

## The Year Ahead: Diversity and Pay Equity Analytics

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The confluence of prominent social justice movements, enactment of various state and local legislation, and an incoming presidential administration committed to gender and racial equality will keep workplace equity issues front and center in 2021. Increasingly, employers find themselves compelled to take a closer look at their employment practices and procedures and how they impact equity within their organizations.

Jackson Lewis P.C. · The Year Ahead: Diversity Analytics and Pay Equity

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### Transcript

Alitia (00:07):

Welcome to Jackson Lewis' podcast, We get work™. Focused solely on workplace issues everywhere and under any circumstances. It is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate a workforce that is engaged, stable, and diverse.

Our podcast identifies the issues, dominating the workplace and it's continuing evolution and helps answer the question on every employer's mind, how will my business be impacted? The confluence of prominent social justice movements, enactment of a variety of state and local legislation, and an incoming presidential administration committed to gender and racial equality will keep workplace equity issues front and center in 2021.

More than ever before, employers find themselves compelled to take a closer look at their employment practices and procedures and how they impact equity within their organizations. This episode of We get work™ looks at how employers are analyzing workplace trends to enhance diversity, equity and inclusion in their organizations.

Our host today are Joy Chin and Matt Camardella principals in the White Plains office of Jackson Lewis. Joy co-leader of the firm's affirmative action OFCCP and government contract compliance and pay equity groups. And after 25 years, someone who can quote directly from United States code and the code of federal regulations.

### Hosts



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Matt, Joy's co-leader in practice and partner in podcasting directs the preparation of more than 1000 AAPS every year. Joy and Matt, the question on everyone's mind today is how do the calls for workplace equality affect my business? And how can data analysis enhance diversity, equity and inclusion in my organization?

Matt Camardella (02:07):

Well, that's a really great question. The varying degree is diversity, equity and inclusion has been a focus for many employers for a number of years now. More recently though, we've seen pressure building from a number of internal and external sources that have forced employers really to up their game and revisit their diversity equity and inclusion programs. So let me give you some examples, internally, the most notable pressure is coming from the employees themselves.

We often see employee resource groups or ERGs empowered and emboldened to push for greater diversity as well as accountability amongst leadership, as it relates to diversity. Then there are the outside forces, and there are a myriad of them such as investor groups. Namely, we see activist investors bringing shareholder actions, designed to push employers to the next level, as it relates to diversity.

Or we see government entities and regulation pushing employers. How? Well, the EOC for example, requires employers to report each and every year on their race and gender makeup of their workforces. And most recently they've been reporting on pay and hours worked in an effort to help enhance employers' efforts as it relates to pay equity.

The OFCCP is no stranger in this space either as they audit employers on their affirmative action programs and their diversity and inclusion initiatives. And then a recent development we've seen from another government entity comes from New York, where I'm from namely the New York City controller's office, has sent letters to a number of the largest employers in the land, asking them to actually release their EEO-1 data.

Also, on the external pressure front, we see pressure forming from customers and prospective customers, where these companies are asking their vendors and suppliers to produce information on their diversity makeup, as well as their efforts around diversity and inclusion efforts. Whether it's in a bid context or just to continue doing business with that particular company.

Then of course there is the never-ending war for talent. We've seen a company's diversity reputation grow into one of the more important considerations for a job seeker. So we might compare all of this to a fire, right? So these pressures, whether they be internal or external have been building for years and they really serve as the kindling here.

But what we saw during 2020 with the killing of George Floyd and Breonna Taylor, the civil unrest, and the calls for justice and equity, that's really acted as the match and lit a fire under employers to really enhance and revisit their diversity, equity and inclusion programs and efforts. So with that in mind, Joy, what kind of trends are you seeing amongst employers in this space?

Joy Chin (05:07):

That's right, Matt. That's right. From what I've seen the events of last year seemed to serve as a call to action for corporate America. They're trying to lead the change they wish to see in the world. Companies are being much more outspoken. They're not only condemning racially motivated violence, but they're publicly committing to increase DEI within their organizations, and they're talking specifics.

They're not just making general commitments to EEO. They're doing more than just paying lip service to it. With the social justice and Black Lives Matter movement, companies are recognizing DEI isn't just a business imperative, but a social imperative. It's more than just increasing diversity in advertising and marketing. Though, I don't know about you, but I feel like I'm seeing more diverse ads and commercials.

The companies know they're going to be held accountable. So they're holding themselves accountable. They're letting the public, their employees, their customers know where they stand and what they intend to do. To that end, the other trend I've seen is a prioritization or in some cases, reprioritizing DEI to a critical business function.

Most large national employers already had well-developed dedicated DEI officers and departments that early in the pandemic, many of those companies were forced to shift focus. As they face them, the immediate crisis of dealing with lockdowns and quarantines.

With the social justice movement, those employers shifted back to making DEI a priority, and employers that didn't before have dedicated DEI teams or functions are now creating them and putting resources and staffing behind them. But enough about me, what about you Matt? What did you see?

