



I'm Legal Counsel to Our Diversity Office; What Do I Need to Know about Data Analytics?

Prepared by:
John M. Bryson
Jackson Lewis P.C.

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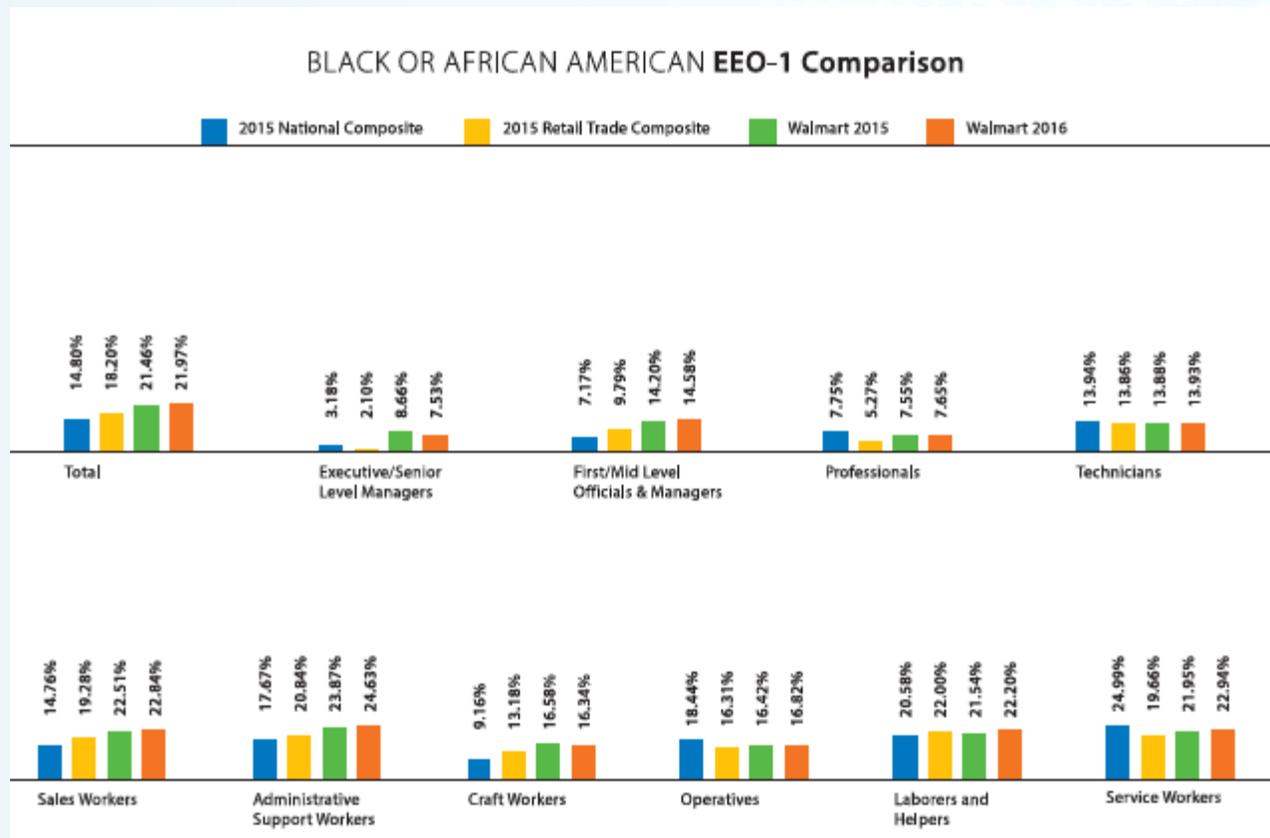
Written by John M. Bryson II on April 16, 2018

As if you don't have enough on your plate already. You just heard in the lunchroom that your Chief Diversity Officer is making a presentation to a trade group on the company's workforce demographics. Should you care?

An often-overlooked area of data analytics is in a company's diversity office. I say "overlooked" because some diversity offices do not feel the need to seek the legal department's advice when they embark on gathering data about, for example, the demographics of the company. Whether you have been asked for advice, or have decided to seek out the diversity office to see what data it is compiling, you should be aware of the types of analytics typically prepared — and the legal implications. Let's look at a few examples.

Workforce Demographics: Most diversity offices track workforce demographics. These analyses typically include all job groups, like EEO-1 job categories, and may be as granular as job titles. Most include race/ethnicity and gender, some include age, and others may include such factors as veteran status, sexual orientation, and disability, in part depending on the availability and reliability of the data in the HRIS. The analyses may be snapshots for a specific date, or time-trends for comparison purposes: "Are we improving year-to-year in our representation of Hispanic females at the mid-level manager position?"

Either way, they typically result in pie charts, graphs, and other visual aids clearly displaying percentages of representation by race/ethnicity, gender, etc., sometimes with red-shaded warning signs for “high-risk” (or “high-opportunity”) areas. Are you shuddering yet?



Source: Walmart Road to Inclusion 2017 Report

Benchmarking: Diversity offices want to be able to answer their CEO’s question, “So how are we doing compared with our competitors?” Benchmarking is a relatively easy task so long as comparative data is available. That, however, is the rub. Although some do, most companies do not publish their workforce demographic data. Some periodicals, like *DiversityInc*, publish limited data on those recognized annually as their “Top 50 Companies for Diversity.” The list may include companies in

your industry, and even if it doesn't, it can be considered a "best in class" benchmark. There are other sources as well, such as industry groups, and the EEOC.

Be aware of the types of analyses conducted by your diversity office. If the office is not asking for your oversight or assistance, offer it.

Adverse Impacts: Government contractors are accustomed to preparing annual Affirmative Action Plans that include statistical analyses of potential "adverse impacts" of various employment processes, such as recruiting/hiring, performance evaluations, terminations, compensation, and promotions. These analyses can be critical in proactively uncovering problems and addressing them. Particularly with non-government contractors, diversity and human resources offices often conduct such analyses to determine the fairness and equity of corporate policies and practices. Like other self-critical analyses, they present risks if disclosed.

So what should you do? First, be aware of the types of analyses conducted by your diversity office. If the office is not asking for your oversight or assistance, offer it.

Second, identify potential legal and reputational implications of these analyses, and address them. You know that such data may be useful to enforcement agencies (EEOC, OFCCP), plaintiffs' attorneys, disgruntled employees, activist shareholders, and media critics. You should take steps to establish and preserve the attorney-client privilege for such analyses

as you would any other area of legal advice. You can also probe the accuracy and reliability of the methods used and results. To the extent your diversity office wants to publish the results of analyses beyond a “control group,” ensure that this business decision considers the legal and reputational risks.

Of course, if the analytical results are all good news, that problem goes away. Feel free to let your diversity office brag about it, in the C-suite and beyond!

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