Diversity, Equity, & Inclusion

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Understanding Diversity, Equity & Inclusion

Diversity, equity, and inclusion (DEI) embraces people from every walk of life.

It recognizes the value of diverse voices and inclusivity as key factors of success.



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Understanding Diversity Equity & Inclusion



DEI is about business, driven by the changing nature of the workforce. Organizations must protect the merit principle, which is to attract, retain, motivate, and develop the best and brightest employees.



Diversity improves business performance outcomes. When people feel valued in the workplace, they are more invested and take pride in their work and organization.



Diversity should be strategically aligned with business goals; diversity requires investment but pays dividends. Failure to understand the impact of the cost of discrimination and poor diversity management can lead to an organization and individual employees facing litigation. This risk can easily be prevented by embracing and showing respect to those who are different than we are.

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Defining Diversity, Equity, and Inclusion

Since diversity, equity, and inclusion all represent a different type of change, it is valuable to look at each term individually



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Classifications of Diversity

- Internal Diversity
- External Diversity
- Organizational Diversity
- Worldview Diversity

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Components of Inclusion

- Access to resources
- Feeling valued and accepted
- A collaborative environment
- Having a sense of belonging

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Equity vs. Equality

Equality displays a `one
size fits all' system, which is only effective if everyone has the same needs and are starting at the same point.



Benefits of Workplace Diversity

- Improved understanding of those you work for, with, and around.
- Creates a work environment that allows everyone to reach their full potential.
- Provides multiple perspectives on problem solving.
- Better performance outcomes.
- Increases employee productivity.
- Increased retention rates.
- Boosts employee morale.
- Improved customer relations.
- Reduces complaints and grievances.
- It's the right thing to do!

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Role of DEI in Law Firms and Corporations

- An increase of fairness
- Higher levels of creativity and innovation
- New and fresh perspectives



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Historical Context

1961: President John F. Kennedy signs and executive order establishing "affirmative action" required government contractors to:

"The contractor will take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, creed, color, or national origin."

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Legality of Affirmative Action:

REVIEW

- **Title VI** of the Civil Rights Act of 1964
  - Prohibits discrimination on the basis of race, color, or national origin in any program or activity that receives Federal funds or other Federal financial assistance.

- **Title VII** of the Civil Rights Act of 1964
  - Prohibits employment discrimination based on race, color, religion, sex and national origin.

- **Title IX** of Educational Amendments Act of 1972
  - Prohibits discrimination based on sex in any education program or activity receiving federal financial assistance.

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Legality of Affirmative Action: 14th Amendment (1868)

Sec. 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

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Affirmative Action

What is it?

Programs designed to achieve a more representative distribution of people within a business or educational setting by giving some degree of preference to women, people of color, and other historically discriminated-against groups

Two main goals:

Remedy past discrimination	Promote diversity

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Moral Case for Affirmative Action



- Affirmative action is compensation for centuries of harm caused to women and people of color because of past discrimination

- Counterargument:
  - Individuals who did the harm may not be the same individuals compensating the victims
    - Think back to requirements for compensatory justice

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Moral Case for Affirmative Action

Utility:

1. Affirmative action promotes public welfare because it could decrease poverty
2. Affirmative action may lead to a less race-conscious society

Counterargument:

1. Can we address poverty in a race and/or gender-neutral way?
2. Do benefits outweigh social costs?
3. Should this be based on "need" and not "race/minority status?"



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Moral Case for Affirmative Action



Justice:

- Assumes there is a lack of equality of opportunity for people of color and women, so affirmative action is necessary to create an equal playing field

Counterargument #1 to Justice Argument:

- Isn't this reverse discrimination?

Response to Counterargument: Discrimination means you have a bad motive; this type of preference is not based on hatred of white males

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45-year-old electrical worker in Westinghouse plant:

"What does bother me is the colored getting the preference because they're black. This I am against. I say, I don't care what his color is. If he has the ability to do the job, he should get the job – not because of his color. They shouldn't hire 20 percent just because they're black. This is discrimination in reverse as far as I'm concerned. . . . If they want it, they can earn it like I did. I am not saying deprive them of something – not at all."



