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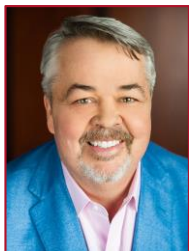


# **Practical Steps to Enhance DEI within Your Company**

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# Speakers



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# Agenda

**1** DEI: Foundational considerations

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**2** Increasing transparency in DEI goals

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**3** Tying DEI goals to compensation

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**4** Achieving pay equity

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**5** Recent trends in DEI

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# DEI: Foundational considerations



# Diversity, Equity & Inclusion

Diversity is all the ways in which we differ, e.g., race, socio-economic status, class, gender, or any other dimension that can be used to differentiate groups of people from one another.

Equity is the guarantee of fair treatment, access, opportunity, and advancement for all while striving to identify and eliminate barriers that have prevented the full participation of some groups.

Inclusion is the practice of diversity in action and is the commitment to ensure that the workplace is a place where differences are welcomed, different perspectives are valued, and the diversity of people is recognized and harnessed to create better outcomes.



# Why is DEI important in the workplace?



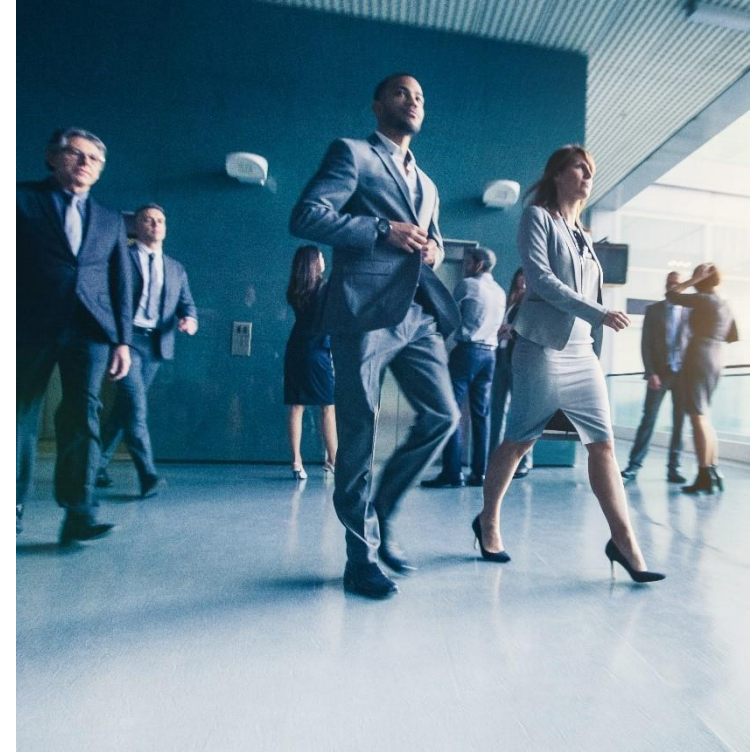
Encourages people to bring their “best selves” to the workplace, and increases employee retention, allowing the organization to tap into the talents employees from different backgrounds, perspectives, abilities and disabilities bring to the workplace



Allows for greater mix of opinions and points of view, allowing deeper inquiries/breakthroughs, a wider range of solutions to problems, and protects the organization from becoming too insular and out of touch



Companies that openly articulate DEI values and workplace tend to appeal to a wider customer/client base





# Why is DEI important in the workplace?

➤ Companies in the top quartile for gender diversity on executive teams are 25% more likely to have above-average profitability than companies in the fourth quartile (up from 21 percent in 2017 and 15 percent in 2014).

➤ In the case of ethnic and cultural diversity, top-quartile companies outperformed those in the fourth one by 36 percent in profitability, slightly up from 33 percent in 2017 and 35 percent in 2014. The likelihood of outperformance continues to be higher for diversity in ethnicity than for gender.

➤ There is a widening gap between companies that are I&D leaders and companies that have yet to embrace diversity.

