



Practical Considerations for Tri-State Employers: Setting Compliant, Realistic, and Measurable DEI&B Goals

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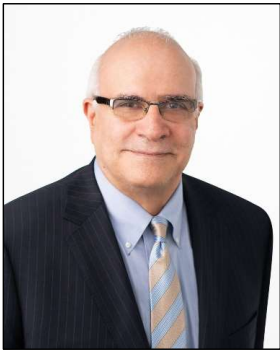
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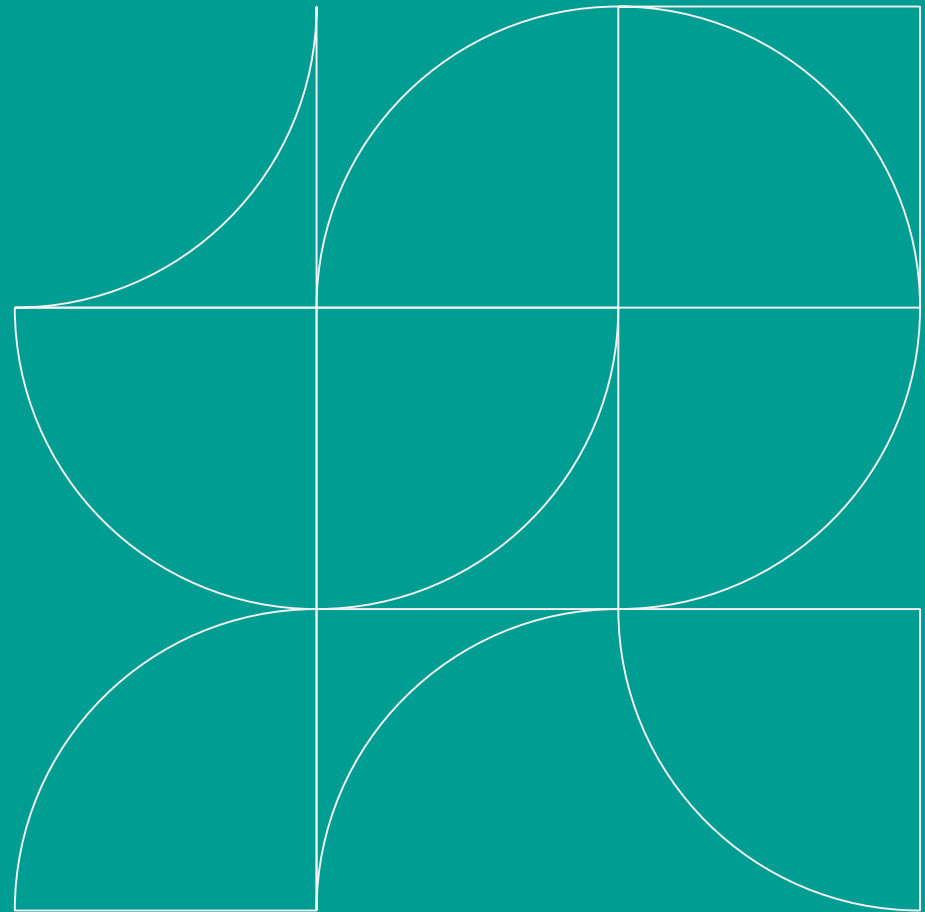


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Agenda

- 01** Societal & Business Landscape
- 02** Legal Framework
- 03** Three-Step Framework
- 04** Relevant Case Studies & Best Practices

Societal & Business Landscape



Defining Diversity, Inclusion, and Belonging

- How is “diversity” defined?
 - The attributes that make us unique
 - Interpreted as a broad concept, which includes commonly known protected classifications such as race, gender, or ethnicity
- How is “inclusion” defined?
 - Having a seat at a table and efforts to fully integrate persons within the workplace
 - “Diversity is being invited to the party; inclusion is being asked to dance.” - Verna Myers
- How is “belonging” defined?
 - Having a work environment where employees feel secure, supported, and included



[Diversity] benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.