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Moral Case for Affirmative Action: Instrumental Arguments

Counterargument #2 to Justice Argument:

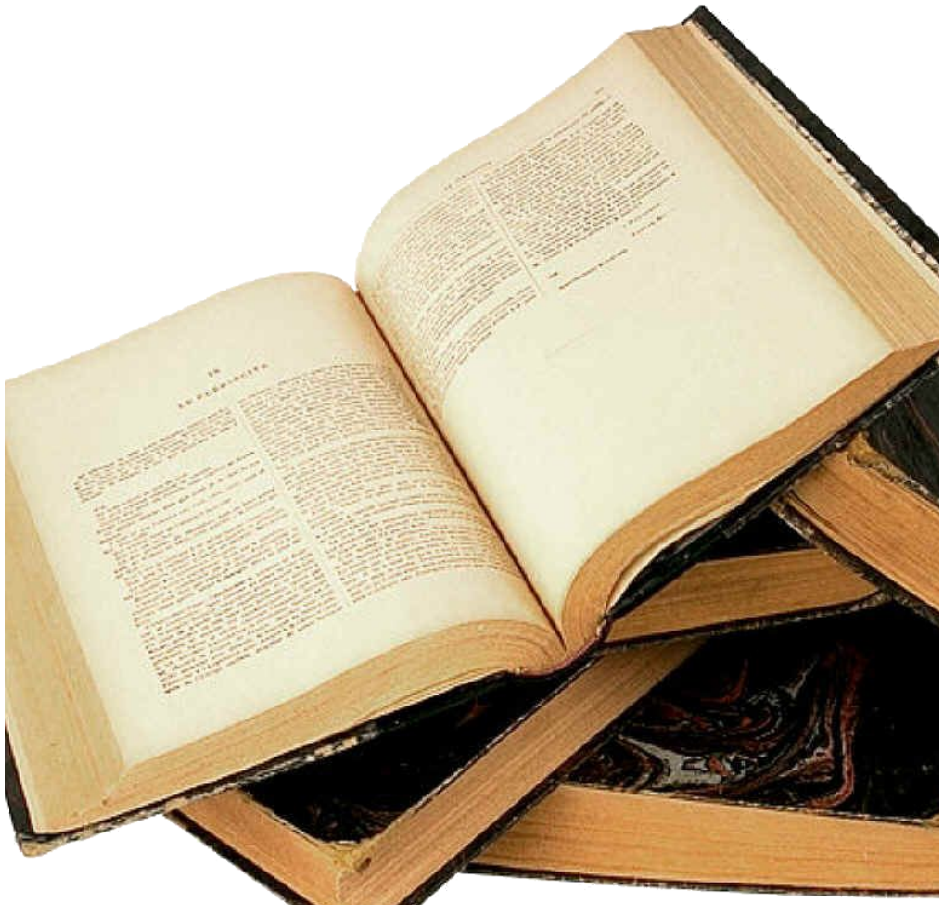
- Affirmative action implies that people of color and women need "extra help"

Response to Counterargument: It's still better than the discrimination people of color and women would face without affirmative action

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Black Author, Shelby Steele:

- ". . . After 20 years, it has proved to be "more bad than good".
- ". . . The quality that earns us preferential treatment is an implied inferiority."
- "the lowering of normal standards in order to increase black representation and such a *lowers of standards* leads blacks who are measure by those lower standards to suffer a '*debilitating doubt*' that may be 'unrecognized' but nevertheless becomes a 'preoccupation' that 'undermines their ability to perform, especially in integrated situations."



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Is Affirmative Action Moral?



Powerful arguments on both sides of the issue – still unresolved

BUT

Review of arguments seems to suggest that affirmative action programs are at least a *morally permissible means* for achieving just ends, even if they may *not* show that they are *a morally required means* for achieving those ends.

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Legality of Affirmative Action

Two types of affirmative action:

- Voluntary affirmative action **programs** by *private actors* (businesses)
  - Subject to reverse discrimination lawsuits under anti-discrimination laws (Title VII)

- Affirmative **action** by *government actors* (state schools; private schools with federal funding)
  - Subject to constitutional/Title VI challenges on equal protection grounds

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Private Actor – Affirmative Action

A voluntary affirmative action program ***may*** withstand reverse discrimination claim under anti-discrimination laws if:

