Coordinate diversity initiatives with affirmative-action compliance to enhance results and reduce conflicts.

**BY WELDON H. LATHAM**

*Much has been written about diversity and inclusion (D&I) and affirmative-action programs (AAP) in the workplace. Some mistakenly use the two terms interchangeably. More attention needs to be given to how these two critical corporate functions, each with unique histories, methodologies and objectives, can harmonize their activities and more effectively support each other’s mission, while achieving their vastly different objectives.*

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Cooperation must begin with a clear understanding of the significantly different objectives of each function. Corporate D&I, when most effective, is a C-suite operation directed at identifying and capitalizing on rapidly changing marketplace and workplace demographics and the increasing influence and buying power of Blacks, Latinos, Asians, American Indians, women and other groups. These factors usually form the basis of a company’s business case for diversity. While most D&I functions are not limited to employment matters, they clearly recognize the importance of D&I in the “war for talent.” D&I may also address board-of-directors issues, procurement and supplier diversity, government relations, philanthropy, communications and the D&I relationship to other corporate functions. Successful corporate D&I activities are as strategically important as product and branding (and can positively benefit both).

Many sophisticated D&I efforts are led by chief diversity officers or equivalents, who are often direct reports to the CEO and some of whom serve on the CEO’s executive committees. The D&I “workforce component” addresses a wide array of D&I people issues, including representation (particularly among Blacks, Latinos, Asians, American Indians, women and other historically underrepresented groups), and this is where some overlap with the AAP function may exist. The D&I workforce function creatively advances strategic corporate objectives by developing measures to address D&I human-resource needs, utilizing such tools as benchmarking, outreach, targeted recruiting, career development, mentoring and other efforts to effectively develop the most diverse and productive workforce.

**Benchmarking Best Practices**

Having advised more than 45 of the nation’s largest companies on a wide range of diversity matters, including devising effective methods to respond to reality-based analysis of gaps in workforce representation, my group has helped create many legally tested D&I best practices to address specific problems. (In our experience, the most common issues of representation gaps occur in the senior executive ranks and the pipeline jobs that lead to those most important positions.)

The best CDOs creatively use D&I achievement as a means to enhance corporate performance and marketplace success, but they seldom have any role in compliance.

Affirmative-Action Compliance Mission

Affirmative-action obligations, on the other hand, are mandated for the thousands of companies that do business with our nation’s largest consumer: the federal government. These federal contractors are subject to Executive Orders 10925 and 11246 (issued in 1961 and 1965, respectively) and their implementing regulations.

Corporate affirmative-action offices are typically staffed with personnel operating in an “AAP compliance” department, reporting to human resources, legal and/or corporate compliance. Their focus is solely compliance, i.e., ensuring that the company is minimizing legal liability by satisfying applicable AAP regulatory requirements. They must stay abreast of regulations issued by the U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), which administers and enforces affirmative-action require-
ments. AAP regulations require federal contractors to provide all U.S. citizens with a non-discriminatory equal-employment opportunity, and they do so in a formalistic, technical and legalistic manner. This involves well-established procedures that every AAP compliance office must follow, including developing the required affirmative-action plans for Blacks, Latinos, Asians, American Indians, women, individuals with disabilities and covered veterans; statistically comparing current “utilization” with labor force “availability”; creating numerical “goals” for improving representation where there is “statistically significant” underutilization; and conducting “adverse impact analyses” of various personnel activities, such as hires, promotions and terminations, to identify and facilitate elimination of barriers to equal opportunity. Affirmative-action plans typically include a description of specific remedial measures directed at improving representation of underrepresented groups. Many companies regard AAP compliance in minimalist fashion, doing the minimum required by regulation to minimize corporate liability. Their efforts are strictly compliance and are not intended, as in the case of D&I, to be creative or expansive in maximizing corporate marketplace success.