Grutter v. Bollinger,
539 U.S. 306, 324 (2003)





Public and Legislative Attention

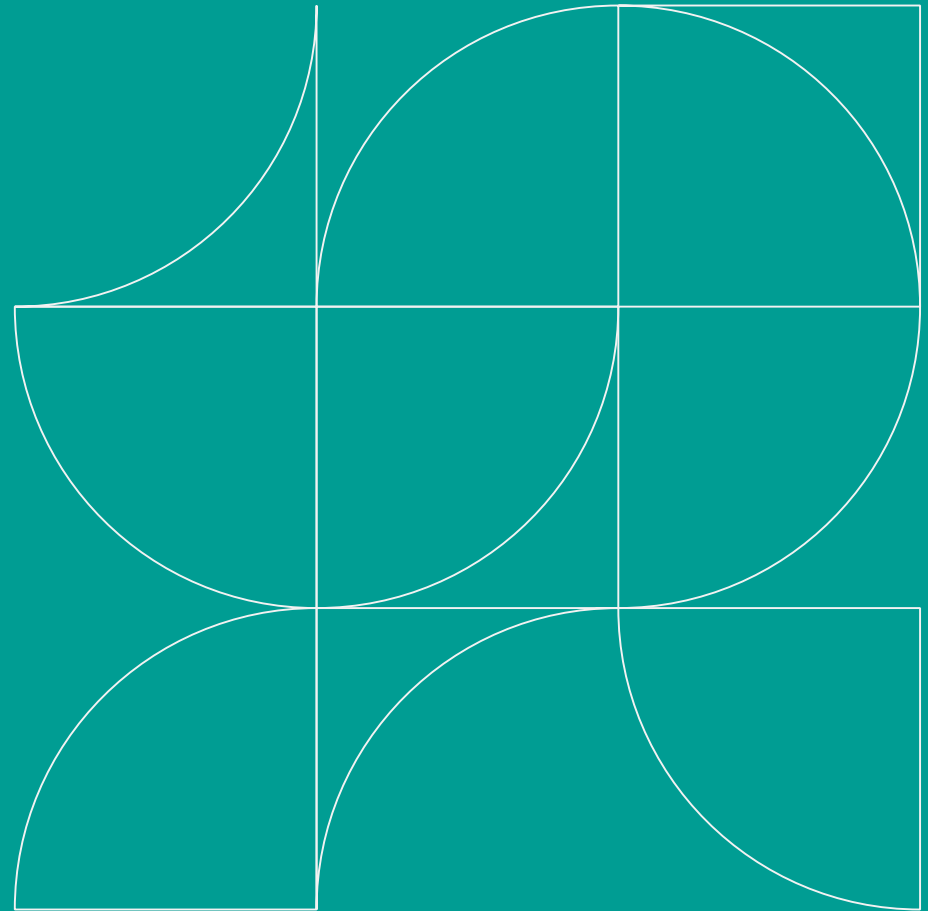
- The public remain vigilant regarding minority representation in several industries and companies.
- On January 15, 2015, the Oscars awarded all 20 acting nominations to white actors for the first of two consecutive years, inspiring April Reign to create the hashtag and movement #OscarsSoWhite.
- Prominent tech companies have been under increasing public pressure to increase hiring of minorities for several years.
- As of January 1, 2021, all publicly held domestic or foreign corporations whose principal executive offices are located in California must meet the minimum requirements for female directors and directors from underrepresented communities on their boards as required respectively by SB 826 and AB 979.



Litigation for Private and Public Employers

- DEI&B goal setting in the private sector and affirmative action in the public sector are facing increasing litigation.
- 2019 study by Elizabeth Hirsh, an associate professor at the University of British Columbia suggested that discrimination lawsuits provided equity-enhancing effects and representation gains for White and Black women and Black men.
- Brian Flores, former Miami Dolphins Head Coach, filed a class action lawsuit against the NFL and three NFL teams alleging discrimination related to the hiring and retention of Black coaches, coordinators, and front office personnel despite the use of the NFL's *Rooney Rule*.
- SCOTUS will reconsider the role of race in college admissions in two cases which will ask them to overrule the landmark 2003 decision in *Grutter v. Bollinger*.