-McKinsey & Company May 2020 report, *"Diversity Wins: How Inclusion Matters"*

# Core practice v. professional development



To successfully evolve into a workplace focused on DEI, the integration must be more than occasional professional development and training



DEI is a core practice

- Proactive educational initiatives
- Supported policies
- Day-to-day practices







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# Increasing transparency in DEI goals

# Setting diversity goals / benchmarks

## General considerations to keep top-of-mind



Avoid the use of actual quotas (i.e., mandating that "X" number of women or people of color are hired/promoted, for example).



Focus on goals that are realistic based on your organizational profile.



Ensure the metrics the company is using is consistent with, and will help in achieving, its diversity goals.



# Setting diversity goals / benchmarks

## General considerations to keep top-of-mind



Take a holistic approach that is in substantial part grounded in data and data analytics.

- Look at factors like rate of application in external and internal applicant data, rates of promotion, hiring-related data (including, potentially, census data), and data reflecting turnover rates.
- Analyze your particular data – both internally and, potentially, externally in the form of applicant flow and/or census data – in order to determine what goals may be realistic based on where things are currently.
- Set **realistic** goals based on your data analysis. There are adverse consequences if you set goals and don't meet them (because they were unrealistic to begin with).



When setting benchmarks, include some concept of timing to ensure that the numbers are realistic.



Review goals and benchmarks to confirm they are data-driven.



# Pros and cons of publishing diversity goals

## The pros



Any risks of publishing diversity goals should be balanced against the pros

- Potential positive impact on employee engagement
- Increased employee morale
- More effective recruiting
- Increased accountability in the organization
- Goodwill in the community and with clients/customers



# Pros and cons of publishing diversity goals

## The cons



To the extent you publish diversity goals, these documents may be used against you in litigation.

- This is true both in "traditional" discrimination cases and "reverse" discrimination cases.
- The use/misuse of company diversity materials is commonplace.



Ensure that any publicly announced diversity goals align with any governmental reporting obligations, to avoid subjecting the company to additional risk from a governmental investigation perspective.



Once a company starts publishing goals, there will be pressure to continue publishing such information externally, as well as scrutiny if the goals aren't achieved or if the goals are viewed as "insufficient."



Publishing goals may result in government contractors' objections to FOIA requests for EEO-1 data to be overruled.






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# Tying compensation to furthering DEI goals



# Tying compensation to DEI goals

Is it right for your company?

 Are the objectives of your company's DEI goals consistent with tying compensation to DEI goals?




 How can you do it in a nondiscriminatory manner?

 How do you manage and collect the data?



# Tying compensation to DEI goals

## Next steps

-  Determine what behavior will be rewarded
-  Determine how the behavior will be measured
-  Determine how the compensation will be provided



# Tying compensation to DEI goals



## Three common methods of tying compensation to DEI goals

- Reward managers for company-wide achievement of stated company goals
- More directly tie performance on specific areas of the company's stated philosophy to compensation
- Include performance supporting the company's DEI philosophy as a metric of performance overall

# Collecting and documenting diversity data

## Mitigate risks and pitfalls in documenting diversity metrics



Develop a cohesive strategy around privilege and confidentiality.

- If legal is involved/copied on the documents/emails, there is greater flexibility in terms of the content since those documents are likely protected by the attorney-client privilege (assuming the counsel is being engaged for purposes of providing legal advice).
- Ensure only very limited individuals at the company have access to the data.
- Collected employee information regarding race/class/gender or other protected categories should be stored outside of employee's personnel file



Determine what diversity information the company needs and whether it can be lawfully and successfully collected.

- Don't collect more than you need, and it's best to use anonymized data if possible.
- There are various issues associated with collecting race information outside of the US.
- Gender data can generally be collected in and outside of the US.
- There can also be an issue with having insufficient data (e.g., a company has the race of only 30% of its employees) and making decisions off of it.

# Collecting and documenting diversity data

## Mitigate risks and pitfalls in documenting diversity metrics



Ensure that conclusions are supported by data.

