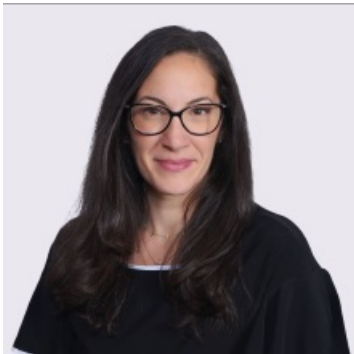


2022: The Year Ahead for Employers - DEI in the Workplace

By Laura A. Mitchell, Michelle E. Phillips &

January 28, 2022

Meet the Authors



Laura A. Mitchell

(She/Her)

Principal

303-225-2382

Laura.Mitchell@jacksonlewis.com



Michelle E. Phillips

(She/Her)

Principal

914-872-6899

Michelle.Phillips@jacksonlewis.com

Related Services

Affirmative Action, OFCCP and
Government Contract

Compliance

Corporate Diversity Counseling

Data Analytics

Labor Relations

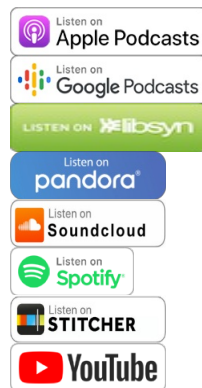
National Compliance and Multi-
State Solutions

Details

January 28, 2022

As we enter the third year of the pandemic, change continues to be the one constant for employers. On this episode of *The Year Ahead* series, we focus on DEI in the workplace, identifying the common misconceptions and mistakes organizations may make when approaching diversity, equity and inclusion and offering best practices to ensure equitable representation and treatment in all areas of the organization.

Jackson Lewis P.C. · 2022: The Year Ahead for Employers - DEI in the Workplace



Takeaways

Regulatory actions, changing customer demographics, employee expectations and recommendations from investors and financial institutions are holding companies and organizations to account on matters of diversity, equity and inclusion. The global response to the death of George Floyd, and the #MeToo and #TIMESUP movements, are pushing companies to be more representative of and responsive to diverse stakeholders. Increasingly, individuals from underrepresented groups are attaining seats of power. New policies are emerging at the regulatory level and as voluntary measures within organizations responding to customer and employee demands.

DEI Influencers

The power of stakeholders and employees is emerging as organizations increasingly adopt zero tolerance harassment and discrimination policies, holding employees at all levels accountable.

Data and DEI

Data are key to demonstrating a commitment to having an inclusive workplace. Organizations will face an increasingly competitive recruiting and retention terrain

in 2022 as labor shortages persist and organizing activity continues to gain momentum.

Assessment and Strategy

Effective DEI initiatives are focused on the collective whole, not one group or individual. They ensure that equal opportunity is afforded to all and reinforce that commitment throughout the employment life cycle and workplace. Assessments are an important first step in building DEI and harassment prevention strategies.

Transcript

Alitia (00:08):

Each year, Jackson Lewis publishes *The Year Ahead for Employers*, a forecasting resource to support organizations as they navigate the legislation, regulation and litigation trends impacting their business. In 2022, we provide the insights and analysis of our attorneys on labor and employment law from the field, in a variety of digital and print formats, including this four part podcast series.

As we enter the third year of the pandemic, change continues to be the one constant for employers. Return to office plans have been disrupted by COVID-19 variants and labor shortages. Coalitions of social forces have amplified calls for equal rights and changes in how we work. And policy shifts ushered in by the Biden administration and influential regulatory agencies converged, creating yet another challenging year ahead for employers.

On this episode of *The Year Ahead* series, we focus on DEI in the workplace, identifying the common misconceptions and mistakes organizations may make when approaching diversity, equity and inclusion, and offering best practices to ensure equitable representation and treatment in all areas of the organization. Joining us today are Weldon Latham, Laura Mitchell and Michelle Phillips, principals respectively, in the Washington, D.C. region, Denver, and New York Metro offices of Jackson Lewis.

