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“Corporate DEI Programs After *Students for Fair Admissions v. Harvard*”

Thursday, August 31, 2023

Course Materials

"Corporate DEI Programs After *Students for Fair Admissions v. Harvard*"

Thursday, August 31, 2023

2 to 3 p.m. Eastern [archive and transcript to follow]

With the recent Supreme Court decision to end affirmative action in higher education, and pro- and anti-DEI activism increasing, companies need to understand the implications of this evolving environment for their own DEI efforts. Join our panelists as they offer insights into how to navigate the increasingly complex surroundings in which corporate DEI programs operate.

- **J.T. Ho**, Co-Head of Public Companies & ESG Practice, Orrick
- **Ngozi Okeh**, DEI Editor, PracticalESG.com
- **Travis Sumter**, Labor & Employment Attorney, NextRoll

Among other topics, this program will cover:

- Overview of the *Students for Fair Admissions v. Harvard* Decision
- Legal Framework Governing Corporate DEI
- Potential Vulnerabilities of Corporate DEI Programs
- Mitigating DEI Legal Risks
- Dealing with Pro- and Anti-DEI Activism

"Corporate DEI Programs After *Students for Fair Admissions v. Harvard*"

Course Outline/Notes

1. Overview of the *Students for Fair Admissions v. Harvard* Decision

2. Legal Framework Governing Corporate DEI

3. Potential Vulnerabilities of Corporate DEI Programs

4. Mitigating DEI Legal Risks

5. Dealing with Pro- and Anti-DEI Activism

“Corporate DEI Programs After *Students for Fair Admissions v. Harvard*”

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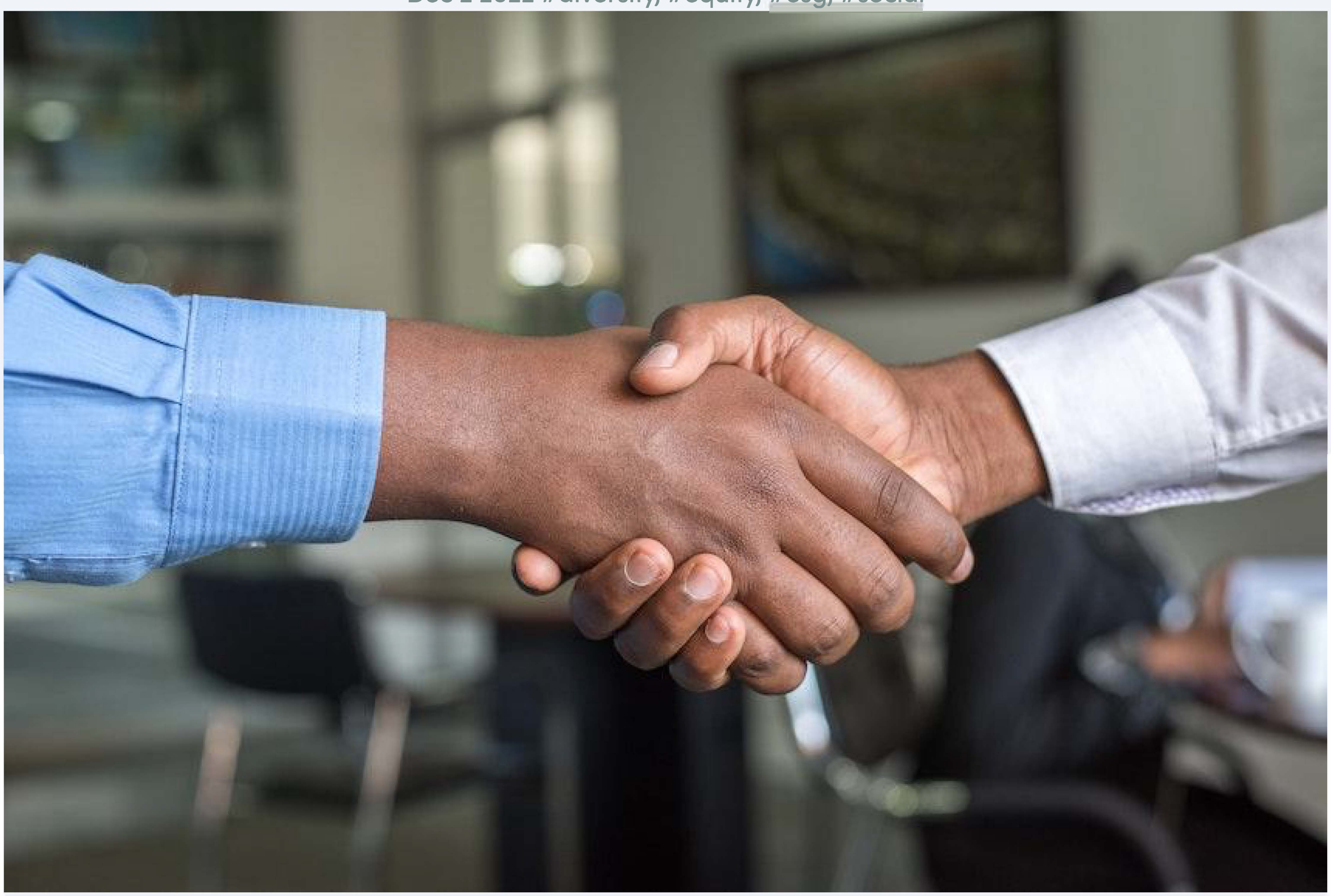
POST

The Re-emergence of the Affirmative Action Debate May Impact Workplaces

Dec 2 2022 #diversity, #equity, #esg, #social



You may have seen the topic of affirmative action re-emerge in the last few months as the Supreme Court revisits this controversial issue. Two new cases are now at the forefront of the 50-year-old debate, as the Court continues to question the efficacy, the fairness, and most of all the constitutionality of considering race in college admissions.

> *"Affirmative action was enacted as a tool to rectify the historical inequity caused by many years of racism by using policies, legislation, programs, and procedures to improve the educational or employment opportunities of historically excluded groups"*
>
> – *BestColleges.com*

A Brief History

Affirmative action emerged in the 1960s amid the civil rights movement to repair the damage of years of racism and discrimination by diversifying all-White universities. While affirmative action was intended to correct historical inequity, it has been under fire from its inception. Starting with *Regents of the University of California v. Bakke (1978)*, Supreme Court cases established precedent for universities to use race as one of many factors to increase college admission rates for historically excluded racial groups. The most recent ruling, *Fisher v. University of Texas*, decided that race could be used when race-neutral alternatives were insufficient. Two cases currently on the docket, *Students for Fair Admissions v. President and Fellows of Harvard College and Students for Fair Admissions v. University of North Carolina* continue the central question of whether race considerations in the college admissions process violates the 14th Amendment's Equal Protection Clause. To date, nine states have banned affirmative action and as the Supreme Court takes on these two new cases, we may see more states take a strong stance in either direction.