- If women hold a lower percentage of positions at higher levels in the Company, there may be an inference that they are "underrepresented" or "disfavored." However, unless you have actually analyzed your own data (both internally and potentially externally) to determine actual statistical underrepresentation, these statements may be misleading, and embedding them in diversity-related documents can create legal risk.



Avoid unnecessary characterizations of diversity-related data.

- Avoid discussing diversity data/metrics in a way that suggests the company has done something wrong (e.g., "we did not promote enough women this past cycle"), especially in documents not protected by attorney client privilege.
- Rather, when discussing such data, the emphasis should be on identifying opportunities for future improvement (e.g., "we should strive to increase our gender representation next year by...").



# Litigation “gotchas”

## Concerns when tying DEI to compensation






- **Manager concerns**
  - Managers may be more likely to engage in discriminatory behavior when making decisions if monetary incentive
  - Managers may treat DEI as a “check the box” exercise for monetary incentive
- **Danger of framing goals as “quotas”**
- **Meeting / not meeting aspirational goals may lead to claims of discrimination**
  - If goals are met, non-protected group argues the company prefers the protected group
  - If goals are not met, protected group argues the company doesn’t take DEI seriously or there are issues with how the protected group is treated



# Tying compensation to DEI goals

Communication is key

-  Ensure everyone understands what an aspirational goal is and isn't
-  Train managers to incorporate DEI goals in a non-discriminatory manner
-  Be sure to obtain buy-in from leadership so everyone understands the organization's commitment to DEI





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# Achieving pay equity

# Pay equity basics



## Equal Pay Act of 1963 (EPA)

- Men and women must be given equal pay for equal work in the same establishment.
- Jobs must be “substantially equal”
- Equal work=work performed under similar working conditions requiring equal measure of skill, effort, and responsibility

- **Various “employee friendly” state laws**



## Title VII

- Prohibits wage discrimination on the basis of sex, race, color, religion, national origin, and retaliation
- Has a more relaxed standard (no requirement to prove that job is “substantially equal” to higher-paid employee or requirement to work in the same establishment)
- Requires proof of discriminatory intent or challenge to facially-neutral policy (disparate impact)

# Pay equity basics

Equal Pay Act: “Substantially equal”

Measured by job content, not titles

- **Skill:** Measured by factors such as the experience, ability, education, and training required to perform the job.
- **Effort:** The amount of physical or mental exertion needed to perform the job.
- **Responsibility:** The degree of accountability required in performing the job.
- **Performed under similar working conditions:** Encompasses two factors: (1) physical surroundings like temperature, fumes, and ventilation; and (2) hazards.
- **Within the same establishment:** A distinct physical place of business rather than an entire business or enterprise consisting of several places of business.

# Pay equity basics

## Affirmative defenses under the EPA

- Seniority system
- Merit system
- Production-quota system, or
- Any other factor other than sex
  - includes job-related factors such as shift differentials, differences based on time of day worked, hours of work, lifting or moving heavy objects, and differences based on experience, training, or ability

# Pay equity basics

## Title VII: No comparator needed

- **No need to show “equal work for unequal pay”**
  - A female employee might be employed in a solitary role within a company but offer evidence proving that, had she been male, she would have been paid more. Examples:
    - An employer hires a woman for a unique position in the company, but then pays her less than it would have had she been male
    - An employer uses a transparently sex-biased system to determine wages
  - Not required to work in the same establishment as a male comparator
- **But must show discriminatory intent OR disparate impact from a facially neutral policy**



# Pay equity audits

## Key considerations and action items



The purpose and goals of the audit.



The breadth and scope of the audit.



The data collected and analyzed.



Timing of the audit.



After the audit.

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# Recent trends in DEI

# Recent trends in DEI



Focus on a multigenerational workforce



Support for gender inclusivity and expression



Impact of manager / leader unconscious bias in the workplace



Increased transparency in DEI goals



Supporting employees' mental health





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