Weldon is the founder and leader of the Jackson Lewis Corporate Diversity Counseling practice group. He is also the leader of the firm's internal diversity and inclusion committee, and a member of the firm's board of directors. A member of the pay equity resource group, Laura partners with her clients to build pay equity programs that benefit employees, and create a stable, high functioning workplace. And Michelle is also a member of the firm's diversity and inclusion committee, and it handles various types of employment litigation with an emphasis on sexual, racial and disability harassment, as well as LGBTQ+ matters. Weldon, Laura and Michelle, welcome, and thank you for joining us today on *The Year Ahead* series.

Weldon Latham (02:27):

First, I'd like to start by welcoming all of our participants, all our clients and others who have a keen interest in our area of presentation today. In 2022, what can we expect? We can expect employers to experience and respond to diversity, equity and inclusion issues. Including in that subject are issues of LGBTQ+, which Michelle Phillips will speak to quite eloquently. And pay equity issues that Laura Mitchell

will deal with in her own particular way of making those numbers really mean something in the context of what companies and employers need to deal with.

All of this, we anticipate in 2022 is going to be raised most prominently by stakeholders. What do we mean by stakeholders? We mean employers, customers, regulators, shareholders, and any groups that have a significant direct entry risk in the business. So they will be educated about your business, and will have some pretty strong feelings about what their expectations are of the company.

We know that since George Floyd incident took place, that there's been a heightened environment by the media, public interest groups, the general public, that have generated a response greater than we've ever seen before, probably since the civil rights movement of the 60s, of the public demanding that society, which includes corporate America, do a better job of responding to justice issues, racial justice issues.

So what we'd like to say is we'd like to give you a heads up that there should be some strong thought in corporate America among your leaders, and particularly among our lawyers, about trends that you're going to have to face. And that you're going to have to advise your clients within your organizations, had to do a better job of responding to these kinds of issues. We have three or four examples of things that are taking place today.

First is state mandates and mandatory requirements. Various state agencies, starting with California, which is not unusual that California would be the most aggressive, has come up with an approach that they want to see, they passed the law in the state that says that they want to see diverse representation on boards of directors, starting with women. And then in a subsequent statute, they came back and said they also wanted to see a strong representation by other underserved groups, being minorities and LGBTQ+.

They're the most aggressive, they've been met with the same level of aggression. You'd expect they've been sued in both federal and state courts. What will come of it, we don't know, but it demonstrates a trend of what the expectation is. These regulatory agencies believe that for publicly traded companies and other large companies, they ought to be representative of their investors. So started with state mandates, NASDAQ, talk about a group that is followed quite closely in the market, came up with a more aggressive statement of saying, you have to have at least two diverse members on your board, at least one female, one minority, or LGBTQ+ member.

That probably is a strategy, so that no one can say that it's an unqualified mandate. They said, but if you can't, just publicly explain to everybody why your company singled out can't achieve these goals. SEC, another major impactor for public traded companies in America, has come out with a similar requirement for board nominations. The same thing, if you can't do it, please tell us why you can't do it.

There are a couple others that are worthy of mention. Agencies like CalPERS or the New York State Department of Financial Services, very influential organizations, giving the same message. Goldman's, there's a whole group of investors. The whole investor class is now saying that they want to see greater diversity, particularly

starting with boards of directors, but immediately adding on to board of directors, executive management teams.

Goldman Sachs had said they will not underwrite an IPO unless it has a diverse board of directors. That's a first. Obviously when they, CalPERS, the New York controller, come up with these kinds of requirements, they can't be ignored. I think what all of these represent is the stakeholders movement in this direction. Probably the most powerful stakeholder are your employees. In fact, I'll add an interesting story that I just heard this week that using both the investor hat and the employee stakeholder hat and the employee stakeholder hat. A union has put into a demand that the company in its next board, next annual shareholder meeting come up with a diversity assessment of what they're doing right and wrong in the diversity space. So that's investor pressure, because they're a stockholder, not because they're a union. They're also employees and they're coming together and saying, "It's time that you major corporations start taking some steps to demonstrate that you get it."

