Diversity and the Law: 2021

Neutral Strategies - Faculty[1]

Jamie Lewis Keith

Art Coleman

EducationCounsel
Policy | Strategy | Law | Advocacy

Melinda Grier

Introduction

This resource addresses court-labeled race- and gender-"neutral alternatives" to considering individuals' race and gender when conferring employment opportunities and benefits and deciding terms and conditions of employment. The term **"**neutral" is a misnomer. Unless and until we can eliminate the added burdens of racism and sexism in society, people of all races, ethnicities,[2] and genders are not on equal footing to compete for opportunities, making equality or neutrality under law impossible.[3] However, prevailing Supreme Court precedent and state bans adopt a faulty neutrality formulation and institutions of higher education (IHE) must wisely navigate it to advance their employment equal opportunity (EEO), diversity- and equity-related educational missions in ways that are both effective and legally sustainable.

These strategies fall into two major categories:

(1)   those that do not consider the race or gender of any individual and aim to advance authentic institutional priorities other than increasing race or gender compositional diversity—but also involve an awareness that the strategies may contribute to increasing compositional diversity and intend that effect as an ancillary matter;[4] and

(2)   those that have an inclusive effect even though they target individuals of certain races or gender, do not confer material benefits or opportunities based on an individual's race or gender, and do not involve a winnowing or selection process—but, rather, serve to expand availability of the same consequential information or opportunities for all, including, e.g., by expanding the applicant pool.

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[2] Race and ethnicity are distinct identities. However, federal non-discrimination law treats them in the same manner, and we use "race" to encompass both throughout this guide for brevity.

[3] *See*, *e.g.*, **Research Charts**, https://www.aaas.org/programs/diversity-and-law; National Academies. (June 2021). *National Academies Reports on Diversity, Equity, Inclusion and Racism in STEMM Education and Workforce*. file:///C:/Users/JLK/Downloads/summit%20paper%20june%202021%20(2).pdf; Malcom-Piqueux, L. (2020). *Transformation in the U.S. Higher Education System: Implications for Racial Equity*, National Academies. file:///C:/Users/JLK/Downloads/malcompiqueux%20symposium%20paper%20(5).pdf; National Academies. (2021). *Investigating the Potential Impact of COVID-19 on the Careers of Women in Academic Science, Engineering, and Medicine*. https://www.nationalacademies.org/our-work/investigating-the-potential-impact-of-covid-19-on-the-careers-of-women-in-academic-science-engineering-and-medicine; National Science Foundation. (2021). *Women, Minorities, and People with Disabilities in Science and Engineering.* https://ncses.nsf.gov/pubs/nsf21321/report/executive-summary (all data are pre-COVID-19 pandemic, but indicate high barriers even before the pandemic for "Blacks or African American, Hispanics or Latinos and American Indians or Alaska Natives," as well as to a significant but lesser extent to women, in science and engineering education and the workforce); Carnevale, A. P., Fasules, M. L., Porter, A., Landis-Santos, J. (2016). *African Americans: College Majors and Earnings*. Georgetown Center on Education and the Workforce. https://eric.ed.gov/?id=ED574446 ("African Americans account for only eight percent of general engineering majors, seven percent of mathematics majors, five percent of computer engineering majors, and 10 percent of health majors. In health, they are clustered in the lowest-earning detailed major: 21 percent in health and medical administrative services, six percent in higher-earning pharmacy, pharmaceutical sciences, and administration").

[4] In the student context, the Supreme Court refers to race-neutral strategies as "alternatives" to race-conscious strategies as a means to advance legitimate institutional objectives, apart from increasing racial compositional diversity, and which will also work "about as well" as race-conscious strategies to enhance such compositional diversity in order to provide compelling beneficial educational experiences for all students that are associated with a broadly diverse student body. *See Fisher v. University of Texas,* 136 S.Ct. 2198, 2208 (2016) (*"Fisher II"*) (quoting *Fisher v. University of Texas*, 570 U.S. 297 (2013) ("*Fisher I*")*).* In the employment context, the goals are different; they are remedial. However, courts also look to the use of neutral alternatives to the consideration of race and gender to avoid undue burdens on those of other races. *See, e.g., Johnson v. Transportation Agency of Santa Clara County*, 480 U.S. 616 (1987); *Shea v. Kerry,* 796 F.3d 42 (D.C. Cir. 2015), *cert. denied*, 136 S.Ct. 1656, (2016).

These strategies may be useful to IHEs seeking to advance faculty-related educational diversity and societal equity interests. Additionally, as many IHEs are federal contractors, these strategies may be helpful as they pursue required good faith efforts to remedy inadequate EEO in parts of their workforce. As defined by federal non-discrimination law and policy, the adequacy of EEO at an IHE is measured by comparing the representation of racial and gender groups in the IHE's relevant workforce—not to their representation in the general population, but to their representation in the available, already qualified labor pool from which the IHE could recruit for a particular category of position in related disciplines at relevant levels. Inadequacy exists when this comparison demonstrates a federal law-defined underutilization, manifest imbalance, or presumed discrimination.[5]

The strategies addressed do not comprise an exhaustive list. They include strategies in use in the field and some promising ideas. Recognizing the broad variety of public and private IHEs in the U.S. in mission, size, location, disciplines offered and demographics of the available qualified pool in those disciplines, and other distinguishing characteristics, a strategy that works well for one IHE will not necessarily work at all for another. However, the strategies presented here cover a panoramic landscape of options, some of which an IHE may find worthwhile to evaluate for suitability in science, technology, engineering, mathematics and medical (STEMM) and other fields in its own context.

Corresponding with STEPs 3 and 4 of the **5-Step Design Guide-Faculty**, https://www.aaas.org/programs/diversity-and-law, the neutral strategies included in this resource are organized in four categories, each with a distinctive objective that contributes to overarching educational mission-driven diversity interests, as well as employment equal opportunity (EEO) interests:

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[5]Inadequate EEO includes "underutilization." While there are several potential measures of "underutilization," the most common and prudent (as it is likely similar to a Supreme Court concept of "manifest imbalance") is the 80% test: where the representation of a race or gender in the employer's relevant workforce (job category/position, seniority level, discipline) is less than 80% of the group's representation in the available and qualified labor pool from which the employer could recruit for a position (on a percentage, not absolute numbers, basis). This is a disparity that is less than two standard deviations but is still substantial. Inadequate EEO also includes "presumed discrimination" on the basis of race or gender, shown when there is a two or more standard deviations disparity between a race's or gender's representation in an employer's relevant workforce and the group's representation in the qualified and available labor pool from which the employer could recruit for the position. *See* **Key Definitions, Amplification of Underutilization,** and **Brief Legal Overview**, https://www.aaas.org/programs/diversity-and-law.

The distinctive objective of each category of strategies is explored. Then, for each strategy, the focus is on:
- ✓ Key Design Elements: *common design elements for effectiveness and legal sustainability*
- ✓ Implementation Examples: *strategies from the field and ideas of promise*

A. Inclusive Design Fundamentals

Distinctive Objective: Some of these designs with neutral effect function as fundamental components of an IHE's broad, overarching diversity and equity system design, with the objective of maximizing the impact of many components of the system (e.g., building more diverse pools of qualified candidates and building more inclusive climate and culture). Others may have the objective and effect of transforming a limited number of stand-alone race- or gender-conscious programs (e.g., research support and mentoring programs) into a single program with authentic neutral effect by "pooling" or "aggregating" them with neutral programs that share a common core objective. This strategy may enhance legal sustainability without changing the race- or gender-conscious objective of the previously stand-alone components. Some of these strategies focus on subject matter rather than selection/participation criteria.

1.   Structural Barrier Removal

Important Rationale. While not the only neutral design fundamental, one design fundamental warrants emphasis and a more detailed introduction of its importance. It is systemic and structural barrier removal, which an IHE may decide to include in its quiver of neutral strategies. Barrier removal may maximize the impact of all diversity and equity efforts. If systemic and structural barriers remain to constantly work against advances, then, once a programmatic intervention is no longer active, the barriers can be expected to exert pressure to diminish programmatic gains. Neutral programmatic interventions are important for advancing diversity and equity, without unnecessarily triggering exacting legal standards. And, if after robust and sustained use of neutral strategies, evidence demonstrates their insufficiency to address substantial and persistent legally-defined "underutilization," "manifest imbalance," or "discrimination," limited race-conscious affirmative action may also be critical and legally sustainable to advance EEO interests. The American Association for the Advancement of Science's STEMM Equity Achievement (SEA) Change program supports IHEs and their STEMM disciplines to self-identify and remove structural barriers. *See* https://seachange.aaas.org/, **Brief Legal Overview**, **Key Definitions** and, for more in-depth guidance, **5-Step Design Guide-Faculty**, https://www.aaas.org/programs/diversity-and-law.

In identifying the need for barrier removal, it is wise for IHEs to be explicit about the context. Committing to barrier removal is not evidence of a need to remedy a deviation from existing legal standards; it is recognizing that those standards are insufficient and committing to better advancing the fundamental aims that legal standards are intended to serve. By adhering to norms in many areas of American society that reflect systemic racism, sexism, and the two together as they impact individuals targeted for both— but have been accepted as benign (or at least neutral)—educational institutions, healthcare institutions, religious organizations, government, financial institutions and others are, in fact, preserving longstanding barriers to equity and inclusion. Through these norms, these groups can even unwittingly perpetuate widespread American systems and practices that are inherently exclusionary. While people of all races and genders may face enormous challenges to realizing their promise and achieving their aspirations, it is impossible to achieve equality under the law when some people are burdened by racism,

sexism and their intersection in society and others are not, as they address life's challenges.[6] It is within this context that IHEs seek to remove normative exclusionary barriers. The fact that an IHE chooses to step away from these systemic exclusionary principles and practices that exist across American society is to be applauded. To do so, an IHE considers the unique ways in which it can remove normative barriers to diversity, equity, and inclusion (DEI). That commitment does not mean that the IHE poses normative barriers that are distinguishable from the long-accepted norms of American society as whole.

