

Will You Agree To An Inclusion Rider?

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During the March 4 Academy Awards, actor Frances McDormand introduced a national audience to the diversity-focused contract provision known as an “inclusion rider.” It requires producers to set inclusion goals for on-screen and off-screen talent from under-represented groups. Such goals are intended to “reflect the world in which we actually live.” In a given production, such a rider might establish a goal that the cast be 50% female, 40% under-represented ethnic groups, 20% people with disabilities and 5% LGBT. Employers large and small are committed to taking action to pursue expanded diversity and inclusion in their workforces. Consideration of gender, race, or national origin in pursuit of diversity is a legal two-way street. If goals are applied like quotas, it creates the possibility of reverse discrimination claims by qualified and interested job candidates who are not considered because they will not help meet the established metrics. Realizing this, sophisticated employers, including those who are federal contractors, have used established goals as a tool toward implementing equal employment opportunity objectives, steering clear of applying goals like quotas. In pursuit of this objective, employers expand the pool of qualified and interested candidates through broader and deliberate recruiting methods. Additionally, they look to expand qualification standards to increase the opportunity that diverse candidates will actively be considered and ultimately hired and advanced. Whether the employer can actually consider protected characteristics, like gender or race, as a specific “plus factor” in employment decisions depends upon the employer’s circumstances and the facts. Public employers must be prepared to withstand strict constitutional scrutiny of consideration of gender or race in employment and must show that such consideration is narrowly tailored to remedy past discrimination. And in some states – Michigan, for example – public employers are expressly prohibited from considering gender or race in employment decisions. Private employers can consider protected characteristics, like gender or race, as a “plus factor” in employment decisions, when supported by a relevant statistical showing of a manifest imbalance in its workforce. We actively encourage our clients to think creatively and act boldly in pursuit of their diversity and inclusion objectives. We also understand the importance of results. Smart employers work to develop a culture where all of these requirements can be met in a way that enhances credibility to the ultimate overall success of its teams.

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