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COMMENTARY



A Call to Action: Stay Calm and Carry On (Legally) in the Wake of Anti-DEI Directives



More than 40 labor and employment attorneys along with leaders of several organizations focused on diversity in the legal industry have issued a call to action for firms to remain steadfast in their diversity efforts in the wake of the U.S. Supreme Court's ruling ending affirmative action in universities.



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Diversity

By Caren Ulrich Stacy, Sandra Yamate and Leslie Davis | June 30, 2023 at 04:10 PM



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While the U.S. Supreme Court's decision to end race-conscious affirmative action in college admissions was not unexpected, it nonetheless appears to have given enlightened leaders in the legal and broader business community reason for pause, if not panic. It shouldn't.

To be sure, there will be some ripple effect transcending academia.

Legislation and executive orders at the state level present additional challenges to affirmative action and diversity, equity and inclusion. Some states have proposed or implemented measures to restrict or eliminate affirmative action in government hiring, college admissions and contracts. Texas and Florida are out front in these unfortunate efforts. As many as 11 other states are close behind. LGBTQ+ rights are also under considerable attack.

In the aftermath of these rulings and directives, legal and business leaders, fearing the unknown and skittish about risk, may contemplate rolling back some aspects of their initiatives that support an equitable, inclusive and diverse environment. Worse, they may choose to abandon them completely for fear of running afoul of new federal and state prohibitions.

That would be an unfortunate, ill-founded theoretical leap, endangering the collective good achieved by the movement to ensure that the diversity of our society is reflected in the diversity of our workforces and leaders. The reality is simple: the decision handed down by the Supreme Court, while regrettable, should have no legal bearing on public and private organizations with properly administered DEI efforts. These organizations are not breaking the law. They are, by and large, simply engaging in good talent acquisition, development and advancement practices to achieve what research has shown results in better outcomes for these organizations, their clients and their talent.

While the court's majority held sway, it must not hold hostage organizations committed to the ideal of promoting and integrating diverse perspectives. If anything, this decision is a clarion call to legal and business leaders not to backtrack but to double down on DEI, with an emphasis on equity and inclusion.

Advancing the Cause

Organizations, at minimum, should perform an "audit" of their DEI initiatives to ensure they have a compelling, evidence-based case for their effectiveness and potential. To the extent that gains in DEI can be empirically supported, arguments in courts of law and public opinion will be that much more persuasive. Should gaps remain in representation, hiring, pay, advancement opportunities and other key metrics, DEI initiatives should be amplified or modified accordingly.

Salesforce Inc., upon discovering that its women employees were being paid less than men for the same work, famously bridged this gap and made inroads in other areas of gender diversity. A McKinsey & Co. study showed that companies with more gender diversity on their executive teams were 21% more likely to outperform less diverse teams on profitability. DEI is not as much about "optics" as it is about good business sense. This is a central recurring theme that needs to be reinforced in the halls of government and throughout the broader business and academic communities.

In addition, talent structures conceived decades ago for different types of workforces and workplaces bear reassessment, and in many instances wholesale modification. While work paradigms fueled by the COVID-19 pandemic have become more hybridized, human resource and talent practices have not always kept pace. Over time, workplace imbalances and inequities have increased and access to pathways for underrepresented groups have become tortuous.

Law firms and legal departments should strongly consider the implementation of any or all of the following talent practices that allow for more inclusive decision-making:

- Introducing "identity redacted" recruitment, which includes the removal of personal identifiable information, as defined by the U.S. Department of Labor, such as names, gender, and race from resumes and applications during initial screening processes.
- Expanding recruitment sources, including broadening channels through which candidates are sourced; partnering with organizations and academic institutions that focus on underrepresented groups and using online platforms promoting diversity are key.
- Standardizing interview questions and evaluative criteria to minimize subjective judgments that can be influenced by bias and ensures a fair assessment of all candidates.
- Establishing specific diversity and inclusion goals that are clearly communicated to all talent and leaders within the organization.
- Increasing diversity in decision-making by ensuring that individuals from diverse backgrounds are involved in all talent decisions, including hiring, compensation, advancement and layoffs.
- Training decision-makers to be aware of and recognize their own biases and the biases of others.
- Using standardized competency-based feedback by empirically measuring an individual's performance against predefined competencies and evaluative criteria, enabling them to understand their strengths, areas for development and opportunities for growth.
- Defining inclusive leadership attributes as part of the formal performance review process and rewarding individuals who successfully demonstrate those skills.

