

Two Sides of the Same Coin: Balancing Workplace Diversity Initiatives and Nondiscrimination Laws

Megan Anderson, Gray Plant Mooty

Sarah Duniway, Gray Plant Mooty

Alfonso Wenker, MN Council on Foundations

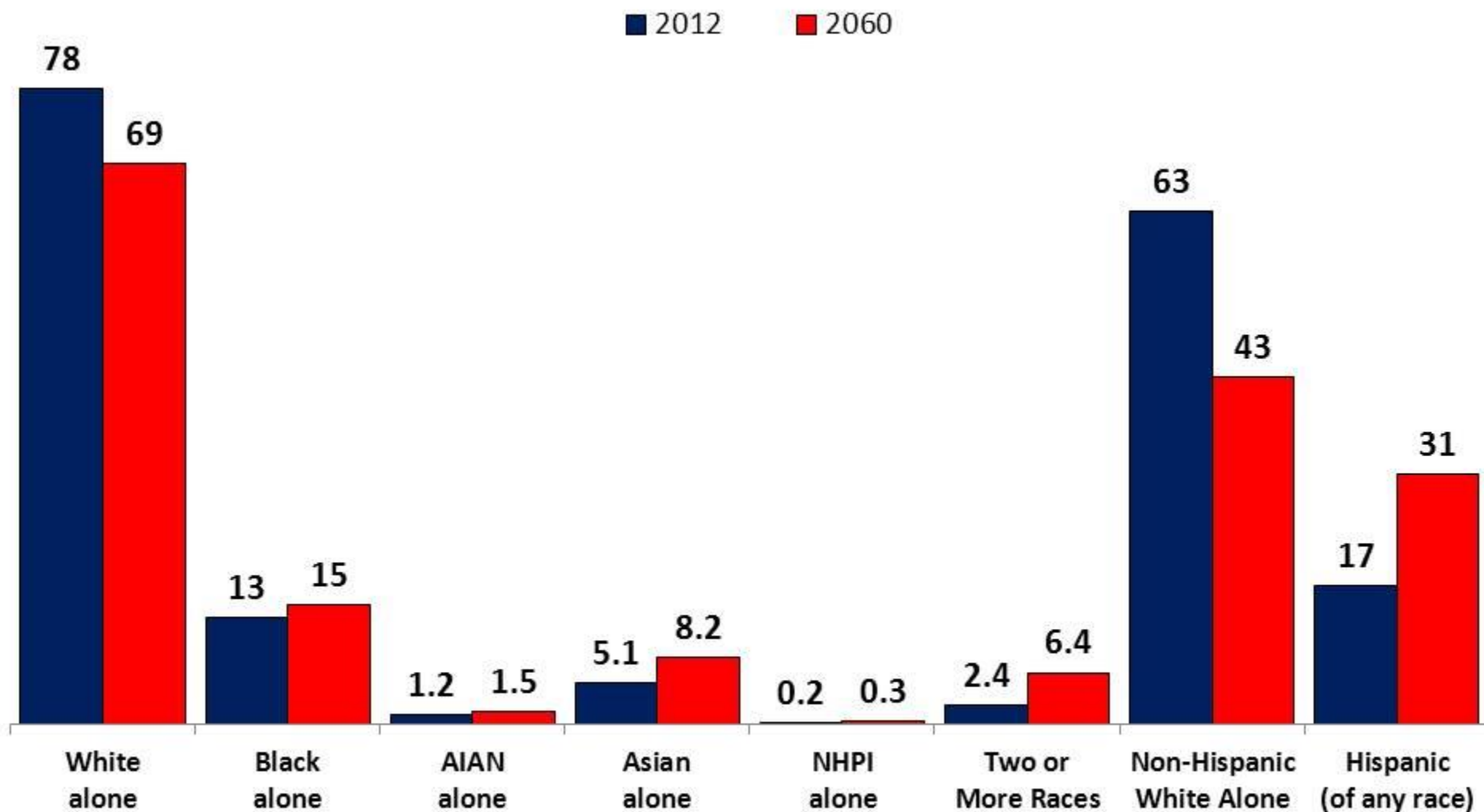


The Case for Workplace Diversity

- Nonprofits and foundations apply their resources for the public and common good
- The face of communities served by nonprofits is changing
- Workplace diversity advances:
 - Common good
 - Ability to serve increasingly diverse communities
 - Credibility and legitimacy with diverse constituents
 - Better results with input from employees of diverse backgrounds, experiences and perspectives
 - Ability to recruit, hire and retain top talent

Population by Race and Hispanic Origin: 2012 and 2060

(Percent of total population)



■ 2012 ■ 2060

AIAN=American Indian and Alaska Native; NHPI=Native Hawaiian and Other Pacific Islander



The State of Diversity in Foundations

- Minnesota – Staff
 - Some groups tend to exceed state workforce percentages:
 - Black/African American
 - Native American
 - Others tend to be underrepresented:
 - Hispanic/Latino/Latina
 - Asian/Asian American
 - Disabled
 - As staff size increases, racial/ethnic diversity decreases
- Minnesota – Boards
 - Tends to be less diverse than staff
 - Men tend to outnumber women
- National trends similar



The State of Diversity in Nonprofits

- 90% of employees believe their employer values diversity
 - but 70% believe employer doesn't do enough
- Job candidates attempt to evaluate organization's commitment to diversity
 - 50% of all job candidates
 - 71% of candidates of color
- And make decisions based on what they find
 - More than 35% of people of color who examined diversity during the hiring process reported having withdrawn candidacy or declined a job offer due to a perceived lack of diversity and inclusiveness

Case Study: DoingGood, Inc.



