

JacksonLewis

2023 Edition: Top Legal Issues Arising in Diversity Initiatives

Association of Corporate Counsel (ACC) Baltimore
February 27, 2023

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Disclaimer

The presenters have prepared the materials contained in this presentation for the participants' reference and general information in connection with education seminars.

Attendees should consult with counsel before taking any actions that could affect their legal rights and should not consider these materials or discussions about these materials to be legal or other advice regarding any specific matter.

Welcome and Introduction

Donald E. English, Jr.
Office Managing Principal
Baltimore



Kimya S.P. Johnson
CDEIO and Principal
Philadelphia



Michael D. Thomas
Principal
Orange County



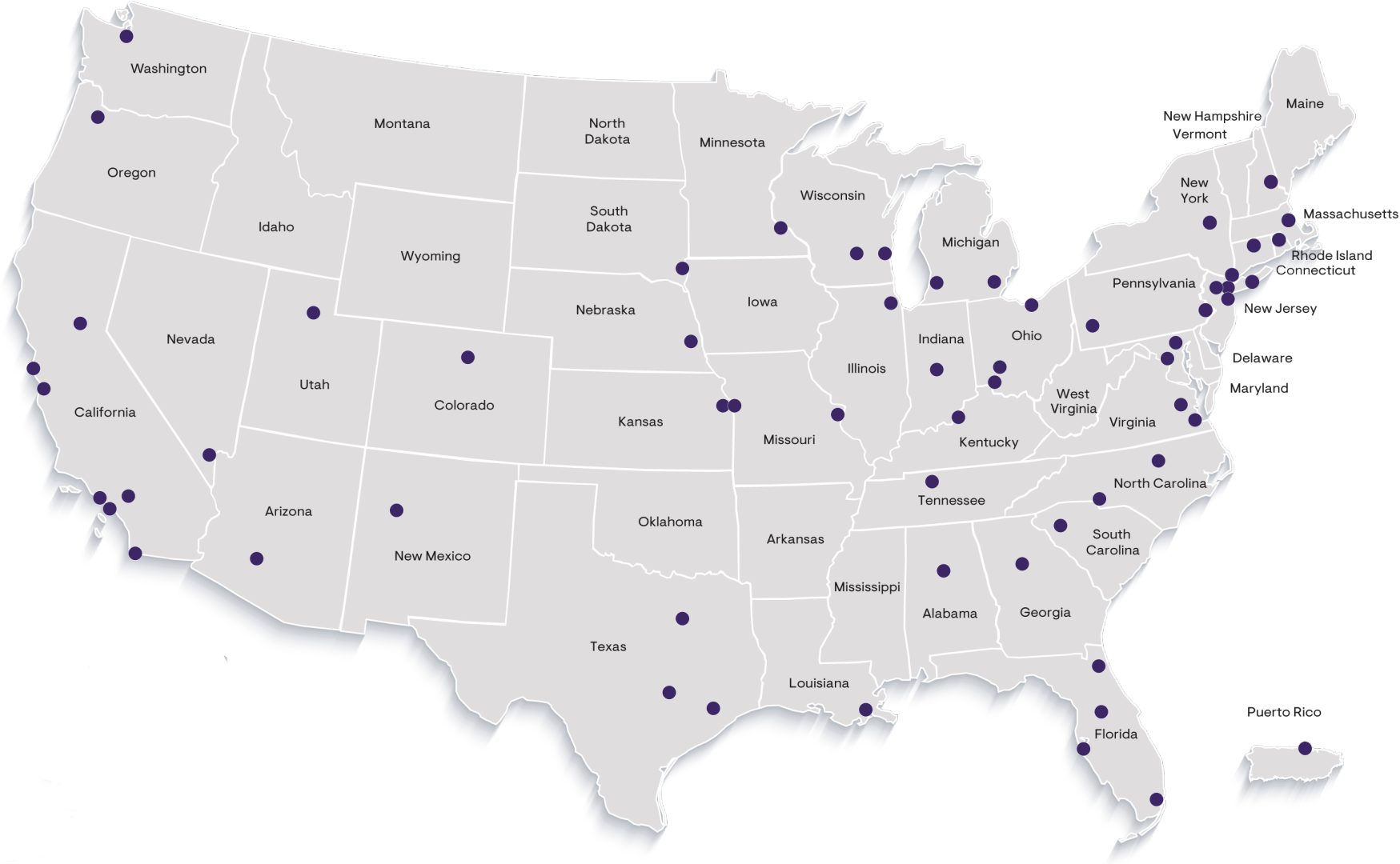
Strategically located to serve employers' needs

61

Locations Nationwide

950+

Attorneys



Jackson Lewis Baltimore Office



25% Black Attorneys



30% Attorneys of Color



57% Women (44% Women Principals)

Baltimore Labor Attorneys



Louis Cannon



Alana Glover



Chelsea Hartnett



**Cassandra
Horton**



**Laura Pierson-
Scheinberg**



**Stephen
Silvestri**



**Lindsay
Swinson**

Baltimore Trial & Appeals Attorneys



**Tonecia
Brothers-Sutton**



Donny English



Andrew Will



Lisa Settles

Baltimore Advice & Counsel Attorneys



Nawal Chaudry



Chuck Kresslein



Kathy McGinley



Larry Seegull

Baltimore Benefits Attorneys



**Joy Napier-
Joyce**



Kellie Thomas

Baltimore Wage & Hour Attorneys



Jed Charner



Emmett McGee

Baltimore AAP/Pay Equity/OFCCP Attorney



Alex Cranford

- Understanding DEI from Legal Lens
- DEI Legal & Compliance Issues
- DEI Litigation Trends
- DEI State Law Trends
- DEI in Regulation and Oversight
- Navigating Risk
- Discussion/Q&A



What is DEI from a Legal Lens?

