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Diversity and Inclusion: What Does This Look Like for the Workforce of the Future?

Corporate Diversity

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 increasingly diverse applicant pools. In this *Bloomberg Law* Insights article, Weldon H. Latham, a Principal in the Washington, D.C., Region office of Jackson Lewis, P.C., discusses the opportunities and challenges presented by these dramatically changing demographics.

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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 increasingly 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 potential legal risks.

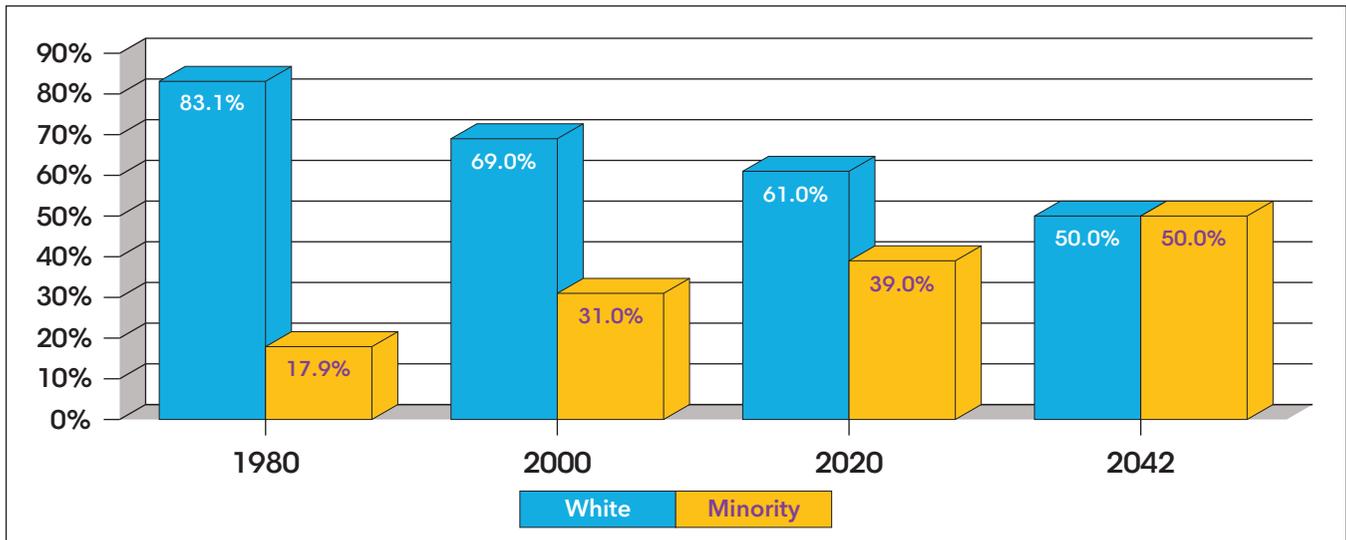
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This article will focus on how the modern workforce is changing; the benefits of diverse corporate workforces; approaches and technology to lawfully manage enhanced D&I in the workforce; and the impact of Trump Administration positions and initiatives on diverse workforce management.

The changing U.S. population and demand for talent have 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*.

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). 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).



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

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 percent 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 percent 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 percent by 2020 and 75 percent by 2030) as Boomers eventually retire. See “Transitioning to Workforce 2020: Anticipating and Managing The Changes That Will Radically Transform Working Life In the Next Decade,” *Cisco White Paper* (2011). While the definition of “Millennials” varies, the term generally includes those born between 1982 and 2004. “Generations: The History of America’s Future,” *Neil Howe and William Strauss* (1991).

A conflicting trend is that current employees are working longer, birth rates are declining, and life-spans and retirement ages are increasing—thus, the number of employees over the age of 65 has increased. “Coming to Terms with Demographic Change in the Workplace,” *SHRM.org* (Nov. 6, 2015). The share of women in the labor force, already at 47 percent, is projected to slowly rise over the next 10 years. “Labor Force Projections to 2024,” *Monthly Labor Review* (December 2015). By 2024, Hispanics—the fastest growing ethnic group—are projected to constitute one-fifth of the U.S. labor force. “Labor Force Projections to 2024: The Labor Force Is Growing, But Slowly,” *Bureau of Labor Statistics, Monthly Labor Review* (2016).

Recruiting and hiring managers, supervisors, managers, and executives will all need to be increasingly well versed in recruiting, motivating, developing, and managing a multi-cultural 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 percent) companies rate ‘organizational design’ as their top priority and three-fourths of millennials said they are well prepared to work effectively in a team.” “10 Workplace Trends You’ll See in 2017,” *Forbes* (November 1, 2016). Moreover, millennials are reported to be “less personally invested in their jobs” (i.e., more mobile) and “place greater value on workplace technology.” “Future Workforce Study,” *Dell/Intel White Paper* (2016).