- DoingGood needs to increase the racial diversity of workforce at all levels
 - Corresponds to need in nonprofit community
- Wants to create a “fellowship” program
 - Hire candidates of color only
 - One year fellowship
 - Perform entry-level program work
 - Receive training and mentoring
 - At the end, may be eligible for regular employment if there is an opening
 - If not, receive career counseling and placement assistance to help land a position at another nonprofit



Employment Discrimination Laws

- Unlawful to discriminate in hiring or terms of employment based on legally protected characteristics:
 - Race, Color
 - National Origin
 - Citizenship
 - Religion
 - Sex
 - Pregnancy
 - Age
 - Disability / Genetic Information
 - Military Service
 - Sexual Orientation / Transgender Status (MN)
 - Marital Status (MN)
 - Familial Status (MN)
 - Receipt of public assistance (MN)



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Discrimination vs. Affirmative Action: Two Sides of the Same Coin

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- Making a hiring decision based on race can result in unlawful discrimination against a member of the majority group





DoingGood's Plan

- If DoingGood's pipeline program could create a legal risk of discrimination claims
 - Caucasian candidate who was not eligible for program
- What *can* they do?



Expand the Pool

- Steps to widen pool of qualified applicants so that pool is more diverse, but employer still makes “color blind” hiring / employment decisions
- Examples:
 - Wider, targeted advertising of open positions
 - Attendance at diverse job fairs
 - Develop and support candidate pipeline programs
 - Increased networking efforts



Ensure and Promote an Inclusive Work Environment

- Strong equal opportunity and inclusion policies
- Diversity training
- Diversity and culture committee
- Diversity-focused events
 - Get to know your colleague initiatives
 - Guest speakers on diversity topics
 - Events that celebrate diversity
 - Sponsoring tables at diversity events

- Already taken all the steps they can to increase pool, build an inclusive work place
- Strongly believe will only successfully overcome lack of diversity through a formal hiring/pipeline program
 - What can they do?





Government Contractors

- Mandatory Affirmative Action Plans
 - Annual affirmative action plan
 - Utilization analysis and hiring goals
 - Good faith efforts to meet goals
 - *No quotas*
 - *Hiring decisions must not be based on protected characteristics*

- Voluntary Affirmative Action Plan
 - A voluntary policy or program
 - to improve the employment opportunities of members of groups that have experienced discrimination in the past based on race or sex
 - Race (or possibly other protected class status) may be considered in making decision
 - If pursuant to goals and steps in the program



Voluntary Affirmative Action – Legal Requirements

1. Conspicuous imbalance in traditionally segregated job categories
2. Manifest imbalance in employer's workforce relative to demographics of relevant labor market
3. Purpose of program to remedy imbalance by *attaining* balance, not *maintaining*
4. Program narrowly tailored to meet its remedial purpose
5. Program written, temporary and reviewed/updated regularly



Manifest Imbalance

- Demographic analysis:
 - Employer's own workforce
 - Compared to relevant labor market
 - In identified job categories that have traditionally been segregated



Purpose and Goals

- Determine and articulate the goals (not quotas) of affirmative action program
- Discuss and consider means of accomplishing goals
 - Race-neutral alternatives considered?
 - Why aren't race-neutral alternatives workable?
 - Why are race conscious measures the only workable option?



Narrowly Tailored

- Consider ways to narrowly tailor program and reduce legal risks of reverse discrimination claim, such as:
 - Broad definition and view of diversity
 - Holistic review of candidates
 - Length of employment period
 - Types of job categories
 - Consider training programs vs. hiring programs, for example



Written Program

- If standards can be met:
 - Adopt a written program that articulates the analysis, goals and steps to achieve them
 - Review and analyze regularly
 - Update and modify as needed
 - Be prepared to wind down the program if and when diversity goals are attained

DoingGood's Program

- Already:
 - identified need for attaining diversity
 - identified job category (entry-level program position that Fellows could fill)
 - adopted all the race-neutral efforts to improve diversity they can



- Next steps
 - Conduct demographic analysis to demonstrate manifest imbalance
 - Identify relevant labor market
 - Tie to specific job category
 - Articulate program goals that would rectify imbalance
 - Not quotas
 - Document analysis, plan and goals
 - For Fellows, define term of program for each Fellow
 - What happens when Fellow's term ends
 - Continue race-neutral efforts as well

Maintaining Diversity

- Affirmative Action programs are limited to *attaining* a diverse workforce
- Not maintaining diversity:
 - Goal and design of plan cannot be based on trying to mirror demographics of labor market indefinitely
 - No consideration of protected class in:
 - Promotion or advancement
 - Pay or benefits
 - Mentoring or retention programs

- *Can:*
 - Consider and adopt efforts to support diverse employees, if available to all:
 - mentoring, sponsoring and coaching
 - training
 - retention
 - work-life balance working conditions
 - Implement efforts to promote inclusion:
 - D&I training
 - strong policies
 - programs and activities that recognize and celebrate diversity
 - etc.



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GRAY

PLANT

MOOTY



Megan Anderson
Attorney
Gray Plant Mooty
(612) 632-3004
Megan.Anderson@gpmlaw.com



Sarah Duniway
Attorney
Gray Plant Mooty
(612) 632-3055
Sarah.Duniway@gpmlaw.com



Alfonso Wenker
Director of Diversity, Equity and Inclusion
Minnesota Council on Foundations
(612) 465-0715
awenker@mcf.org

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