Legal Framework for Setting DEI&B Goals



Legal Baseline

Title VII of the Civil Rights Act of 1964 (Title VII)

Prohibits discrimination in recruiting, hiring, termination, advancement, and compensation or any other term, condition, or privilege of employment based on race, color, religion, sex, or national origin

The Equal Pay Act of 1963 (EPA)

Prohibits sex-based wage discrimination

The Age Discrimination in Employment Act of 1967 (ADEA)

Protects individuals 40 years or older from discrimination based on age

Americans with Disabilities Act of 1990 (ADA)

Prohibits discrimination against qualified individuals with disabilities

State & Local Laws

States and municipalities prohibit discrimination based on a wide range of protected characteristics some of which are distinct from those protected under federal law



Title VII permits diversity efforts designed to open up opportunities to everyone...

...Further, the Commission believes that “persons subject to Title VII must be allowed flexibility in modifying employment systems and practices to comport with the purposes” of the statute. However, employers are cautioned that very careful implementation of affirmative action and diversity programs is recommended to avoid the potential for running afoul of the law.

EEOC Compliance Manual
Section 15-VI(C) Diversity and Affirmative Action



Key Factors for Evaluating Legality of DEI&B Initiatives

- **First:**

- Determine if there is an imbalance in your workforce you need to correct.
 - The Supreme Court has held that employers may establish programs by which they can take voluntary affirmative action measures, provided they can demonstrate a showing of a “*manifest imbalance*” in the race/ethnicity or gender of the employee group compared with benchmark data (“availability” data). See *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979).
- No precise definition of *manifest imbalance*
 - Some interpretations suggest that statistical significance should be the standard to determine when such an imbalance has occurred (that is, greater than 2 or 3 standard deviations).
- Should be based on analytics that are specific to the employer and to the jobs at issue
 - Compare the workforce composition in those jobs with the external availability or the percentage that one would “reasonably expect” to see in those jobs.
 - Where job requires special training, comparison should be with those in the labor force who possess the relevant qualifications.
 - Source of external availability data should be reputable and have used supportable methods for gathering the data used for benchmarking.
 - Census or EEOC consolidated data often used for this purpose