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, larger returns on investments, reduced turnover, and enhanced morale.

A recent study published in *Harvard Business Review* concluded that diverse teams:

- **Focus more on facts:** Constantly re-examining data and facts while remaining objective, scrutinizing views of colleagues, increasing awareness of biases;
- **Process facts more carefully:** Diverse teams, drawing on a broader base of experience, out-perform homogeneous teams because they analyze and scrutinize in greater depth; and
- **Are more innovative:** Avoiding the “pitfalls of conformity,” diverse teams are more creative in developing new products and services.

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

Similarly, a landmark 2015 report by McKinsey & Company found that “companies with more diverse workforces perform better financially.” See “Why Diversity Matters,” *McKinsey & Company* (February 2015) (“*McKinsey Report*”). McKinsey notes, “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 percent more likely to have financial returns above their respective national industry medians;

- Ethnically-diverse companies are 35 percent 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 observes 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.” *McKinsey Report*, p. 2.

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 potential employment discrimination;

(b) aggressive use of race, gender, or other “protected-class-neutral” measures; and

(c) limited, prudent use of race, gender, or other “protected-class-conscious” measures, in those rare instances where race/gender-neutral recruiting and hiring have failed to increase minority/women representation in key corporate positions.

(Published 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 article 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 broad 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; Coca-Cola’s \$192 million settlement). See “Texaco Ends Bias Suit With \$176 Million,” *Chicago Tribune*, Nov. 16, 1996; “Bias Case Costs Coke Record \$192.5 Million,” *Chicago Tribune*, Nov. 17, 2000.

The plaintiffs’ bar is constantly looking for the “next big case” with enormous financial rewards. The Seventh Circuit’s ruling in April 2017 that Title VII of the Civil Rights Act of 1964 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.” *Hively v. Ivy Tech Community College*, No. 15-720 (7th Cir. 2017). (The Equal Employment Opportunity Commission 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. *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)).

Moreover, federal enforcement agencies—the EEOC and the 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

Dramatic changes in the demographics and characteristics of the labor force described above bring increased opportunities and challenges to workforce management. Strategizing and planning for these changes can assist pro-active companies to convert the changes into competitive advantages through a variety of programs, initiatives, and measures.

The workforce of the future will likely see a 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 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 Act 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 Circumstances

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 is-

sues. If such measures have failed to accomplish measurable D&I progress after diligent efforts over a reasonable period of time, companies may consider more aggressive measures. In our experience, most companies create “best practice” programs, but many fail to achieve their objectives because they do not ensure companywide efforts are truly diligently implemented.

In those extraordinary limited instances where neutral measures have actually failed, the Supreme Court and 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 (even in favor of minorities and women) in employment decisions—provided such actions are taken pursuant to a compliant Voluntary Affirmative Action Plan (“VAAP”) covering all the necessary requirements. *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.”

Impact of Trump Administration on Diverse Workforce Management

A question often heard lately is: Will Trump Administration policies have a negative impact on corporate diversity and inclusion efforts?

Although we are still in the initial months of the new administration, President Trump has already taken steps to reduce government regulations affecting the workplace and reverse Obama administration initiatives. For example:

- On Feb. 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.

- President Trump’s 2018 Budget proposes a 20 percent reduction in Department of Labor funding (a \$2.4 billion decrease).

- 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.

President 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—Why?

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 this President’s policies.

Second, basic legal protections against discrimination will remain in effect, including statutory protec-

tions such as Title VII of the Civil Rights Act of 1964, Section 503 of the Rehabilitation Act, the Americans with Disabilities Act (“ADA”), the Age Discrimination in Employment Act (“ADEA”), and many others. Interestingly, Victoria Lipnic, appointed Acting Chair of the EEOC by President Trump, has stated 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.

Third, in light of an expected decrease in the vigor of federal enforcement, companies may 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-women 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 the President’s attempts to unilaterally change the direction from greater legal recognition of diversity. Federal courts have enjoined this President’s attempts to institute a ban on immigration [see, e.g., *State of Hawaii, et al. v. Donald J. Trump, et al.*, No. 1:17-cv-00050-DKW-KSC (March 29, 2017)] and, as noted above, 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. *Hively v. Ivy Tech Community College*, No. 15-270 (7th Cir. 2017).

Enforcement through private litigation and the negative publicity that accompanies it raise potentially *greater* risks to companies than federal enforcement, since such proceedings can be accompanied by aggressive negative public relations campaigns from interest groups 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’s policies.

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 it. This article presents creative measures 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 significant benefits of effective D&I programs, while avoiding or reducing 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.

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