> *"While the best approach isn't clear cut, most agree on the importance of diversity. A survey found that a majority of college students believe that racial/ethnic diversity improves the social experiences (62%) and learning environment (59%) of schools".*
>
> – *BestColleges.com*

Some Food for Thought

At the core of the affirmative action discussion is the question of how to rectify historical inequity, and if we ought to rectify it at all. While this monumental question deserves a dedicated blog on another day, a brief discussion on the objectivity of college admissions, meritocracy as a concept, and fairness in the application process offers helpful food for thought.

It's tempting to believe that grades, test scores and extracurricular activities provide an objective assessment of an applicant, however, college admissions is not an objective process. Admissions teams weigh various aspects of applicants as well as institutional priorities with the ultimate goal of building a well-rounded and diverse student body. While some may believe we live in a colorblind or post-race society, research shows that race and systemic racism continue to shape experiences, opportunities, and outcomes. The ability to consider race, systemic inequity, and s university's own institutional needs and historical inequity may aide institutions in arriving at best admissions decisions.

One of the main arguments against affirmative action is that it is unfair to offer admission based on anything other than merit. However, this has already been happening for White and wealthy families for over a hundred years through Legacy admissions. Legacy admissions give non-merit-based admissions preference to students whose families have historical ties to the university. A study of thirty elite universities found that if a parent or relative went to the school, for example, they are up to 45% more likely to be admitted. With three quarters of the top 100 schools implementing legacy admissions, this program plays a big role in perpetuating homogeneity of the student body at elite universities.

And then there's meritocracy as a concept in admissions. Believing that students are rewarded with college admissions purely due to skill and effort would lead us to troubling conclusions based on the racial demographics of elite universities. Luckily, the concept of meritocracy has long been debunked as it perpetuates the kind of inequity it aims to eliminate. Understanding that meritocracy is a myth in our society frees us to think more holistically about systems that provide an advantage for some, and helps us begin to consider how to level the playing field.

Takeaways for the Workplace

While affirmative action is being questioned in the context of schools, impacts may be felt in other places that want to improve the diversity, equity, and inclusion of their organizations. As you set data-driven corporate DEI goals, it's important that the DEI team, HR team, and legal team partner together to prepare for potential similar challenges that may arise from your DEI strategy. To prepare for these challenges, consider these points:

- Ensure data-driven DEI goals are carefully crafted to comply with employment law. Partner with your legal team to ensure you prepare for objections that may come up internally and externally.
- Revisit job descriptions and promotion criteria and rethink your ideas around traditional merit and who it was made to attract and promote. Consider how it may be limiting your efforts for diversity by overlooking non-traditional talent.
- Communicate the background of the DEI strategy with the company so employees understand issues around historical inequity for your industry, organization, or region and how your DEI strategy helps to address these issues.
- Ensure the leadership team is bought into the development and is fluent in the DEI strategy and willing to address objections that come up internally or externally.

Stay the course. It's tempting to get cold feet about moving forward with your DEI strategy when affirmative action is called into question, yet again, however remember why you've decided to prioritize diversity, equity, and inclusion and continue to do the work.

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The Editor

Ngozi Okeh is an experienced leader with a history of driving efforts to conceptualize, define, assess and promote diversity, equity, and inclusion (DEI) as strategic business processes. Ngozi is currently the Director of DEI at a leading marketing technology company where she develops and executes enterprise-wide DEI initiatives through rigorous strategic planning efforts, community partnerships, leadership collaboration, strategy evaluation, and careful management of communication and buy-in as well as policies and procedures. Previously, she worked at an independent mortgage bank, where... View Profile

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July 12, 2023

Affirmative Action Ruling: What Corporate Governance & Securities Lawyers Should Know

The other big end-of-term SCOTUS development that could impact "human capital" risks was the decision in two companion cases that struck down the use of "affirmative action" in college admissions. You might think that companies can ignore this holding since it directly applies only to educational institutions and isn't interpreting the laws that specifically apply to private businesses, but this Morrison Foerster memo explains several ways in which corporate DEI programs could be affected.

Corporate governance and securities advisors need to be aware of these issues because many companies have been increasing their disclosures about DEI programs & metrics – either in SEC filings or on their websites. That means you need to be able to spot disclosures that could imply that the company is engaged in risky practices.

Beyond the disclosure, if human capital is a significant issue at your company, you may need to collaborate with the DEI team, HR, and employment lawyers to be able to update the board on management's assessment of risks and any significant changes to practices. As the MoFo memo alludes to, a handful of companies are already facing litigation.

The memo suggests taking the following steps to mitigate risks (also see this Cooley memo):

> 1. **Review DEI Programs for Vulnerabilities:** Companies should review existing DEI efforts with an eye toward areas of vulnerability and confirm that the initiatives do not create unlawful preferences based on protected characteristics or include quotas or set asides. Employers should consider including race-neutral factors, such as socioeconomic status, first-generation professionals, and geographic diversity, which could help increase diversity in the workplace while mitigating the risk of potential challenges.
>
> 2. **Review Written DEI Materials:** Employers should review their DEI program materials for any statements that describe their companies' practices in a manner that could be viewed as unlawful. In some cases, plaintiffs have used statements in DEI policies and literature to support reverse discrimination claims.
>
> 3. **Justify Efforts for DEI Programs:** Employers should be prepared to justify the importance of their existing DEI programs and how those programs are consistent with the law.
>
> 4. **Train Leadership and Managers:** Companies should ensure that their leaders and managers are educated on the benefits and objectives of the companies' DEI and affirmative action programs. It will be important for managers to understand what DEI means and that they cannot give preferential treatment to underrepresented groups when making employment decisions.
>
> 5. **Review Diversity Trainings for Risk:** Employers should review current diversity trainings, including unconscious bias training, considering recent legislation aimed at limiting DEI programs and trainings that might make their programs vulnerable to attack.
>
> 6. **Monitor State Laws on DEI:** Companies should continue to monitor state and local laws and regulations aimed at limiting or requiring DEI efforts to ensure compliance with those laws.

