

The Jackson Lewis Corporate Counsel Conference

THE FUTURE OF WORK

Diversity, Inclusion and Training: What does this Look Like for the Workforce of the Future?

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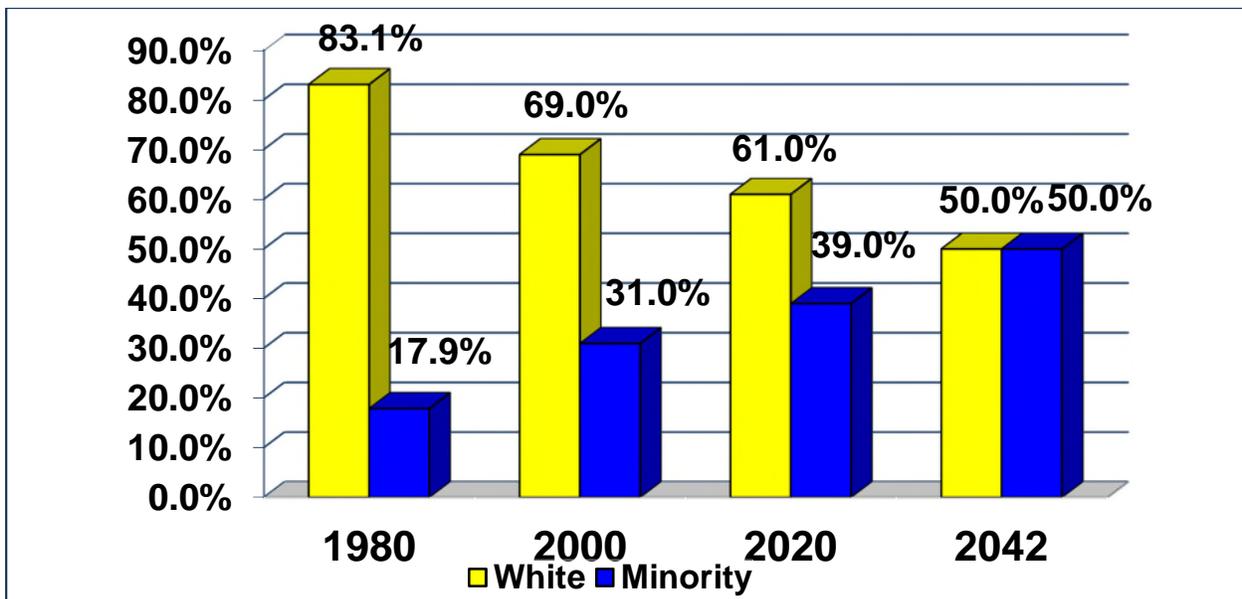
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Corporate Diversity and Inclusion (“D&I”) programs have evolved from the concern of a few forward-thinking corporations over 25 years ago, to a mainstream business imperative today. Rapid U.S. population demographic changes are remaking the workforce. Companies large and small are already facing the reality of overwhelmingly diverse applicant pools. These dramatic changes present *opportunities*—to win the “war for talent”—and *challenges*—to maximize productivity of a multi-cultural workforce, while managing legal risks. This white paper will focus on: (I) how the modern workforce is changing; (II) benefits of diverse corporate workforces; (III) approaches and technology to lawfully manage enhanced D&I in the workforce; (IV) essential training approaches available *now* to ensure policies become actual practices; and (V) impact of Trump Administration on diverse workforce management.

The changing U.S. population and demand for talent has made the diverse workforce of the future inevitable. The challenge is to use the new environment to secure and manage a highly talented and productive, multi-cultural workforce, while avoiding legal pitfalls. Companies trying to improve their diverse representation, and motivate the entire workforce to be most productive, while avoiding risks, must turn D&I from a business and legal threat into a *critical competitive advantage*.

I. DIVERSE WORKFORCE OF THE FUTURE

The racial and ethnic demographics of the U.S. workforce have been changing dramatically in recent decades. By 2042, the entire U.S. workforce will have no race or ethnic group as a majority of the working population. Indeed by 2032, minorities will become a majority of the “American working class” (i.e., those without a college degree).¹



Source: 2010 U.S. Census (2020 and 2042 are projected).

