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## The Modern Partnership: In-house and Outside Counsel

By [Cathy Landman and Margo Wolf O'Donnell](#) | 2019-Jul-24

**A**s lawyers take on increasingly sophisticated business advisor roles in today's marketplace, the partnership between in-house and outside counsel has become more important than ever. And while every lawyer wants to provide the best possible service to the client, the practical steps for achieving outstanding service in this context are not always clear. Drawing on our shared experience, we have identified four key steps lawyers on both sides of this relationship can take to help them build their credibility and deliver solutions that advance their business.

### 1. Develop a commercial point of view, and base the legal strategy on business goals

So many skilled lawyers bring a nuanced understanding of the law to their work, but when it is time to apply that knowledge and counsel to the company's business strategy, they have difficulty bridging the divide between the worlds of law and business. The key to becoming a valued business advisor and in-house lawyer is

understanding not just the legal risks for the company on a given matter, but also the interplay between those risks and the company's larger business goals.

In a legal practice, that means having a conversation early on to ensure an understanding of the desired result. And that conversation needs to continue as a matter unfolds and new information comes to light.

An understanding of what the company is trying to achieve — where they are now and where they want to be — should drive the legal strategy and lead you to the legal remedy that furthers those goals. That may mean litigating or not, finding a resolution outside of litigation, or coming at the problem from another angle, such as a new approach to a deal or contractual language.

## 2. Educate each other and constantly reflect on what you are learning

It is crucial for both sides of this partnership to make time to educate each other — for the outside counsel to educate the client on the most pressing legal issues they may face, and for the in-house team to educate the outside counsel on how their business works. To facilitate communication that extends beyond just the discovery phase, develop a work process that includes shared folders, files, timelines, and project plans, and encourage both teams to check in regularly.

Designate time for reflection at important milestones throughout the project so that the in-house and outside teams may ask of themselves and each other what they have learned and how it might alter the goals or process going forward. Finally, make sure both teams are speaking the same language by using the right tools and a shared vocabulary.

While written word is the order within law firms, the business community tends to rely on tools like PowerPoint for communication. Sometimes translating a lengthy document into a more visual mode can facilitate understanding and even yield creative, new solutions to the problem.

Always be thinking not just about communication between the inside and outside teams, but also how to enable the in-house team to present ideas to their internal clients, the business leaders.

## 3. Build a shared roadmap that can evolve, and demonstrate good judgment

The in-house counsel is continuously juggling big priorities with the day to day responsibilities of the job. The best outside counselors help their clients anticipate what is on the horizon and determine whether the current approach and practices will put the company on the right trajectory.

Timeliness is an important factor in building a workable roadmap. Good business advisors understand how to foreshadow what is to come so business leaders have time to digest information and then decide. The partnership also depends on crystal clear communication and a willingness to use technological tools to improve efficiency.

Because skillful navigation involves looking both at your feet and the path ahead, teams must constantly be asking what's coming next, what's the precedent if we do X, and what are the potential costs and benefits? This is where creative problem solvers can demonstrate significant value. Nothing beats good judgment, a great

strategy, and a thoughtful plan to execute it.

## 4. Move beyond a transactional mindset and nurture the relationship

Good client service cannot be merely transactional, so outside counsel can truly demonstrate their worth by providing value outside the billable hours. That means making time to learn their client’s business, conduct on-site visits, and make themselves available as a resource. It’s also important for other members of the outside team beyond the billing partner — including associates and paralegals — to take ownership of the work.

The in-house counsel can create these connections by inviting everyone on the team to an on-site visit to learn the business and understand the goals of the project. This is an investment in the outside team, which is just an extension of the in-house team, and the work will be more efficient and effective if everyone works together as one entity. The complex legal matters businesses face today require that everyone is on board and invested in achieving the optimal outcome.

In-house and outside counsel see legal and business challenges through distinct lenses that are shaped by their respective training and approach to problems. We need both perspectives to create innovative legal strategies. By embracing the key steps we have outlined above, lawyers can build a thriving, long-lasting inside-outside partnership that yields creative solutions for the company and its outside partners.