All of this says there's an unbelievable trend and message for our clients. So what are we telling our clients? We're telling our clients be aware that the trend is coming and sometime soon you'll be faced with having to deal with disclosure requirements relating who's on your board, who's in your executive committee. And based on some of these organizations, who are you truly hiring and is it representative of the investor group that owns your publicly traded company?

I'm sure if this discussion goes on, we'll talk more about specific advice each of us are providing. But I have the privilege today of being here with Michelle Phillips, who's going to tell us about her unique and constant experience trying to help companies dealing with difficult issues of LGBTQ+. And Laura Mitchell, who's going to tell us about an issue that's been hot ever since the beginning of the Obama administration, pay equity.

These two things are clearly issues that are being confronted by the lawyers and statutes and litigation on a regular basis and they determine, they have a major impact on how lawyers advise clients and how clients respond to their clients.

Why don't we start with Michelle. Why don't you tell us a little bit more about some of the things you're finding, both in the law, the regulations, and as we've said, this stakeholder trend?

Michelle Phillips (10:03):

Yeah. There's almost like this squeezing of corporate American and it's coming from all these different directions. So on the one hand there was the *Bostock* decision, which was the Supreme court decision on June 15th, 2020, and that granted rights based on gender identity and sexual orientation. And then there's the post-*Bostock* era that we have found ourselves in from that date to the present and continuing. And so what's happened now is courts around the country are grappling with this granting of protections. But at the same time, we're seeing religious liberty concerns being raised.

You could see it most recently in the vaccine situation, where people are applying for religious exemptions. And so on the one hand, there's this assertion of sincerely

held religious beliefs, both under the First Amendment, the 14th Amendment, the RFRA, which is the Religious Freedom Restoration Act with governmental entities. And on the other hand, we're also seeing this expansion of rights and to your point, Weldon, led internally and outward-facing.

So the employee resource groups are demanding greater accountability at all levels of the organization, and it's our job to advise our clients. And to not just have them be minimally compliant with the law, but to really put into place a DEI strategy that embodies the corporate culture.

And Laura's going to talk to the pay equity issues. But I think that whether you're looking at the recent *Demkovich* decision in the 7th Circuit, or you're looking at the *Bear Creek Bible* case, which is occurring in Texas. All of these is this expansion of rights. And where do people, where do stakeholders find themselves in this post-*Bostock* environment? Which shouldn't be a zero sum, it should be an expansion of qualified candidates to source all of these different positions and to mentor people, to bring them up and to really be strategic in our thinking so that we're both compliant, but that we also get to the right place.

So Laura, I'd love to hear your views on that and how do we stay compliant, but also be out in front of future regulations?

Laura Mitchell (12:28):

Yeah, I think the theme that's coming through is accountability. And first, happy new year everyone. I hope everyone got a chance to take a break and take a deep breath before diving into 2022. It feels like we're still on that speeding train.

But I think employers, corporations, their feet are being held to the fire with this notion of, it's not just sufficient enough to have a statement, Michelle, as you mentioned. What is the meat behind that statement? And in my world, it's data. And Weldon alluded to the fact that there are regulatory bodies that are requiring disclosure of EEO-1 reports. There are requirements to show the diversity of boards. We have supplier and vendor requirements for diversity, even outside of the employment law space.

So it's this notion of what can it's measured gets done and the way you measure something is with data. So you collect it, you analyze it, and then you have results. And what do those results mean? Well, it depends. In what context are you sharing them? How are we interpreting them? So the accountability piece is huge.

We're also seeing it in the impact of just the consumer dollar. This whole notion of the cancel culture. There's so much pressure on organizations externally, internally. We've talked about all of these stakeholders and it comes down to what are company's going to do? Where is their identity and how are they going to communicate to all of these different stakeholders what commitment they've made and what progress they're making towards that commitment.

And I think it's really interesting, especially in the pay equity space, that's become kind of a no brainer for a lot of organizations. Pay equity, the expectation is that we're analyzing it on an annual basis, that we're looking at pay equity as part of our merit cycles. But what we're seeing is the trend for pay equity goes beyond just base

salary compensation decisions. It's bleeding over into bonus programs or sign-on bonus, the distribution of equity. For a lot of startup companies, there's more value in the potential value of a company than your actual starting salary. How do we go about measuring that? There's some case law, but it's definitely developing because it's a new topic area.

