



DEI Micro-Webinar Series:

The Power and Perils of DEIB Data

Christy E. Kiely
Partner, People Analytics Practice Group

Nicholas H. De Baun
Partner, People Analytics Practice Group

July 9, 2024

Seyfarth Shaw LLP

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).
©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential



Legal Disclaimer

This presentation has been prepared by Seyfarth Shaw LLP for informational purposes only. The material discussed during this webinar should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The content is intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have.

Presenters



Christy E. Kiely
Partner, People Analytics Group
Washington, DC



Nicholas H. De Baun
Partner, People Analytics Group
New York

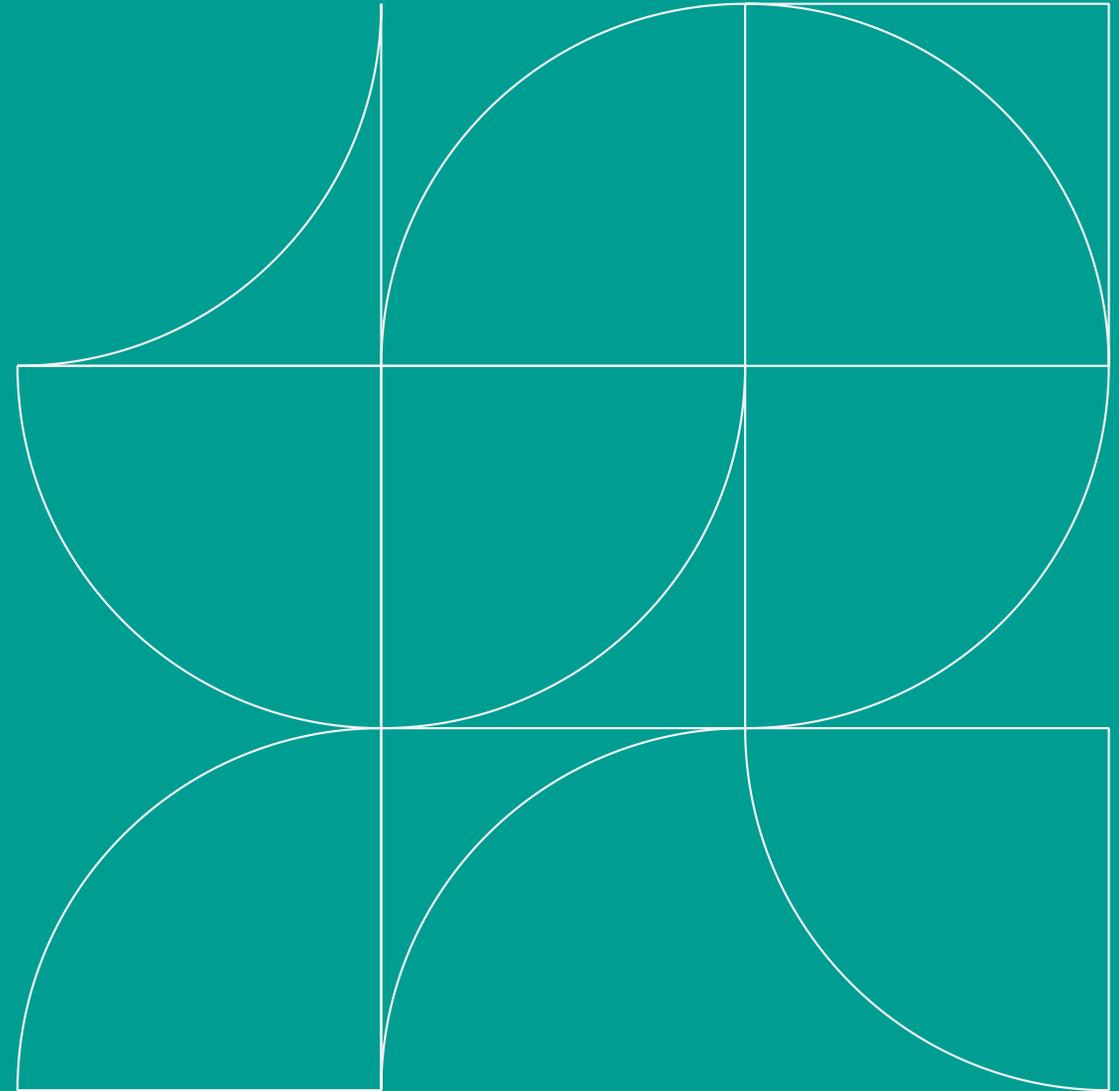


Agenda

- 1 | An All-Too-Common Hypothetical
- 2 | DEI Data – the Risks
- 3 | Best Practices

1

An All-Too-Common Hypothetical



Hypothetical, Part I

Laura is the CTO of a large fintech company. She has about 400 employees reporting up to her. Recently, Laura has become concerned that women and some races and ethnicities are underrepresented on the team.

