

# ***ACC NCR – Richmond***

## **Legal and Business Case for Diversity and Inclusion**

**Weldon H. Latham**  
**Chair, Corporate Diversity Counseling Group**  
**Jackson Lewis P.C.**

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# OVERVIEW

- I. Legal Case for Effective D&I Programs
- II. Risks of Poor D&I Performance Programs
- III. Business Case for Effective D&I Programs
- IV. Effective D&I = Competitive Advantage
- V. Conclusion

# I. Legal Case for Effective D&I Programs

- A. Legal Underpinnings: Title VII of Civil Rights Act of 1964, 42 U.S.C. Section 1981 (Civil Rights Act of 1866), Age Discrimination in Employment Act (“ADEA”), Americans with Disabilities Amendments Act (“ADAA”), Executive Order 11246 / OFCCP (Federal contractors), Dodd Frank Act (Section 342), Lilly Ledbetter Fair Pay Act of 2009, *et al.*
  
- B. Controlling Case Law: *United Steelworkers v. Weber*, 443 U.S. 193 (1979), *Johnson v. Transportation Agency*, 480 U.S. 616 (1986) & progeny.
  - 1. Require written voluntary affirmative action plan (“VAAP”) to take remedial race-conscious action.
  - 2. Must satisfy requirements: (a) “manifest imbalance,” (b) “do not unduly trammel rights” of non-protected class, and (c) temporary.
  - 3. Most programs use effective race and gender-neutral programs.

# I. Legal Case for Effective D&I Programs

- C. EEOC Voluntary Affirmative Action Guidelines: 29 CFR Part 1608 (Echo *Weber* 3-prong test).
  1. “Reasonable self-analysis.”
  2. “Reasonable basis.”
  3. “Reasonable action.”
  
- D. *Grutter v. Bollinger*, 539 U.S. 306 (2003): diversity is compelling state interest [in university admissions context]; *Petit v. City of Chicago*, 296 F.2d 524 (7<sup>th</sup> Cir. 2003) (diversity compelling state interest in government employment context).
  
- E. Federal / State regulatory and legislative focus on pay equity beginning with 2009 Lilly Ledbetter Act – emphasize importance (a) analyzing race / gender compensation disparities, and (b) remedying “gaps” before Federal / State agencies get involved.

## II. Risks of Poor D&I Performance Programs

### A. Plaintiffs' Attorneys Claim *Equal Access to "Justice"*: Major Public Corporate Discrimination Settlements

| Amount        | Basis     | Year | Industry                  |
|---------------|-----------|------|---------------------------|
| \$250 Million | Gender    | 2010 | Pharmaceuticals           |
| \$192 Million | Race      | 2002 | Beverages                 |
| \$185 Million | Pregnancy | 2014 | Retail – Automotive Parts |
| \$176 Million | Race      | 1996 | Energy                    |
| \$160 Million | Race      | 2002 | Insurance                 |
| \$160 Million | Race      | 2013 | Financial Services        |
| \$ 90 Million | Gender    | 2004 | Manufacturing-Aircraft    |
| \$ 80 Million | Race      | 2005 | Catering/Hospitality      |
| \$ 54 Million | Race      | 2007 | Package Delivery          |
| \$ 52 Million | Age       | 2017 | Manufacturing-Defense     |
| \$ 31 Million | Gender    | 2016 | Retail                    |

Source: *DiversityInc* (2006); "Morgan Stanley-Settles Gender Bias Case for \$46M," *Money* (Apr. 24, 2007); other media reports.

## II. Risks of Poor D&I Performance Programs

### B. Adverse Impact of *Public Diversity Crises*

*(Beyond Legal Liability)*

1. Damage to brand and corporate reputation.
2. Loss of customers (informal and formal boycotts).
3. Losing War for Talent (best & brightest come in many forms).
4. Major distraction to management / workforce.
5. Poor employee morale, productivity, retention.
6. Increased scrutiny: enforcement agencies / plaintiffs' attorneys.
7. Market capitalization drop (e.g., Texaco: \$1 Billion in one week).
8. Supervisory paralysis / fear of discipline / claims of retaliation.

# III. Business Case for Effective D&I Programs

## A. *Diverse U.S. Population:* Changing Demographics of the Workplace

1. Women in workforce - 47% - rising over next 10 years.
2. Hispanic Americans projected 20% of workforce by 2024.
3. African American representation increasing, with growing emphasis on senior management and Board.
4. Minorities will become majority of "American working class" (no college degree) by 2032.
5. No majority race or ethnic group in U.S. workforce by 2042.

*Sources:* "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); *Census.gov*.

# III. Business Case for Effective D&I Programs

## B. *Serving a Diverse Public: U.S. Buying Power*

1. Total Minority Buying Power: \$4.0 trillion (2018 est.)  
(**138% gain since 2000**).
2. Hispanic American Buying Power \$1.7 trillion; African American \$1.3 trillion; Asian American \$1.0 trillion.
3. LGBTQ Buying Power \$1.1 trillion (2017).
4. African American, Hispanic American, Asian American, LGBTQ Buying Power each exceeds GDP of *all but* 14 nations.
5. Women drive 70-80% of all consumer purchasing.

*Sources:* Multicultural Economy Report, Selig Center for Economic Growth, The University of Georgia (2017); see also Top 10 Things Everyone Should Know About Women Consumers, available at <https://girlpowermarketing.com/statistics-purchasing-power-women/> (Jan. 21, 2015); [America's LGBT 2015 Buying Power Estimated at \\$917 Billion](#)," Witeck Communications, Inc./The National Gay & Lesbian Chamber of Commerce press release, July 20, 2016.



# III. Business Case for Effective D&I Programs

## C. *Diversity Initiatives: Recent Trends Pushing D&I*

1. CEO Action for Diversity and Inclusion. 600+ CEOs.
2. “Best Company” Listings: (e.g., *Fortune*, *Working Mother*) – increasingly important for branding, recruitment, and reputation.
  - *DiversityInc Top 50 Applicants*. 1800 in 2018 v. 75 in 2001.
3. Empirical Research Demonstrates Value:

“Diversity is a competitive differentiator shifting market share toward more diverse companies.”

-- “Delivering Through Diversity,” McKinsey & Company, January 2018.

# IV. Effective D&I = Competitive Advantage

## Competitive Advantages of Effective *D&I Initiatives*

1. Avoid diversity crises: Class-action discrimination lawsuits, negative media coverage, social media dissemination, major reputational damage.
2. Increase sales and profitability.<sup>1</sup>
3. Enhance market penetration and customer retention.
4. Win “War for Talent:” expand access to best & brightest.
5. Enhance employee retention / reduce turnover.
6. Win in Global Marketplace: workforce better serves diverse: customers, employees, investors, regulators.

<sup>1</sup> Recent studies confirm the benefits of D&I. See, e.g., “Why Diverse Teams are Smarter,” *Harvard Business Review* (November 4, 2016); “Why Diversity Matters,” *McKinsey & Company* (February 2015).

# Conclusion

Employers increasingly seek to reflect growing diversity of customers, suppliers, shareholders, talent pool, and communities in which they do business.

D&I programs are consistent with the law, decisions, and regulations.

# Thank You

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