Key Factors for Evaluating Legality of DEI&B Initiatives

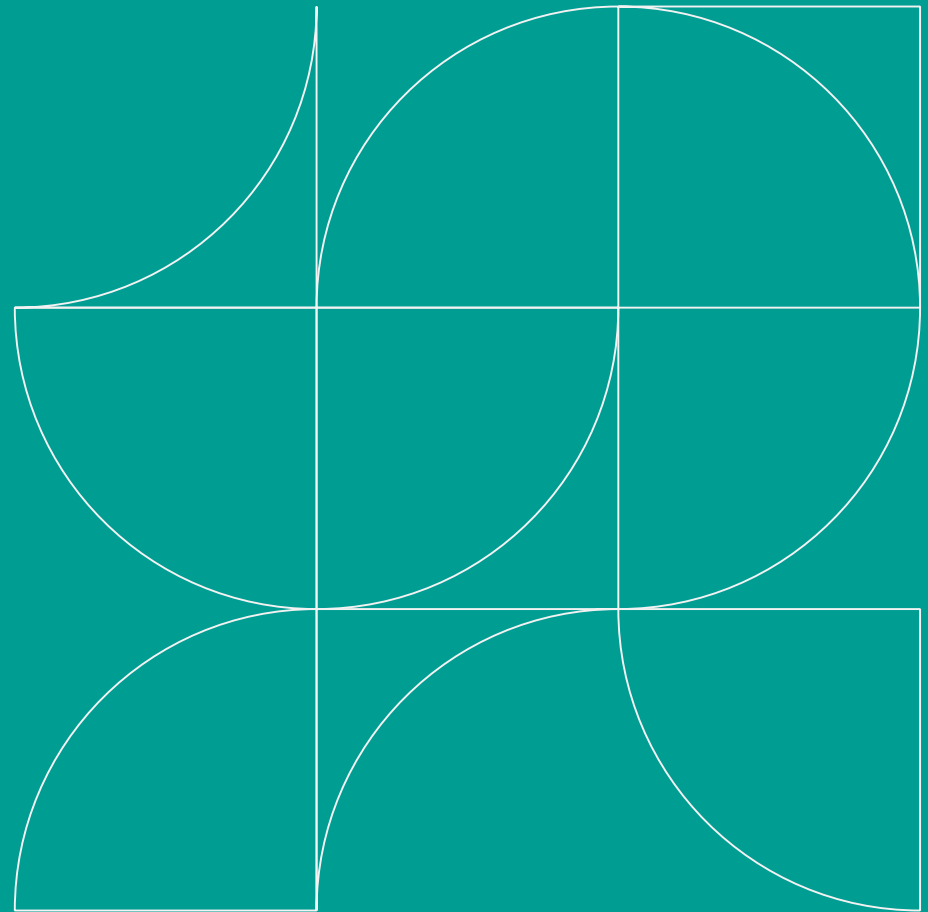
- **Remedial Purpose and Limited in Time and Scope**
 - Action to solve or “remedy” an imbalance must be narrowly tailored
 - Should be temporary and remedial in its intent
 - Goal should be to solve the “manifest imbalance,” not to maintain racial/gender balance
 - Remedy should be reviewed periodically to determine if there continues to be a manifest imbalance, and when the imbalance is solved, the remedial program ends
- **Not Trammeling Rights of Others**
 - Plans cannot “unnecessarily trammel” the rights of others
 - Actions should not be exclusionary
 - Programs should be “narrowly tailored” and cannot “insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.”
 - **No illegal quotas; race/sex cannot be the sole factor in promotion or hiring**