Key Design Elements—For effectiveness and legal sustainability:

a. *Conduct a data-rich self-evaluation process through which the IHE and its STEMM and other discipline-based departments (or clusters of related departments) identify the most significant and actionable barriers to advancing their EEO and faculty/researcher-related educational mission-driven diversity and equity goals.* The focus is on systems, policies, processes, practices and criteria that affect whether conduct, climate, and culture are welcoming to everyone, including those who have been excluded or marginalized; whether resources are made available that support all faculty/researchers and create an opportunity for all faculty/researchers to thrive professionally and personally; and whether all research is evaluated on the basis of its quality, without the bias of assuming that the dominant population's assessment defines the limits of quality. Indeed, diversity is important for innovation in and advancement of science. *See* **Research Charts,** https://www.aaas.org/programs/diversity-and-law. SEA Change provides one approach to this process.

b. *Listen to insights of willing members of minoritized* **groups.** The focus is on applying the experience and suggestions of those whom barriers target, while assuring that these individuals are not made responsible for the hard work of eliminating barriers. Those in the dominant population must take responsibility; individuals who have faced long-standing bias have a voice and experience that should be listened to; and they may actively participate if they so desire.

c. *Employ a decision-making process that prioritizes and invests in barrier removal initiatives that evidence indicates will have the most meaningful and sustainable impact*. Evaluate the severity of each barrier alone, as well as in its connection to the effectiveness of potentially high-impact programmatic interventions. Consider practices, timelines, burdens, and other issues of professional and personal life that may disproportionately impact women and other minoritized faculty members and staff.

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[6]*See supra* note 3 (discussing resources focused on the impacts of discrimination on individuals in higher education and academia). *See also* Thurow, L. C. (1980). *THE ZERO-SUM SOCIETY*, at 188-89. Basic Books, New York, N.Y. ("Imagine a race with two groups of runners of equal ability. Individuals differ in their running ability, but the average speed of the two groups is identical. Imagine that a handicapper gives each individual in one of the groups a heavy weight to carry. Some of those with weights would still run faster than some of those without weights, but on average, the handicapped group would fall farther and farther behind the group without the handicap. Now suppose that someone waves a magic wand and all of the weights vanish. Equal opportunity has been created. If the two groups are equal in their running ability, the gap between those who never carried weights and those who used to carry weights will cease to expand, but those who suffered the earlier discrimination will never catch up. If the economic baton can be handed on from generation to generation, the current effects of past discrimination can linger forever."). While one group is no longer carrying a weight that the other has not all along, the groups are not starting from the same place.

d.   *Maintain a clear and ongoing focus on conduct expectations for members of the IHE's community that support climate and culture valuing diversity and inclusion of all*

talent to advance excellence and integrity. Legal requirements must be understood and satisfied, but the focus here is on identifying and eliminating conduct, processes and systems that pose barriers to inclusive climate and culture—while encouraging and supporting conduct, processes and systems that advance inclusion on an ongoing basis. Resource support and recognition are provided for individuals—of any race or gender—who show initiative in identifying and implementing efforts that advance this goal.

e.   *Demonstrate that institutional leadership understands the importance of and communicates effectively about EEO, as well as the universal benefits, mission-necessity, and moral imperative of diversity and equity in the workforce—which are advanced by inclusive community climate and culture*. Leadership demonstrates authenticity by holding itself and others accountable for barrier removal and providing support systems and resources for action steps. Leadership at all levels of the IHE, including the governing board, must internalize this commitment and carry the mantle forward. Reporting norms (to the governing board, to visiting committees, to department heads, the Dean and Provost, and in public materials) should reflect concepts of merit and excellence that include diversity, equity and inclusion—if the IHE measures and reports on all that it highly values. (This does not mean race- or gender-based quotas, though. It means awareness of whether a legally recognized underutilization exists, and, in any event, whether some races and gender are not well represented and how different groups experience the workplace as a focus of barrier removal and other remedial efforts.)

Implementation Examples–Barrier removal strategies from the field and ideas of promise in support of faculty diversity and equity:

a.   *Engage a multi-office, broadly diverse team* centrally, and local teams within clusters of related disciplines, to guide or undertake data-gathering and evaluation of barriers and how to most effectively remove them, leveraging the team members' access to existing data, as well as knowledge of existing activities IHE-wide through which data gaps may be filled efficiently. *See* the **Model Charter for a Multi-Office DEI Team**, https://www.aaas.org/programs/diversity-and-law. Engage a broad diversity of voices on the teams and in their outreach efforts. Include any office that is responsible for the IHE's annual affirmative action plan; enable collaboration between that office and academic data experts on meaningful data sources for related faculty disciplines that could be useful both in updating the affirmative action plan and in pursuing faculty DEI efforts.

- *Create and engage the IHE and departmental leaders and communities in exploring the importance of DEI to the excellence of teaching, research/scholarship, and the educational program, and the IHE's and field's contributions.*

  o Create a network of faculty and senior academic officers, including individuals of all races and genders, to coordinate, facilitate, support and track progress of, and adjust DEI and equal employment opportunity-enhancing efforts. Models from the field may include:

- **Establishing a prominent role in the diversity/equity infrastructure for the President or Chancellor of the IHE, as well as a governing board commitment.**

- **Assigning ultimate responsibility for faculty diversity to the Provost or senior academic executive, as well as assigning aligned responsibility to deans and department heads**, who are responsible for faculty employment matters; and providing them with adequate support staff and other resources to demonstrate the importance of the responsibility.

- **Publicly identifying the importance of knowledge of and commitment to promoting culture and climate of DEI in a broad sense** (without considering individuals' race or gender *per se* in employment terms and conditions) as key components of excellence assessed in all aspects of faculty employment decision-making, including hiring, promotion, tenure, awards.

- **Creating a central diversity/equity council of senior leaders, including faculty and academic human resources professionals**, to set overarching goals, track progress, identify priorities, assure necessary resources and collaborate with local DEI committees to develop and disseminate tools, templates and guidance, and identify and disseminate effective, broadly useful models—with sensitivity to differences in needs of clusters of disciplines.

- **Creating local diversity/equity committees of faculty, staff, and students** for reach major unit of the IHE to focus on that unit's local action, collaborating with the central council, and aligned with institutional DEI aims.

- **Assuring that institutional and local goals and monitoring are in alignment with the IHE's affirmative action plan (AAP)**. Connecting the AAP's assessment of federally defined inadequate EEO to efforts in units of the IHE is important for satisfying legal requirements and advancing effective policy.[7]

- **Creating a chief diversity/equity officer position centrally (coordinating and sitting on the diversity/equity council) and diversity/equity officers locally** (possibly with faculty appointments or credentials, coordinating and sitting on the diversity/equity committees). This structure may be modeled on central and local development officers or other common institutional structures for execution of priorities across a decentralized academic community.

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[7] The Office of Federal Contract Compliance Programs (OFCCP) within the U.S. Department of Labor requires federal contractors, including IHEs, to prepare and update their affirmative action plan annually to identify and make good faith efforts to remedy any federally defined "underutilization" or more severe disparity of races and gender in categories of their workforce, as compared to the available, qualified recruitment pool. But OFCCP does not authorize or require race- or gender-conscious action as a remedy.

- **Creating a central, cross-discipline DEI advisory council** of faculty from across the institution to support the central council and local committees, acting as a sounding board for ideas and problem-solving.

- **Developing a collaborative ideas-sharing system.** Creating a system through which all units' chief DEI officers (or other DEI leaders) meet periodically during the year to share ideas, challenges and progress across units and develop systems and program benchmarking goals related to effectiveness (not quotas).

o Develop and implement regularized review, evaluation and reporting procedures that track progress, provide feedback, and make results easily and publicly available for transparency—
- Use data analytics and dashboards to identify challenge areas for focus to achieve and support the success of a broadly diverse faculty;
- Evaluate and experiment with potential solutions;
- Publicize initiatives (e.g., on a website);
- Focus on differences by field;
- Report on trends;
- Report on successful programs to provide exemplary models;
- Evaluate adjustments and actions that would advance goals.

o Develop or update institutional and aligned but discipline-specific local academic unit DEI mission statements and plans driven by mission, with broad stakeholder engagement and specific teaching/ pedagogy, research/scholarship, and education program tied to DEI mission.

- **Engage stakeholders**, hold conversations with members of campus, departmental, alumni, donor, and other stakeholder communities to elevate understanding and commitment to DEI mission and plans; include faculty whose scholarship focuses on DEI among those who guide these conversations.

o Build capacity to focus on fixing the system (not perceived deficiencies of students and colleagues).

- **Focus on faculty/staff professional development to serve a broadly diverse student body well and to build an inclusive and diverse faculty community.** Employ a broadly diverse group of trained professionals and experts on the faculty to facilitate capacity-building for faculty and staff so they can better appreciate and serve a diversity of cultural norms and experiences, and understand the context of societal inequities associated with personal identities and backgrounds of colleagues and students.

- **Focus on inclusive faculty-student engagement and pedagogy.** *See* the Student Experience Project resources, which include [guidance](#) and a [professional learning program](#) for faculty.

o Define the role of faculty—of all races and genders—in advancing the IHE's mission to educate students to thrive and contribute in an increasing diverse

society, and reflect this role in job descriptions and criteria for leadership, mentoring positions, and promotion.

- o Develop common definitions of diversity and equity. *See* **Key Definitions**, https://www.aaas.org/programs/diversity-and-law.

- o Recognize that diversity includes diversity of perspectives and views, including views reflecting political perspectives different from the dominant political party representation on campus; this recognition is aligned with, and should not depart from, expectations that all faculty will be committed to inclusive pedagogy for a broad diversity of students and creating an inclusive and welcoming learning and work environment for all students and colleagues.

b.   *Eliminate unnecessary criteria-based barriers for searches, promotion, and tenure.* Some of this work will require robust engagement with faculty over a period of time, led by respected faculty and academic leaders who are champions of DEI and inclusive practices. Administration colleagues may support faculty leaders, but they alone will be unable to lead a change in norms around criteria.