¹ See “People of Color Will Be a Majority of the American Working Class in 2032: What This Means For the Effort to Grow Wages and Reduce Inequality,” *Economic Policy Institute* (June 9, 2016).

The diversification of the U.S. workforce by race, ethnicity, gender, age, people with disabilities, sexual orientation, and other protected classes raises broad implications for recruiting, hiring, development, and workforce management. Nationally, over 75% of all applicants for employment since 2014 are minorities and women. Millennials have progressed from a minuscule proportion of the workforce in 2000, to 35% in 2015. According to a Cisco study, “Generation X (born approximately 1965 to 1981) and the Millennial Generation, also known as Generation Y (born approximately 1982 to 1995), make up a major portion of current workers, and will constitute the majority of the full-time workforce (50% by 2020 and 75% by 2030) as Boomers eventually retire.”² While the definition of “Millennials” varies, the term generally includes those born between 1982 and 2004.³

A conflicting trend is that current workers are working longer. As birth rates continue to decline and lifespans increase—with retirement ages increasing as well—the number of employees over the age of 65 increases.⁴ The share of women in the labor force, already at 47%, is projected to slowly rise over the next 10 years.⁵ By 2024, Hispanics—the fastest growing ethnic group—are projected to constitute one-fifth of the U.S. labor force.⁶ Recruiting and hiring managers, as well as supervisors, managers, and executives, will all need to be increasingly well-versed in recruiting, motivating, developing, and managing a multicultural workforce.

Much of the commentary on the workforce of the future focuses on the younger generation entering and affecting workplace dynamics. As the *Forbes* November 2016 article, “10 Workplace Trends You’ll See in 2017,” noted, *team* rather than individual performance will become dominant: “Nearly all (92%) companies rate ‘organizational design’ as their top priority and three-fourths of Millennials said they are well prepared to work effectively in a team.”⁷ Moreover, Millennials are reported to be “less personally invested in their jobs” (*i.e.*, more mobile) and “place greater value on workplace technology.”⁸

II. BENEFITS OF DIVERSE CORPORATE WORKFORCES

An increasing array of studies confirms what has been known intuitively for years; diverse workforces produce better results. Such workforces generate greater innovation, higher profits, increased return on investments, reduced turnover, and enhanced morale. A recent article in *Harvard Business Review* concluded that diverse teams:

- **Focus more on facts:** Constantly re-examine data and facts while remaining objective, scrutinizing views of colleagues, increasing awareness of biases;

² See “Transitioning to Workforce 2020 - Anticipating and Managing The Changes That Will Radically Transform Working Life In the Next Decade,” *Cisco White Paper* (2011).

³ “Generations: The History of America’s Future,” *Neil Howe and William Strauss* (1991).

⁴ “Coming to Terms with Demographic Change in the Workplace,” *SHRM.org* (November 6, 2015).

⁵ “Labor Force Projections to 2024,” *Monthly Labor Review* (December 2015).

⁶ “Labor Force Projections to 2024: The Labor Force Is Growing, But Slowly,” *Bureau of Labor Statistics, Monthly Labor Review* (2016).

⁷ “10 Workplace Trends You’ll See in 2017,” *Forbes* (November 1, 2016).

⁸ “Future Workforce Study,” *Dell/Intel White Paper* (2016).

- **Process facts more carefully:** Utilize a broader base of experience to analyze and scrutinize in greater depth; and
- **Are more innovative:** Avoid the “pitfalls of conformity” and demonstrate more creativity in developing new products and services.⁹

Similarly, a landmark 2015 Report by McKinsey & Company found that “companies with more diverse workforces perform better financially.”¹⁰ McKinsey noted, “We know intuitively that diversity matters. It’s also increasingly clear that it makes sense in purely business terms.” McKinsey compared financial performance of companies in the top quartile for diversity (gender and ethnicity) with lower-ranked companies, and found that:

- Gender-diverse companies are 15% more likely to have financial returns above their respective national industry medians;
- Ethnically-diverse companies are 35% more likely to outperform their national industry medians; and
- For every 10 percent increase in racial and ethnic diversity on the senior-executive team, earnings before interest and taxes rise 0.8 percent.