Pathways to Diversity

If an organization's leadership is not reflective of its workforce or surrounding community, related policies and processes should be reassessed and modified to allow equal access to top roles. Advancement criteria should be codified and circulated. Progress should be celebrated. Legacy leadership should be receptive to judicious turnover, supporting their replacements and, when appropriate, serving as valued mentors.

Employing tools such as the Mansfield Rule that require law firms and legal departments to implement these types of processes has shown to boost and sustain diversity in leadership. Mansfield's methods are grounded in behavioral science and have proved successful in shifting cultures and mindsets with respect to providing equal access and facilitating advancement and promotion to leadership. Mansfield early adopter law firms have increased the diversity of their leadership at nearly double the rate of other firms in the last five years.

And within the leadership ranks and beyond, find ways to have the difficult but important conversations about why our organizations are not already more diverse and inclusive. Looking back helps us look forward. Institute for Inclusion in the Legal Profession serves as a catalyst and safe place for these conversations.

To support diverse, high-potential talent, law firms and legal departments might consider the Leadership Council on Legal Diversity Pathfinder Program. This structured opportunity is designed to accelerate career advancement, providing underrepresented lawyers with the education and networking opportunities they might otherwise lack. The National Association of Minority and Women Owned Law Firms is another resource for corporate leaders serious about diversity to find quality lawyers and firms that offer diverse teams as well as deep expertise.

It's worth noting that the surge in governmental and societal antagonism toward race-conscious affirmative action and DEI coincides with the shift to the "hybridized" workplace. Serving as a mentor, providing feedback, allocating workloads fairly, and helping people realize performance expectations can be challenging in a hybrid environment, where team members are distributed across locations and work arrangements. Some struggle with bridging virtual divides. Many, particularly those in underrepresented groups, feel new levels of challenge and complexity stand in the way of their career advancement. They are not wrong. In their constantly evolving workplaces, with requirements vacillating from remote to hybrid to in-person depending on the day and the organization, recent reports show that men are returning to in-person work more quickly than women. Opportunities to grow and advance differ dramatically when unequal facetime is a factor.

Outcomes

What is shared here should come as no surprise to those who lead or are otherwise involved in DEI efforts. Indeed, these are among the best-practice protocols designed to build and sustain inclusive and equitable environments that lead in turn to a wonderfully diverse workforce built on outstanding talent. While the "crisis" induced by the recent SCOTUS ruling will unleash naysayers, fearmongers and alarmists who claim that all DEI efforts are illegal and should be abandoned, their supposition has no basis in truth, statute or regulation.

Instead, the events of the past few days shine a bright light on the importance of DEI, not only as a recruitment and retention tool but also as a buffer against current and potential Supreme Court rulings.

While race-based affirmative action and even DEI are called into question, this is not the time to dismiss efforts that are working. Now is the time to use what we know to do even better. Stay calm and continue on.

DEI Call-to-Action Advocates

Join us and the many advocates, including the following leading labor and employment lawyers, who have swiftly banded together to push this critical call to action forward.

“We encourage organizations to stay the course, not be deterred by legislation, policies, or protocols that overlook or ignore the organizational advantages conferred by DEI objectives, and keep pushing to ensure that our workplaces and communities are inclusive and equitable,” they said.

To join the growing movement and sign on as an advocate and ally on this call to action, click [here](#).

Of course, this article and call to action do not constitute legal advice and the views and opinions expressed do not necessarily reflect the views of the entities represented by the authors and advocates.

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