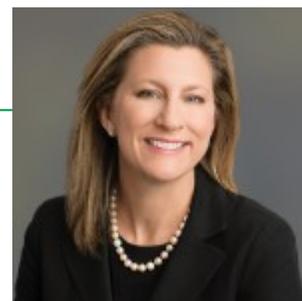
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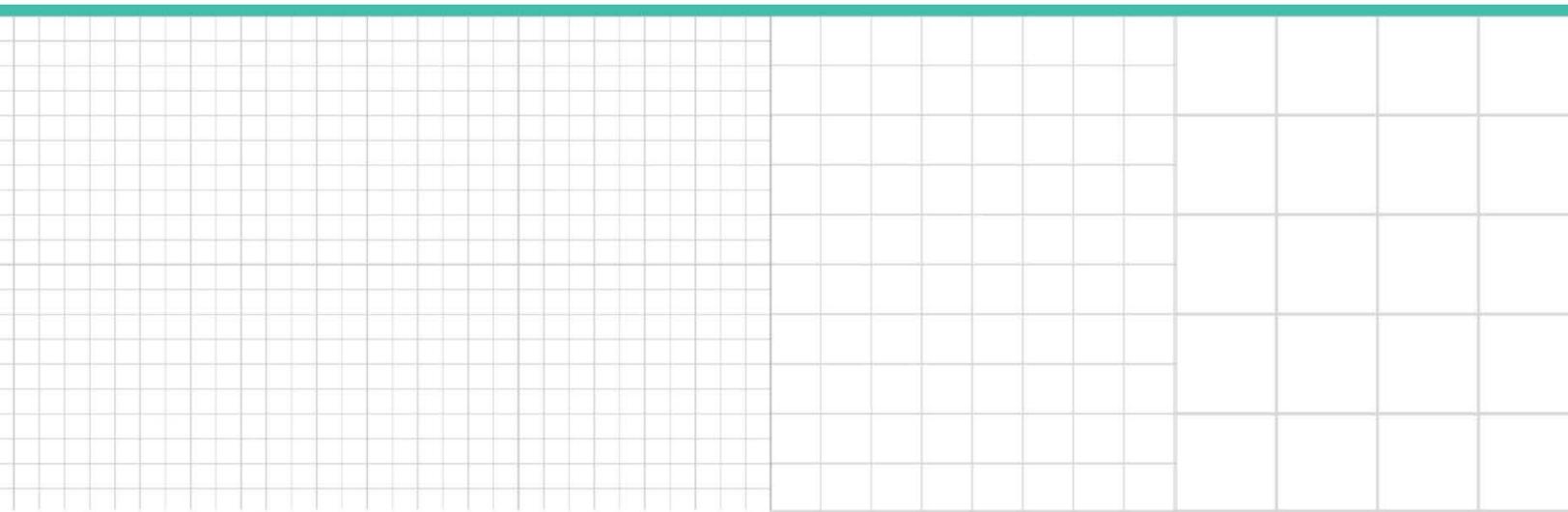
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**What Employers Need to Know about Rapidly Changing Employment Laws As Employees Return to Work During the COVID-19 Pandemic**

*Margo Wolf O'Donnell, Benesch*

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# What Employers Need to Know about Rapidly Changing Employment Laws As Employees Return to Work During the COVID-19 Pandemic

**Editor's Note:** The joint and several liability clause identifies the parties that are jointly and severally liable for obligations under the agreement. The term is also frequently incorporated into other clauses and may appear anywhere in an agreement.

Contributed by *Margo Wolf O'Donnell, Benesch*

After shut-downs due to the COVID-19 pandemic, many businesses around the country are now in the process of reopening their doors and requiring that employees return to the physical workplace. Because COVID-19 cases continue to surge in some areas and many schools are starting the year with remote learning, it is critical for employers to understand the maze of federal and state laws that apply to their workforce.

## Families First Coronavirus Response Act

The [Families First Coronavirus Response Act](#) was signed into law on March 18, 2020 and will remain in effect until December 31, 2020. The FFCRA applies to employers with less than 500 employees as of the date that any eligible employee requests a leave under the Act. Temporary employees who are jointly employed are included in that number, but independent contractors are not. The FFCRA may apply to 1099 employees in certain situations when there is a joint employer relationship as defined under the law.

The FFCRA includes the Emergency Paid Sick Leave Act, which allows for paid sick leave of two weeks (up to 80 hours) as of the first day of employment for employees who cannot work or telework. EPSLA sick leave may be taken at full pay, up to \$511 per day or \$5,110 in aggregate if the employee is subject to a federal, state, or local government quarantine or isolation order relating to COVID-19 or is experiencing COVID-19 symptoms and seeking a medical diagnosis. EPSLA sick leave may be taken at 2/3 pay for employees who need to take care of individuals subject to a quarantine or a child whose school is closed or if a child care provider is unavailable.

FFCRA also includes the Emergency Family and Medical Leave Expansion Act for employees who have worked for an employer for at least 30 days. The EFMLEA provides for an additional 10 weeks of paid family leave at 2/3 pay for employees who are unable to work due to a bona fide need to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

Employers may receive dollar-for-dollar reimbursement through tax credits for all qualifying wages they pay to employees under the FFCRA and amounts paid or incurred to maintain health insurance coverage for employees on leave.