- • *Develop hiring criteria and processes to carry out inclusive aims and avoid biases unrelated to substantive merit.*

  - o Include the full range of measures that the IHE values—academic/intellectual quality, accomplishments, and promise, as well as ability to create a welcoming environment and teach a broad diversity of students (all students) effectively.

  - o In preparation for and conduct of each search process, elevate the importance of DEI to the quality of the educational and research program; train faculty on identifying and avoiding implicit bias, including identity, pedigree, and publication bias; and focus on design of inclusive processes:

    - ▪ **Include how to identify and raise the potential of implicit bias** throughout the search process;

    - ▪ **Develop inclusive review of position descriptions.** Have position descriptions reviewed by a small and broadly diverse group of faculty and a trained academic administrator (e.g., a Dean) to ensure criteria—
      - ✓ Are job related;
      - ✓ Are not unduly restrictive or rigid;
      - ✓ Do not contain criteria that could lead to pedigree or publication bias which perpetuates the status quo and bars consideration of valuable new perspectives and experience;
      - ✓ Consider how a candidate's background might affect their achievements or might demonstrate excellence and qualifications in ways that might extend beyond traditional pathways and metrics.

    - ▪ **Carry out initial screening of candidates for faculty positions with names of degree-granting institutions and journals redacted**. Delay review of letters of support for candidates until the full un-redacted *curriculum vitae* is reviewed after the initial screening.

- **Include guidance on effective and legally sustainable search procedures** to identify and select highly qualified candidates without bias or exceeding legal parameters on race and gender identity-status.

o Assure that search procedures model DEI goals and have appropriate timelines. Include ample time for robust outreach (general and targeted) with clearly assigned responsibilities for search committee members established before the search starts. When procedures and responsibilities are clearly identified, it is less likely that individuals or committees will stray from inclusive models that aim to eliminate past implicit bias. Such clarity also makes it more likely that the process will have legitimacy and that broad diversity of qualified candidates can be recruited and retained in the pool.

o Require robust outreach prior to proceeding with interviews and other aspects of the selection process and consider requiring a dean or department head to sign off on the adequacy of the outreach—

- **This is not a judgment on the diversity of the pool or identity of candidates.** However**,** a lack of diversity in the pool may raise a question about the extent of outreach efforts. Similarly, a lack of diversity in the interview or short list may raise a question about whether the scope and definition of selection and merit criteria are as inclusive as possible and reflect all qualities the institution and department value for the position.

- **It is a careful evaluation of the quality and extent of outreach and whether the criteria align with the institution's and department's needs and all valued qualities inherent in merit.** Deans, department heads and other decision-makers can interrogate whether all possibly fruitful outreach has occurred—as well as whether criteria are aligned with merit and attentive to avoiding bias—to make available the most diverse and qualified pool, interview list and short list possible for consideration. They can make these assessments prior to allowing the process to proceed at each stage (to interviews, short-listing, and selection).

o Require all candidates for employment to submit a DEI Statement reflecting their awareness of or experience with DEI issues; record of advancing DEI in their teaching, research, and service; and commitment to and ideas for furthering the IHE's and discipline's DEI missions.

o Consider promise, not just accomplishment thus far, particularly for early career faculty positions; consider a diversity of relevant kinds of accomplishments and experiences*.* Failure to authentically consider and weigh context when evaluating accomplishments and promise can under-value talent.

- **When identifying early career faculty or doctoral students for opportunities, including potential mentor relationships, encourage later career faculty to recognize that some faculty have had less opportunity and guidance to realize their potential but have made the most of the opportunities available to them**. Such individuals may be more "qualified" than someone who has not maximized the abundant opportunities available to them. Ensure that the norms of evaluation include

understanding context in fairly weighing relative accomplishments of individuals.

c. *Consider whether the search design and process may pose barriers—or convey welcome—to candidates of color or who are women or LGBTQ+ people or people who have intersecting, minoritized identities.*

- *Provide a range of activities and campus contacts* that may appeal to a wide variety of people, without assuming appeal based on race or gender, and invite candidates to choose their preferences.

- *Be welcoming and accommodating of different needs:* childcare, lactation rooms, non-federally recognized religious holidays, and other needs of a broad diversity of candidates.

- *Consider family needs for all genders*. Provide support for spousal and partner employment opportunities for candidates of all genders. Attend to day care and education options for candidates of all genders.

d. *Develop an overarching hiring policy (e.g., Target of Opportunity) for hires of distinction and cluster hires*. *See* **Sample Target of Opportunity Policy-Faculty**, https://www.aaas.org/programs/diversity-and-law. Assure that the policy, and associated funding, apply to all searches (or all of a certain category of searches) for faculty positions; the policy is an umbrella policy, not applied selectively after a search begins. The policy provides that if, in any category of covered hiring process, multiple individuals of high quality are identified, there is an ability to hire a second or a cluster of individual(s), under a process that confirms satisfaction of the applicable criteria and availability of funding. Factors that could be considered to hire the additional individual(s) would be:

- *For cluster hires, evidence of elevated value from a cluster of individuals* who together contribute more to the IHE's and department's needs than any one hire could provide.

- *For target of opportunity hires, evidence of high professional distinction*, e.g., one of only a few experts in the field and/or particularly high distinction in comparison to many excellent faculties at the institution.

- *For target of opportunity hires, evidence of an outstanding record of use of effective pedagogy for a broadly diverse and inclusive student body or of other inclusive and equitable conduct* in faculty, staff or student mentoring, or the like, that advances the DEI mission of the IHE, regardless of the candidate's own race, gender or other identity.

- *For target of opportunity hires, regardless of a candidate's own race, gender or other identity, evidence of the candidate's ability to fulfill existing priority academic or service needs* in an established discipline or in an area where the IHE wishes to expand its academic and service program, including, e.g., scholarly work on issues of race or gender in a field or society and disrupting associated inequities.

- *For target of opportunity hires, act under established institutional umbrella hiring policies and processes—do not apply a policy change in the middle of a search.* But these hires may be expedited or justify the waiver of other aspects of the hiring process consistent with previously established institutional policy.

e. *Focus on building an inclusive community, supported by inclusive policies.* Individuals of any gender or race may benefit, but these policies are likely to be particularly helpful to minoritized faculty members.

- *Provide flexibility in the promotion and tenure clock to accommodate parental and family needs.*

- *Provide as generous as possible family leave policies.*

- *Provide domestic partner benefits.*

- *Demonstrate by credit and reward that contributions to DEI are valued* (e.g., service on committees, mentoring programs, etc.)*.*

2. Inclusive Outreach.

Important Rationale. Inclusive outreach is a fundamental element of effective faculty diversity, equity and EEO policies because such outreach assures that consequential information is broadly accessible to all potential applicants, including those from groups that may not otherwise respond to general outreach or feel welcome to apply. Such outreach aims to build a broadly diverse and qualified applicant pool. It does not provide material benefits to individuals of some race or gender groups and not others; complements but is not disproportionate to general outreach; and is distinct from winnowing and decision-making.

Key Design Elements—For effectiveness and legal sustainability:

a. *Build a broadly diverse, well-qualified pool of applicants* by specifically targeting individuals from racial, gender (including LGBTQ+) and other groups that are not well represented on the faculty in specific disciplines or academic areas.

b. *Assure that targeted inclusive outreach is but one component of an otherwise robust general program of outreach*, which aims to reach any interested and potentially qualified faculty member and is generally effective at doing so.

c. *Assure that resources invested in targeted inclusive outreach are not disproportionate to resources invested in general outreach* and do not result in inadequate information (or disproportionately less or different consequential information) being provided to any qualified and interested potential candidate.

- *Targeted inclusive outreach communicates the same underlying consequential information*; however, the method, frequency and approaches are tailored to the audience, with the aim of effectively reaching individuals who might not otherwise apply and convey a message of welcome. Authentic messaging about the IHE or department providing a welcoming climate for a diversity of faculty—or demonstration of its commitment to developing such a climate—is also important.

d. ***Refrain from including in targeted outreach material benefits to individuals of some racial or gender identities*** that individuals of other races or genders do not receive. Rather, view targeted outreach as an audience-sensitive communication or a demonstration that candidates from a broad range of doctoral/terminal degree institutions and backgrounds will be seriously considered and are authentically welcomed.

e. ***Where possible, determine the inclusive nature of and need for targeted outreach by collecting data disaggregated*** by race, gender, and other factors relevant to the targeted outreach to determine effectiveness of general and targeted outreach and any need to adjust communications to ensure their effectiveness for all potentially qualified candidates.

- ***The targeted outreach must not provide material benefits to some individuals and not others based on be an individual's race or gender if the outreach is to be considered neutral.***

f. ***Document that inclusive outreach efforts aimed at building a diverse, inclusive qualified pool are authentically separate and distinct from the winnowing and selection processes***. To maintain neutrality, assure that race and gender are not considered in deciding whom to interview and do not, in any way, affect selection criteria or decisions. (But assure robust outreach efforts to build the most diverse pool possible. *See* Section A.1, implementation example b.)

g. ***Engage in outreach to increase the chance the successful candidate will accept an offer. This action should be considered neutral because it is the offer (including compensation, the start-up package, and other terms and conditions of employment) that confers a benefit on an individual, not outreach that merely builds a relationship to encourage acceptance of the offer.*** However, for outreach to be considered neutral, race and gender should not be considered when providing perquisites (e.g., signing bonuses, a car, trips to campus, etc.). Any benefits in excess what other comparable candidates normally receive should be based on priority qualities of the candidate, other than racial or gender identity status, but may include, e.g., that a faculty member's area of scholarship and teaching concerns issues of race or the faculty member brings effective pedagogy for a diverse student body, if that is a high priority for the IHE (without regard to the racial identity of the faculty member).