All that said, the EEOC also issued a press release about the ruling, which says:

> It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace.

This Covington memo walks through the context of that statement, summarizes EEOC guidance that applies to DEI programs and distinguishes them from "affirmative action," and concludes:

> In considering what initiatives could be targeted for litigation, employers should give thought to the extent to which their DEI efforts and initiatives implicate tangible employment actions or, instead, promote a more equitable and inclusive work experience.

Companies may take different approaches in responding to this SCOTUS decision and the general "anti-woke" backlash. For example, some may issue statements to employees and other stakeholders that they'll continue to prioritize DEI in a way that's consistent with the Court's decision, and others may decide that it's better not to comment. I know Ngozi will be sharing her valuable perspective as a DEI leader, including thoughts on preserving a diverse talent pipeline, over on PracticalESG.

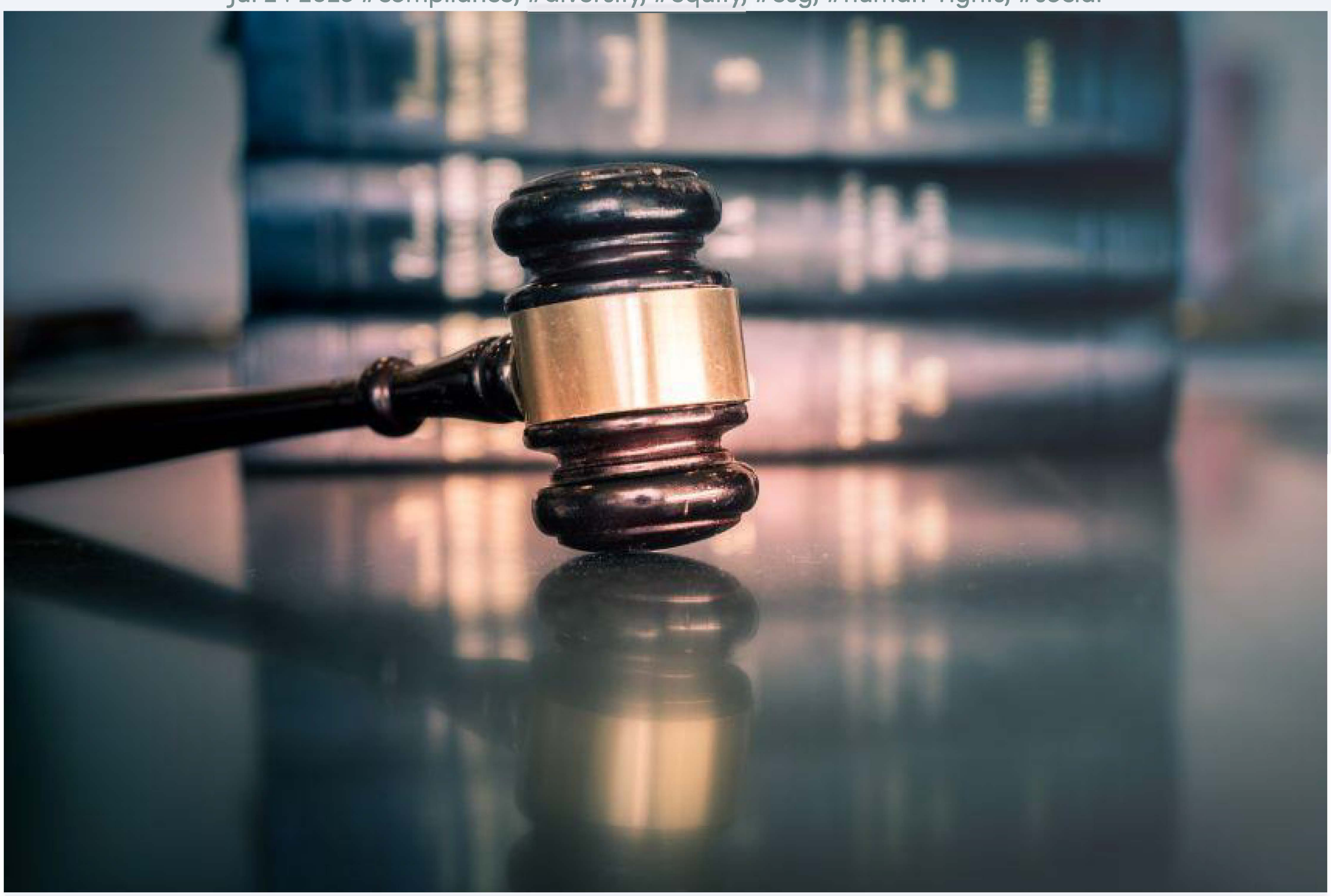
– **Liz Dunshee**

Posted by Liz Dunshee
Permalink: https://www.thecorporatecounsel.net/blog/2023/07/affirmative-action-ruling-what-corporate-governance-securities-lawyers-should-know.html

POST

13 State Attorneys General Demand End to Corporate DEI

Jul 24 2023 #compliance, #diversity, #equity, #esg, #human-rights, #social



The Supreme Court's ruling about affirmative action in college admissions has the corporate world questioning implications of the ruling on their DEI policies. Attorneys General in 13 states believe that the implications are directly applicable beyond college admissions. In a letter to Fortune 100 CEOs explicitly calling out big tech companies with DEI policies, the group of AGs demand a business-wide end to affirmative action practices – or else.

> "In sum, the Court powerfully reinforced the principle that all racial discrimination, no matter the motivation, is invidious and unlawful: Eliminating racial discrimination means eliminating all of it…
>
> We urge you to immediately cease any unlawful race-based quotas or preferences your company has adopted for its employment and contracting practices. If you choose not to do so, know that you will be held accountable – sooner rather than later – for your decision to continue treating people differently because of the color of their skin."

Time will tell whether these CEOs – and others – will heed this written warning and whether it will have larger implications.

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The Editor

Ngozi Okeh is an experienced leader with a history of driving efforts to conceptualize, define, assess and promote diversity, equity, and inclusion (DEI) as strategic business processes. Ngozi is currently the Director of DEI at a leading marketing technology company where she develops and executes enterprise-wide DEI initiatives through rigorous strategic planning efforts, community partnerships, leadership collaboration, strategy evaluation, and careful management of communication and buy-in as well as policies and procedures. Previously, she worked at an independent mortgage bank, where… View Profile

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AGs Threaten Fortune 100 Companies Over DEI Programs

Jul 19 2023 #compliance, #diversity, #esg, #social

Last month, the Supreme Court of the United States (SCOTUS) issued a ruling ending affirmative action in college admissions. Many have wondered how this ruling may affect DEI programs in the private sector. Earlier this month, thirteen Attorneys General sent a letter to the CEOs of Fortune 100 companies warning of potential legal consequences over race-based employment and diversity policies. A memo from Gibson Dunn breaks down the contents of the letter.