The Department of Labor issued rules in connection with the FFCRA. On August 3, 2020, the United States District Court for the Southern District of New York struck down four Department of Labor regulations pertaining to the FFCRA, including: (1) the requirement that in order for employees to be eligible for leave, the employer must have work available for them; (2) the broad definition of "health care providers" who may be excluded from the FFCRA; (3) the requirement that employers must approve intermittent leave; and (4) the requirement that employees must provide employers with documentation specifying the reason for the leave and the duration. *State of New York v. United States Dept. of Labor*, Case No. 20-CV-3020 (S.D.N.Y. Aug. 3, 2020). In reaching its holding, the Court did not specify whether its decision should apply on a nationwide basis. The DOL's next steps will likely clarify the applicability of this ruling.

## EEOC Pandemic Guidelines

In addition to providing FFCRA benefits, if applicable, employers must also follow the newest guidelines put forth by the U.S. Equal Employment Opportunity Commission in connection with the Americans with Disabilities Act.

During the pandemic, employers may send employees home if they display influenza-like symptoms, such as fever, chills, cough, shortness of breath, or a sore throat. Employers may ask employees who report feeling ill at work, or who call in sick, questions about their symptoms to determine if they have or may have COVID-19.

Employers may take an employee's temperature to determine whether he or she has a fever but must keep confidential any collected medical information about fevers or other symptoms.

And, employers may ask employees about their exposure to COVID-19 during travel. According to the EEOC guidelines, employers may follow the advice of the CDC and state/local public health authorities about information required to permit their employees' return to the workplace after visiting a specific location, whether for business or personal reasons.

## **Furloughs and Temporary Layoffs**

During the pandemic, employers have used furloughs and temporary layoffs, mandatory time off from work without pay, as a means to control costs. During a furlough, the employer-employee relationship continues, and employees generally remain on the business' payroll roster and retain their access to benefits. However, employers must inform employees that no work is to be performed during the furlough period, including answering emails or work calls. This is because under state and federal law hourly employees must be paid for hours worked; employees who are exempt from wage and hour laws typically must be paid on a "salary basis," meaning that they must be paid a full salary for any week in which they perform any work. If these employees decide to perform even one minute of work during any week, the employer could be obligated to pay the entire salary of that employee for that week.

A permanent layoff is termination of employment, without specific right to be recalled by the employer. In this scenario, employee benefits end, and the termination usually triggers payout requirements under state wage laws.

## **WARN Act**

Employers considering downsizing during the pandemic need to have an understanding of the federal Worker Adjustment and Retraining Notification Act. The Act, which was enacted in 1988, applies to businesses with 100 or more employees. WARN generally requires covered employers to provide 60 days' advance written notice to affected employees of a "plant closing" or "mass layoff."

Mass layoffs are defined under WARN as involving at least 50 employees at a single site during a 90-day period.

Several states, including California, Illinois, and New York, have instituted their own "mini-WARN" acts, which specify their own notice periods. Employers in states with "mini-WARN" acts must comply with both the federal and state acts.

## **Reduction in Hours/Compensation**

Employers generally can change the work hours and schedules of hourly, nonexempt employee hours worked as needed during the pandemic. However, some state and local "show up to work" and/or predictive scheduling laws might apply limitations to what can be changed or require a certain amount of notice to be given. State and local laws also might require notice for changes in hourly compensation for exempt workers and/or the salaried compensation of exempt employees.

## **Sick Leave Provided Under State or Local Law**

Paid sick leave policies vary by state and, sometimes, even by cities or counties within states. In Illinois, for example, the Chicago Paid Sick Leave Ordinance and the Cook County Earned Sick Leave Ordinance require employers in those localities to provide eligible employees with at least one hour of paid sick leave for every 40 hours worked, subject to other requirements.

In general, in places where paid sick leave is mandated, employees may use paid sick leave for their own illnesses as well as those suffered by a qualifying family member.

Various states and localities have provided additional sick leave in response to COVID-19 so that employees may use paid sick leave if their workplace is closed by “order of a public official due to a public health emergency,” or if they are caretakers for a child whose school or place of care has been closed by such an order.

Employers should be aware of these new laws if they operate in states including Arizona, Colorado (note amendments to HELP Act), Connecticut, Maryland, as well as cities like Los Angeles, Seattle, and Washington, D.C.

## **Best Practices for Employers**

Human resources leaders and employers around the country face new and complex state and federal employment laws. Sound legal counsel and proactive updates to policies and procedures will help ensure compliance with these laws as employees return to work during the pendency of the COVID-19 pandemic.



# COVID-19 and the importance of corporate board diversity



## Margo's Master Plan

By [Margo Wolf O'Donnell](#)

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Research shows time and again that businesses with diverse boards of directors tend to be more profitable. In particular, it has been noted that including women and people of color as corporate directors positively impacts board decision-making and governance.

Women and people of color make contributions related to their expertise, of course, but they may also bring different experiences and perspectives to the table.

Lawmakers around the country have realized how critical board diversity is to businesses' overall performance and are beginning to mandate standards for representation on corporate boards.

Facing these requirements, even in the best of times, many businesses report that they struggle to find qualified women and people of color to serve on their boards. And now, with a cascade of layoffs hitting even upper-level employees, there could be even fewer highly visible female and minority candidates to choose from when adding new directors.