Hypothetical, Part I

Laura recently learned about the HR Ops team when she met Hector, one of its junior members, at a company event. Laura learned that Hector is responsible for maintaining and pulling demographic data for HR.

Hypothetical, Part I

Laura calls Hector and asks him if he could pull some demographic data and send it to her. Laura tells Hector she'd like to see the race/ethnicity and gender of every employee in IT. And, as long as he is doing that, could he also include age?

Hector pulls the data and emails it to Laura.

Hypothetical, Part II

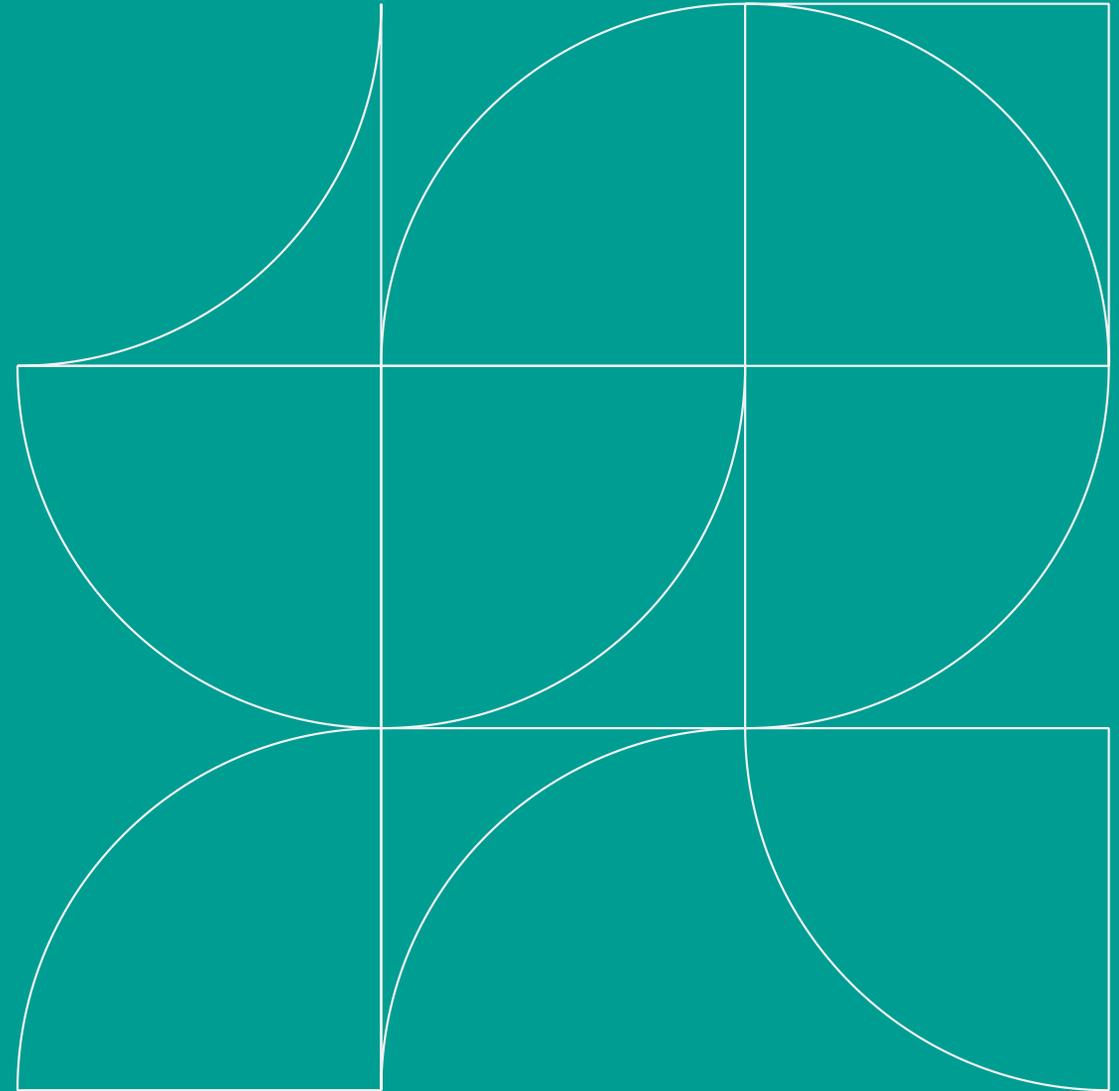
Laura is thrilled to finally have access to this data – now the team can really make progress! She emails the spreadsheet to her management committee – her direct reports – and encourages them to review the data in advance of their regular monthly meeting tomorrow.

