

Leading DEI with Practicality and Purpose

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The Supreme Court's affirmative action decisions and the current divisive political landscape have perpetuated skepticism about corporate Diversity, Equity and Inclusion ("DEI") efforts, and undoubtedly have made corporate DEI programming challenging. Corporate counsel should not allow these developments to derail DEI efforts. Instead, corporate counsel should take this opportunity to reinvigorate their companies' commitments to DEI, in order to create workable and legally defensible programs that achieve robust representation and workforce success.

Corporate counsel are well positioned to play a key role in focusing their companies on the case for DEI, whether premised on fundamental fairness, correcting for historical underrepresentation, or aligning with the shareholder goal of profitability. To do so effectively, they should approach DEI with a view to expanding and not restricting the workforce pipeline. In fact, an effective DEI program should always begin with the message that such programs create new, expansive, and more representative pipelines to the ultimate growth asset: talented people who achieve the corporate mission. Corporate counsel can take a few key steps to help their clients achieve a more diverse and inclusive workforce.

Educate

Like any other successful corporate initiative, an effective and legally compliant DEI program requires buy-in from the board and management. Board members themselves may misunderstand how the Supreme Court's decisions impact a company's DEI programming. Corporate counsel can play a role in ensuring that the board understands the impact of the Supreme Court's decisions, which should include an emphasis on the critical premise – which remains unchanged by the Supreme Court's rulings – that hiring and retention based solely on race are impermissible. Counsel also can confirm DEI's aim, which is to expand, rather than restrict, the talent pipeline. These



topics demand board attention and counsel (along with key human resources professionals and partners) should play a role in making that happen with the appropriate education, guidance and support.

Aligning With The Corporate Mission

Innovation, fiscal success and a productive workforce are fundamental to the mission of most companies. Every business aims to serve one or more communities, and those communities also produce talent. That talent in turn is more likely to understand the business's target consumer, and therefore more likely to produce a superior product or more effective service. Furthermore, a diversity of backgrounds leads to multiple perspectives, which in turn produce more innovative and profitable products. Diversity clearly is a differentiator.

Effective recruiting, retention and employee development practices begin with the acknowledgement that a community-representative workforce is vital to the company's success. The research on this point is irrefutable. Aligning business goals with the goals of recruiting and retaining diverse employees helps clarify the *who*, the *what* and the *why* of the company's diversity imperatives.

Take Stock

The recent Supreme Court decisions left unchanged the prohibition on using hiring quotas, numbers or percentages based upon legally protected categories (except in certain,

very limited circumstances). Within this legal framework, the business should conduct a review, under the guidance of counsel, of its existing DEI programs. The review should include ensuring that programs and policies create neither intentional nor unintentional quotas (an aim or goal of hiring a specific number of diverse individuals, would not be permitted, but an overall mission or aspiration of achieving a workforce that better resembles the makeup of the employer's community, is permissible). Programs that might be reviewed include hiring or fellowship programs, affinity and ERG groups, sponsor programs and the use of diverse candidate slates. And data – critically important for those companies subject to OFCCP contracting rules, as well as compliance with state pay equity legislation – is a useful driver here. Data helps companies set benchmarks against which they can assess progress. Data can also disclose gaps in hiring and other practices, and the company can design initiatives to bridge those gaps. Utilizing experts to produce, analyze and report on that data is important. This analysis and review might also include racial and civil rights audits. There is yet another reason for critical self-examination: undertaking a methodical assessment of identifying and addressing gaps can provide important defenses to claims that an organization failed to take appropriate steps to stamp out potential discrimination within its existing workforce. It is better to be data-informed than data-ignorant. Any fear of exposure that could inhibit audits can be addressed by conducting the analysis as part of a counsel-led effort to mitigate risk.

Embrace the “I” in DEI

Some DEI detractors see DEI as a zero-sum game – as if supporting the retention of individuals of color automatically undermines the retention of those in the majority. Some DEI critics argue that the intended effect (and consequence) of DEI programming is to limit employment opportunities by race or other characteristics. But DEI is about ensuring that everyone has equal access to success, including those that historically have been disenfranchised from traditional models of promotion and leadership. The detractors' argument ignores the fact that a truly effective DEI program expands employment opportunities for all, rather than diminishing prospects for some. It is easy to get distracted by the drama of headline-grabbing lawsuits. The proper response should be a measured one and should focus on communicating the amplification of opportunities. For example, businesses should expressly invite all employees to participate in and support ERGs and affinity groups. The entire workforce should be encouraged to par-

ticipate in providing a safe and welcoming environment for underrepresented individuals.

Role Model the Roadmap

A lawyer's position carries leadership obligations that go beyond ethical and professional responsibilities. While ethical obligations may not yet mandate DEI activities (beyond state-mandated continuing legal education requirements), lawyers have a universal obligation to devote professional time and resources and use civic influence to ensure equal access to justice. Beyond that, the ABA encourages lawyers to participate in efforts to support DEI. Keep those guideposts in mind with respect to recruiting and retaining individuals in legal departments in particular, and the impact those efforts have on other departments within the business.

Be Creative and Communicate

All of these guidelines are intended to be useful, but the difficult question remains: how does a business create and retain a workforce that reflects the communities it serves, and how best can it accomplish the goal of creating an inclusive workforce? One solution is to think creatively. Offering hiring managers different options in sourcing talent, such as recruiting from new universities, through community affinity groups and other interest-focused organizations, may naturally result in different workforce dynamics. If the net is cast wide enough, it will capture candidates whose consideration may have been eluded in the past, perhaps because of educational backgrounds or upbringing. Training is also a key part of the equation – particularly with respect to ensuring that managers understand and recognize their own implicit biases. Communications to the greater business can also help: all employees should understand that while the aim is to produce an inclusive and representative environment, the employer will never select a candidate to interview, or hire, without regard to that person's ability to do the job, and certainly not on the sole basis of the individual's gender, race or any other non-work related characteristic.

The recent affirmative action decisions provide an ideal opportunity to revisit – and recommit – businesses to the DEI goals of broadening employment opportunities. A well constructed and legally compliant program can achieve this goal – and at the same time give business a competitive edge in the marketplace.

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