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Areas for Collaboration

With companies that have both D&I and AAP compliance functions, an overlap can exist because both are seeking to improve underutilized groups’ representation. The AAP compliance function requires strict procedural adherence to regulations and 50 years of precedent. The D&I function is helping to achieve the business case for diversity as a corporate imperative and must utilize new and creative thinking to address a dynamic demographic and economic environment to help the company succeed in the marketplace. The potential for conflict is obvious, given the extremely different objectives, methods and historical context, as well as the practical differences of corporate “silos,” where D&I and AAP compliance are usually managed independently and neither collaborates nor coordinates their activities. All these circumstances can lead to problematic disconnects—for example, the D&I and AAP teams having differing workforce representation objectives (e.g., hiring goals), and remedial versus action plans.

Consider the following hypothetical situation: The CDO of a certain company has analyzed the workforce and has determined that Latinos are underrepresented at the senior-manager level. The reality-based representation-gap analysis and basis for the CDO’s determination might include studies of market-research trends, customer demands, low current Latino representation, availability of Latino senior managers, the company’s strategic-planning objectives, relationships with Latino organizations, and other real factors—all appropriate, but far beyond the formalistic “utilization vs. availability” analysis required by the AAP regulations. The CDO appropriately communicates the goals, objectives and methodologies to the CEO, HR and senior management, and they are included in the performance objectives of key leadership. At the same time, AAP compliance has used the OFCCP utilization methodology and has concluded that there is no Latino underrepresentation (based on the minimalist methodology and applicable national, not local, availability statistics) requiring the setting of a lower goal, but there is female underrepresentation using the same standard. The AAP group...
sets its goal for improving female representation, includes that goal in its AAP, incorporates remedial measures in the AAP, and notifies executives and hiring managers.

These differing results could cause problems: 1. Confusion as to what the corporate goals and methods are; 2. Reduced ability to achieve either goal; 3. Possible legal complications. In this instance, D&I’s analysis showed under-representation of Latinos but not women, and the AAP compliance office analysis showed under-representation of women but not Latinos. These conflicting signals may well leave executives and hiring managers confused as to what are the corporate goals and rationale. If unresolved, this confusion will likely depress performance and results in both areas. With respect to the legal complication, if an employee or the EEOC were to challenge an employment decision made pursuant to either the CDO or AAP methodology, the company would need to explain its basis for the differing results. While a clear understanding of the differences between D&I and AAP compliance should carry the day, the problem could unnecessarily give the employee or EEOC some leverage in arguing that the company has no consistent policy or goals, where in fact, the D&I effort has strong legal authority (where it is not confused with the AAP standard) and clearly has a different legal standard. (See “Workplace Diversity Programs: Debunking 3 Myths” at www.DiversityInc.com/workplace-diversity.)

Ensuring Understanding & Cooperation

Reconciling the differences between D&I functions and AAP obligations requires corporate-level coordination and a clear understanding of the different objectives and legal standards. Companies should first realize that there must be a clear understanding by the two functions about the relationship between D&I initiatives and AAP obligations, which must then be effectively communicated throughout the company. Without such awareness, there is potential for confusion among managers and employees as to conflicting expectations, which impedes effectiveness and increases legal risk.

At a bare minimum, through a combination of C-suite, legal, human resources, D&I and compliance interaction, and policy statements, the two functions should be fully coordinated. AAP compliance should work with D&I in its development of AAP remedial measures to ensure policy understanding. Differing approaches to workforce analysis, management and enhancement should be reconciled to ensure not only a minimalist approach to compliance with federal law but optimization of D&I performance. D&I efforts may well create aggressive action plans that are different and go well beyond the AAP remedial approach; both, done well, can be different and legal.

In short, AAP compliance obligations must, of course, be satisfied by appropriate goal-setting and remedial plans but should also be intelligently designed and coordinated with the broader, more aggressive strategic business-success-driven motivations of D&I. Ideally, companies can successfully coordinate their two functions to eliminate apparent inconsistencies and achieve both their quite different objectives.

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