Matt Camardella (06:59):

I have given some thought to this Joy and I think there are a couple of things I would point out here that are important. First and foremost, employers have increasingly look to leverage data and analytics to

support their diversity, equity and inclusion efforts.

Listen, it's no secret that everything gets measured these days, right? Just look at how your phone alerts you, to how many hours you spent staring at the screen each week? My number is embarrassingly high. So enough about that, but big data is all the rage, right?

It's no coincidence that data scientists are in great demand these days, right? We see it in everything from professional sports, where a manager will decide when to pull their starting pitcher in a baseball game based on analytics, right?

To doctors making decisions on which course of treatment to pursue with a patient based on predicted health outcomes, given that patient's age, weight, height, race, ethnicity, gender, socioeconomic status, et cetera. So we're certainly seeing employers using this data for business decisions as well.

For example, in a retail space, a company might decide on where to put a store based on analytical data or how to staff it, what hours to be open, et cetera. So employers are thinking about all of this data and saying, "Hey why can't we use this information to help improve our employment processes, vis-a-vis, diversity, equity and inclusion and get better outcomes."

The second thing that I would note Joy here is, we're seeing an increasing desire to release information related to diversity, right? Specifically, this falls under the transparency rubric, right? This also should come as no surprise. Some of the most recognized and well regarded companies in the world have been doing this for some time. Yet many companies still struggle with this concept of full transparency versus some level of strategic and limited form of transparency.

So whether to release information and what information to release really warrants careful consideration for an employer, right? So on the one hand releasing diversity information can bolster an employee's reputation, especially if the data looks good. Yet putting that information out in the public square can subject employers to on the one hand criticism, for sure, but even potential liability.

One group may look at the information and conclude that a company is not doing enough, right? So no good deed goes unpunished in that circumstance. Whereas another group may actually take data that is publicly available and use it as evidence in a claim of discrimination or a lawsuit brought against an employer.

So employers really need to think about the implications of transparency and do a risk assessment and decide ultimately what they're most comfortable with, right? How much information to release and to whom, right? So for example, are they only going to release information on their diversity metrics internally?

Because really they think the most important audience for them is their existing workforce. Or do they want to make some level of information available to the public or even all of their information? One thing I would note here is likelihood that information released internally is going to get released externally is very, very high.

So an employer should think about how much information it is sharing to the internal workforce population if it has concerns that that information is going to get out to the public, because in all likelihood it will. Now Joy, we haven't talked about pay equity yet. How does pay equity fit into all of this?

Joy Chin (10:58):

How doesn't pay equity fit into the DEI equation? You can't have DEI without the EMAC. Seriously though pay equity is a critical element of building a diverse and inclusive workplace. It's about more than just leveling salaries. It's about leveling the entire playing field, creating an inclusive environment.

Pay equity involves ensuring and providing equal access to opportunities to higher paying positions. The ability to earn more ensuring everyone has the same shot at success. People tend to equate or feel their compensation as a measure of their value or worth, so it becomes very personal.

And studies have shown that when employees feel they're being treated fairly and equitably, they feel valued. So they trust the organization. They're more engaged in their work. They feel invested in the company success because they feel the organization values them. And you're right, it's interesting, Matt, but not surprising, right?

That you're seeing transparency with diversity information, trending. Transparency with respect to pay has long been touted as a means of encouraging equal pay. You and I have seen it and we litter, right? Helping clients with OFCCP and the ever-growing number of state pay transparency laws. But Matt, I want to get back to something else you said earlier, you talked about seeing an increase in employers using analytics and supported their DEI programs. How exactly are they doing that?

Matt Camardella (12:29):

Well, how much time do you have Joy? Because they're using analytics in quite a number of ways, but I'm

just going to focus on a couple areas, so as to not monopolize our time today. So look, most employers have focused first and foremost on the representation of women and people of color in their organizations.

So for example, an employer will simply count up the number of women in this workforce and divided by the total number of employees it has, right? And that will tell the employer, what's the overall representation of females in their workforce.

This is the type of baseline information that a lot of companies will include in diversity reports that are published, and so that they can lay out big picture what their organizations look like from a diversity profile perspective. But those are very basic analysis. More recently, what we've seen is that the analysis have become much more sophisticated.

So for example, we may see organizations not just looking at their representation overall, but perhaps they're looking at different levels within the organization or within different functional areas under different business slips, right?

So an employer, for example, may be most interested in the representation of people, of color in management as a whole, or in another instance, an employer may be looking at the diversity representation at each level of management and try to determine if and where a glass ceiling may arise.

We even see some employers measure how long employees are actually staying in their jobs before they promote to the next level, why? They want to see if there's a difference between men and women or whites and people of color when it comes to how long they are, "sock" at the level that they're at. As this might be evidence of some sort of bias or unintended barrier to advancement for diverse employees.

But another area of analytics, which has really exploded in recent years is looking at a company's hiring process. Many employers for a long time have been focused on and dedicated considerable resources to the recruitment and outreach to diverse talents.

However, that hasn't necessarily translated into increased diversity in hiring. Now, why is that? We can certainly guess and surmise any number of reasons why that might be the case. But why guess, when we have every increasing loads of data available to us to look at.