And beyond that, we see organizations really wanting to focus on this notion of opportunity parity. If you're thinking about promotability, time to promotion, who is promoting and to what roles. As you give and open up access to greater roles within an organization, you give access to more pay. So pay equity is not just in the single-lane anymore. It really is encompassing a lot of activities that organizations are engaged in with respect to their employees.

And then all of it, though, again, as I'm mentioning, is driven by data. And so how are organizations collecting this data? What data are we collecting? There's this juxtaposition between what's required. We have our EEO-1 one reports, which require binary, gender data, male or female. But organizations are getting this pressure from their internal employee population, the employee resource groups, states like California to actually solicit and collect non-binary data.

Actually solicit and collect non-binary data. And so how do you reconcile the two of those? So we're seeing actual employers moving the needles and putting pressure on agencies to have compliance, reporting compliance, come into line with the expectations of employee populations. So there's so much issue right now, and a lot of change going forward, but I think you have to have, along with accountability, you have to have a measured approach to it. Right. And I think Weldon that's a lot of what you counsel on, is how to develop these programs so they don't just kind of spin out of control and everyone has this great idea and commitment to diversity, but you have to have a practical, tailored approach to it. So I'm curious, kind of what questions you are seeing from clients on a regular basis now. What's top of mind for folks?

Weldon Latham (16:52):

Well, what's interesting, this year has been fascinating both this year and since May 20th, George Floyd and Ahmaud Arbery and the various situations that have generated there, those kinds of things don't usually generate the same level of activity in corporate America. We have been inundated with requests for how do we deal with these situations? Both of you pointed out how do we deal with the employee's response to these situations? That's, what's become much more difficult. And the question we get absolutely the most is, okay, we understand within the next few years, maybe this year, maybe we can hold it off. We're going to have to give up this data. What's our strategy? And most companies have not really thought it through. And I think both of you have outlined clearly what the strategy has to be. We tell our clients, if you have some time, we have this particular one in mind.

If you have next 18 months before you have to divulge, let's analyze your company and determine what your numbers, what you said, Laura, what are your numbers? What do your numbers look like? How bad will they look to your customers, to your... A lot of these companies have very strong policies. They try to emulate the customer base, or the stock base, or some base of people that's actually out there

that's concerned and has a valid interest in the company. But when they review that data you talk about, it does not reflect the same level of commitment that they have pledged to many for the last 10 or 15 years. So I think the biggest challenge before you decide how you're going to fix it, is collect the data yourself and make sure that the company has the data in front of them before they release it to the public. I'd love to know what you two think, Michelle, because before we start telling them what they need to do with the data, with a recognition that yes, you're going to have to give it out, what's your strategy? What are you telling them, Michelle?

Michelle Phillips (18:57):

Well, one thing that you're saying, which is really important is who are you as an organization? Right. Like what do you stand for,

Weldon Latham (19:07):

Right.

Michelle Phillips (19:07):

Really? Because that's the thing with the data, right? Like you can say whatever you want, but the data, I mean, again, I understand there's different ways you can collect it and what's your universe and is it statistically significant? So there's a lot to be done with the data. It's not an objective monolithic thing, but putting that aside, what are you going to do when this data comes out? And what happens when you find out that in certain bands, people aren't progressing at the rate that they should be progressing? And is your diversity measures a check the box kind of a thing, or are you really committed to it? Do you really want to create a work environment that is inclusive, that people feel comfortable bringing their whole and full selves?

And that's what I work with my clients on. Like you say that this is who you are. Maybe you have an EEO policy that includes gender identity or sexual orientation, but do you reference non-binary to what Laura was saying before. Do you have a gender transition plan? Do you have a transgender employment policy? So these are the markers that distinguish the companies that say they're for DEI objectives. And those that actually do, they do it, it's in the doing of it. And so I think all three of us work with companies around the doing of it. What do you think, Laura?