Implementation Examples–Inclusive outreach and recruitment examples from the field and ideas of promise to advance faculty diversity:

a. **Develop outreach efforts that can be designed to create a potential pool of candidates for future searches, as well as attracting qualified candidates for current searches.**

- ***Identify graduate students at your own IHE who could be potential future faculty and might contribute to the IHE's diversity***, and make certain they are receiving the same level of mentoring and research and teaching experience as students in the IHE's dominant population receive.

  o Consider the effects of policies and practices not to appoint graduate students at an IHE to the IHE's faculty early in their career. Consider the positive and negative relative effects on DEI and other interests.

- *Encourage faculty to reach out to colleagues in the same and related disciplines at a broad range of institutions, including Historically Black Colleges and Universities (HBCUs), Tribal Colleges and Universities (TCUs), Hispanic-Serving Institutions (HSIs) or other doctoral-granting institutions that serve a substantial number of students of color or women, asking for names of potential applicants who are highly qualified, including those who could help diversify the faculty.* Build relationships that could demonstrate the IHE's commitment to diversity and inclusion.

- *Encourage faculty to develop and maintain professional contacts and relationships directly with colleagues at other IHEs, research funding agencies, and industry* who might be interested in future employment or who would know graduate students or former graduate students who might be seeking employment. Include a focus on relationships with potential future employees who would contribute to department diversity.

- *Encourage and fund faculty to attend professional conferences that target people of color, women, and LGBTQ+ people.* Get to know advanced graduate education and multi-career stage prospects of promise, network with them at professional meetings and keep them informed about exciting events at the IHE. When positions become available, encourage faculty to reach out to these colleagues to apply.

- *Maintain relationships with valued visiting faculty*, including faculty who are people of color, women of all races, and LGBTQ+ people of all races, and reach out to them if regular positions become available.

3.   Inclusive Community Building and Mentoring

Important Rationale. Inclusive community-building and mentoring is a fundamental element of effective faculty diversity, equity and EEO policies because they are key to the recruitment, retention, and success of a broadly diverse faculty. Inclusive programs do not benefit individuals on the basis of race or gender to the exclusion of faculty in need of other identities. Some designs are clearly neutral, and others may be supportable with sufficient evidence that all needs are met.

Key Design Elements—For effectiveness and legal sustainability:

a.   *Examine the cultural norms and climate of the IHE and departments* to determine whether they are welcoming and reflect the value the department attributes to DEI in the faculty, staff, and students. Use evidence to identify needed mentoring and community-building action.

b.   *Generally, do not consider the race and gender of individuals in selecting participants for faculty mentoring programs to maintain neutrality. These programs may target <u>all</u> new faculty members or all faculty members assuming their first academic position.* They are designed to make certain that new faculty have the information they need to develop their academic portfolio, understand the bases for progress, promotion, and tenure, and know what resources and support the institution provides in a variety of areas.

- *Ensure that these programs are effective and reflect inclusion in content and communication style* considering issues of relevance and importance to all faculty, including faculty of color, women faculty, and LGBTQ+ faculty, as determined by blind surveys and guidance from current faculty of minoritized groups.

- *Demonstrate that orientation and mentoring are not for faculty with "deficits," but rather are beneficial for all new faculty members. Each person will bring different strengths and have different areas where learning or skills development is important. Elevate the IHE's diversity and equity related mission. Demonstrate the baseline competencies needed to advance the IHE's mission in teaching, research, and service—including competencies related to educational diversity and equity. Demonstrate the high value the IHE attributes to those whose expertise/knowledge or commitment contributes substantially to these interests.* Connect the mission to the responsibility of all faculty to well-serve a broadly diverse student body, faculty, and society, requiring educational and research programs and conduct that are inclusive, welcoming, and effective for all talent. Be sure availability of resources for the full range of skills development is communicated effectively to all audiences and is available to everyone.

c. *Consider how to increase the likelihood that mentoring programs that do consider race and gender contextually and individually (but are not exclusive to these identities) may be justified as inclusive in effect. That may be a supportable position if: there are very strong data demonstrating that faculty in the IHE's dominant population already receive more or better quality mentoring than individuals in minoritized groups at the IHE; the number of race and gender targeted programs is extremely small in comparison to the totality of programs available to any faculty in need without such considerations—and, importantly, needs of all faculty are met; and there is a strong record of a persistent underutilization of the targeted group, despite robust use of other neutral strategies.* However, if possible, it is wise to use aggregation (see Section A.4 below) to structure a single program with focus groups, rather than a stand-alone program.

  - *An Affirmative Action Plan to demonstrate the underutilization, surveys and/or multivariate regression analyses and other data to demonstrate disparate quality and availability of mentoring, comparing mentoring available to faculty in the IHE's dominant population and minoritized faculty are important.* Data demonstrating level-setting—not a preference—are key. Evidence of an artificially limited labor pool, to which the IHE has contributed, may also be helpful. *See* Section D.2 below and **Brief Legal Overview**, https://www.aaas.org/programs/diversity-and-law.

  - *In any event, targeted programs should not receive a disproportionate allocation of resources or have the effect of depriving other faculty of opportunities*.

  - *There is a heightened risk in today's legal landscape that any consideration of race or gender for participation will not be considered inclusive and neutral in effect.* However, a strong evidence base of persistent underutilization and disparity of availability and quality of mentoring, an absence of race- or gender- consciousness in conferring other employment benefits and opportunities, and an absence of

burden on those outside of the targeted group will be helpful in satisfying exacting legal standards, if they were to apply.

d.   ***Prepare faculty to be effective mentors to students, with a view toward DEI.*** Value this work by faculty; recognize and reward it.

Implementation Examples–Inclusive community-building examples from the field and ideas of promise to advance faculty DEI:

a.   ***Conduct climate surveys that describe conduct/circumstances/experiences rather than labels (e.g., avoid labels such as "racial or gender harassment or discrimination"); labels may mean different things to people in different positions of power.*** Evaluate the results. Involve the departmental community in discussing key take-aways and engaging around hard issues; and create and pursue a follow-up plan to address priority concerns.

b.   ***Reflect in formal, clear policy inclusive conduct expectations, do's, and don'ts, for the IHE and department that are developed in an engaged process and are broadly understood and owned by the central and departmental communities.***

c.   ***Demonstrate that conduct expectations are taken seriously and acted upon when they are not met.***

- ***Provide options for raising concerns***, including anonymously and with as much confidentiality as possible (but be transparent about limits). Provide well-trained ombudspeople, who understand their role and effective approaches for resolving sensitive race- and gender- conduct-related issues, if possible.

- ***Provide formal and informal means of resolving conduct concerns.***

- ***Ensure that the policy and its implementation are protective of individuals who are not in power positions, while treating everyone ethically.***

- ***Report to the community on the types of conduct concerns that are raised, and how they are addressed to demonstrate a serious response*** without disclosing identities of the accused and identified targets in any particular incident.[8]

d.   ***Establish formal mentoring programs.*** Assign each new faculty member a senior faculty mentor who is well-oriented and meets with the new faculty member periodically to provide information regarding the IHE and the unit, as well as departmental culture, norms, and expectations. Assure that the faculty mentor is given clear expectations and responsibilities to fulfill basic mentoring responsibilities.

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[8] The Family Educational Rights and Privacy Act and Regulations, 20 U.S.C. § 1232g and 34 C.F.R. Part 99, prohibit disclosure of student education records, including disciplinary records, with limited exceptions. Institutional human resource policies and state law also may include limitations. Avoiding disclosure of individual identity requires care when populations are small, or incidents are widely known. Consult your IHE's privacy office or other experts. In some cases, it may be necessary to collect data for several years to anonymize even aggregate data or to report on the policy more generally (e.g., when x type of misconduct is determined, our policy is to take serious action which may include y, z).

- ***Assure that the norms you are inculcating are inclusive norms; do not perpetuate exclusion and harassment.*** In addition to being clear about conduct expectations for all faculty, staff, and students, develop a process and neutral arbiter to address concerns when conduct expectations are not met by faculty (including those in powerful roles). Provide guidance to new faculty, post-docs, and graduate student assistants on ways to navigate such difficult, often threatening situations. Adopt, articulate, and implement a strong policy against retaliation for raising conduct concerns in good faith.

- ***Consider providing a small mentoring committee for each new faculty member (rather than a single mentor); also consider consulting new faculty to understand the qualities and experience they seek in mentors.*** A small but distributed mentoring committee, with members who have backgrounds and qualities that appeal to an early career faculty member can discourage dominance and abuse of power by a single mentor who may have outsize influence on an early career faculty member's professional future. A committee can also result in complementary matching. Consider including on such committee a faculty member who is not in the department and pay attention to the diversity of committees.[9]

e. ***Provide assistance related to teaching skills; support development of inclusive pedagogy for a broadly diverse student body.*** Offer support and group training for all new faculty members to help them develop inclusive teaching skills and syllabi. Value and reward those skills.

4. Aggregation and Pooling.

Important Rationale. These design concepts leverage fungibility of certain program resources or opportunities, and the existence of some key goals in common among a small number of programs that include race or gender-related participation criteria and a much larger number of programs that do not. They may transform race- or gender-conscious programs into neutral programs in their effect, which is to provide enhanced opportunities and benefits for people of all races and genders.