Hypothetical, Part II

At the meeting, Laura and the management committee go over the spreadsheet line by line. The company is in the midst of its annual promotion cycle, and the committee earmarks some employees for promotions to improve the diversity of the team's senior ranks.

2

DEI Data – the Risks



The Risks



The data will be leaked outside the company or fall into the wrong hands.

Here, the data was emailed widely among senior managers. In the event of litigation, the company could be forced to produce the data.

Once the data is 'out in the wild', it is impossible to recapture.

The Risks



Data can be misused and/or mischaracterized

- Intentionally (competitors, detractors, press)
- Inadvertently (well-intentioned but misguided)

Difficult to prove a negative

- i.e., that known demographic information did not influence decisionmakers

The Risks



There is also a risk that the data will come to light in discovery if there is employment-related litigation, or if there is a regulatory inquiry by the EEOC or the DOL.

DiBenedetto v. AT&T Services, Inc.

1:21-cv-04527 (N.D. Ga. June 2024)



“To implement the D&I program, **AT&T compiled and distributed to its business department leaders...detailed information on the racial, ethnic, and gender demographics of its workforce, including breakdowns of these demographics at different levels of the corporate and departmental hierarchies.**”

Among the cited evidence was a **company email that “included bar graphs and charts showing the race, ethnicity, and gender composition of the [department at issue] and breakdowns of these demographics by non-management positions, management positions, and senior leadership positions.”**

The relief sought by the Plaintiff included: injunctive relief, reinstatement, full back pay, compensatory damages, liquidated damages, punitive damages, attorneys’ fees and costs, and interest.