> In their letter, the group of Attorneys General stated their view that "racial discrimination in employment and contracting is all too common among Fortune 100 companies and other large businesses." They warned that if a company "previously resorted to racial preferences or naked quotas to offset its bigotry, that discriminatory path is now definitively closed" as a result of the Supreme Court's decision in SFFA v. Harvard.

According to the memo, the letter goes on to list examples of allegedly unlawful activity including the use of "explicit racial hiring quotas" and criticizes several companies for their 2020 commitments to racial justice. The memo points out that the AGs view of DEI programs may be at odds with certain federal and state government contracting requirements which the letter does not address.

Given the court's ruling on affirmative action, future rulings could undermine the legal frameworks currently protecting company DEI programs. The memo urges companies to evaluate their current DEI programs and assess if SCOTUS's decision may introduce them to additional scrutiny or litigation risks.

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The Editor

Zachary Barlow is a licensed attorney. He earned his JD from the University of Mississippi and has a bachelor's in Public Policy Leadership. He practiced law at a mid-size firm and handled a wide variety of cases. During this time he assisted in overseeing compliance of a public entity and litigated contract disputes, gaining experience both in and outside of the courtroom. Zachary currently assists the PracticalESG.com editorial team by providing research and creating content on a spectrum of ESG... View Profile

POST

Do New Supreme Court Decisions Signal an End to DEI?

Jul 28 2023 #compliance, #diversity, #environment, #equity, #esg, #human-rights, #social

Last month was tough for DEI efforts. The Supreme Court brought an end to affirmative action in college admissions and granted businesses the right to withhold services from same-sex couples. These decisions signal a policy climate that is increasingly hostile to issues of diversity. And while diversity can mean many things, race, and sexual orientation specifically seem to be under attack.

These rulings don't signal an end to DEI because the justification for DEI isn't that fickle. The reality is that DEI is not just good for marginalized groups; it's good for everyone, especially businesses. DEI has withstood resistance from its inception and it will continue to be a focus for businesses that are interested in their own success and longevity in an ever-changing and increasingly diverse world.

Keep DEI a Priority

Companies that continue to make meaningful DEI progress stand out and set themselves up for success. Here are a few tips to help:

- **Continue to set clear, data-driven DEI goals** that aim to increase the diversity of underrepresented groups in your organization, improve the equity of your policies and procedures and drive the inclusion of your culture or belonging.
- **Fund and staff programs** that promote your DEI goals to set them up for success.
- **Partner with your legal team** to ensure that your DEI goals are compliant and that you're prepared for any resistance that may emerge internally or externally.
- **Pay attention to language in your strategy** and ensure you focus on dismantling challenges over providing perceived advantages for underrepresented groups.
- **Ensure that the responsibilities of DEI** do not fall on one person or live solely within HR. DEI should be a cross-functional effort from all departments and business areas.
- **Work with executive and senior leaders** to ensure they are not just bought into the DEI goals and strategy, but participate in developing them. Leaders should be able to articulate the DEI goals and programs and why the company is prioritizing and investing in these goals and programs.
- **Plan for ongoing workforce education** to level up the cultural competence of your workforce and help employees understand why and how you'll achieve your DEI goals. Focus on how your DEI goals and programs align with your business goals.

For helpful resources to build and maintain a strong DEI strategy, check out PracticalESG.com's member resources, such as our checklists "Creating Your DEI Strategy," and "Dealing with Skeptics."

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Lawrence Heim

August 8, 2023

Mitigating Litigation Risk When Incorporating DEI Goals Into Executive Incentive Programs

Here's something I blogged last week on CompensationStandards.com: DEI-related goals have become one of the most common non-financial metrics in public company executive incentive plans. However, in addition to thinking through potential complexities and unintended consequences, you may also need to work with your employment law colleagues to take a closer look at those programs and related disclosures in light of June's SCOTUS affirmative action decision, and related fallout.

To get more color on what executive compensation advisors should know, I'm delighted to share this guest post from Orrick's J.T. Ho, Mike Delikat, John Giansello and Bobby Bee:

> On June 29, 2023, the Supreme Court found Harvard and UNC's admissions policies, which considered race and ethnicity as factors in admissions, to be unlawful under Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. While this ruling does not directly impact corporate DEI programs due to existing legal prohibitions on considering race in employment decisions, this case may embolden more applicants, employees, government officials like state Attorneys General and conservative activist groups to bring "reverse discrimination" claims and shareholder demands and proposals, a trend that already is on the rise.
>
> Executive compensation programs that include DEI performance as a metric have already been and may continue to be a source of such claims and attacks. Many executive compensation programs in recent years have incorporated DEI metrics due to institutional investor demands. Such goals are often tied to increasing the number of women or diverse employees by a certain percentage, especially in higher-paid roles or retaining a certain percentage of such groups of employees, and have become more formulaic and rigorous over the years due to investor scrutiny.
>
> However, while "the devil is in the details," incorporating DEI metrics into executive compensation programs can lead to the risk that managers perceive the achievement of the metrics as a de facto quota and impel employment decision-making based on diversity metrics instead of individual qualifications and job performance—or the reasonable perception thereof, which could give rise to reverse discrimination claims. For example, in *Frank v. Xerox Corp.* (5th Cir. 2003), where the Fifth Circuit reversed summary judgment for Xerox on a reverse discrimination claim, the court noted that "[s]enior staff notes and evaluations also indicate that managers were evaluated on how well they complied with the [diversity] objectives," among other factors. As a result, the Fifth Circuit noted a jury could find the company "had considered race in fashioning its employment policies" and that because of plaintiff's race, "their employment opportunities had been limited." According to the EEOC amicus brief filed on appeal, managers were evaluated on how well they followed and adhered to diversity objectives in making personnel decisions; numerical targets were considered in hiring, promotion or pay decisions; and money designated for merit pay increases was allocated based on achievement in specific "EEO categories."
>
> The court arrived at a different conclusion in *Coppinger v. Wal-Mart Stores* (N.D. Fla. Oct. 25, 2008), where the plaintiff alleged, among other things, that Wal-Mart tied manager bonuses to its

diversity program involving two components: (1) placement goals, which measured the disparity between the rate at which women and minorities apply for managerial positions and the rate they obtained such jobs, and (2) good faith effort goals, which required all salaried managers to mentor three employees from diverse backgrounds and attend at least one diversity event each year. Although the court granted Wal-Mart's summary judgment motion, the court noted that it did so because, despite the allegations, "no part of any decisionmaker's bonus or compensation was related to placement goals or good faith efforts goals other than attending one diversity event each year." Although the court concluded that the plaintiff had failed to point to any record suggesting that managers took the goals into consideration when making any employment decision, it left open the question of whether it would have held differently had such goals been more concretely tied to the managers' evaluations or bonuses.