McKinsey observed that “when companies commit themselves to diverse leadership, they are more successful. More diverse companies . . . are better able to win top talent and improve their customer orientation, employee satisfaction, and decision making and all that leads to a virtuous cycle of increasing returns.”¹¹

III. APPROACHES AND TECHNOLOGY TO ACHIEVE AND MANAGE ENHANCED WORKPLACE FAIRNESS, DIVERSITY, AND INCLUSION

The workforce of the future will demand greater management, supervisory, and Human Resources time, attention, and planning to capitalize on and leverage the rapidly changing demographics, skills, and expectations. Companies must take into account the (a) legal risks of employment discrimination, (b) the aggressive use of race, gender, or other protected-class “neutral measures,” and (c) the limited, prudent use of race, gender, or other protected-class “conscious measures,” to secure the optimal benefits of the new workforce.¹²

⁹ “Why Diverse Teams are Smarter,” *Harvard Business Review* (November 4, 2016).

¹⁰ See “Why Diversity Matters,” *McKinsey & Company* (February 2015) (“*McKinsey Report*”).

¹¹ *McKinsey Report*, p. 2.

¹² Case law tends to use terminology correlated to the specific protected class at issue, such as “*race-conscious*” and “*gender-neutral*.” To encompass all protected classes (such as age, ethnicity, sexual orientation, *etc.*), this White Paper uses the terms “protected-class neutral” and “protected-class conscious” terminology.

Legal Risks of Employment Discrimination

Employers need to be ever-mindful of employment business and legal risks, including monetary exposure, injunctive relief, and reputation-damaging effects of legitimate employment discrimination claims and class-action allegations, such as those that have resulted in enormous verdicts and settlements over the years (e.g., Texaco's landmark \$176 million settlement).¹³ The plaintiffs' bar is constantly looking for the next big cases with large financial rewards. The Seventh Circuit's ruling in April 2017 that Title VII covers sexual orientation claims is a reminder of the ever-present risks involved in not securing, maintaining, and effectively managing a constantly changing and more diverse workforce, with a broader definition of "diversity."¹⁴ (The EEOC already considered such claims as covered by Title VII despite the absence of clear language in the statute, but judicial sanction of this agency position is significant.)¹⁵

Moreover, Federal enforcement agencies—EEOC and U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP")—are still enforcing equal employment opportunity statutes, recently emphasizing close scrutiny of potentially-discriminatory *systemic practices*, and *pay equity*. Companies should implement the steps discussed in the following sections to proactively avoid, or mitigate the potential damage from, complaints, investigations, audits, and other actions by the enforcement agencies, as well as allegations, complaints, and lawsuits from plaintiffs' attorneys.

Managing Demographic Changes and Workforce Diversity with "Protected-Class Neutral" Mechanisms that Raise Few Legal Issues¹⁶

Dramatic changes in the demographics and characteristics of the labor force described above will bring increased opportunities, and challenges, to workforce management. Strategizing and planning for these changes can assist proactive companies to convert the changes into competitive advantages, through a variety of programs, initiatives, and measures. The workforce of the future will likely see focus on innovative diversity-related management and best practices, such as:

1. **Aggressive D&I Initiatives:** Implementation of more aggressive initiatives to secure the most talented minorities and women and help them be more fully productive (e.g., setting demographic goals in under-represented jobs, incorporating D&I objectives in performance evaluations, mandating diverse candidate pools for hiring and promotions).
2. **D&I Assessments and Action Plans:** Regular assessments of workforce D&I and under-representation, ranging from single business units to the entire enterprise, resulting in creation of Action Plans including compensation incentives to strenuously encourage senior

¹³ "Texaco Ends Bias Suit With \$176 Million," *Chicago Tribune*, November 16, 1996.

¹⁴ *Hively v. Ivy Tech Community College*, No. 15-720 (7th Cir. 2017). The Seventh Circuit ruled that Title VII applies to sexual orientation claims against covered employers.

¹⁵ *Baldwin v. Dep't of Transportation*, EEOC Appeal No. 120133080 (July 15, 2015); *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012).

¹⁶ See Footnote 12, above.

management to ensure that D&I initiatives are creating more diverse and highly productive teams.