- Sometimes referred to as “voluntary affirmative action”
- Purpose to increase the representation of underrepresented groups and reap the benefits of having a diverse workforce
- **Voluntary, self-directed, and generally not regulated by an external entity (with limited exceptions and movement)**

Potential DEI-Related Legal/Compliance Issues

- Discrimination Claims
- Federal Agency Shifts
- Demographic Shifts => “Underrepresented?”
- DEI Assessments (Data Analytics, Culture Audits & Surveys)
- Union-Management Concerns
- Attorney-Client Privilege/Work Product Doctrine
- Metrics, Goal-Setting and Measurement
- Data Privacy and Collection
- Policy Creation
- Training
- Industry-Specific Obligations
- Public vs. Private Organizational Distinctions

Litigation Challenging DEI Efforts

- Publicly-Announced Shareholder Lawsuits
 - Challenging DEI Efforts
 - Challenging Company Culture as “Toxic”
- “Reverse-Discrimination” Lawsuits
 - DEI Incentives, DEI Goals, DEI Programs
- Agency Challenges to DEI Goals
 - OFCCP
- Individuals (or Class Actions) Claiming “DEI Performativity”
 - Diverse Slates Challenged as “Sham Interviews”
 - Former DEI Officer Lawsuits

Recently- Enacted or Expanded State Laws

- Workplace Training
 - Florida's HB7 ("Stop Woke Act")
 - State Governors declaring illegal DEI initiatives
- Gender-Oriented Health Benefits
 - Restrictions in Insurance Coverage for Abortion
 - Restricted Access to Reproductive Health Services
 - Medical Care for Transgender People
- Identity Legislation
 - CROWN Acts
 - "Don't Say Gay" Bills
- Pay Transparency
- Data Privacy/Collection
- California Consumer Privacy Act (CCPA)
- Responses to employer DEI related actions and/or statements

Risk Mitigation Framework for Speaking Out

- Does the issue align with your company strategy (DEI Strategy, ESG Strategy or Social Purpose Strategy)?
- Can you make a difference in this area or have an impact?
- Are your actions aligned with the interest of internal (employees) and external stakeholders (investors, customers, applicants and communities where you work)?
 - Climate Survey/Pulse Survey.
- Why this framework?
 - Legal Risk Mitigation
 - Maximize ROI

Expanding DEI Oversight

- State Corporate Board Diversity Laws
 - California’s SB 826 (Women) and AB 979 (“Underrepresented”) – Challenged!
 - Movement in Other States (MD, IL, NY, WA + HI, MA, MI, NJ)
- NASDAQ Rules
 - SEC Approves Rule 5605(f) (Diverse Directors Representation)
 - Rule 5606(a) (Board Diversity Disclosure)
 - Challenged! (Pending in 5th Circuit)
- ESG Reporting
 - SEC’s Proposed Rules (May 2022)
 - VC Requirements

Navigating Risks

- Know the Legal Guardrails: Title VII and state anti-discrimination statutes.
- Identify the DEI related problem/issue you are trying to address.
- Identify your risk tolerance.
- Implementation matters
 - Do periodic testing of DEI measures to ensure they are implemented in a non-discriminatory way and consistent with your values and goals
 - DEI initiatives that generally raise no discrimination concerns.
 - Seeking to expand pool of applicants
 - Allowing diverse groups to come together to identify issues of concern
 - Identifying and removing unintended barriers
 - Promoting outward-facing initiatives of diverse groups-investing in a pipeline
- Care must be taken to avoid actions that can raise discrimination issues
 - Protected category-based employment decisions
 - Establishing quotas where no lawful obligations exist
- Care must also be taken to manage intersection of DEI initiatives and other employment actions that occur in the workplace such as hiring, promotions etc. (diverse slates).
- Don't forget to focus on inclusion-look beyond the numbers

Discussion

April 25, 2023

Save the Date!

The Workplace Law Landscape:

Top Issues Employers Need to Know Now

Tuesday, April 25, 2023

Four Seasons Baltimore

Agenda:

Registration

1:00–1:30 p.m.

Program

1:30–5:00 p.m.

Reception

5:00–6:00 p.m.

Topics

- 30-Minute Speed Round
 - Top Five Maryland Developments
 - ERISA/Benefits
 - Litigation Trends and Restrictive Covenants
 - Arbitration Agreements and Class Waivers
 - Wage and Hour
 - Labor Update
- Controlling the Culture Shift: How to Thrive Amid Challenges in the Hybrid Workplace
- Handbooks: What You Need to Have, Add or Change
- Internal Investigations in a Remote Workplace
- The DEI Push and Pull: Emerging “Anti-woke” Initiatives and Their Impact on DEI Programs
- Evolving Benefit Considerations for Employers following Dobbs v. Jackson Women’s Health
- Rise in Employee Activism: What a Revitalized Labor Movement Means for Union and Non-union Workplaces

Register [here](#).

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Thank you.

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