While there are few cases in this area to date, in light of the recent Supreme Court decision, companies who incorporate DEI metrics into executive compensation programs should do a privileged evaluation of their programs to determine whether their goals actually impact individual employment decisions, which can be problematic, or merely inspire broader initiatives, such as improvements in outreach and in the composition of candidate and interview pools or evaluation techniques, which is legally permissible. In other words, rewarding executives for their overall efforts on DEI rather than for achieving targeted metrics will mitigate some of the legal risk.

Further, whether goals involve hiring or retention is also relevant as what leads to employee retention is a complicated set of factors, including organizational culture, effective leadership and employee perceptions of working conditions, and it is often difficult to connect goals related to retention to any individual employment decision in hiring, promotion, termination or salary and benefits. Such analyses are complicated, and companies are advised to seek legal counsel and the benefits of privilege to ensure that factors that mitigate against the risk of reverse discrimination claims are being considered and implemented when constructing executive incentive plans.

This is certainly a challenging area, and we'll be discussing practical ways to approach it at our virtual conferences that are coming up in less than 2 months – the "2nd Annual Practical ESG Conference" and the "Proxy Disclosure & Executive Compensation Conferences." Here's the action-packed agenda for the Proxy Disclosure & 20th Annual Executive Compensation Conference. Get guidance on navigating DEI oversight, disclosures & goals during these two panels:

– "Human Capital Management: Facing Down Heightened Complexities & Disclosures" – with Skadden's Ryan Adams, Kirkland's Sophia Hudson, Vontier's Courtney Kamlet, and Aon's Laura Wanlass

– "ESG Metrics: Beyond the Basics" – with Orrick's J.T. Ho, Semler Brossy's Blair Jones, Davis Polk's Kyoko Takahashi Lin, and Pay Governance's Tara Tays

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– **Liz Dunshee**

Posted by Liz Dunshee
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Checklist: Creating Your DEI Strategy: Ongoing Monitoring & Improvement

PracticalESG.com

You have formulated your DEI strategy and are implementing and measuring progress. Contrary to what most assume, this is not the end! We have just begun. Remember, DEI is a journey and not a checklist item. Hence, you must continually enhance your DEI strategy. Following are some critical points to consider.

Tip 1: Start Small and Don't Be Afraid to Modify

Start small and acquire momentum. Odds are, you'll need to make changes along the way as you better understand the needs and challenges of your organization and society.

1. When embarking on larger projects, start small. Invite and incorporate feedback along the way to increase the probability of success.

2. Stay up-to-date on DEI topics to understand the DEI social norms as they evolve to be more inclusive. Initiate conversations internally to understand their role in the workplace.

3. Don't be afraid to improve on the DEI initiative. Perhaps you decided to make "equity" a core part of the strategy and, maybe, you would like to change the name D&I to DEI, with "equity" as the middle acronym. Keep the employees and managers in the organization in the loop by communicating the things that have changed and the reason for such changes. Invite questions and feedback.

4. Recognize there is always room for improvement, and perfection can be the enemy of good. Collect desired improvements over time so that non-urgent changes can be prioritized and/or implemented in connection with regularly scheduled strategy rollouts. If you are frequently making changes, employees may find it difficult to keep track and may disengage. That said, out-of-cycle updates are sometimes necessary, to be responsive to important issues.

Tip 2: Plan for Fatigue

DEI work is a marathon and not a sprint; thus, employees and leaders are likely to experience fatigue. Plan for this by considering the following:

1. Don't underestimate the power of celebrating small wins. This enables the transition from one project to another and includes the employees by presenting them with the progress on the projects, enabling them to assess it.

2. When possible, communicate mistakes and improvements. This allows employees to view DEI as an active journey and understand that the journey is imperfect.

3. Get ongoing feedback. It is a great idea to maintain an active discourse about DEI topics by seeking input from different people on various DEI projects. Make sure you consider these insights. Always recognize and express gratitude toward the contributor. Even if the feedback does not result in immediate change, help the contributor understand why. It is good practice to ask the contributor if they mind that their name is on your notes or if they would prefer that you document the feedback as anonymous. It is important to be responsive to this feedback in ways that furthers your mission to create a diverse, equitable, and inclusive workplace. If this feedback goes unaddressed, it could be a liability that exposes the company to risk, since there is documentation of the issue with no response. These issues can get tricky, so be sure to consult your employment lawyer when you're unsure of the next step or associated risks.

4. Recruit a dedicated owner. When employees are juggling between their regular duties and managing the DEI work, they are bound to feel overwhelmed and exhausted. Hiring a project owner, a director, or Chief Diversity Officer dedicated to DEI work will ensure that monitoring DEI work is someone's full-time job. This shouldn't mean that the DEI becomes siloed. Remember that for unanimous adoption, everyone, especially the CEO, should consider themselves a DEI champion.

5. DEI work should be aligned with the company values. This will help maintain its relevance and ensure it remains a core part of the organization's functions and culture.

Tip 3: Plan for Resistance

DEI work can be challenging for some. Prepare to engage with those who are adamantly resisting it.

1. Have the leaders at the forefront of the project. They must actively participate in company meetings and executive meetings regarding DEI. If managers and employees realize that the CEO is serious about DEI, they often follow suit.

2. Ensure that training is ongoing and readily available. Provide the employees and managers with live and recorded training sessions. Make training accessible to the employees so they can explore the resources in their own time. Refer to these resources in conversations with those opposed to DEI.

3. Implement systemic changes in policies and procedures. Your DEI plan should extend beyond the processes of recruiting and training. Ensure that you alter your policies and procedures into more equitable and inclusive versions so that everyone in the organization, no matter where they are in their journey, will participate.

4. Identify and empower change agents in each team. Empower them to enforce their message, communicate any concerns, and maintain positive energy and high morale around DEI work.