This issue is of particular urgency here in Illinois, as well as in California, New York and Maryland, where board diversity laws are already on the books. Michigan and New Jersey have proposed legislation in the works.

In California, SB 826 mandated female representation on boards by Dec. 31, 2019. As part of the law, the required number of female board members is being increased incrementally. By Dec. 31, 2021, boards of six or more directors must have at least three female directors; boards of five directors must have at least two female directors and boards of four or fewer directors must have at least one female director. The potential fines for not adhering to the new law start at \$100,000.

Meanwhile, Illinois has adopted a state law that requires reporting on board diversity. H.B. 3394 requires that by Jan. 1, 2021, any Illinois-headquartered, publicly listed corporation must include information regarding its directors in its annual report filed with the secretary of state.

The Illinois law goes further. Corporations must list data on specific qualifications for board members; the skills and experience considered; the self-identified gender of each director; the



available on the Illinois secretary of state's website.

So, while there are no monetary penalties associated with the Illinois law, there is a significant public relations risk for companies that fail to achieve at least some level of diversity on their boards.

And, whether or not a business' home state has yet put diversity requirements into law, the economic impact of including a diverse set of perspectives on a board is clear.

In a recent Benesch study, "[Corporate Governance 2020: Practices and Trends at Middle Market Public and Private Companies](#)," our research documented that in M&A deals, companies with 30% or more female representation on their boards tended to see better returns on their acquisitions than companies with fewer women on their boards.

In these challenging economic times, every bit of improved financial performance counts. So now, more than ever, a fuller and more comprehensive set viewpoints at the leadership level are needed to find a path forward.

Businesses will have to look to non-traditional sources, including the nonprofit and start-up worlds, to find the innovative leadership they need to take a seat at the table at their next board of directors meeting. Search and recruiting practices will likely have to change from the traditional networks and relationships of old to include newer, more inclusive sources of board candidates.

Fortunately, there are plenty of qualified women and people of color who could bring their insights and expertise to corporate boards. Now, more than ever, the onus is on corporate leadership to find them.

# WHY REDUCING IMPLICIT BIAS IS ESSENTIAL TO YOUR BUSINESS

BY MARGO WOLF O'DONNELL, ESQ. AND RICHARD D. KALSON, ESQ.



MARGO WOLF O'DONNELL

As thoroughly discussed in a recent two-part ADSC Wednesday Webinar presented by Benesch Law, that also included David Peitsch, Esq. and P.E., Keller's Chief Legal Officer, as well as its Ethics and Compliance Officer, implicit bias can impact every stage of the employment lifecycle, including recruitment, hiring, orientation, mentoring decisions, job assignments, promotions, performance reviews, marketing campaigns, discipline and termination. Implicit bias can be exercised at all levels of an organization, from the senior leadership to the most junior employee. All of your employees are at risk of perpetuating these biases.



RICK KALSON, ESQ.

This is a common example of how unconscious bias can lead to imperfect decisions in the workplace not based on facts, but based on preconceived views of general characteristics. Implicit bias does not necessarily stem from a person's intention. An employer may intend to make employment decisions based on facts and yet still perpetuate preconceived and inaccurate assumptions. This can have consequences on the performance of a business on several levels.

In the example above, when the employer rewards the younger employee with an important project—not because of that employee's actual skill set but based on an assumption—the employer risks a poor outcome if the younger employee lacks the needed skills. The employer also has lost out on the wisdom and experience the older employee may have brought to the project alongside the technical skills that employee may very well possess. The employer has now fostered a work environment in which stereotypes instead of merit impact employees' career paths. The perception or reality that the workplace does not evaluate based on ability or results can have a negative impact on morale and productivity.

Implicit bias affects our perception of others and of reality, and that impacts our decision-making about the particular aspects of people's work we pay most attention to, how actively and openly we listen to ideas, and how much we affirm work and skills. These small daily decisions shape the paths of employees' careers, enabling some to move forward while causing others to stall out. Most employers have no intention of creating this result.

In today's environment, employers are even more focused on ensuring racial and gender equities in the workplace. In order to ensure that your company maintains a diverse and inclusive workforce and positive morale, disrupting implicit bias is essential.

How do we reduce the impact of the inevitable bias that comes into our workplace? There are three top actions every company should take now:

First, examine and reevaluate the language used in recruiting materials, internal communications and company handbooks. Make sure these documents are current on the law and that they are as free as possible

*Continued on page 97*

Why is it important to disrupt these biases? Because they create barriers to opportunity for those who could benefit your business. Study after study has shown that diverse perspectives lead to more profitable strategies and better business. Also, government agencies and courts recognize the role of implicit bias in evaluating cases involving claims of discrimination based on protected characteristics such as age, race, religion, national origin, gender, and sexual orientation. The Equal Employment Opportunity Commission has defined illegal discrimination to include "unconscious stereotypes regarding the abilities, traits or performance of individuals belonging to certain racial groups." Some courts have held that discrimination can be shown through unconscious prejudice. In those instances, even good intentions do not matter.

