

# CLIENT ALERTS

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## Are DEI-Based Termination Decisions Creating Liability for Your Company?

### Client Alert

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As part of their commitment to DEI (Diversity, Equity and Inclusion), many employers are highly cognizant of both increasing and maintaining the number of underrepresented minorities and/or people belonging to a historically marginalized group (commonly referred to as “diverse persons”) in their workforce. In the face of impending layoffs, employers may be tempted to make employment decisions in which race, ethnicity, or some other protected characteristic is a considered factor. Employers may recognize that executing layoffs in a reverse seniority manner (the so-called “last in, first out” rule) may disproportionately impact recently hired diverse workers and undo recent diversity gains. Although perhaps well-intentioned, consideration of a protected characteristic as a factor in employment decisions are unlawful. Yet, there remains a sort of Catch-22. Employers considering protected characteristics when making layoff decisions face liability, as do employers failing to consider protected characteristics and making layoff decisions that disproportionately impact a certain protected demographic group. This Alert serves as a warning to employers looking to make equitable layoff decisions and provides practical advice for employers wishing to reduce the risk of layoff litigation.

### [The cautionary tale of alleged unlawful race-based layoff and other termination decisions](#)

- In late 2021, in the case of *Duvall v. Novant Health*, a jury in a federal court in North Carolina awarded the plaintiff \$10 million after finding that his employer unlawfully discriminated against him as a White male by setting unlawful racial and gender quotas for senior management and terminating his employment to achieve said quotas.

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- In July 2022, in Michigan, a White female employee filed a race discrimination lawsuit against her former employer, the Wayne County Airport Authority, claiming that it regularly made race the “determining factor in all employment decisions;” that its employment decisions “crossed the line of lawful encouragement of diversity into illegal discrimination,” and that it wrongfully terminated her employment because she is White and complained about anti-White discrimination.
- In August 2022, the Minneapolis Public Schools made headlines after it reached an agreement with a teachers’ union to layoff teachers based on reverse seniority, but with racial exemption built in for diverse teachers. To illustrate, if the next teacher in line to be laid off based on reverse seniority were Black, he or she would be skipped over such that the next in line White teacher, who had more seniority, would be terminated. The Minneapolis Public Schools defended its agreement, explaining that the terms are needed to fix “past discrimination.” It now faces a lawsuit for race discrimination.
- In August 2022, White American Express employees filed a class action claiming that American Express implemented a policy to achieve workforce equity using racial quotas. Specifically, they claim that “when AmEx conducted rounds of mass layoffs in or about the third quarters of 2021 and 2022, respectively, white employees were let go in wildly disproportionate numbers. Conversely, black employees were retained at rates that far exceeded their representation within the affected bands. Indeed, upon information and belief, in some teams the only individuals who were not laid off were black.”
- In September 2022, Twilio, a tech company providing communication tools, made the news after its CEO announced in a message to all employees that it would layoff 11% of its workforce through an “Anti-Racist” and “Anti-Oppression” lens. The CEO explained that such a lens meant that Twilio’s layoff decisions would focus on ensuring that employees who are members of a historically marginalized group are either not affected or at least not disproportionality affected, while explicitly not providing that same protection to other protected groups, including White employees.
- Publicly traded companies have also been in the news for DEI efforts that allegedly advocated for and led to discriminatory policies in the name of equity. Pfizer was recently sued based on a fellowship program that allegedly excluded Asians and White applicants. The lawsuit led to an open letter from an action group to the Pfizer Board raising concerns regarding alleged plans to set a specific racial quotas within the Pfizer Board of Directors, and claimed potential discrimination in compensation and hiring policies.
- Last week, a large law firm with offices in multiple states announced that it was laying off attorneys, paralegals, and other professional staff due to a slowdown in legal work. In a memorandum to employees, the firm purportedly stated: “We are purposefully choosing to be transparent and conduct a reduction in force, rather than engage in reductions through our performance management process. Respect for each other, *equity and inclusion*, transparency, and commitment to excellence are among our core principles, and we have implemented this reduction in force decision in a manner we believe adheres to these principles and is consistent with our culture.” Although citing “equity” and “inclusion” without citing “diversity,” given the context, the memorandum might be cited as an admission that the firm made layoff decisions based on protected characteristics.

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Despite good intentions and social and political pressure, employers must be wary of making employment decisions in which a protected characteristic is a considered factor. Even if the purpose is to advance social equity, race-based (or some other protected characteristic) employment decisions remain unlawful discrimination.

Rather than consider to protected characteristics as factor in layoff decisions, employers should adhere to these basic principles to avoid disparate treatment, disparate impact claims, and other claims:

1. Do utilize objective criteria for selecting those impacted by a layoff.
2. Do prepare a Reduction in Force plan to document the business reasons for a layoff, criteria used for selecting those impacted, how the criteria will be applied, the location/positions impacted, the timing, etc.
3. Do conduct a disparate impact analysis to determine if a layoff has created any statistical impact on certain protected groups.
4. Don't use race or other protected characteristics as a factor in a layoff or other employment decision—even if it is not the main factor.
5. Don't ignore WARN Act or mini-WARN Act laws.
6. Don't ignore collective bargaining agreements (if applicable).

If you have any questions about implementing and executing a reduction in force plan or any other Labor & Employment issue, please contact your Butzel Labor & Employment attorney.

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