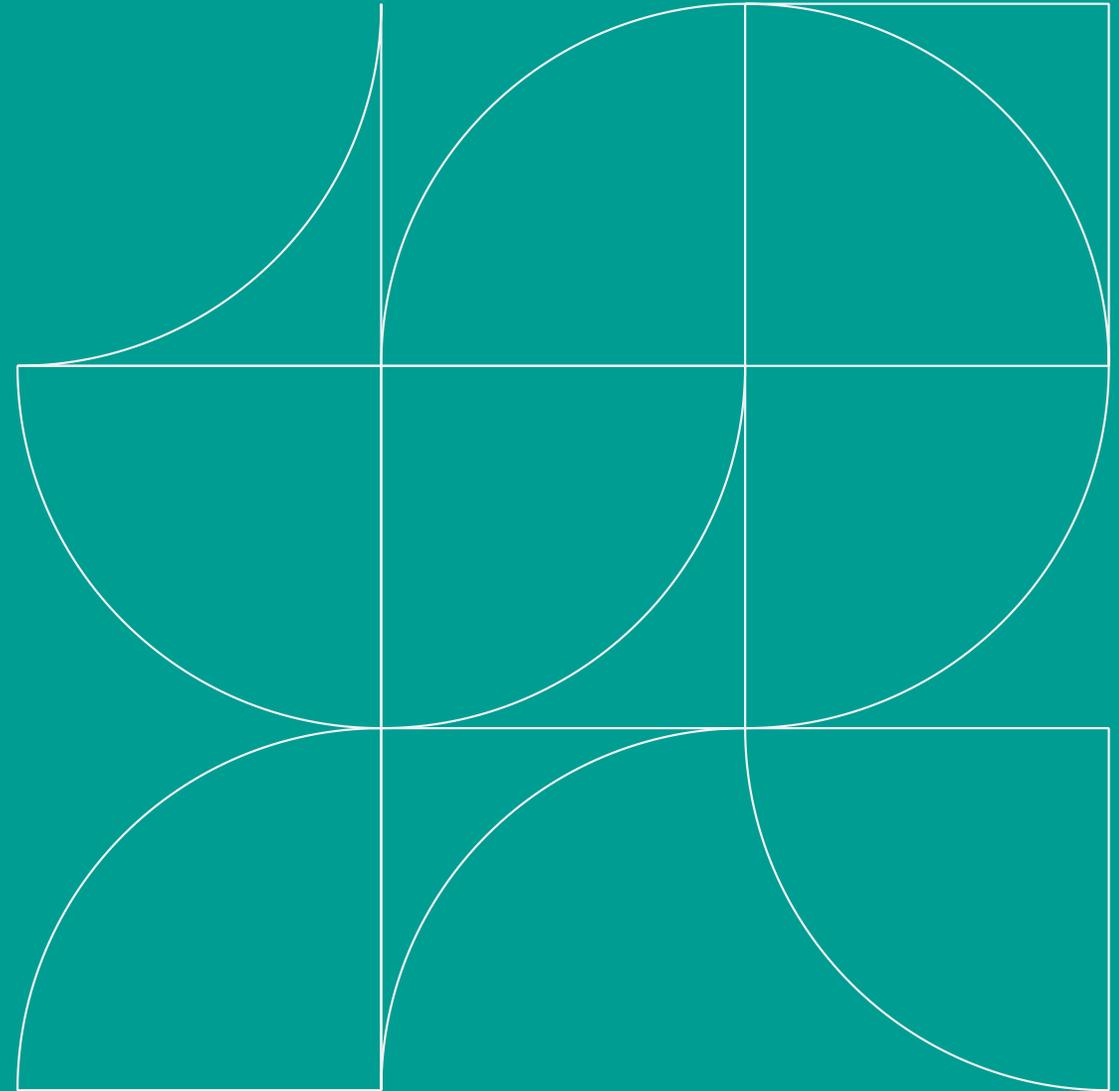
The Risks



Because senior managers reviewed this data without guidance from HR or legal, and because they used this data to make promotion decisions, there is a risk in some jurisdictions that they could be ***personally liable*** if there is litigation later on.

3

DEI Data – Best Practices



Best Practices



- Always undertake a deliberate risk-benefit analysis
- DEI data is useful and powerful..... which can be good, or bad
- Drive insights and meaningful change within the boundaries of current law

Best Practices



- HR should tightly control employee data.
- HR should not provide employee data unless it knows:
 - Who is going to see it
 - Why they want it
 - How they are going to use it

Best Practices



- There should be a central team in HR responsible for providing such data.
- Senior HR should be aware of and approve every request, and requests should be escalated to Legal as appropriate.

Best Practices



- If someone outside the trained HR leadership group is presenting on data, have a representative there to ensure nothing is lost in translation

Best Practices



- Data should be
 - Provided on a need-to-know basis only
 - Restricted to just the information that is needed for sound decision-making

- Lock reports with technology to prevent undesired editing / forwarding

Best Practices



- Counsel should be as necessary consulted (whenever possible) to preserve privilege.
- Label reports “CONFIDENTIAL – DO NOT FURTHER DISTRIBUTE” and, ideally, as “ATTORNEY-CLIENT PRIVILEGED WORK PRODUCT”

Best Practices



Dashboards

As a general matter, the following rules apply:

- The more aggregated and high-level the data, the less risk.
- The more limited the population who has access to the data, the less risk.

Best Practices – Dashboards, cont'd



As a general matter, the following rules apply:

- The more removed recipients are from day-to-day employment decisions, like hires, promotions, and terminations, the less risk.
- After-the-fact summaries (such as the composition of previous applicant pools) present less risk than sharing demographic details in real time, particularly with persons involved in a selection process.

Best Practices



Dashboards

- Should be provided only after thoughtful consideration
- Should reflect only data that is necessary for sound decision-making
- Be especially careful with anything connected to hiring, promotions, and pay
- Should never reflect personally identifiable information (PII)



SCAN ME

CLE: NEW PROCESS

Please scan the QR code and complete the digital attendance verification form to receive CLE credit for this program.

You will need:

1. **Title:** The Power and Perils of DEIB Data
2. **Date Viewed:** July 9, 2024
3. **Attendance Verification Code:** SS_____

State-specific CLE credit information can be found in the form.

**thank
you**

For more information, please contact:

Christy Kiely

Partner, People Analytics Practice Group

email: ckiely@seyfarth.com

phone: +1 (202) 828-5368

Nick De Baun

Partner, People Analytics Practice Group

email: ndebaun@seyfarth.com

phone: +1 (212) 218-3334