Key Factors for Evaluating Legality of DEI&B Initiatives

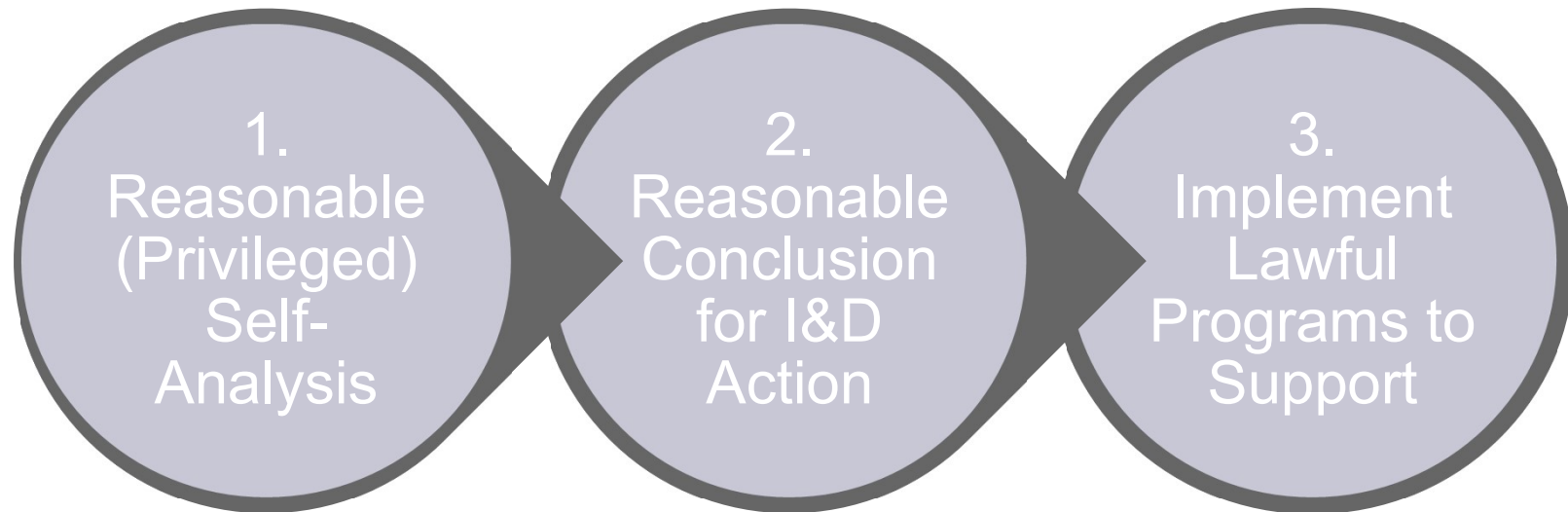
- **Diversity Can Be A “Plus Factor”**

- Programs that are not specifically “preference” programs have less risk.
- Title VII does not bar employers from favoring women and minorities under certain circumstances.
- Diversity goals should further a compelling interest “of which racial or ethnic origin is but a single though important element.”
- A holistic approach to qualifications should be used.
 - Diversity taken into consideration, along with all other qualifications
- **The Supreme Court has permitted “preferences” where there is a “substantial imbalance” in the workforce. See *Johnson v. Transportation Agency*, 480 U.S. 616, 631 (1987).**

Three-Step Framework



A Three-Step Framework to Establish Goals and Benchmarks



1. Reasonable (Privileged) Self-Analysis

- Effort aimed at identifying areas of opportunity for underrepresented groups and/or company talent strategy
- We recommend conducting the analysis under attorney-client privilege.
- Starting point for areas of analysis:
 - Current employee population as compared to the qualified pool of candidates in the reasonable recruitment area in which the employer recruits for similar jobs
 - Compare representation in specific jobs or specific job levels; consider business unit breakouts
- A robust inclusion and diversity program means looking at (under) representation at each level of the company, for example: EVPs; SVPs; Directors; professionals by similarly situated categories, such as IT professionals, finance professionals, etc.
- Always make sure you're comparing "apples to apples."

Considerations Related to Benchmarks

- The purpose of benchmarks is to establish accurate metrics against which your employee population and progress can be measured.
- Benchmarks should be based on a combination of external labor market availability and internal workforce data.
 - External market availability comes from:
 - Third-party vendors like consultants or market survey firms
 - Government agencies like Bureau of Labor Statistics, US Census Bureau, EEOC, and National Center for Educational Statistics (NCES)
 - Internal availability should be included in the benchmark based on the race and gender composition of the workforce in jobs that might be a source of promotable talent. In other words, the jobs that “feed” into higher level positions within the company...

Additional Considerations Related to Benchmarks

- Regardless of the data source selected to create benchmarks, make sure the benchmark reflects your workforce and you understand what it is saying:
 - Are your benchmarks position specific?
 - How are you defining your “relevant labor market”?
 - How are you identifying the promotable population?
 - How do your applicant pools compare against the benchmark?
 - If you are using industry specific data, does the industry itself have a problem that may undercut the reliability of that data?

TIP: Benchmarks will define your path – they form the basis for your decision to take action and are the measure against which effectiveness will be judged. Thus, above all else, you must have a clearly articulable and documented reason for why you have chosen the benchmarks that you have. Never look solely at population statistics or the percentage of minorities or women at lower levels in the organization. Always look at the “qualified pool of candidates”.