Key Design Elements–For effectiveness and legal sustainability:

a. ***Put aside race- and gender-conscious participation criteria for a moment. Then, without considering those individual identity-based criteria, identify stand-alone programs (e.g., a mentoring, community building, special research program) and fungible resources (e.g., research funding, equipment) that share core objectives (e.g., providing research experience). If a substantial majority of all the programs and resources are not subject to race- or gender-based participation criteria, combine all the programs and resources into a single umbrella program.*** Create a single program with pooled resources that is open to all who are interested (or who satisfy neutral criteria), but with a limited proportion of seats and funding (and possibly an associated

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[9]National Academies. (2018). *Consensus Study Report on Sexual Harassment of Women, Climate, Culture, and Consequences in Academic Sciences, Engineering and Medicine.* https://www.nap.edu/catalog/24994/sexual-harassment-of-women-climate-culture-and-consequences-in-academic.

title) within the overall program or resource pool requiring or preferring individuals who also satisfy race- or gender-based criteria.

b. ***Consider neither participants' nor applicants' race or gender to determine participation in the aggregated program or access to the pooled fungible resources.*** The program's purpose and selection criteria for participation and the type and level of resources provided advance authentic institutional aims for faculty who can deliver a high-quality educational and research program, apart from increasing race- or gender-compositional diversity of the faculty.

c. ***Finally, select all faculty who will participate in the combined program. Determine the kind and amount of fungible benefits (e.g., research stipends, equipment, technical support) they will receive on neutral bases. After doing so, allocate the limited proportion of seats, benefits and resources that are subject to race and gender conscious participation or benefits criteria to those already selected faculty who also satisfy the identity-related criteria. Finally, allocate the seats, benefits and resources that do not involve identity-related criteria to the rest of the already selected faculty.*** This approach expands the seats and benefits available to everyone, including individuals who do not satisfy the identity-conscious criteria, subject to two provisos. First, all participants must be chosen, and the benefits awarded to them must be determined without consideration of their race or gender. Second, the benefits (e.g., funding and equipment) must be fungible. Fewer individuals require seats and resources that do not involve identity criteria when some of the selected individuals no longer need those seats and resources (because they are given seats and resources that do involve identity criteria). Be prepared to add seats and resources, if necessary, to accommodate all selected individuals, however. That may occur if the number of selected individuals whose identity would satisfy the identity-conscious seats and resources is inadequate to use all of such seats and resources, and the number of remaining selected individuals exceeds the available seats and resources that are free of identity criteria. Rigorous design and implementation are critical to neutrality.

d. ***Maintain fealty to the core design rationale. While the Supreme Court has not ruled on this strategy, there is a credible position that it has an inclusive, neutral effect*** because ***this strategy expands the participation and associated benefits and resources available to all interested faculty who satisfy neutral criteria.*** All selected faculty receive the same fungible opportunities and benefits or, at least, receive any differential opportunities and benefits on bases unrelated to any individual's race or gender.

e. ***Monitor the aggregated program and pooled resource strategy design annually*** to assure fealty of the design and implementation to the intended and required design elements, as well as impact.

Implementation Examples – Support actions for successful aggregation and pooling strategies that may transform stand-alone race- and gender-conscious or exclusive programs and resources into neutral programs and resources:

a. ***Combine community-building and mentoring programs created by and for faculty or postdocs who are people of color, women, or LGBTQ+ individuals, with more general mentoring programs that have some core content and objectives in common. Include in the programs some specialized content of particular interest to faculty and postdocs***

from the originally race- and gender--conscious programs. Provide for focus groups within the aggregated program addressing the specialized content, as well as focus groups addressing topics of wider interest, with all focus groups being open to all program participants. Provide for focus groups to address subject matter of particular importance to minoritized faculty and post-docs. Allow interest to drive participation in the focus groups. It is likely that the groups will serve to build community, potentially including some authentically supportive allies who are not members of the targeted group(s). Provide institutional support (e.g., food and beverages, funds to support outside speakers) to encourage attendance where the subject matter is authentically a priority to the IHE's mission.

b.   *Combine programs to seed early-stage faculty research ideas or to provide supplemental or other special research support, where limited donor funding is subject to race- or gender-conscious or exclusive criteria, but a substantial majority of donor funding is not.* Select participants and determine the level of support to be provided to them based on the merit of their research ideas and other neutral criteria, not based on individuals' race or gender *per se*. After selecting participants based on neutral criteria, assign the benefits and funding that are subject to the identity-conscious criteria to those who also satisfy those criteria; and then allocate the rest of the benefits and funding to the remaining people who were selected. As in aggregated programs above, the IHE needs to fund all commitments made (without regard to race or gender), so it should scale the overall commitment accordingly and have a contingency fund to ensure funding is adequate.

- *Some funding may come with a title that denotes the funding source (e.g., the NSF early career minority researcher).* While that may raise questions and has not been reviewed by the Supreme Court, there is a credible position that such title should not destroy neutrality if race is not considered in selecting participants for the program or determining the type and amount of benefits, and availability of the program is broadly communicated.

- *Among neutral criteria that may be considered in selecting all participants, so long as they are authentically applied to everyone, include, e.g., a teaching or research focus on issues of race, expertise in inclusive pedagogy or a strong record of using such pedagogy, a strong record of commitment to inclusive mentoring practices, or experience helping others to overcome barriers to pursuit of an academic career—with no consideration of the race or gender status of the individual. See* Part B below.

5.   Subject Matter Focus, Not Participation Criteria

Important Rationale. This design fundamental focuses on race and gender subject matter, on which federal non-discrimination law generally does not impose exacting conditions. It is when individuals' race or gender is either a factor considered or an exclusive requirement in conferring opportunities or benefits that federal non-discrimination law imposes exacting conditions.

Key Design Elements—For effectiveness and legal sustainability:

a.   ***Ensure programs are focused on race and gender DEI-related subjects of importance to the IHE's or discipline's mission*** that are also of particular interest to faculty of color and faculty who are women or LGBTQ+ individuals.

b.   ***Eliminate race- or gender-based restrictions on who may teach, attend, or participate in the programs.***

c.   ***Design/implement programs that contribute to the IHE's aims by elevating understanding of race- and gender-related issues by faculty and students who participate, regardless of participants' race or gender and/or may advance scholarly contributions on issues of race and gender.***

d.   ***Enable self-selection to determine participation. Based on self-selection in the context of societal inequity, a high proportion of faculty who participate may be faculty of color or faculty who are women or LGBTQ+ faculty.*** Others who participate are expert or authentically interested in the subjects. After participating, these others may help to elevate understanding of important issues of race and gender at the IHE and advance integration of a diversity of people and perspectives in the institution.

e.   ***Maintain fealty to the core design rationale. Federal non-discrimination law does not regulate subject matter; it regulates differential treatment based on racial and gender identity.*** Such law is not triggered by the race or gender subject matter of programs, so long as individuals' participation and receipt of benefits are not determined with consideration of their race or gender.

Implementation Examples—Strategies whose subject matter focus addresses important institutional interests that advance DEI without restricting participation or benefits based on individuals' race or gender:

a.   ***Create a program that helps faculty and students learn how to engage in difficult conversations around race, ethnicity, and culture, drawing on expert faculty to teach.*** Open the program to all faculty, staff, and students (or all who satisfy criteria other than individual identity-status).

b.   ***Build inter-disciplinary teams to study specific issues related to race, gender, diversity, and equity drawing from interested faculty in a wide variety of complementary disciplines to contribute to the various topics that are identified.*** Teams can be proposed by individual faculty or suggested by deans or others. Identify goals and deliverables. Provide support, such as release time, graduate student research support, administrative support and financial support for faculty who are members of the team.

c.   ***Provide stipends or release time for faculty who wish to re-work their syllabi or enhance their teaching for inclusiveness or to address issues related to race, gender, diversity, or equity.*** Activities may include research within their subject matter, seeking assistance from other colleagues in the same or related disciplines either within the IHE or at other IHEs, adding new courses that could expand the IHE's offerings, and developing or deploying inclusive pedagogy. Also included may be professional development opportunities for faculty who commit to learning how to engage inclusive pedagogy.

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d. *Create and support community education programs—including compensation for the involved faculty members—that offer faculty expertise on issues of race, gender, diversity, equity, and inclusion to the IHE and local community.* Highlight the research of faculty who have developed expertise and how this expertise advances an inclusive community and excellence in a field, as well as serving other community interests.

- *Seek willing faculty with relevant expertise to be involved in programs run by the residential life office* where they can prompt and facilitate conversations of race, gender, diversity, and equity.

- *Sponsor programs that focus on current issues that may be particularly compelling for many people of color, women, and LGBTQ+ people, but are made available to anyone who is interested.* Programs may be led or facilitated by faculty with expertise in the area, e.g., immigration, sexual misconduct, racialized criminal justice.

e. *Consider contributions to and participation in activities that promote DEI as a factor in measuring excellence as part of promotion, tenure, and salary decisions.* An individual's activities, not their race or gender, are considered in evaluations.

f. **Create awards that recognize faculty who, or academic/research units that, make special efforts or undertake innovative activities to promote DEI.** An individual's or unit's efforts, ideas, and initiatives—**not** any individual's race or gender or the unit's racial or gender composition—should be considered in evaluations.

B. Neutral Selection Criteria

Distinctive Objective: These strategies reflect selection criteria that may be considered, along with other criteria, in the hiring process, the promotion and tenure process, or in decisions to provide other support, e.g., professional development/mentoring opportunities, research support, etc., without application of exacting legal standards. If authentic and properly implemented, it should be possible in many cases to use these criteria as exclusive participation or recipient requirements without triggering such legal standards.

The substantial focus of neutral strategies is to advance one or more of these primary aims:
  i.   important institutional objectives related to the educational mission (including education, research, and service) other than just increasing compositional diversity for its own sake;
  ii. an understanding of the totality and value of a faculty member's life experiences and academic training;
  iii. revealing a faculty member's ability to contribute to the richness and quality of IHE's academic/research/service program and ability to provide excellent educational opportunities for all students; and
  iv. addressing inadequate EEO (an underutilization or presumed discrimination of certain races or gender in the IHE's relevant faculty workforce in a discipline).

While they do not substitute for considering the fullness of race- or gender-related contributions that an individual may make, these criteria also often do contribute to an increase in some aspects of compositional diversity—racial/gender and other. That is because societal inequities in resources and opportunities that may define neutral criteria burden people of color, women, and LGBTQ+ individuals

disproportionately; and ameliorating such inequities may be disproportionately but not uniquely or universally of interest to people of those identities. If the other institutional interest is authentic and substantial, the positive effect on—and ancillary awareness and intent to enhance—aspects of compositional diversity should not destroy neutrality.