We all have inherent biases; learning to recognize and control unintended outcomes of those biases is the challenge we face. For example, imagine that an employer has a high profile project that requires skills in technology. Faced with choosing between two employees, a Baby Boomer and a Gen Xer, the employer may opt for the younger worker, assuming his or her age makes them more likely to be comfortable with technology.

from bias. Have a lawyer review the policies in conjunction with the business people implementing the policies. Find out how these policies have been and are being actually implemented in the workplace.

Second, pay special attention to the performance review process. Are the assessments strictly limited to job duties and performance, or are they overly broad in ways that might reward some employees and penalize others based on personal characteristics that do not involve merit? Take steps to ensure that the reviews are complete and honest and tied to the particular job duties of the position involved. Pay particular attention to how the reviews affect promotions and raises and the general progression of employees at your business.

Third, invest in good training by an outside professional. Look for someone with experience and make sure the training is customized for your business. Live and interactive trainings are most effective and provide employees with the opportunity to ask questions and follow up when needed. Make sure that employees at every level of your business attend the training. Top level employees are important role models and set the tone for

your entire business. If they take implicit bias seriously, others will.

Making an effort to reduce bias ensures that employment decisions are more consistently made based on the reality of and needs of the workplace, thereby increasing productivity and profitability and reducing potential legal liability. Recognizing that implicit bias affects every employer is the first step in ensuring that this bias is not holding back your employees or your business. Reducing implicit bias now will help further and improve your workplace for the future. ▲

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June 30, 2020

## Illinois Employment Laws Taking Effect July 1, 2020

Client Bulletins

Authors: [Margo Wolf O'Donnell](#), [Jordan J. Call](#)

**The State of Illinois and the City of Chicago have enacted several employment laws that will take effect on July 1, 2020. Employers with employees in Illinois or Chicago should take note of the following laws in order to ensure immediate compliance.**

**Minimum Wage Increase:** The minimum wage in Illinois will increase to \$10 per hour on July 1, 2020. Illinois' minimum wage will increase by \$1 per hour on each January 1 date thereafter until reaching \$15 per hour on January 1, 2025. Employers with employees within the City of Chicago should also take note that the Chicago minimum wage will increase to \$14 per hour on July 1, 2020. In Cook County more broadly, the Cook County minimum wage will increase to \$13 per hour on July 1, 2020, unless the employees work in a municipality that has opted out of the Cook County minimum wage ordinance.

**Predictive Scheduling:** Chicago's Fair Workweek Ordinance goes into effect on July 1, 2020 and requires certain employers to provide predictive scheduling for certain employees. This ordinance requires covered employers to provide covered employees with notice of their work schedule at least ten days in advance. Schedule changes occurring after this ten-day period will require an employer to provide "predictability pay" to the impacted employee, which is an extra hour at their regular pay rate. Covered employees are also entitled to premium pay at 1.25 times their regular pay rate if they agree to work within 10 hours of a prior day's shift, and employers may not require employees to do so. Employers must also provide covered employees with a "good faith estimate" of their work schedule upon hire.

Employers in the following covered industries will be subject to the ordinance: (1) building services; (2) health care; (3) hotels; (4) manufacturing; (5) restaurants; (6) retail; and (7) warehouse services. The law will cover employers in these industries that have at least 100 employees globally, as long as such an employer has at least 50 "Covered Employees." These "Covered Employees" generally include those who earn less than \$26 per hour or \$50,000 annually, perform the majority of their work in the City of Chicago, and perform most of their work in one of the aforementioned covered industries.

The City of Chicago published its [Final Rules](#) for the Fair Workweek Ordinance, [Fair Workweek FAQs](#), and a [Notice](#) that must be posted in a conspicuous place. Employers should modify their policies and prepare a notice to include with covered employees' first paycheck in order to ensure compliance, and also take steps to post the required notice in the workplace.

**Changes to Illinois Human Rights Act:** On July 1, 2020, amendments to the Illinois Human Rights Act (IHRA) through the enactment of the Workplace Transparency Act (WTA) will apply the IHRA and WTA to any employer with one or more employees within Illinois during 20 or more calendar weeks in a calendar year. Until July 1, 2020, the IHRA only applies to employers with 15 or more employees.



Beginning July 1, 2020, employers will also be required to disclose annually (by each July 1) any adverse judgment or administrative ruling relating to unlawful harassment or discrimination against the employer in the preceding calendar year. The information must include the number of adverse judgments or administrative rulings and whether the actions dealt with sexual harassment, discrimination, or harassment on the basis of sex, race, national origin, religion, age, disability, military status, sexual orientation or gender identity. If the Department of Human Rights is investigating a charge filed under the IHRA and makes the request, an employer may be required to disclose information on settlements of any sexual harassment or unlawful discrimination claims. An employer who fails to make the necessary disclosures is subject to the imposition of civil penalties.