2. Reasonable Conclusion for Implementing I&D Action

- If the self-analysis reveals areas of opportunity, the company should implement an action plan.
- A reasonable basis may exist when the self-analysis indicates that:
 - There is underrepresentation in certain groups, jobs, etc. compared to reasonable benchmarks
 - There are specific practices that are suspected to lead to the results in the self-analysis, for example:
 - A historical recruiting practice to recruit from specific universities
 - Educational requirements – some are absolutely needed, but evaluate if they are all necessary
- A conclusion that a reasonable basis for action exists **does not** require:
 - An admission or finding of discrimination of any type
 - A determination that a Title VII violation occurred
 - A waiver of any defenses that may have existed for prior discrimination

3. Implementing Lawful Programs

- Generally, a reasonable action is one that is designed to:
 - Achieve Title VII's stated purpose
 - Solve issues identified and disclosed in the self-analysis
 - Function as a concerted and reasoned program rather than *ad hoc* events
 - Be in place temporarily and be monitored for effectiveness
 - Avoid unnecessary restrictions on employment and promotional opportunities for the workforce as a whole
- The action must be developed with specific goals and objectives in mind, though these need not necessarily be numerical.
 - The goals should be established for **specific** jobs or job levels

Reasonable Action in Response to Self-Analysis

Reasonable Action

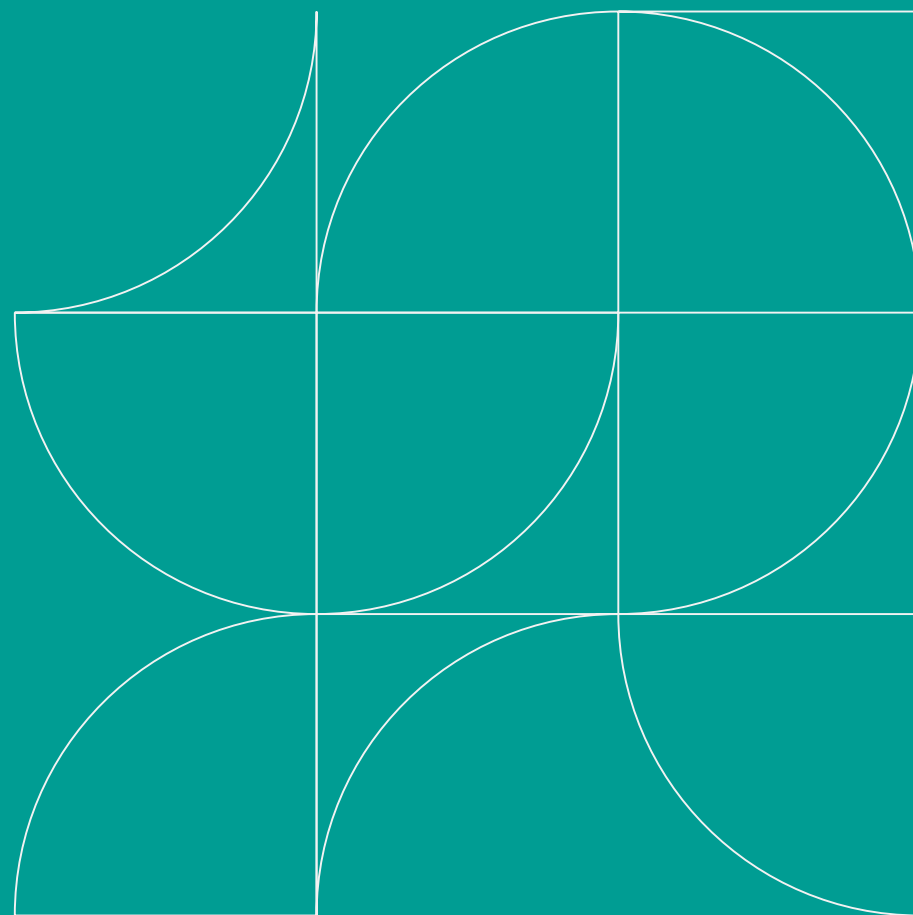
vs.

Unreasonable Action

- Aspirational goals based on a comparison of selected jobs within the current workforce with the relevant labor pool with annual interim goals aimed at making or measuring progress toward the long range goal
- Engaging in targeted recruitment which focuses on certain populations as part of an overall/larger recruitment strategy
- Eliminating or revising selection procedures or criteria which may have negative impacts on particular populations
- Establishing non-discriminatory training programs to overcome a lack of skilled applicants

- Discharging White or male employees and replacing them with People of Color or female employees
- Creating or setting aside position openings which are only available to women and/or People of Color
- Establishing a training program that is only offered to specific groups of employees (e.g., women or certain minority groups)
- Refusing to hire or deciding to terminate employees in order to maintain a certain utilization of female and/or minority employees

Relevant Case Studies & Best Practices





Senior Management wants to implement a Rooney-type rule and insists that for each opening, the company also include at least one woman and one person of color in the applicant pool. Is that okay?