- Employer has reasonable statistical basis for concluding minorities are underrepresented in business – achieve diversity;
- Program intended to correct historic workforce imbalances (racial or sexual);
- Correct an "egregious," "persistent," and "manifest" racial imbalance not caused by previous discrimination
- Can be used for hiring, but not in layoffs
  - 1984 Supreme Court Case – seniority for layoffs okay so long as seniority system adopted without a discriminatory purpose; minorities/women usually low seniority though, so if actual victim of discrimination give them rightful place in seniority system – must prove ACTUAL victim of discrimination to get bumped up in seniority system
  - 1986 Supreme Court Case –cannot make layoffs solely based on race/minority status
- Cannot be an absolute bar to employment or advancement of non-minorities – cannot overrule seniority, and cannot be used in gov't set-aside programs
- Must be "narrowly tailored" to objectives
- Target goals are pursued for only for a limited time; and
- No inflexible quotas

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Government Actor – Affirmative Action

- Affirmative action by government actors *may* withstand constitutional challenge if:
  - Affirmative action program is narrowly tailored to achieve a compelling government interest (diversity);
  - Race is just one factor in admission (educational institution) decision, but not the only factor;
    - 2003 Supreme Court case of *Grutter v. Bollinger*
  - No quotas or automatic "boost" for minority applicants;
  - Race-conscious admission policies must be limited in time; and
  - No set-aside programs
    - 1989 case of *City of Richmond v. J.A. Croson Co.;* reaffirmed in 1995 case of *Adarand Construction, Inc. v. Pena*
  - Subject to Title VII and Equal Protection

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Guidelines to Businesses Implementing Affirmative Action

(1) Both minorities and non-minorities should be hired or promoted only if they reach certain minimum levels of competency or are capable – after training or education – of reaching such levels in a reasonable time.

(2) If the qualifications of the minority candidate are equal to (or higher, or only slightly less than) than those of the nonminority, then the minority should be given preference

(3) If both the minority and the nonminority candidates are adequately qualified for a position but the non-minority candidate is clearly more qualified, then:

   a) If performance in the job directly affects the lives and safety of people (such as a surgeon or an airline pilot) or if performance on the job has a substantial and critical effect on the entire firm's success (such as head comptroller), then the more qualified nonminority should be given preference; but

   b) If the position (like most positions in a firm) does no directly involve safety factors and does not have a substantial and highly critical effect on a firm's success, then the minority person should be given preference.

(4) Preference should be extended to minority candidates *only so long as* their representation throughout the various levels of the firm is not proportional to their availability – *cease as soon as defects remedied*.

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Recent Legal Challenges to DEI Programs

2023: The Supreme Court ruled 6-3 that Harvard's admissions practices were unconstitutional, stating they violated the Equal Protection Clause of the Fourteenth Amendment. The Court found that Harvard's use of race as a factor in admissions constituted discrimination against Asian American applicants.

While the *SFFA* opinion does not directly apply to private employers, employers have also been watching these matters closely, wondering whether the outcome of these cases will affect current company policies and practices, especially those focused on diversity, equity and inclusion.



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Reverse Discrimination Litigation

Challenges to DEI initiatives are not new, although are likely to increase following SFFA.

- *DiBenedetto v. AT&T Services Inc., case number 1:21-cv-04527, U.S. District Court for the Northern District of Georgia.*
  - Older white male employee claimed he was selected for layoff in part because he did not fit within the goals of AT&T's corporate-wide Diversity & Inclusion Plan (DIP).
  - AT&T filed a motion to dismiss arguing that DiBenedetto's race and age had nothing to do with its decision and that he was fired because of poor leadership and teamwork skills.
  - Case settled on June 26, 2024, while AT&T's summary judgment motion pending.



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Shareholder Derivative Actions

Shareholder demands and proposals have sought to force companies away from DEI initiatives

- *Nat'l Ctr. For Pub. Policy Rsch. v. Howard Schultz, case number 2:22-CV-00267-SAB, U.S. District Court for the Eastern District of Washington*
  - Plaintiff is an advocacy group committed to conservative causes in government and the private sector.
  - Challenge to Starbucks' DEI policies, including goal to achieve BIPOC representation of at least 30% at all corporate levels and at least 40% of all retail and manufacturing roles by 2025
  - Motion to dismiss filed and granted.
  - Judge stated from the bench that a shareholder derivative suit was an improper forum for making a political statement, and that if the plaintiff did not want to invest in "woke" America, it should seek other investment opportunities.