**Reminder to Conduct Mandatory Sexual Harassment Training:** Another amendment to the IHRA through the enactment of the WTA mandated that all employers with employees in Illinois provide sexual harassment training to their employees by December 31, 2020. While there are no changes related to this training requirement taking effect July 1, 2020, employers now have six months within which to provide this mandatory training for the 2020 calendar year. As such, any employer in Illinois that has not yet provided training to its Illinois employees should take steps now in order to provide this training by the end of the year.

**Employers should seek legal counsel to ensure compliance with current local, state and federal employment laws. For more information, please contact a member of Benesch's Labor & Employment Practice Group.**

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# IILP Review 2019-2020: The State of Diversity and Inclusion in the Legal Profession



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# Be Bold and Chart Your Own Course: Risk-Taking Across Settings in Law

**Margo Wolf O'Donnell**

**Partner and Co-Chair Labor & Employment Group, Benesch, Friedlander, Coplan & Aronoff LLP**

**Meredith Emerson Ritchie**

**General Counsel and Chief Ethics Officer of Alliant Credit Union**

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*It is essential that women attorneys learn to strategically take calculated risks in order to advance their careers. Here, O'Donnell and Ritchie encourage readers to strategize, be bold, and ask for what they want and tell them how to do just that.*

## I. Introduction<sup>1</sup>

As law firms and corporations continue to seek pathways to building gender diversity at all levels of their organizations, experts on diversity and inclusion point to the need for more women in leadership roles.<sup>2</sup> Organizations that achieve gender diversity in entry-level positions but continue to maintain predominantly male management are falling far short of the goal they claim to be seeking to achieve. But when women occupy positions of power, their very presence signals to younger women coming up that, with hard work and careful planning, it is possible for them to reach the same heights as any of their male counterparts. As the saying goes, “You have to see it in order to be it.” In addition to forging paths for others to follow, women in leadership positions influence the culture of an organization, from the way it serves its clients to the way colleagues interact to the formation of new workplace policies that impact the work lives of men and women alike.<sup>3</sup>

Without question, law firms and corporations need more women in leadership positions.<sup>4</sup> There are many ways to achieve this goal, and most of them depend on important structural changes that organizations must commit to making.<sup>5</sup> But at least one method is fully within the control of individual women: their willingness to take calculated risks at critical junctures in their careers. These risks that propel women to the next level in the legal profession can take on different forms at different stages in their career, but they all come down to a willingness to boldly seek out opportunities and overcome fear of making the ask, whether it be for a promotion or higher compensation.

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1. Many of the statements in this article are opinions and observations of the authors. Both authors have practiced in the legal profession for more than twenty-five years and have experienced and observed women and gender issues in the legal profession during this time both in-house and in law firms. Both authors also are experienced in leading women's initiatives both within and outside of the legal organizations where they have worked over the years and have served as mentors for many other women lawyers. Both authors also have taken on leadership roles in bar associations and other organizations with the mission of helping other women attorneys succeed. They have planned and led dozens of programs intended to help women succeed in the legal profession and both have won awards for their innovative programming on behalf of women attorneys.

2. See Marcus Noland, Tyler Moran & Barbara Kotschwar, *Is Gender Diversity Profitable? Evidence from a Global Survey* (Peterson Inst. for Int'l Econ., Working Paper No. 16-3, 2016), <https://piie.com/system/files/documents/wp16-3.pdf>.

3. *Id.*

4. *Id.*

5. See LAUREN STILLER RIKLEEN, *CLOSING THE GAP: A ROAD MAP FOR ACHIEVING GENDER PAY EQUITY IN LAW FIRM PARTNER COMPENSATION* (2013), [https://www.americanbar.org/content/dam/aba/administrative/women/closing\\_the\\_gap\\_authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/women/closing_the_gap_authcheckdam.pdf); see also DESTINY PEERY, *PROMOTION AND RETENTION OF WOMEN IN LAW FIRMS* (2018).

The paths and choices faced by women attorneys differ across organizations. Below, we examine the experience of two settings, a law firm and an in-house counsel's office, to zero in on specific opportunities for women to move beyond the safe path and propel their careers forward by taking strategic risks. Based on our years of practice, we have seen and experienced ourselves that being willing to take risks has a direct correlation on the ability of women to succeed in any setting in the legal profession.