We want to implement a diversity pledge by which we will pledge to double our roster of Black leaders within five years. Is that okay?





Senior Management directs Human Resources to hire five senior Black leaders in management during the next year. Is that okay?





Our company is struggling to retain Black and Latinx employees in our management roles. We would like to start a special company training program solely for Black and Latinx employees, which provides them with business training, soft skill development, and access to company leaders to improve retention. Is that okay?





We operate an employee referral program where employees are given a monetary referral bonus referring successful candidates to the company. Can we offer employees a higher referral bonus if their referral is an underrepresented minority?

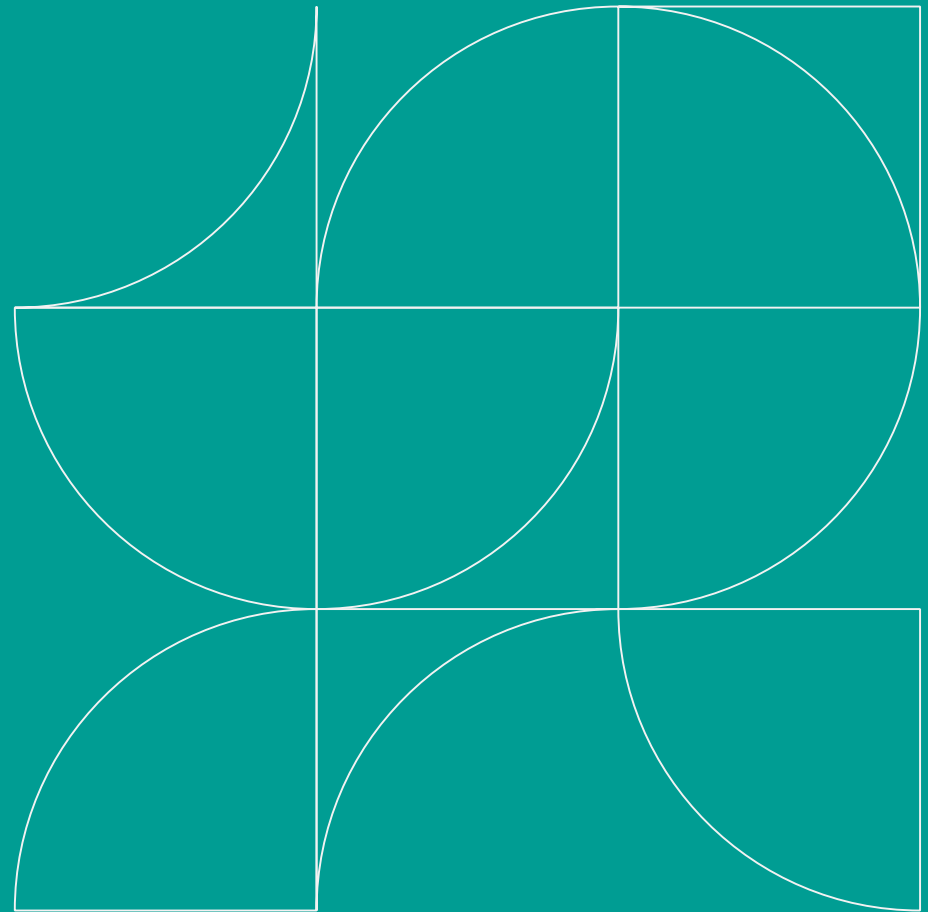




We are a federal government contractor with affirmative action plans. Can we also establish a separate diversity plan with goals outside of our AAPs?



Questions?



Thank You

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