Universal Key Design Elements—For effectiveness and legal sustainability of all neutral selection criteria. These design elements are common among all neutral criteria and are not repeated with each example:

a. ***The criteria substantially serve important interests of an IHE apart from increasing race or gender compositional diversity for its own sake.*** However, these strategies are favored when used as a "race-neutral alternative" to considering individuals' race or gender to increase compositional diversity to remedy a federally defined underutilization or presumed or actual discrimination in certain positions at an IHE. They should also be supportable to advance racial or gender aspects of broad diversity needed to deliver an excellent educational/research/service program, as an ancillary aim to the primary remedial aim. *See* **Brief Legal Overview**, **Key Definitions** and **5-Step Design Guide-Faculty**, STEP 4, https://www.aaas.org/programs/diversity-and-law.[10]

b. ***The neutral institutional interest to be served is authentic and it is clearly and consistently documented and communicated.*** Criteria that are valued are evidence-based, backed by research.

c. ***An individual's race and/or gender are not criteria in decision-making for the conferral of benefits or opportunities.***

d. ***Neutral factors may include recognition of qualities (other than identity status per se) and abilities/accomplishments that can help create a climate and culture that welcomes and includes all faculty members, staff, and students.***

e. ***Listen to faculty and other members of the community who can share experiences that can assist in evaluating the effectiveness of various criteria and approaches or can suggest new approaches.***

f. ***The process/practices applying neutral strategies should not include separate tracks, standards, or other aspects-based on individuals' race or gender.***

g. ***If the effect of neutral strategies is to increase racial or gender compositional diversity, these strategies must reflect authentic institutional interests. They must be a "business necessity"—i.e., the important institutional interests they serve would not be achievable via measures with less disparate impact.*** For example, if an IHE's mission requires faculty who practice inclusive pedagogy and its academic program requires

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[10] If there is a federally defined "underutilization" or "presumed" or actual discrimination, the authentic aim of an IHE's neutral strategy (where individuals' race and gender are not considered) may include increasing compositional diversity as a remedy. This should be a strong position for private IHEs that are subject only to the federal non-discrimination in employment statute, Title VII. Public IHEs that are subject to Title VII as well as the Constitution's Equal Protection Clause may be wise to have another authentic interest (other than just increasing compositional diversity to advance Title VII EEO interests). *See* **5-Step Design Guide-Faculty**, STEP 4 (employment law nuance on design of neutral policies of private and public IHEs) and Part D of this Neutral Strategies Guide.

faculty whose research and teaching focus are on issues of race or gender, these are business necessities that are unlikely to be achieved without reliance on these criteria.

h. *Evaluations of neutral criteria are conducted on an on-going basis in a regular and documented process linked to the IHE's annually updated Affirmative Action Plan, with follow-up occurring, as needed, based on findings.* The areas of evaluation include:

- *Availability and use of neutral criteria that are administratively and financially feasible,* within business needs (taking into account that the IHE will need to prioritize and may need to incur some substantial effort/expense in using neutral criteria).

- *Effectiveness of the neutral criteria to serve their intended institutional goals.*

- *Effectiveness of neutral criteria to contribute to compositional diversity for the purpose of addressing any existing underutilization or presumed discrimination,* as well as to create a sufficiently diverse setting where beneficial teaching/educational experiences and productive research can occur.

- *Needed adjustments made in design or implementation* to address findings and changed internal and external circumstances.

1. Expertise/Knowledge Criterion and Commitment Criterion.

Important Rationale. These criteria rely on an individual's expertise, knowledge, or experience, however acquired (through personal experience, learning, or service)—not on their race or gender *per se.*

Additional Key Design Elements– For effectiveness and legal sustainability:

a. *Criteria to support developing a faculty that has the skills, commitment, and ability to advance the IHE's mission-related DEI goals*, with faculty of all races and genders being able to satisfy the requirements.

Implementation Examples–Neutral criteria from the field and ideas of promise in support of faculty diversity and equity:

a. *Consider life experience/childhood background that would bring socioeconomic, first generation, and similar diversity perspectives to the faculty and advance inclusion of students who have similar experiences. Also consider socio-economic and other privileges and challenges a candidate for early career faculty positions may have experienced. as a context when assessing their accomplishments to date and the extent to which their record reflects "traditional" accomplishments.* These criteria may be more commonly considered in the student setting, such as in college admissions decisions. However, in addition to other qualification criteria, they can be relevant and helpful in the faculty context as well. In considering these characteristics, an IHE or department prioritizes diversity of experiences and perspectives and inclusivity on the faculty.

- *Experience of coming from a low socio-economic background, using commonly accepted standards*, e.g., concentration of poverty in residential zip codes and school districts or the experience of financial or food insecurity.

- *Experience of attending under-resourced schools and IHEs.* While this may correlate with socio-economic status in many cases, families or individuals with higher means also live in poorly resourced school districts because of racial hostility and segregation in residential areas, the desire to live in a certain ethnic or immigrant community, or because of geographic limitations.

- *Substantial family and earning responsibilities as a student and/or early career professional, possibly continuing responsibilities for parents and siblings*, which may have affected a candidate's ability to devote the same focus on academic career or training matters. If these factors had a greater effect during undergraduate, graduate education or during post-doc experiences, having full-time, regular employment may allow a candidate a greater focus on academic career matters.

- *Experience as the first generation in a family to attend or graduate from college and/or to have an academic career.*

b. *Knowledge and expertise on issues of racial and gender diversity in society with a passion and ability to elevate others' understanding.*

c. *Commitment to ameliorating racial or gender inequities in society and/or serve communities targeted by such inequities.*

- *Recognize that b and c are distinct criteria and give due attention to all aspects of each criterion.* Not everyone with knowledge of inequity and passion to share that knowledge is committed to ameliorating inequity in their careers or personal service. Not everyone with knowledge has passion and/or ability to share it.

- *Do not assume these criteria are satisfied by all people of color, women, and LGBTQ+ people or that they are not satisfied by others*. That would perpetuate stereotypes and is likely to be at odds with federal non-discrimination law. Expertise and knowledge may be gained from personal experience, book learning, or service. Commitment may be demonstrated through a record of meaningful action.

d. *Experiences and challenges of having immigrated from another country or whose first language is not English, without consideration of a person's national origin, race, or gender identity status.*

e. *Elicit information from the candidate to determine whether any of these criteria are satisfied.* This information is specific to an individual. It is not based on assumptions and stereotypes associated with racial- or gender- identity status. Consequently, specific information must be elicited from each applicant to determine whether any DEI-related expertise or knowledge criterion is satisfied.

- *In recruitment materials, express the value to the IHE of faculty who satisfy the criteria in b and c.*

- *Require "DEI Statements" or ask similar questions in interviews or in applications that address awareness of issues of race and gender in education and society, record of advancing DEI interests in action, and commitment and ideas for advancing DEI interests at the IHE* that would enable the candidate to advance the IHE's DEI-related educational mission. *See* STEP 4 of the **5-Step Design Guide-Faculty** (discussing design of faculty DEI statement or interview policies and evaluation processes) https://www.aaas.org/programs/diversity-and-law.[11]

f. *Reflect the authenticity of the importance of these criteria to the quality of the IHE's educational program by documenting and communicating publicly about that connection, incorporating these criteria among other attributes in defining high merit, and considering these criteria among other qualifications for open positions, promotion and tenure.* Engage faculty and students in exploring and embracing the importance of knowledge or issues of race and gender in society and a commitment to disrupting systems of inequity as part of the mission-driven educational experience the IHE seeks to offer to all students and to include in areas of valuable research. The focus of these criteria is on enhancing the IHE's or program's climate, elevating understanding of issues of race and gender, advancing the IHE's service mission through its faculty, and enhancing students' preparation to live in an increasingly diverse and global society.

g. *In addition to considering these criteria in hiring, promotion, tenure, special benefits, and recognition programs, consistently demonstrate and report on ways in which the IHE leverages knowledge of issues of race and gender and commitment to ameliorate related inequities and advance program quality.*

- *Provide candidates with information about the IHE's commitment to DEI.* Include materials that explain the breadth of the commitment and the key role that DEI plays in the IHE's definition of excellence and programs.

  o Formalize consideration of these and other criteria for hiring and advancement in job descriptions, elicited information from candidates (i.e., in interviews, candidate statements or talks), evaluation processes, search training and leadership professional development.

  o Report to the IHE's governing board and extended community on commitments and progress in advancing inclusive diverse faculty, staff, and student body.

2. Merit in Actions Advancing EEO, Diversity and Equity Interests.

Important Rationale. These criteria reward actions that advance diversity and equity interests. They are measured by the actions taken and impacts achieved, but not the bare compositional diversity outcomes and not individual race or gender identity.

Additional Key Design Elements– For effectiveness and legal sustainability:

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[11] *See* the University of California system's design and scoring rubric for DEI Statements at
https://ofew.berkeley.edu/recruitment/contributions-diversity/rubric-assessing-candidate-contributions-diversity-equity .

a. *Acknowledging advancing diversity and equity interests of the IHE as an important factor in professional excellence,* rewarded in material ways including awards, compensation, and positions of distinction.

Implementation Examples—Neutral criteria-based awards and benefits, from the field and of promise in support of faculty diversity and equity:

a. *Create faculty achievement awards that publicly recognize faculty who advance mission-driven diversity and equity through their teaching, research, or other activities.*

b. *Include success in using inclusive pedagogy as a factor of evaluation for promotion and tenure.*

c. *Provide professional and leadership development opportunities in research and teaching for faculty who demonstrate dedication to advancing DEI mission.*

d. *Create Distinguished Post Doc and Visiting Scholar programs* that invite promising candidates from a wide spectrum of institutions, including HBCUs, HSIs, tribal colleges, and all women's colleges. Appointments for a year provide opportunities to teach and do research. During this year, provide personalized advising and mentoring by a designated faculty member with the goal of preparing participants for tenure-track positions.