## II. Risk-Taking in a Law Firm Setting

The primary demand on lawyers in a law firm setting is the need to build and maintain a book of business.<sup>6</sup> With women representing only nineteen percent of equity partners, according to the National Association of Women Lawyers, it is clear that gender disparity and institutional sexism make this task more difficult for women than men.<sup>7</sup> Younger associates may inherit clients from mentoring partners, who tend to be male and choose to mentor associates who remind them of themselves.<sup>8</sup> In addition, women lawyers may not have access to the broader formal and informal networks through which business flows.<sup>9</sup> In many cases, this means women must work harder to make connections with new clients without the benefit of these channels. It is easy to feel defeated by these circumstances, and we have observed many women lawyers choose to retreat to less ambitious positions or practice areas because putting themselves “out there” to go after new business feels like too much of a risk.

But this feeling that the deck is stacked can become a self-fulfilling prophecy, and it does not take into account something that is equally true: the world of business really is changing in terms of diversity. While law may be one of the last industries to see true gains in diversity, the rest of the business world—the source of clients seeking legal services—seems to be much further along in this evolution.<sup>10</sup> Access and connections still count for a lot, but clients are increasingly demanding a diversity of perspectives and experience in their lawyers.<sup>11</sup> Not to mention that more than ever these clients are women themselves.<sup>12</sup> Women in law firms can build a sustainable book of business and succeed when they take advantage of all available avenues to them to developing business—including their own formal and informal networks and seeking new credentials. Then women must choose every day to take risks, by looking for opportunities and picking up the phone or sending the email to a potential client. These small risks taken on a daily basis lead to increased connections with client, which then leads to a larger book of business—the key to law firm equity partnership and leadership positions.

Risk-taking operates on a larger scale at particular junctures in a woman's law firm career. In the early years, the goal is to learn as much as possible on the path to becoming an expert in a given practice area in order to provide clients with the best services. As mid-career life grows more complex, with responsibilities in and outside of work, many women seem to begin to curtail their ambition and, consciously or unconsciously, hew to the safe path.

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6. *Id.*

7. DESTINY PEERY, PROMOTION AND RETENTION OF WOMEN IN LAW FIRMS (2017), <http://www.legalexecutiveinstitute.com/wp-content/uploads/2018/05/130-PM-2017-NAWL-Survey-Report.pdf>.

8. *Id.*

9. *Id.*

10. Daniel S. Wittenberg, *Corporate Clients Demand More Diversity from Law Firms*, AM. BAR ASS'N BUS. OF LAW (Aug. 1, 2017), <https://www.americanbar.org/groups/litigation/publications/litigation-news/business-litigation/corporate-clients-demand-more-diversity-law-firms/>.

11. Marc Brodherson, Laura McGee & Mariana Pires dos Reis, *Women in Law Firms*, MCKINSEY & Co. (Oct. 2017), <https://www.mckinsey.com/~media/mckinsey/featured%20insights/gender%20equality/women%20in%20law%20firms/women-in-law-firms-final-103017.ashx>.

12. Cynthia Dow, *More Women Than Ever Before in General Counsel Role at Fortune 500 Companies*, LAW.COM (July 25, 2018), <https://www.law.com/corpocounsel/2018/07/25/more-women-than-ever-before-in-general-counsel-role-at-fortune-500-cos/?sreturn=20181023202603>.

However, from our experience, mid-career can also be the ideal time to begin a new chapter and tackle a challenging role. Years of working in the legal profession have built skills and wisdom younger lawyers cannot begin to imagine. Mid-career lawyers also have been around enough to see that setbacks happen to every lawyer and they are only temporary—the fear of failure no longer holds as much power as it used to. Seeking out a new opportunity by changing firms, taking on a leadership role, or altering focus in some other way could be an energizing move, both for the lawyer and for the lawyers' clients. But these kinds of experiences are only available to women lawyers willing to leave the safety of the status quo and take bold risks.

### III. Risk-Taking in an In-House Setting

While in-house lawyers do not face the same business-development pressure, they do have the constant need to prove their value to their internal customers within the organization. It might seem strange to advocate for the importance of risk-taking in a position that exists to minimize risk for the company, but forging a thriving career as an in-house counsel requires a woman to do just that. On a day-to-day basis, the counsel's office becomes the office of "no—where new projects or ventures get stopped in their tracks. But an in-house attorney is much more valuable to her organization when she can help colleagues find elegant solutions to the challenges new ventures pose. Taking calculated risks by using the law to find a solution puts a lawyer on the winning side of innovation and growth, which is good for the company and also for that lawyer's career.

Risk-taking also plays a role when it comes to advancement. Unlike a law firm, where all partners have the opportunity, at least in theory, to move up the ranks, there is only one general counsel spot in a corporation. Many women find themselves stuck in an assistant or associate general counsel role, unsure of how to position themselves for serious consideration for the top position.<sup>13</sup> An oft-cited statistic from a Hewlett-Packard internal report claims that men will apply for positions they feel about sixty percent qualified for, while women believe they must be one-hundred percent qualified.<sup>14</sup> Whether that is because women lack the confidence than men possess, or because they simply overemphasize on-paper qualifications at the expense of relationships or creative framing of their experience, the end result is that women tell themselves they are not ready for the next step when in fact they may be.