So, in recent years, we've seen applicant tracking systems become much more sophisticated with more robust reporting features. For example, these systems can now tell us with a simple query where an applicant fell out of the selection process, why they fell out, when, a specific date they fell out and who made that decision?

Listen armed with this data, an employer can now isolate the stage or stages in its hiring process that seemed to be causing the greatest rate of attrition for diverse talent. And now they can really be focused on any barriers that exist in the process at those specific stages so that quite frankly, they can take full advantage of all the hard work the day has made as it relates to diversity outreach.

Now, Joy in talking about these analytics, we have to just quickly digress and talk about the data itself is an important issue. Obviously, in order to perform these analytics, an employer will need a lot of data. Importantly, that data is going to include information on race and ethnicity and gender most notably or whatever other characteristics an employer may want to look at.

So, for example, veterans status, LGBTQ status, age, et cetera. Collecting this information however does not come without risk, right? If an employer is not required to collect this information, actually trying to collect it and possessing it does create risks, alright?

Specifically, there may be allegations of discrimination, but also just the mere possession of this data can deprive an employer of an important affirmative defense to a claim of discrimination. That being, we didn't know, the person's protected characteristic. And this is especially true when it comes to applicant data, because as a general rule, only federal government contractors and subcontractors are required to collect this information, right?

So data collection should be done very carefully with a couple of things in mind. One, if you're going to ask for this information, ask for it on a voluntary basis. Don't compel applicants or employees to provide it. Inform these individuals, why the information is being sought so they know it's not going to be used for an unlawful purpose.

Take the time to explain how the information is going to be used so nobody is surprised. And explain how confidentiality is important and how the information will be maintained in a confidential manner, right?

Critically employers really should take pains to ensure that this data residing in the system is only accessible to those individuals who have a real need to know. Now Joy, I'm sure you've helped employers with their diversity analytics. Tell me a bit about what you've been involved?

Joy Chin (18:11):

Pay equity analysis, a lot of pay equity analysis. When I talked about employers making public DEI commitments, reviewing pay is usually in the top 10. I mean, think about it Matt. Employment decisions that were forced by the pandemic furloughs, pay freezes, pay reductions and support for social justice. It got employees taking a hard look at their employment. And you get everyone employers and employees thinking about workplace equality and a totally different way.

I don't think employees are going to care whether there's a legitimate non-discriminatory business reason for a pay difference. Though, that technically may be enough to defend a pay discrimination claim in court. But as we've seen the court of public opinion has much tougher standards.

They're more concerned with whether they're being treated fairly alongside their colleagues. It's that notion of a level playing field I was talking about. Whether they feel everyone has the same shot, the same opportunity for success.

So pay analysis are going beyond just looking at pay data alone to ensure employees are paid equitably, employers are looking at the total comp system to ensure fairness in the process itself. And that's probably why I've also seen an increase in adverse impact analyses. So some are the usual adverse impact analyses we see, right?

Looking at hires, promotions, terms to see if selection procedures are causing certain groups of individuals to be selected or not at disproportionately higher rates. But the notion of workplace fairness and pay equity has employers using adverse impact analysis. As you pointed out to evaluate other potential areas of bias that may prohibit opportunities for increased pay such as steering or directing certain groups of individuals to lower paying positions. The only way to do that is by looking at the data.

Matt Camardella (20:10):

So true. Well, I think we can confidently say that employers increasingly are using analytics to help them address issues associated with diversity, equity and inclusion, but Joy I have a sneaking suspicion that you're going to tell me we can't learn everything we need to know from the analytics.

Joy Chin (20:29):

You know me too well, Matt. There absolutely are. One of my favorite quotes is statistics are no substitute for judgment. Numbers don't lie Matt. Though, as another favorite saying goes, "If you torture them long enough, they'll confess to anything." But anyway, analytics can tell you what's happening, but not why. And they don't tell you what to do. For that, employers still need to think qualitatively.

Lack of diversity and applicant flow data alone doesn't tell you why you're struggling to attract diverse candidates, right? Just like lack of diversity and promotions or high attrition rates won't tell you why you're having trouble developing or retaining diverse talent. It's knowing what to do with the analytics. The data that I think is most valuable and that requires sifting through and understanding the data.

Matt Camardella (21:18):

Thanks Joy. Whether an employer is establishing a diversity program for the first time or enhancing programs already in place. I think we've certainly given employers a lot to think about. The main thing I've taken away from our conversation is that analytics provide a valuable tool to employers to help them improve their diversity, equity and inclusion programs. But at the same time, it's not the end all be all. So Joy I just have to say it was great chatting with you today. And while podcasting is fun, I am really looking forward to when you and I can present in person together soon.

Joy (21:53):

Thanks Matt. You know, I always enjoy our chats, whether they're in person or virtual, especially when we try to solve the world's problems someday Matt, when we run the world. But for now, I guess I'll just leave it at this. The use of analytics is a powerful tool for employers, but at the end of the day, it really should be just one part of a holistic DEI program. So Matt, until next time.

Alitia (22:21):

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