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Targeted Programs

Young Americans for Freedom et al. v. U.S. Department of Education et al., No. 3:2024 cv 00163 (filed August 27, 2024).

- Plaintiff is challenging the McNair program's eligibility criteria, which require students to be low-income, first-generation college students or part of a group underrepresented in graduate education.

American Alliance for Equal Rights v. Southwest Airlines Co., Case No. 24-1209 (filed May 20, 2024)

- Plaintiff challenges Southwest Airlines' Lanzate Travel Award Program for being racially discriminatory.
- On August 22, 2024, Southwest Airlines asked the court to dismiss Plaintiff's complaint, arguing that Plaintiffs claims are moot because Southwest has already agreed to open its Program of awarding flight passes to students so that eligibility will no longer be limited by race, ethnicity, or national origin.

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Diversity Training

Arsenault v. HP Inc., 3:24-cv-00943 (D. Conn. Filed May 29, 2024)

Plaintiff, a white man, alleges that he was subject to a "shaming session" after expressing his negative opinions on DE1, which led to retaliation and culminated in the termination of his employment and a refusal to rehire him. He alleges that Defendant was motivated by his race when it terminated his employment.



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DEI Strategies for Organizations

Create a DEI Policy

- A DEI policy typically covers a range of areas including recruitment and hiring, employee training and development, promotion and retention, workplace culture and communication, and addressing any instances of discrimination, harassment, or bias.



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Implementation Strategies



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Measuring DEI Success

Representation Data Diversity metrics across all Tracks progress in workforce diversity organizational levels

Employee Engagement Surveys Assess perceptions of inclusivity and Measures effectiveness of inclusion belonging efforts

Retention Rates Monitor retention of diverse Evaluates long-term impact of DEI employees' initiatives

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Addressing the Barriers

Conduct Regular Assessments: Regularly evaluate the effectiveness of DEI initiatives and gather employee feedback to identify ongoing challenges.

Engage Employees: Involve employees at all levels in DEI discussions and initiatives to foster buy-in and collaboration.

Adapt and Evolve: Be willing to pivot strategies based on feedback and changing organizational

Lack of Leadership Commitment

Resistance to Change

Ineffective Communication

Inadequate Resources

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Successful DEI Programs

Google

- **Overview:** Google emphasizes diversity in its workforce and aims to create an inclusive workplace.
- **Key Components:**
    - **Data-Driven Insights:** Regularly collects and analyzes employee demographics and feedback to inform DEI strategies.
    - **Training Programs:** Comprehensive training on unconscious bias and inclusive leadership.
    - **Diverse Hiring Practices:** Structured interviews and diverse hiring panels to minimize bias.

Successful DEI Programs

Microsoft

- **Overview:** Microsoft prioritizes DEI as a core value and integrates it into its business strategy.
- **Key Components:**
  - **Global DEI Strategy:** A holistic approach that includes accessibility and neurodiversity initiatives.
  - **Community Engagement:** Collaborates with organizations to promote STEM education among underrepresented groups.
  - **Leadership Accountability:** DEI goals tied to performance metrics for executives.

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Key Elements of Successful DEI Programs

- **Leadership Commitment:** Active support and engagement from top leadership.
- **Employee Involvement:** Engagement of employees at all levels in DEI initiatives.
- **Clear Goals and Metrics:** Establishing measurable goals and regularly tracking progress.
- **Tailored Training:** Ongoing education and training tailored to the organization's needs.
- **Culture of Accountability:** Holding leaders and employees accountable for DEI outcomes.
- **Flexibility and Adaptability:** Willingness to adapt strategies based on feedback and changing circumstances.