The truth is that no one will come knocking to deliver a promotion. Diligent preparation and quality work are not the only, or even the most important, factors in becoming visible and successful within an organization. Women must be bold.

But what does boldness look like in-house? It begins with an honest accounting of achievements and value to the corporation, as well consideration of feedback from trusted colleagues and mentors, to assess that they are ready to take a risk to move their career forward. The next phase requires strategic thinking. Women might seek out a group actively working toward grooming women for these top positions and learn as much as possible about how to advocate for themselves. And, again, as much as women must focus on skills and experience, they must also attend to strategic relationships, among peers and mentors, who will support their candidacy and get them closer to their goal. When not taking the risk is the biggest risk of all, it is time to leap.

### IV. The Crucial Risk that Law Firm and In-House Attorneys Must Take to Progress in Their Careers

Whether at law firms or in-house, women attorneys must face and overcome one specific risk: asking for what they want. We, the authors, received critical promotions to law firm partner and to general counsel positions when we saw that the timing was right and made the ask. We needed to

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13. *Id.*

14. Tara Sophia Mohr, *Why Women Don't Apply for Jobs Unless They are 100% Qualified*, HARVARD BUS. REVIEW (Aug. 15, 2014), <https://hbr.org/2014/08/why-women-dont-apply-for-jobs-unless-theyre-100-qualified>.

communicate that we felt ready for that promotion, and that we were confident of our entitlement to it. That is why it is especially important that women be clear and direct when articulating what they want. Otherwise, it is only too easy to be passed over for that important promotion that is essential to progress to the next level. We knew that if we asked and did not receive the requested promotion, it could have negatively affected the positions we had at the time. But we made the ask anyway, because we knew we deserved more in our careers than the status quo.

However, after taking that risk and receiving our promotions, we now face even more “risky” communications in our day-to-day work. As a law firm partner, it is imperative to make the ask for business when you know you or your firm can provide value. Likewise, as an in-house attorney, it is essential that your company understands the important role you are playing in the success of the business. This type of self-advocacy can feel uncomfortable, but with practice, it becomes easier, and is necessary to ensure continued success and attainment of leadership roles in a legal career.

## V. Impediments to Risk-Taking Are Also Opportunities for Growth

Whether they are in law firms or in-house settings, based on our experience, women seem to fear risk more than men, take setbacks more personally, and struggle to bounce back from them. Why? It is not just some ephemeral lack of confidence holding them back. Studies through Stanford’s Clayman Institute for Gender Research have shown that men tend to be judged more on their potential, while women are judged on their achievements, leading men to be seen as skilled while women are viewed as merely lucky, forced to prove themselves again and again.<sup>15</sup> Women also must walk a tightrope between respect and likability that men do not face. Finally, some evidence even shows that women’s failures are remembered by colleagues—probably due to the skilled/lucky dichotomy—longer than men’s.<sup>16</sup> As a result, we have observed many women consider their fear of failure before taking steps forward in their careers.

Individual women cannot change these biases. But they can begin to work smarter, not harder, and learn from what has worked for men. As a 2013 Harvard Business Review piece put it, women need to realize work is not school.<sup>17</sup> Instead of playing by the rules and trying to please the boss, women must figure out how to influence and challenge authority.<sup>18</sup> They must also embrace improvisation and rely on their instincts and experience to guide them. They must also recognize that performing well is not the best way to promote themselves. Instead they must perform well *and* campaign for their careers, playing office politics to their advantage, and become the kind of indispensable team members who advance.<sup>19</sup>

## VI. Conclusion

Individual women cannot shoulder the burden of achieving gender parity at all levels of the legal profession. Law firms and corporations must embrace policies and practices that tackle this problem from many angles, not just because it is a matter of fairness but because more diverse legal teams deliver better service to clients. But women can make a difference in their own careers by pledging to be active champions of their own work, seeking out opportunities they have earned, and, when the time is right, taking bold risks that move them forward. There will be rewards to this risk-taking for individual women, of course, but, perhaps even more significantly, over time the cumulative effect of all these individual choices might go some way to addressing some of the larger institutional and structural challenges we face. That will place more women in the position of being leaders and role models and challenging the perception that women are less focused on achievement and advancement than their male peers.

15. Adrienne Rose Johnson, *What Works for Women at Work*, STANFORD CLAYMAN INST. FOR GENDER RESEARCH (Feb. 3, 2014), <https://gender.stanford.edu/news-publications/gender-news/what-works-women-work>.

16. *Id.*

17. Whitney Johnson & Tara Mohr, *Women Need to Realize Work Isn’t School*, HARVARD BUS. REVIEW (Jan. 11, 2013), <https://hbr.org/2013/01/women-need-to-realize-work-isnt-schol>.

18. *Id.*

19. *Id.*