- **Value significant experience of individuals of all races and genders in those settings, whether as a member of the dominant identity group or a minoritized group**—i.e., because each person's identity status in those settings is the opposite of what the person's identity status would be in other societal settings.

e. *Similarly create faculty exchanges with HBCUs, HSIs, tribal colleges, and all women's colleges* for the value those faculty members' experiences bring to the faculty and students.

f. *On a regularized basis, conduct faculty equity salary studies and adjust salaries that are inconsistent* with cohorts with similar qualifications, experience, and quality of performance.

C. Neutral System Strategies

<u>Distinctive Objectives</u>: These strategies reflect a broader **system** design. Like barrier removal, they may be part of a complement of other diversity-associated employment efforts, or they may enhance the impact of other efforts. Many barrier removal efforts, if undertaken with system-wide reach are also neutral systems strategies. We will not repeat them here, but rather focus on additional system-wide initiatives and approaches to an IHE's DEI efforts.

As is the case with neutral selection criteria, the substantial and authentic aim of neutral systems strategies is to advance important institutional aims other than the bare aim of increasing compositional

diversity for its own sake. [12] These strategies do not consider an individual's race or gender in determining who receives (or does not receive) an opportunity or benefit. However, these strategies also are favored alternatives to race- or gender-consciousness and may contribute to compositional racial and gender diversity.

Universal Key Design Elements — For effectiveness and legal sustainability of neutral system strategies. These design elements are common among all system strategies and are not repeated with each example:

a. *The criteria substantially serve important interests of an IHE—apart from increasing race- or gender-compositional diversity for its own sake.* However, these strategies are favored when used as a "race-neutral alternative" to considering individuals' race or gender to increase compositional diversity to remedy a federally defined underutilization or presumed or actual discrimination in certain positions at an IHE. They should also be supportable to advance racial or gender aspects of broad diversity needed to deliver an excellent educational/research/service program, as an ancillary aim to the primary remedial aim. *See* **Brief Legal Overview**, **Key Definitions**, and **5-Step Design Guide-Faculty**, STEP 4, https://www.aaas.org/programs/diversity-and-law.

b. *Individuals' race and/or gender are not criteria in decision-making for the conferral of benefits or opportunities.*

c. *The neutral institutional interest to be served is authentic and it is clearly and consistently documented and communicated.*

d. *If the effect of these measures is to increase racial or gender compositional diversity, these measures reflect authentic institutional interests. These strategies must reflect a "business necessity"—i.e., the important institutional interests they serve would not be achievable via measures with less disparate impact.* For example, if an IHE's mission requires faculty who practice inclusive pedagogy and its academic program requires faculty whose research and teaching focus on issues of race or gender, these are business necessities that are unlikely to be achieved without reliance on these criteria in neutral systems programs.

e. *Evaluations of neutral system strategies are conducted on an on-going basis in a regular and documented process, with follow-up occurring, as needed, based on findings.* The areas of evaluation include:

- *Availability and use of neutral system strategies that are administratively and financially feasible (even though requiring an IHE to prioritize and incur some significant effort/expense).*

- *Effectiveness of the neutral system strategies to serve their intended institutional goals.*

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[12] *See supra,* note 10 and accompanying text, however, which address the definition of neutral aims to increase compositional diversity when remedying inadequate EEO and potential differences in definitions of neutrality for private and public institutions.

- *Effectiveness of neutral system strategies to contribute to compositional diversity for the purpose of creating a sufficiently diverse setting where beneficial teaching/research/service can occur.*

- *Effectiveness to remedy a persistent underutilization.*

- *Needed adjustments in design or implementation to address findings and changed internal and external circumstances.*

<table>
<tr><td>1.</td><td>**Neutral Systems and Processes**</td></tr>
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Important Rationale. These strategies focus on structures to embed a sustainable focus on advancing DEI interests within core systems, policies, and norms of an IHE or unit.

Implementation Examples— Strategies from the field and ideas of promise to make structural changes that can contribute to DEI:

a.   *Create a stealth recruiting portal* and accompanying umbrella HR policy that allows a potential candidate of any race or gender and any discipline to submit a curriculum vitae and statement of interest at any time, if they will (and requiring them to demonstrate they will):

- *Especially advance the IHE's DEI mission—not based on their identity status but based on their record of action* (e.g., demonstrated interest in and ability to engage a diverse student population, a record of inclusive pedagogy, experience in overcoming challenges to pursuit of an academic career—including low socio-economic background, first generation in college, immigrant background, English as a second language, etc.—commitment to disrupting systems of racial and gender inequity via research and teaching focus or service activities, etc.).

- *Bring cutting edge interdisciplinary work that reflects a new perspective than the "norms" in any discipline.*

- *Expand educational partnerships to enrich the diversity of the education and research experience.*

As part of the review of candidates' submissions, identify the potential to work with existing faculty to expand academic programs or add academic specialties, especially interdisciplinary specialties. Based on the review by a senior academic administrator the policy permits the IHE to decide whether to proceed through a hiring process at the time of submission or to consider the candidate for future openings, including under a complementary Target of Opportunity Policy (*see* Part A.1, implementation example d and **Sample Target of Opportunity Policy**, https://www.aaas.org/programs/diversity-and-law).

b.   *Focus on IHE-wide and school/college/department wide policies, systems, and processes—not isolated programs. Creating an inclusive foundation of policies, systems and processes will have the greatest impact, including as a vehicle for delivering and sustaining the impact of more limited-scope programmatic interventions.* Continuously evaluate and measure the impact of neutral policies,

systems and processes that have beneficial neutral and DEI impacts. Focus on standards/criteria-setting, conduct expectations, access to information, experiences and resources, recognition, financial support, and rewards.

c. *Incorporate diversity, equity and inclusion throughout units' budgets and operations IHE-wide.*

- *Integrate DEI operational support* into annual budget planning and preparation for each unit.

- *Share DEI efforts across units* to encourage modeling effective practices and maximizing resources and cooperative efforts between divisions.

- *Make funds available to support speakers and activities across the IHE that enhance diversity and equity interests*. Publish papers presented or results of these activities and distribute them widely on campus, even if the subject matter focus is in a particular discipline.

- *Provide budget incentives to units that advance inclusive and exemplary outreach efforts and flexible hiring criteria, exemplary mentoring efforts, and other measures to transcend traditions that impair DEI*. This focuses on the actions taken, not the demographic results.

- *Establish backward looking data collection on trends and regular evaluation processes.*

- *With an IHE-wide lens, expand broad academic programs and multi-disciplinary specialties that focus on research and teaching on race, gender, and climate and culture associated with diversity and equity.* For example, faculty across disciplines may work together to craft a curriculum that all incoming first year undergraduate students take that focuses on these issues (sometimes called common curriculum, e.g., "What is the Good Life" (University of Florida) or "Diversity Flag" courses (University of Texas at Austin).

<u>Distinctive Objective</u>: Consideration of an individual's race or gender in determining hiring and other employment terms, conditions and benefits is only permitted by federal law in limited circumstances, and only with a federally defined remedial justification.[13] The policies in this section neither fit neatly into the

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[13] *See*, *e.g.*, *Johnson v. Transportation Agency of Santa Clara County*, 480 U.S. 616 (1987); *United Steelworkers v. Weber*, 443 U.S. 193 (1979). There must be a legally recognized remedial aim:

    1.   Remedying a *prima facie* showing of discrimination (presumed discrimination) on the basis of race or gender, with evidence of two or more standard deviations between a race's or gender's representation in an employer's relevant workforce (job category/position, seniority level, relevant discipline(s)) and the group's representation in the qualified and available labor pool from which the IHE could recruit;

    2.   Remedying a court-recognized "manifest imbalance" between representation of a racial or gender group in an employer's relevant workforce compared to the group's representation in the available, qualified labor pool from which the employer could recruit—a disparity that is less than two standard deviations, but still substantial. Even where a remedial program is adopted as a result of litigation finding discrimination or a manifest imbalance, the permission to consider race or gender extends only to parts of the plan that are directly approved by the court. *See, e.g.*, Humphries v. Pulaski County Special School Dist., 580 F.3d 688 (8th Cir. 2009) (quoting *Donaghy v. City of Omaha,* 933 F.2d. 1448, 1458 (1991)); or

    3.   Remedying a persistent "underutilization" in a federal contractor's workforce that is identified in a compliant affirmative action plan, in general when ongoing use of neutral strategies have failed to remedy the persistent underutilization. While there are several potential measures of underutilization, the most common and prudent one is the 80% test: where the representation of a race or gender in the employer's relevant workforce is less than 80% of the group's representation in the available and qualified labor pool from which the employer could recruit for a position. (This test is likely similar to a "manifest imbalance," although that has not been decided.) *See also* **Amplification of Underutilization,** https://www.aaas.org/programs/diversity-and-law.

Even with a remedial basis under Title VII (which applies to public and private employers), the race- and gender-conscious remedies may not be overbroad in relation to the harm to be remedied. Race or gender must be considered as minimally as possible to ensure that the identity-consideration is not unduly burdensome on those with identities that are not targeted for the remedy. This generally requires maintaining opportunities for people of any race or gender to compete for opportunities and prohibits race-and gender-consciousness in lay-off decisions where significant vested rights are affected. Remedial programs that are adopted by federal contractors as good faith efforts to eliminate underutilization of a race or gender, as identified in a federal contractor's affirmative action plan, may not confer or deny opportunities or benefits based on an individual's race or gender, unless there is a strong history of persistence of the underutilization despite sustained neutral efforts. *See, e.g., Johnson*, 480 U.S. 616 (1987); and *Wygant v. Johnson Board of Education*, 476 U.S. 267 (1986). *See* **Brief Legal Overview**, https://www.aaas.org/programs/diversity-and-law.