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Understanding Implicit Bias

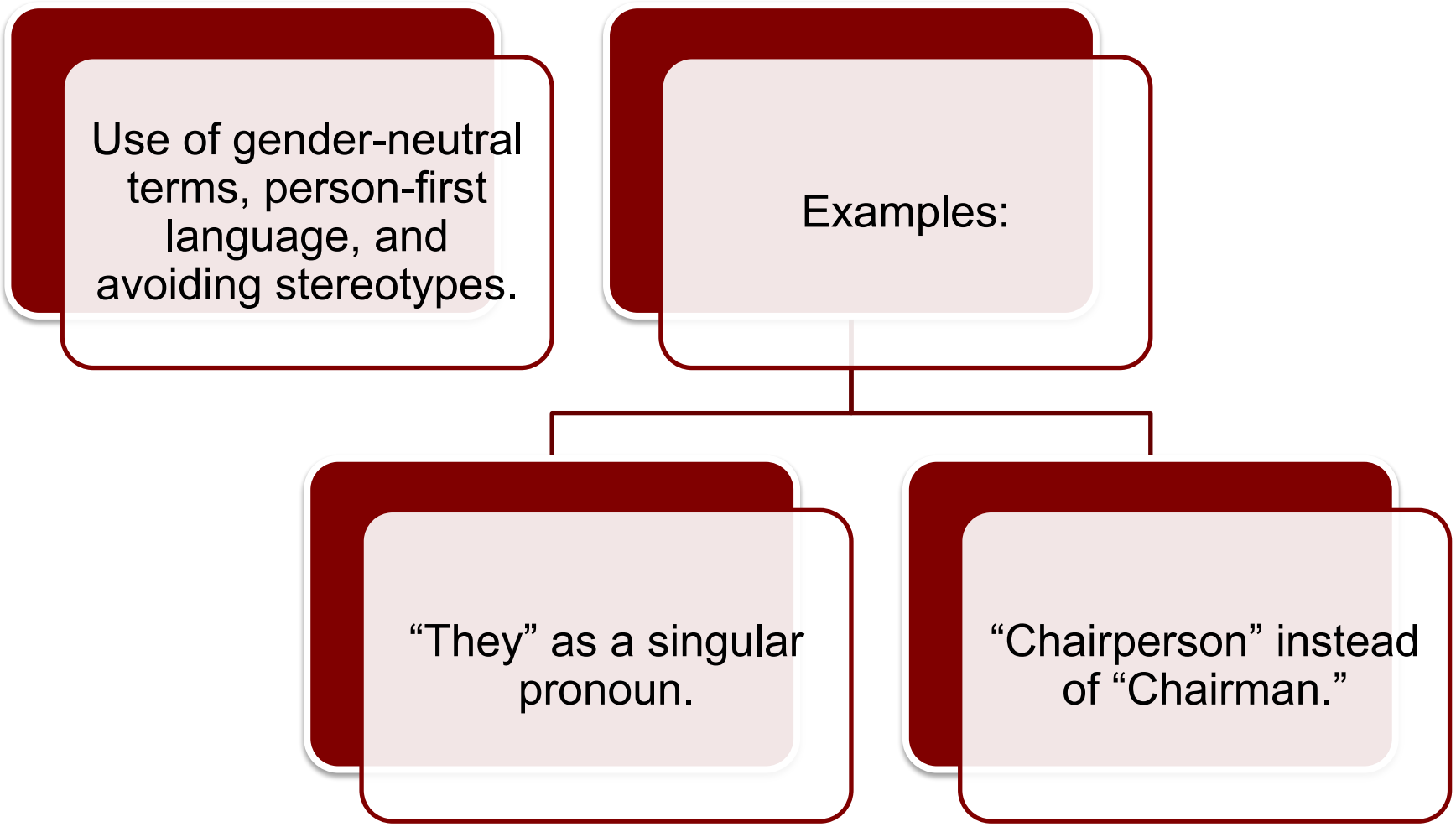
Unconscious attitudes or stereotypes that affect understanding and actions.

Can influence hiring, evaluations, and team dynamics.

Mitigation strategies include training, reflection, and data-driven decisions.

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Inclusive Language in the Workplace



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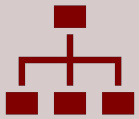
Building a DEI Committee



Cross-functional team with diverse representation.



Responsibilities: setting goals, reviewing policies, and promoting accountability.



Should report progress regularly to leadership.

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Psychological Safety



A key element of inclusion.



Employees feel safe to speak up without fear of retaliation or ridicule.



Drives innovation and teamwork.

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DEI in Remote and Hybrid Workplaces

Ensuring equal access to opportunities and visibility.

Combatting proximity bias.

Inclusive virtual meetings and asynchronous communication norms.

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Supporting ERGs (Employee Resource Groups)

Employee-led groups focused on shared identities or experiences.

Benefits: community, advocacy, mentoring, and leadership development.

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ONGOING JOURNEY

DEI requires continuous effort and commitment.

SMALL CHANGES

Small actions can lead to significant impacts.

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QUESTIONS



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