3. **Improved Employee Engagement/Retention:** Enhanced efforts to increase employee retention (especially of the most talented minorities, women, and highly-mobile Millennials), including targeted career development programs to prepare for promotions; more focused and frequent employee engagement surveys to identify trends, create remedial measures, and enhance employee satisfaction; expanded use of coaching, mentoring, and sponsorship; positively responding to greater demands for work-life balance initiatives; and relaxation of office dress codes with emphasis on informal culture.
4. **Enhanced Disability Management:** Greater attention to effectively and legally managing the wide variety of disabilities presented by (a) a productive but aging segment of the workforce, and (b) expansion of the term “disability” under the Americans with Disabilities Amendments Act.
5. **Better Practices in Succession Planning:** Improved use of succession planning to win the “War for Talent,” achieve continuity in corporate performance, and enhance career development and employee retention. This can best be achieved by deliberately including high-quality candidates drawn from a diverse workforce (including diversity of experience, skills, and identity), while continually revitalizing employee energy, intellect, and capabilities.
6. **Focus on Pay Equity:** Proactive pay equity analyses by gender, race/ethnicity, age, and other factors to remediate inequities (gender/race-based pay inequities have become generally indefensible); enhanced use of advanced regression analyses for pay equity and adverse impact analyses of various job categories and workplace functions to facilitate prompt corrective actions and serve as sophisticated legal defenses of company practices.
7. **Increased Monitoring/Benchmarking:** There is an array of rapidly-developing tools to better assess corporate performance in the workplace, such as regular statistical benchmarking—including creation of industry/geographic-specific databases—of workforce demographics to determine “gaps/underutilizations” and address them; dramatically increased use of “big data” to identify status, trends, and problems, to assist in addressing them; and increased use of industrial/organizational psychologists and other experts to create and validate pre- and post-employment tests.
8. **Enhanced EEO Policies and Related Training:** Ensuring that all company workplace fairness policies are recognized as a senior management priority, and are regularly updated, accurate, and available to all employees; and comprehensive training of affected personnel to ensure that practices effectively implement company policies.
9. **Effective Use of EEO Complaint Processes (including Anonymous Complaints), as Beneficial “Early Warning System”:** Ensuring internal complaint systems, processes, and outcomes enhance credibility with employees as a real alternative to “external sources”

such as plaintiffs' attorneys, and as a high-functioning "early warning system," to aid both the company and its employees.

10. **Effective Utilization of Employee Resource Groups:** Focused use of Employee Resource Groups to assist in problem and solution identification relating to broad company-wide D&I objectives and challenges.

Legally Permissible "Protected-Class Conscious" Mechanisms Used in Limited Extraordinary Circumstances¹⁷

D&I measures and initiatives that are designed and implemented in a race/gender-neutral fashion, *such as those discussed above*, seldom raise legitimate legal issues. If such measures have failed to accomplish measurable D&I progress after diligent efforts over a reasonable period of time, companies may consider even more aggressive measures. In our experience, most companies create "best practice" programs, but many fail to achieve their objectives because they do not ensure company-wide diligent implementation efforts.

In those extraordinary limited instances where neutral measures have failed, the Supreme Court and U.S. Equal Employment Opportunity Commission ("EEOC") have authorized race/gender-conscious programs and employment selection decisions as exceptions to the Title VII prohibition against taking race and gender into account in employment decisions—provided such actions are taken pursuant to a compliant Voluntary Affirmative Action Plan ("VAAP") covering all the necessary requirements.¹⁸

IV. TRAINING NOW — FOR THE WORKFORCE OF THE FUTURE

Even the best policies and techniques are useless, if they are not (1) well-known by the workforce, (2) practiced by line supervisors and employees, and (3) enforced by management. The messaging regarding the value of training itself must come from the top, and the practices espoused must be enforced from the boardroom to the mailroom. A frequent complaint of minorities and women in class action discrimination cases is that the company denied them access to training where such training is a prerequisite to promotions and career advancement.

It should be clear to all companies that the workforce of the future will be more diverse, and that the workforce will be increasingly composed of more minorities, women, and Millennials. Recent studies have confirmed that Millennials place a high value on training, to enhance learning opportunities and growth. Millennials also value immediate and ongoing feedback and expect technology to be an integral part of the workplace. Training programs must embrace these realities to be truly effective, as vehicles to provide substantive knowledge to mid-management and line employees, as well as provide the employer with a sound defense to litigation.