5. Differentiate resistance and criticism. Criticism can be constructive and lead to the enhancement of your strategy. Recognize that resistance emerges as toxic pessimism and willful inertia. It can adversely impact your organization's DEI initiative over time.

6. Remember that separation is an option. Some employees are early adopters, others follow suit much later, and a handful are often committed to opposing all the elements of the DEI. If these individuals become disruptive or engage in behaviors that violate the company and the DEI values and policies and procedures, consider separation. Ensure that the leadership discusses the culture and direction they envision for the organization and commit to parting with employees who do not share this vision. Make sure you document and follow the HR protocol for compliant and legal employee separation.

Tip 4: Commit to Clarity at Every Stage

Clarity is critical in making the strategy actionable and measurable.

1. Ask clarifying questions and make use of simple language in all your documents. Everyone within the organization should be able to comprehend the strategy. To ensure that everyone feels included in the process, don't communicate in a way that makes employees feel like they must be a part of an exclusive group to understand your message. It's essential to ensure that the strategy is easy to convey to the employees and easy for them to communicate.
2. Always ask "who." There are several dimensions of diversity; so it is essential to understand the specific application of the strategy. Instead of using the terms "diverse groups" and "underrepresented groups" in your plan, specify who the goals reference. For example, are you referring to Black, Indigenous, People of Color (BIPOC), people with disabilities (PWD), or women? It may be challenging and uncomfortable to dive into the details, but once you do, you will be better able to identify the requirements of the plans, define it, and assess its success.

Checklist: Diversity, Equity & Inclusion: Dealing with Skeptics

PracticalESG.com

With topics as personal as diversity, equity, and inclusion, you will inevitably run into resistance. Resistance may appear as an employee who consistently expresses negative sentiments to others around your DEI initiative or a leader passively resisting participation or aggressively critical of your DEI programs or a combination of these. You may feel discouraged to know that some are not yet bought into your organization's position and programs on DEI; however, there are some great ways to provide growth for the organization and individuals.

To determine what to do about naysayers, ask these questions:

- Is this an opportunity for the organization or employee development?
- Is this an important stakeholder?
- How is this employee impacting others?
- Is the employee violating company policies?
- What can you take away from this experience?

This checklist walks through considerations for each of these questions. Note that these questions aren't standalone solutions. You will want to consider all of the questions together as well as your organizational culture to develop your response.

1. Is this an opportunity for the organization or employee development?

To understand the learning opportunities, start by understanding the sentiment and where this behavior is coming from. Do they have questions or concerns that haven't been addressed? If so, make sure that you understand and manage their queries and concerns in a way that helps them feel connected to the topics and the DEI programs your company is embarking on. Do they have a genuine interest in providing feedback that will improve the initiative? If so, allow them to get involved and to provide their input. Do they lack training around the DEI issues? Provide training on unconscious bias, allyship, microaggressions, and other topics and encourage them to attend.

Employees should be able to grow on their DEI journey, no matter where they start.

2. Is this an important stakeholder?

Lisa Beth, Lentini Walker, and Stef Tschida, authors of the book *Raise Your Game, Not Your Voice,* provide an excellent definition for a "stakeholder" in compliance. For our purposes, the DEI-adapted definition of a stakeholder is someone who is interested in DEI and is impacted by and cares about how DEI at your company turns out. They typically exert influence to help or hurt your program, have responsibility for creating change in your organization, or stand to either benefit from or lose something due to your work, among other considerations. Lisa, Beth, and Stef propose several strategies for dealing with a skeptic in compliance, and these also work for skeptics of DEI:

- Determine if this stakeholder represents passive opposition or is more inclined to nefarious resistance.
- Find allies who may be able to influence and sway the opinions in this group.
- Ask questions to find out why there is low support.
- Determine if you are responsible for any of the lack of support and work to remediate or balance any of the erosion of support.
- Be clear about your hopes for the future.
- If you have to go around them, make sure you are transparent in your actions and maintain as much of the relationship as possible.
- Let it go it there is no way you can convert or neutralize. You can't win them all. Don't give up, but be realistic about how much time and effort you expend.

If the skeptic is a stakeholder who is high in the organization's ranks, you will need to recruit an ally and someone at their level or higher that they respect to help sway their opinions. Remember that your organizational leaders should be bought in and committed to DEI work before you embark on your strategy, so you should have plenty of allies that you can go to.

3. How is this employee impacting others?

These are difficult situations, and you have to stay mindful of the impact that this employee may have on the initiative and on other employees and whether the employee is violating the company's professed DEI values by their words and actions. It's worth repeating that having contrary opinions on DEI topics should be an excellent organizational and individual development opportunity. If the employee's skepticism becomes obstructive to the participation or feeling of safety for other employees, or it becomes detrimental to the company's DEI goals (which should also be tied to the company's business goals), it may be time to determine whether company policies are being violated. You can work with the employee's manager and HR to discuss the impact of their behavior on the organization — and if they're violating policies, work on an improvement plan to support their growth and improvement. More on that below.

4. Is the employee violating company policies?

Suppose this employee doesn't have an interest in growing their understanding and improving their behavior to align with the company's goals and policies and is indeed violating company policies through their behavior. In that case, unfortunately, you may need to consider separation. Review your Code of Conduct, Policy on anti-discrimination, anti-harassment, or DEI policies for guidance. Particular tact will be necessary here to mitigate the likelihood of them spreading rancor on their way out. Consult with your employment lawyer and your HR team to ensure that you are mitigating risk as you do this, and that you are following lawful separation procedures.

5. What can you take away from this experience?

This provides an excellent opportunity to revisit your DEI program to ensure that you have solid avenues for employees to give feedback and get involved. Also, review company policies to clear up ambiguity that exists around employee conduct. Revisit the Creating your DEI Strategy – Preparing to Build your DEI Strategy Checklist to ensure that you engage the right stakeholders and bring the skeptics along on the journey.

Checklist: Preparing Human Capital Management Disclosure

By TheCorporateCounsel.net

Item 101 of Regulation S-K requires companies to describe their business and that of their subsidiaries. To the extent material to an understanding of the company's business taken as a whole, Item 101(c) requires a description, and disclosure, of the company's human capital resources, including the company's number of employees. Item 101(c) also requires disclosure of any human capital measures or objectives that the company focuses on in managing the business—such as measures or objectives that address the development, recruitment and retention of employees. For human capital resources disclosure that's material to a particular segment, the company should identify the segment in its disclosures.