The Supreme Court decisions that have permitted consideration of race or gender in limited circumstances in the employment context are old and decided by justices who are no longer serving. *Weber* permitted set-asides in compelling remedial circumstances but, after that, *Johnson* relied heavily on the consideration of gender as a factor—not a set-aside—to determine sustainability. While not directly overruling these decisions and involving many nuances, more recently the Court has been much less receptive to any consideration of race or gender in employment decisions. The employment decisions are less coherent over time than those that relate to student admissions; and it is unclear whether the older cases might be decided differently if they were before the Court today. See, e.g., *Ricci v. DeStefano,* 557 U.S. 557 (2009). The benefit conferred in *Weber* was intentional dedication of 50% of the openings for Black employees in a training program previously open only to whites. In *Ricci*, the Court struck down an employer's refusal to certify a facially neutral written examination that was used to determine promotions, after the results showed substantial disparities in test scores among racial groups. While not intentional, the test had the racially disparate adverse effect of excluding individuals of color from being considered for promotion. The Court held that intentional differential treatment of individuals on the basis of race by throwing out a test without certainty of the need, was not justified to remedy the unintended disparate impact of the test.

category of neutral strategies (that may be used, with or without a remedial justification)—nor into the category of race- and gender-conscious strategies (that may be used only when evidence shows they are required to address a persistent remedial need that cannot be addressed through neutral strategies). However, while the Supreme Court has not ruled on these hard to pigeonhole policies, there is a sound position to be taken that they should be considered equivalent to neutral or that they would satisfy exacting legal standards were such standards to apply.

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1.   Macro Race- and Gender-Attentive Strategies

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Key Design Elements–For effectiveness and legal sustainability:

a.   Distinguishing Macro-Attentive from Neutral.

- *Macro Race- and Gender-Attentive policies—like neutral strategies and unlike race- and gender-conscious strategies—do not consider the race or gender of any individual in deciding who receives or does not receive an opportunity or benefit.* They apply criteria that individuals of any race or gender may satisfy. However, macro-attentive policies lack neutral strategies' defining attribute of being specifically designed to advance an authentic and substantial institutional objective (other than increasing compositional diversity). They are designed to increase the racial or gender compositional diversity of the workforce for the purpose of addressing a legally- recognized underutilization or presumed discrimination. [14]

  o The Supreme Court has not yet ruled on whether macro race- or gender-attentive policies are subject to exacting legal standards in the employment context, but there is a sound argument that they should not be subject to such standards or would satisfy them. That is because neither neutral nor macro-attentive policies consider an individual's race or gender in determining who receives a benefit or opportunity. They both apply criteria that individuals of any race or gender could satisfy and share an ultimate remedial goal that is recognized in law.

  o The employment legal regime requires a remedial justification for race- and gender-consciousness; and citing to the importance of a diverse faculty for educational benefits of all students' learning is a supplemental (but not alone sufficient) justification. Consequently, in the faculty employment context, the ultimate aim—and likelihood of sustainability—of macro-attentive policies is strongest when the aim encompasses both (1) a remedial justification and (2) a universally beneficial educational justification, helping to prepare all students to thrive, contribute and lead in an increasingly diverse society.

  o IHEs should consider whether a clearly neutral design would be authentic and workable, avoiding the uncertainty of macro race- and gender-attentive strategies. A clearly neutral design is always the lowest risk for high reward, if available.

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[14] "Macro-attentive" is our term, not the Supreme Court's. It reflects policies with macro-level racial and gender awareness and aims, without consideration of individuals' identity status, and for a purpose that is substantial and has been recognized by courts as justifying race- and gender-consciousness when evidence demonstrates the need.

Implementation Example–A macro-attentive policy that provides organizational, not individual benefits for effectiveness and legal sustainability:

a. *An after-the-fact award to academic units for their diversity outcomes achieved through authentically neutral policies:*

b. *Individuals' race and/or gender are never considered in hiring or in establishing the terms, conditions, and benefits of employment.*

c. *However, after faculty positions are filled on authentically neutral bases, the Provost reviews hiring, promotion and tenure outcomes across the institution and allocates a limited but meaningful discretionary pool of funding* to the colleges/schools/departments that have that have made the most significant advancements in their racial and gender diversity outcomes. This benefit is not provided to an individual, but to a unit. To the extent the unit provides these resources to individuals, the criteria are not based on their race or gender identity-status.

d. *This program is designed and communicated as an incentive* to take strong action to build broadly diverse recruitment pools, attend to developing inclusive and welcoming climate and culture, and examining with seriousness whether criteria for decision-making are creating unnecessary barriers and whether they are reflecting the full range of abilities and qualities that the IHE and discipline value*.*

2. Artificially Limited Labor Pool

Key Design Elements—For effectiveness and legal sustainability:

a. *Capacity-building remedial justification.* An Equal Employment Opportunity Commission (EEOC) regulation[15] implementing the main federal employment statute, Title VII and an old but standing 1979 Supreme Court case[16] on which the regulation is based, permit race- and gender- conscious affirmative action to select participants in time-limited, capacity-building programs without a finding of underutilization/manifest imbalance or presumed discrimination, if certain conditions are met.

- *These programs are "training programs—including on the job training*—which emphasize providing minorities and women the opportunity, skill, and experience necessary to perform the functions of skilled trades, crafts and professions [if] historic restrictions by employers, labor organizations, and others [create] circumstances in which the available [recruitment] pool, particularly of qualified minorities and women, for employment or promotional opportunities is artificially limited."[17]

  o In fields such as many STEMM disciplines, there is a "pathways problem"— when comparing low or no representation of a race or gender in the IHE's relevant workforce (job category/position, level of seniority, relevant discipline(s)) to the group's representation in the available, qualified pool from

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[15] 29 C.F.R. § 1608.3(c).

[16] *Steelworkers v. Weber*, 443 U.S. 193 (1979).

[17] *Supra* note 15.

which the IHE (or its department) could recruit for a position, the representation of the group in the IHE/department's workforce may still equal or exceed 80 percent of the group's representation in the pool (on a percentage basis). A legally-recognized underutilization or manifest imbalance is lacking, but the IHE may have contributed to that pathways problem.

- *Evidence is required that an IHE historically participated in creation of barriers and limited access to preparatory programs for women or people of color in certain disciplines with those exclusionary practices still having an effect.* This may have been a norm at the time, as opposed to something unique to a particular IHE, but the evidence needed is how the IHE participated.

- *If those conditions are met, targeted, appropriately designed and implemented capacity-building programs may arguably be supportable* under this EEOC regulation and Supreme Court precedent applying Title VII, without application of exacting legal standards. This option may be available, at least to private IHEs.

  - o If this regulation applies, a "trainable cohort" of graduate students, post-doctoral associates, and adjunct or early career faculty at an IHE might be prepared to compete successfully for tenure-track positions and tenure through limited-time research and teaching assistantships, post-doc appointments, and training and mentoring programs involving consideration (but not exclusive criteria) of race and gender.

  - o In the current legal landscape, even private IHEs are in a stronger position if they first pursue capacity-building programs that use neutral participation criteria and can demonstrate the insufficiency of these programs to remedy an artificially limited labor pool, before pursuing identity-conscious programs.

- *While Title VII and the EEOC regulation apply to private and public IHEs, the Supreme Court has indicated that the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, which applies to public (but not to private) IHEs, may impose a higher standard on public employers than Title VII does.* Consequently, in addition to strong evidence of its own contributions to exclusion with continuing effect, a public IHE is well-advised to first pursue capacity building and other programs that use neutral selection criteria and demonstrate their inadequacy alone to address the artificially limited labor pool, as a condition to pursuing race- or gender- conscious capacity-building programs. Public IHEs are well-advised to demonstrate that neutral strategies are inadequate in order to establish that limited identity-consciousness in capacity building programs is not an undue burden on those who are not members of the targeted groups.[18] *See* **5-Step Design Guide-Faculty**, STEP 4; **Brief Legal Overview**; the **Federal Non-Discrimination Law on Sex & Gender…And How It Compares to the Law on Race & Ethnicity**, https://www.aaas.org/programs/diversity-and-law.

- *Individual race- and gender-consciousness in selecting participants for time-limited capacity-building programs is less burdensome than identity-consciousness in hiring for regular employment positions--whether to remedy artificially limited labor pools or substantial and persistent underutilization*. When a remedial justification exists,

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[18] *See Johnson v. Transportation Agency of Santa Clara County*, 480 U.S. 616 (1987); *Ricci v. DeStefano,* 557 U.S. 557, 594-96 (2009) (Scalia, J., concurring).

Identity-conscious capacity-building programs should be somewhat easier for private and public IHEs to sustain than identity-conscious regular positions. However, this has not been tested at the Supreme Court in the higher education context or in recent years.

- ***Enabling others in need of these capacity-building opportunities to compete for participation in such programs is important***. Quotas for women and people of color are unlikely to be legally supportable in light of the Supreme Court's more recent cases.

- ***The concept of an artificially limited labor pool has not been applied by the Supreme Court or, to our knowledge, the EEOC in a higher education setting.*** The Supreme Court case on which the EEOC regulation is based involved evidence that a factory and union formally excluded general laborers based on their race for many years, a large cohort of general laborers at the factory were capable of being trained, and a formal, time-limited remedial plan was created in a collective bargaining agreement.

- ***If an IHE is considering remediation of an artificially limited labor pool as possible justification for race- or gender-conscious time-limited, capacity-building programs, there are several considerations it should evaluate before making a decision to pursue such a program.*** These considerations include an institution-specific assessment of whether the IHE has contributed to an artificially limited labor pool; consideration of the institution's risk tolerance in light of the breadth of the regulatory language but absence of guidance specific to IHEs; and the need to have evidence of the IHE's contribution; and institution-specific legal advice. This information will help the IHE to weigh benefits and risks associated with pursuing these programs. The risk assessment for public IHEs should also consider Constitutional standards.

- ***The words of the EEOC regulation may apply and, if the regulation applies, an employer's reliance on the regulation (EEOC's written guidance) would provide Title VII liability protection for the employer.[19]*** Title VII could not, however, protect a public IHE from Equal Protection Clause liability.

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[19] *See* 42 USC 2000e-12(b).