¹⁷ See Footnote 12, above.

¹⁸ See *United Steelworkers v. Weber*, 443 U.S. 193 (1979), and *Johnson v. Transportation Agency of Santa Clara County*, 480 U.S. 616 (1987). Consistent with the rationale and requirements of these cases, the EEOC has established Guidelines, set forth at 29 CFR Part 1608, entitled "Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, As Amended."

The *Forbes* article discussed above¹⁹ predicted somewhat revolutionary changes in the workplace, including incorporating virtual reality into traditional functions such as recruiting and training. Noting that many Millennials are experts at virtual reality outside the office, the article states, “virtual and augmented reality can help close the experience gap for job seekers and allow employee training to be more engaging, less expensive, and free of distractions.” General Mills already has a virtual reality tour of its offices, and General Electric uses virtual reality at career fairs.²⁰

To address these important developments, training programs should include some of the following, directed primarily at Millennials (who will also be composed of an unprecedented number of minorities and females) but beneficial to all:

1. **Be Tech-Savvy:** Millennials are facile and comfortable with technology. Integrate technology into in-person trainings by using mobile devices and apps, as well as tools such as clickers, to include real-time surveys and responses during the training. Design content for access on mobile devices; provide links so Millennials can augment learning after the program.
2. **Be Visual:** Use infographics, presentations with video, virtual reality, *etc.*
3. **Provide Regular, Ongoing Training:** Give Millennials the training and career development opportunities they seek; help keep them fully engaged.
4. **Provide Regular/Candid Feedback:** Millennials seek feedback and advice. In the classroom, this may mean engaging mentors or senior associates to participate and provide coaching; online, this may mean incorporating “ask the expert” features in the e-learning course.
5. **Keep It Short:** Millennials are generally self-motivated and digitally resourceful, and can use training time more efficiently. Leverage this by teaching Millennials where to access the information on their own.
6. **“Gamify”:** Millennials grew up playing video games. Allow trainees to unlock badges or earn “prizes.”
7. **Set Clear Expectations:** Millennials want to know what is expected of them—what are the criteria? In training, communicate how the training relates to their performance evaluations. If the training involves knowledge assessments or evaluations, tell them up front so the trainees know what performance is expected.

As noted above, training must take into account the increasing race/gender/disability/sexual orientation/age diversity of the new workforce, and the needs and demands of these diverse employees. For example, employers need to ensure that the training opportunities (in person/electronic) are accessible to all employees regardless of ability/disability or language

¹⁹ See Footnote 3, above.

²⁰ *Id.* at 3.

proficiency. This is particularly true for training in areas such as harassment or retaliation prevention, where the existence of an effective training program can help defeat legal claims. Topics to be covered must be designed and delivered in creative ways that address the unique characteristics, backgrounds, and experiences of all employees.

V. IMPACT OF TRUMP ADMINISTRATION ON DIVERSE WORKFORCE MANAGEMENT

The question has been asked—will the Trump administration have a negative impact on corporate diversity and inclusion efforts? Although we are still in the initial months of the new Presidential administration, President Trump has already taken steps to reduce government regulations affecting the workplace and reverse Obama administration initiatives. For example:

- On February 24, 2017, President Trump signed an Executive Order requiring every agency to establish a Regulatory Reform Task Force to evaluate regulations and recommend repeal or modification, in line with reducing government regulations.²¹
- President Trump's 2018 Budget proposes a 21% reduction in Department of Labor funding (a \$2.5 billion decrease).²²
- On March 27, 2017, President Trump signed a bill nullifying President Obama's Fair Pay and Safe Workplaces Executive Order which had required prospective Federal contractors to disclose labor law violations, barred forced arbitration for sexual-harassment claims, and required pay transparency that would allow workers (particularly women) to identify wage disparities.²³

Trump's negative references to various minority groups and women throughout his campaign suggested to commentators that his regulatory policies would likewise be adverse to women and minorities. Even if this is true, his impact on major corporate D&I initiatives will likely be minimal.

First, achievement of enhanced D&I efforts is critical to the future business success of corporate America. Companies that discount the importance of diverse workforces and marketplaces will put themselves at a competitive disadvantage, regardless of the President's policies.