1. Human Capital Management Disclosure Topics & Metrics

– Disclose Number of Employees

Item 101(c) requires companies disclose the number of its employees. Investors use this metric as one way to assess the size and scale of a company's operations as well as how the company changes over time.

– Possible Disclosure Topics

In a memo following the SEC's adoption of human capital resources disclosure requirements, Compensia outlined the following broad categories of human capital resources disclosure for companies to consider – each company will need to evaluate its own particular circumstances to identify its human capital resources and determine their materiality to an understanding of its business:

- Workforce governance
    - Board or committee oversight of human capital resources
    - Role of chief human resources officer
    - Employee engagement

- Workforce composition
    - Talent acquisition and recruiting
    - Diversity and inclusion
    - Experience and education of workforce

- Workforce stability
    - Turnover (voluntary and involuntary)
    - Internal promotion initiatives
    - Employee satisfaction surveys

- Workforce skills and development
    - Educational opportunities
    - Formal and on-the-job training
    - Employee recognition programs

- Workforce culture
    - Work-life initiatives
    - Employee health, safety and well-being programs
    - Employee/manager feedback mechanisms

- Workforce compensation
    - Pay elements
    - Employee incentives and benefits
    - Pay equity

- Risk management
    - Ethics and compliance
    - Incentive risk management policies
    - Succession planning for key positions
    - Legal or regulatory proceedings related to employee management

– <u>Disclose Human Capital Measures Material to Understanding Company's Business</u>

Measures and objectives disclosed by companies will vary from one company to another based on the nature of a company's business and workforce. These could be things like:

- The number of part-time employees, independent contractors, seasonal workers and/or contingent workers

- Employee turnover rates, voluntary and involuntary

- Internal rates of hiring and promotion

- Opportunities for emerging talent in the organization
- Workforce diversity data
- Workforce compensation, pay equity
- Cultural initiatives to improve retention
- Workforce health & safety
- Continuing education and training, such as number of days or hours per year per employee
- Employee engagement scores

2. Drafting Considerations

– Don't Reinvent the Wheel

The human capital resource disclosure requirement, although new with the SEC's 2020 amendments to Regulation S-K, wasn't really all that new to companies. That's because many companies already track the type of information that should be disclosed. Some companies already disclose the information as part of a ESG or sustainability report, or other reports such as diversity and inclusion reports that are available on company websites.

– Consider Disclosing Information in Proxy Statement Too

Item 101(c) requires disclosure of human capital resources in a company's Form 10-K although we believe that many companies will include disclosure in both the Form 10-K and the proxy statement.

– Human Capital Resources Disclosure Should be Tailored

Each company's disclosure must be tailored to its unique business, workforce, and facts and circumstances. The SEC adopted a principles-based disclosure framework for human capital management recognizing that exact human capital measures and objectives may evolve over time and may depend, and vary significantly, based on factors such as a company's industry, the various regions or jurisdictions in which a company operates, the general company strategy, including whether and to the extent a company is vertically integrated and other matters that affect human capital resources such as national or global health matters.

- Metrics Should Be Consistently Calculated

  When the human capital disclosure requirements were adopted, SEC Chair Jay Clayton urged companies to provide meaningful qualitative—and quantitative—disclosure. In addition, he expressed an expectation that companies maintain metric definitions constant from period to period—or disclose prominently the changes to metrics or the definitions of metrics.

- Determining Materiality & Accuracy of Human Capital Management Information

  When drafting human capital resources disclosure, you should remember to consider where human capital information is disclosed outside of SEC filings to ensure consistency with that disclosure. It's important confirm disclosures with unit leaders and senior management and to coordinate closely with HR to ensure that the Item 101(c) disclosure aligns with how the company manages talent and evaluates human capital matters. Factors that would indicate that a measure is material to running the business and should be disclosed would include being part of incentive agreements or programs or being reported to the board.

- Human Capital Disclosure Rule Doesn't Require Adoption of Metrics

  The SEC's "human capital" rules are principles-based. They don't require companies to adopt particular measures—or any measures at all—to manage their business. What the SEC rules require is disclosure about existing human capital measures or objectives that the company focuses on in managing the business and that are material to an understanding of the business taken as a whole. Given that human capital is typically a focus of management and a driver of performance, most companies do employ some measures in this area.

3. Internal Controls

When preparing human capital resources disclosure, it's important to ensure the company has disclosure controls in place, particularly around any quantifiable metrics that may be disclosed. Companies should also apply disclosure controls & procedures to data that they intend to measure and disclose to show progress in future periods. Companies should be cautious in disclosing specific metrics until they've established robust procedures to ensure the information is materially accurate, since it's better to wait to include information than to make inaccurate disclosure in the Form 10-K or elsewhere. We expect companies to gradually expand their human resource capital disclosure to cover additional topics and metrics as they develop adequate disclosure controls & procedures and shareholder expectations evolve.

For more information, see our "Human Capital Management" Practice Area on TheCorporateCounsel.net, along with our "Business Disclosure Handbook" – posted in our "Business Disclosure" Practice Area on TheCorporateCounsel.net.

<u>Checklist: Creating Your DEI Strategy: Implementation & Tracking</u>

PracticalESG.com

You've put pen to paper, and mapped out your company's DEI strategic plan. You are ready to initiate the plan. Follow these steps for effective strategy implementation and tracking your progress.

Step 1: Determine your tracking tools and review cadence

1. Determine the aspects you intend to track. Not all data will be relevant to your DEI goals. For instance, if your goal is to increase representation and equity of the women in your organization, begin collecting data on the gender recruitment and retention demographics at all levels of the organization and assess the pay and promotion data to identify the gaps.

2. Once you identify the relevant data you will need to track, review your capability to track and assemble the necessary reports. Invest in the required resources to track the recruitment and retention activity. If you are interested in analyzing the employee sentiment and engagement around DEI, now is the time to identify and include relevant questions in the company's employee engagement surveys. If you do not have the tools available internally to track the necessary data, research and select a vendor to provide that insight.

3. Determine how frequently you will track your data. Will you assess the data weekly, monthly, or quarterly? You must review the data frequently enough to use it to make meaningful decisions, but with sufficient time to complete operational cycles, so that the reports have substantial content.

4. Present diversity data in a simple, salient, and comparable manner so you can evaluate your progress over time.

5. Consolidate your data into a report, scorecard, or dashboard — or incorporate it into the company reporting process.

Step 3: Create Accountability

1. Assign the metrics and the task of reviewing the reports to a person. Consider who will lead the data reporting: the HR, D&I, or the people analytics teams? Determine when the executive leadership will review the reports and the way they will use these reports.