Laura Mitchell (20:35):

Yeah. And I would add just another layer to that, that the companies who are really successful are the one who have achievable goals that are not arbitrary, but they're actually measured and they're grounded in fact. And again, going back to data, I know everybody gets tired of me talking about data, but it's that you're trying to have your executive team reflect the population. What population are you talking about? Are you talking about nationwide population? Are you talking about the population in the city in which you have your headquarters? Right. What are you grounding these numbers in? We hear all the time where there's been kind of an edict from leadership. We want to increase representation of people of color 5%. Well, that's a fantastic goal to have, but is it actually achievable or are you setting up your organization for failure?

Because those roles that you have, we don't have access to individuals who are qualified to fill those roles. So it's great to have a plan, but it really needs to be something that's goal oriented, but actually tailored again and meaningful and grounded in the data and what's actually realistic. And the other thing to take into consideration is you may not have a representation issue. You may actually be employing the population that you should be employing given what's available. And so you don't want to overset goals because then you could run into legal issues where you're actually making decisions on the basis of race or gender, which is prohibited. Right. We talk about, I think Weldon mentioned kind of organizations that want to implement the Rooney Rule, right? It's still about selecting the best qualified candidate, but it's increasing the pool of qualified candidates that we have to select from.

And that sometime is a hard message to get kind of all the way to the top because they just want to address the stakeholders. We just need more people of color. They don't really get into the details about how do we do that. What's actually reasonable. What is the timeline, Weldon, like we can't just snap our fingers and have this happen. If we're going to advance people within the organization, do we need to actually start at lower level management and then work on our succession planning programs, right, as opposed to just hiring in at these higher levels. So when we talk about kind of accountability, we talk about planning, it's really all of these multifaceted components that we have to take into consideration. And Michelle, to your point, the policies have to match the practices, right, or it's going to fail. So I think that all of these different aspects are things that folks need to think about. And I think the call to action is so great right now that we're kind of running towards the finish line without making sure that we've got our shoes tied appropriately.

Weldon Latham (23:44):

Laura, you've raised so many issues that come up when you're really sitting down with a company trying to solve these problems. And it makes them think. One of the problems that I find is you meet a new CEO, the CEO is committed, for whatever reason something has happened and the CEO's world. It may be observing one of these events, horrible events, taking place. Maybe having a new board member, maybe having a customer that tapped the CEO on his or her shoulder and said, "Hey, I can't continue to do business with you unless you have a better perspective and a better image because I have people I have to respond to." But whatever the motivation is, that now all of a sudden there's a great need for more minority and female and LGBTQ representation. Okay, that's the standard. But you're not going to get there, I agree, totally what both of you said, you're not going to get there overnight. You got to say, "How are we going to get there? What's our purpose for getting there?"

And by the way, maybe we're not doing things right. 10 years ago, we said we wanted to do exactly the same thing and nothing has changed. What do we need to identify? That's why we tell clients, analyze your organization, first. Know your data, know your people, know what's going on. Had a very interesting situation once with a client and we did the whole analysis. We came back to the client and we said to them, "What we found out from talking to your own people is there's no comfort

zone here. Underrepresented people are afraid to have an employee resource group." And they said, "Oh, that couldn't be. We encourage it all the time." So we had the meeting with their top executives in the C-suite. The CEO sent them out and said, "Go to someone you trust in the organization who confide in you and find out if what the Jackson Lewis group says is true."

A month later, they came back all were their heads bowed down, because told us it couldn't be the case and they found out that that was exactly the case. That they were afraid to bring their whole selves to work. They even said, "I don't even want to be seen in the halls talking with another underrepresented colleague because it'll hurt me. If not today, tomorrow, in the future." The environment was that tainted. So, we need to find out in the individual case.

Many companies, that's not what the issue is. The issue is something also as simple as we keep going back to the definition of insanity, doing the same thing over and over again, expecting a different result. We go to the same schools, we hire from the same friends, we keep hiring the same trends and, "Oops, nothing's changing." So you need to open, what I always say, "Open your aperture." You don't have to lower your standards, but you have to enhance where you look for the kinds of people you want. And guess what? You're going to be really surprised. Some of those people are the best and brightest you're ever going to find anywhere. So it's out of education.