Second, basic legal protections against discrimination will remain in place, including statutory protections such as Title VII of the Civil Rights Act of 1964, Section 503 of the Rehabilitation Act,

²¹ Rebecca Harrington, "Under Trump, EEOC Will Focus on Job Growth," *Business Insider* (April 19, 2017), <http://www.businessinsider.com/trump-executive-orders-memorandum-proclamations-presidential-action-guide-2017-1/#presidential-memorandum-february-3-reviewing-the-fiduciary-duty-rule-22>.

²² Vin Gurrieri, "Trump Seeks \$2.5B Cut For DOL Budget," *Law 360* (March 16, 2017), <https://www.law360.com/articles/902571/breaking-trump-seeks-2-5b-cut-for-dol-budget>; Bill McMorris, "Trump Budget Slashes DOL Funding 20 Percent," *The Washington Free Beacon* (March 17, 2017), <http://freebeacon.com/issues/trump-budget-slashes-dol-funding-20-percent/>.

²³ Braden Campbell, "Trump Kills Government Contractor 'Blacklisting' Rule," *Law 360* (March 27, 2017), https://www.law360.com/employment/articles/906301/trump-kills-government-contractor-blacklisting-rule?nl_pk=114c0d2f-8a47-471e-a38c-c83a2ee1a55c&utm_source=newsletter&utm_medium=email&utm_campaign=employment.

Americans with Disabilities Act (“ADA”), Age Discrimination Enforcement Act (“ADEA”), and many others. Interestingly, Victoria Lipnic, appointed Acting Chair of the EEOC by President Trump, has said that equal pay issues are of particular interest to the EEOC and that she considers it a priority to file *more* equal pay lawsuits since the EEOC has filed relatively few in recent years.²⁴

Third, in light of an expected decrease in Federal enforcement, companies could see increased “private plaintiff” enforcement. If Federal enforcement agencies do not assist employees who feel aggrieved, those employees will likely turn to the courts. Heightened anti-minority and anti-female rhetoric can lead to more, not less volatile workplaces – which “employers of choice” work hard to avoid. So far, the courts have shown that they will not accept attempts to unilaterally change the direction from greater legal recognition of diversity. Federal courts have enjoined the President’s attempts to institute a ban on immigration,²⁵ and the Seventh Circuit Court of Appeals recently ruled that Title VII extends to sexual orientation claims even though such claims are not explicitly covered by the statute.²⁶

Enforcement through private litigation is potentially a *greater* risk to companies than Federal enforcement, since such proceedings can be accompanied by aggressive negative public relations campaigns to pressure corporate defendants. In addition, some state and local agencies will step into the vacuum, as State Attorneys General have in opposing the Muslim ban.

In sum, companies that seek long term success in an increasingly multicultural America must continue to enhance their diversity for purely good business reasons, irrespective of this new Administration.

VI. CONCLUSION

The “Workforce of the Future” will present unprecedented opportunities for companies to utilize a more diverse talent pool and access a substantially broader diverse customer base—if they embrace these resources. This paper presents ways to improve recruiting, hiring, developing, promoting, and retaining highly-talented minorities and women—as well as Millennials—capitalizing on modern approaches, tools, and technologies (from advanced statistical analysis to virtual reality) to achieve the benefits of effective D&I programs, while avoiding the related business and legal risks.

It is clear that the modern workforce is changing at an accelerated pace. Companies that plan for the inexorable changes in workforce demographics—by anticipating and effectively optimizing the full range of diverse skills, views, expectations, and demands—will achieve that highly-sought competitive advantage, over those that do not.

²⁴ Kate McGovern Tornone, “Under Trump, EEOC Will Focus on Job Growth”, *H.R. Daily Advisor* (Feb. 13, 2017), <http://hrdailyadvisor.blr.com/2017/02/13/trump-eeoc-will-focus-job-growth/>.

²⁵ See, e.g., *State of Hawaii, et al. v. Donald J. Trump, et al.*, No. 1:17-cv-00050-DKW-KSC (March 29, 2017).

²⁶ *Hively v. Ivy Tech Community College*, No. 15-270 (7th Cir. 2017).