2. Decide the cadence for reviewing reports and the process for retrospectives of programs and projects.

3. Discuss the course of action if the reports reflect slow or no progress.

4. Consider the level of transparency you will provide on the data and commitments. Determine the portion of the report you will communicate internally and externally, the manner in which you intend to do so, and how that impacts the level of internal controls that you need to implement in order to ensure that the data is accurate.

5. Identify how the budget will be managed on a daily basis.

Step 4: Receive ongoing feedback

1. Establish feedback loops by utilizing employee feedback to improve the strategy. Provide ample opportunities to candidates, employees, investors, and customers to provide feedback along the way. Relay surveys to the job candidates about their application and the interview process. Invite people to meetings to brainstorm on specific issues and send out brief questionnaires after training sessions. Establishing feedback loops ensures that the strategy remains inclusive and the employees are engaged.

2. Follow through on the feedback received and communicate when the strategy has been responsive and enhanced due to feedback.

Step 5: Determine your process for updating the strategy

1. Clarify the manner in which you will update the DEI strategy over time: Will one person be in possession of the document and update it? Will the changes require the approval of the DEI committee or the company's board of directors before their implementation?

Checklist: Creating Metrics for Tracking DEI Progress

By PracticalESG.com

When done right, the collection, analysis and disclosure of diversity data can be a powerful medium for progress. Take the following steps to create the metrics to track DEI progress.

1. **Identify the data relevant to your DEI goals.**

   While it can be tempting to try to start collecting data on a wide range of DEI issues, keep in mind that data collection and analysis take time and resources. These resources should be used strategically to maximize the impact of your efforts. To that end, deciding what data to collect depends largely on your organization's goals. Use the SMART goals you've already set for your organization as a starting point for deciding what data to gather. If you're unfamiliar with SMART goals, or just want a refresher, check out our checklist "How to Create SMART DEI Goals."

   Review your goals and identify both qualitative and quantitative data relevant to your SMART DEI goals. These data should be tied to your goals in such a way that you can determine your progress toward your goal based on the data you receive. Filter out the data that you don't need since not all the accumulated data will help you achieve your DEI goals. Check out Gartner's DEI Metrics Inventory to see which metrics can help you measure progress in each area of your business.

2. **Ground your data in relevant benchmarks.**

   One of the many positive aspects of data collection is that it allows you to compare your company's progress to the progress of others. This is done by comparing your data directly with peers or to an industry standard or framework. This practice — known as benchmarking — will help you identify where your company fits into the bigger picture when it comes to DEI progress. It also helps you to collect and analyze your data in a standard and uniform way.

   Research and opt for meaningful benchmarks by assessing the local labor markets, future labor markets and data that shows the positive impact of DEI on strategic goals such as customer growth and retention. Include the data of peer companies to which current and potential employees, customers and investors might be comparing you. Each company will have different needs and may opt to use different benchmark standards. One example of a benchmarking framework is the Global Diversity and Inclusion Benchmarks, but no one framework is one-size-fits-all and you should do research to discover the best framework for your company.

You may want to use your data to assess progress by department or even at a team level. If needed, balance individual, group-level and organization-level numbers. This will give you an idea of where progress is being made, and potential problem areas that will need to be addressed to reach your goals.

3. **Invest in the tools for ongoing data collection.**

There are a variety of DEI tools available to help collect data and options for data gathering exist for companies and budgets of all sizes. Annual employee engagement surveys and exit surveys are great data gathering tools that come at relatively low costs; however, for those looking to deepen their data infrastructure, there are a number of technologies and firms on the market designed to improve companies' DEI data infrastructure.

Determine the resources you will need for the ongoing data collection. Consider whether you possess the technology and tools required. If you don't have the resources to collect the metrics relevant to your DEI goals, research and collaborate with potential vendors to support and facilitate your process. *Note:* Work with a vendor that offers you the data you need. Ensure that they can customize the data to fulfill your specific requirements and discuss the best practices that you may have overlooked.

4. **Determine the review and analysis process.**

Once you've gathered your initial data, you'll need to compile and analyze it. You'll need to determine how frequently to review your data. For many goals, an annual review will not be sufficient and 30-, 60- or 90-day reviews may be more appropriate to ensure progress is being made. Assign ownership of DEI goals to specific persons, groups or entities. The individual or group responsible will ensure that the data is collected and be responsible for its review. Create a process for review by identifying which individual or group will review the document — and how frequently. Involve the CEO and the executive leadership in a meaningful way.

Make sure you **use** this data. Utilize the data to ask questions and take action, to clarify and enhance your DEI strategy, and to monitor progress over time. As your program progresses, you'll make progress in the areas you target, but you'll also find emerging areas that need attention. Utilize the data you find to further clarify and refine your DEI goals. As you begin to reach your goals in certain areas, look for where you want to grow your DEI program and let your data guide you to the areas that most require your attention.

5. **Create accountability by providing internal and external disclosure.**

Disclosure creates accountability for your company and builds credibility among your stakeholders and employees. Employees are much more likely to honestly report and discuss the problems they face if they feel that the company is genuinely interested in fixing them. Not all data you collect will be relevant for internal or external reporting. You'll need to determine which data you will disclose to your organization. Internal disclosures should demonstrate transparency and continuous progress on your goals.

Consider the form of your final reports and make the documents accessible and understandable to non-DEI professionals. Display the data clearly and saliently. In the final report, eliminate any complexity that may make the report obscure for someone outside of the analytics team to understand.

Determine the elements of the process you will disclose externally on the company website or in regulatory filings to demonstrate commitment to creating a more diverse workforce and inclusive workplace culture. Implement robust controls to ensure that externally reported data is accurate. Consider your data along with your goals as accountability anchors. (See example diversity reports HERE.)

6. **Commit to data integrity.**

Data collection, analysis and disclosure are about taking an honest look at the state of DEI within your company. Demonstrating progress is secondary to painting an accurate picture of your company's DEI status. To give your stakeholders accurate and useful information, collect the same data over time to show comparable progress over time.

Include all the relevant data. Even in moments of little or no progress, make sure the data is documented. You may utilize this information to learn and adjust the strategy to achieve the intended impact. Communicate this journey to your organization. Resist the urge to manipulate the data and make it appear more favorable. It is okay for the data to reveal that you have significant work to do. You're not alone.

Implement robust controls to ensure that the data you compile is accurate and that it is being collected and reported in a consistent manner over time. Involve your internal audit department to help validate key data points.