And I guess probably in your area, Michelle, was probably the most, trying to say it the right way, misunderstanding about how to communicate, how to do better, how to make people feel comfortable and wanted so that they can do their job. And that's the whole thing and I'll turn it to you in a second. But I think that's the whole thing, we as business lawyers have to keep in mind. The bottom line at the end of the day is the bottom line and companies need to be a lot more ... Get their employees to be comfortable enough to be a lot more productive.

Michelle Phillips (27:24):

Just some final thoughts on that. You're talking about opportunity parity and so it's one thing who you attract, it's another thing who you retain. So what do we have in the way of a mentorship? I mean, we're at Jackson Lewis. We've really done a very good job just because, first of all, we've expanded the pool in terms of recruiting the sources, right? So that's really important for a client to do that. But then it's, "What are we doing to keep people here? What are we doing in terms of succession planning? How are we giving people a seat at the table? How are we having them valued? Do we allow for psychological safety that people can give dissenting of views or different opinions?"

And so it's, for me, the true inclusion is not just getting people in, but it's in having them find a place where they're contributing, where we're thinking about promoting, we're thinking we have the long range view for our employees. I think, again, I'll just leave it there because I know we're getting close to time, but these are things that we can help our clients with and regularly do. Don't just do check the box training. Actually have it be impactful training, right? Don't just do online training other than COVID, whether you have to do it remotely or in person, have it be impactful. That actually people leave the DEI training with clarity about what they need to do differently.

Laura Mitchell (28:53):

And I also think just to add on in closing, there has to be a comfort level. So if we're talking about data, data collection, we have to be able to make our employees feel comfortable in disclosing that data and that it won't be used against them. So as part of our plan, who's going to have access to what data and what are they going to use it for? We get requests. I'm sure Weldon, you do all the time, for a dashboard. Management wants a dashboard so that they can monitor all of the diversity initiatives. But is that really necessary and at what level can we just give them aggregated data as opposed to employee level data? That has to be part of this conscious development of this plan so that we can make people feel comfortable that the information's not going to be used against them. That only those that need to know, who are aren't in direct decision making roles, have access to it and are monitoring it.

I think each one of us has touched upon the fact that it has to be comprehensive and thoughtful when we're thinking about all of the different facets of DE&I programs. Organizations are at different points of the spectrum. You can be a novice in this and just starting out. You can be sophisticated in your DE&I journey and still be grappling with some of these issues. I think it comes full circle back to, as an organization who are you, where do you want to be and where are you today?

Weldon Latham (30:20):

Right. Well, I guess it's time for us to bring this to a close. I think all of you that are listening or watching, I have a sense that we have some people that really care about these issues. We care about the clients we serve and we are very much committed to trying to help. We don't have a one size fits all approach. Each of us, each of our experts, want to get to know you as the clients, want to get to know your issues. I want to help you avoid some of the pitfalls that we have had to help clients go through. So with that, I'd like to thank Michelle Phillips. I'd like to thank Laura Mitchell. And I'd like on behalf of the firm to thank all the people who have participated today and tell you that we are here, ready, willing, and able to play a role in helping you achieve your goals and objectives in a way that deals with the trends to expect in 2022. Thank you.

Laura Mitchell (31:16):

Thanks everyone. Be well.

Alitia (31:18):

Thank you for joining us. Please tune in to our next program where we will continue to tell you not only what's legal, but what is effective. For more information on today's topic, our presenters and other Jackson Lewis resources visit [Jacksonlewis.com](https://www.jacksonlewis.com). As a reminder, this material is provided for informational purposes only. It is not intended to constitute legal advice, nor does it create a client-lawyer relationship between Jackson Lewis and any recipient.

Transcript by Rev.com

©2022 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on employment and labor law since 1958, Jackson Lewis P.C.'s 1,000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged and stable, and share our clients' goals to emphasize belonging and respect for the contributions of every employee. For more information, visit <https://www.jacksonlewis.com>.