselves, if done anonymously and possibly in such a way that it would be voluntary for the employees to respond?
- Could it be left to an external supplier to carry out anonymous monitoring, so that the external supplier handles the collection of information anonymously from the employees?

Employee activism

How to balance the ESG/DEI agenda with employees' freedom of expression?

How to balance the ESG/DEI agenda with employees' freedom of expression?

- Employees may wish to share and discuss their personal views on different topics such as the war in Ukraine, Black Lives Matter, the MeToo movement, etc. with coworkers **in the workplace** and perhaps also **in the public domain**
 - But what if these views do not coincide with the employer's policies or the views of the majority of the employees in the workplace?
- How do employers generally approach these situations in your jurisdiction?

Questions from the audience?