Breakout Sessions – Series 4

IMPLEMENTING EXCELLENT DIVERSITY AND INCLUSION PROGRAMS

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Diversity and inclusion (D&I) is increasing in organizational priority and public focus. Those responsible for execution of an organization’s D&I plan, however, realize that implementation of a legally compliant and effective D&I initiative is not as easy as it seems. Even the most well-intentioned employers that seek to recognize and encourage diverse and inclusive cultures in their workplaces face challenges, including where to start, what to do, and how to measure the success of their initiatives. This presentation and accompanying materials will provide a road map for designing an effective diversity and inclusion program, practical tips for executing a comprehensive plan, and an analysis of the pitfalls to avoid ensuring D&I becomes a fully integrated, strategic business partner.

I. Understanding D&I and Its Underlying Rationale(s)

It is important to define what a diversity and inclusion or D&I initiative is – and, by implication, define what it is not. And it is equally important to ensure the rationale(s) for having a D&I initiative is clear from the outset.

Diversity and inclusion is now a priority within many organizations. There are many rationales, grounded in research, for why D&I should be an area of focus. Such reasoning includes, but is not limited to: (1) tangible, positive impacts on company bottom line; (2) increased employee creativity and productivity; (3) boosts to workforce retention, development and culture efforts; and (4) expansion into or deepening within new customer markets.

Diversity and/or inclusion programs and initiatives, which are sometimes referred to as “voluntary affirmative action,” are being implemented in order to increase the representation of underrepresented groups and reap the benefits from having a diverse workforce. D&I programs are voluntary, self-directed and, with very limited exception, are not regulated by any outside entity. Thus, organizations are determining what programming to implement and how to implement it.

II. Understanding the Phases of a Well-Executed D&I Initiative

Organizations of any size may fall within one of several phases when seeking to implement a D&I initiative. Those phases include: 1) Assessment/Legal Compliance/Risk Reduction; 2) Program Development and Implementation; and 3) Strategic Business Integration.

A. Assessment, Legal Compliance, and Risk Reduction

1. Conduct a Qualitative Organizational Assessment

In order for a D&I program to be successfully developed and implemented, there should be an understanding of the company’s D&I needs and goals, its employees, its business and its customers/clients/consumers. This understanding is often developed during the strategic planning phase. However, before each program or initiative is developed and communicated, the assessment process should be revisited. Relevant information for D&I programming purposes may be gathered in the form of a survey, focus group(s), internal data analysis, industry and/or labor market data, another form of assessment, and/or a combination of measures.

- Who are the company’s employees and customers?
- What are the company’s employees and customers saying about the company’s D&I commitments, efforts, and programming (if any)?
2. Engage in Quantitative Data Collection and Assessment

D&I initiative implementation requires the gathering and analysis of job candidate and/or employee demographic diversity data, among other information. However, increased legal and regulatory focus on data privacy and collection efforts make diversity data gathering a legal and compliance minefield. Organizations are focused on building data privacy structures around data collection, access, and storage. They are providing means for job candidates and employees to voluntarily self-identify demographic data, and they are ensuring there are disclosures, notices, and consents in place.

- What information has been collected for the D&I program?
- Who has access, when can it be accessed, and how is it stored?
- How is diversity progress being measured (ensuring there are no quotas)?
- How will diversity data get analyzed (adverse impact, labor pool utilization comparisons, gap analysis, etc.) and how will the data be reported?
- Can any or all of the data collection and analysis efforts be conducted under attorney-client privilege?

3. Identify the D&I Initiative-Related Legal and Compliance Issues

Effective D&I plans begin by contemplating and incorporating legal compliance and risk-reduction measures into the structures of programming as well as company systems and processes. D&I practitioners are navigating complex legal issues involving discrimination/EEO laws, affirmative action/federal contractor reporting, and industry-focused statutory requirements, among other things.

Although D&I initiatives are voluntary and self-directed, there are legal issues that practitioners should contemplate to ensure the program is legally compliant and reduces the potential risk of litigation. Some of the initial questions to be explored when assessing compliance and risk include:

- What company policies are in place (e.g., EEO, Respectful Workplace, Anti-Harassment, etc.) and has the policy language been reviewed recently by legal counsel?
- What is the company’s complaint-reporting process?
- Have there been any required trainings for employees, managers, leadership, etc., which focus on an aspect of workplace culture or dynamics? If so, what was covered and who attended?
- What is the company’s federal contractor or subcontractor status?

The legal landscape surrounding D&I is tricky. Employers will be well-served to engage employment-focused legal counsel who is experienced with D&I execution challenges in the discussion of the D&I strategic plan, initiative, or program – and to do so early.
B. Program Development and Implementation

There are a myriad of articles, studies, and research discussing best practices, pitfalls, and do's and don'ts when seeking to implement legally-compliant and effective D&I programs. And practitioners, and legal counsel, often find themselves buried in information but lacking in guidance. Whether launching a new D&I initiative or expanding an existing program, there are best practice guiding principles that employers should consider.

1. Strategic and Action-Oriented Planning

A prime obstacle to successful implementation of D&I initiatives is the lack of a well-thought out and defined plan of action. Effective D&I initiatives start with strategic planning and an understanding of how D&I fits into the overall goals of the business. In order for the D&I vision to move into execution, there should be workable action plans with articulated deliverables and timelines. Organizations with the most effective initiatives have D&I action plans that all can follow. Some of the questions that may be explored in the strategic and action-planning phase include:

- What is the rationale(s) for having a D&I program?
- Who or what is the focus of the D&I program?
- What are the goals of the D&I program?
- What is the timeframe for the D&I program or goal to be realized?
- How will the company measure progress?
- Who is responsible for D&I implementation (e.g., HR, Talent, a dedicated D&I professional, a defined committee, etc.)?
- How is the D&I function going to be structured?

Taking the time to prepare a strategic and action-oriented D&I plan will provide practitioners with the necessary guidance and definition to execute more successfully.

2. Setting Goals and Measuring Progress

A prime challenge to an organization’s D&I initiative surfaces in goal setting and other efforts to measure progress and/or ensure accountability. Courts are unified in finding racial, gender or other quotas in employment to be unlawful. Quotas may be found when there are numerical requirements around hiring, promoting, or advancing individuals based on their race, gender or another diversity-oriented characteristic. Companies with an over-emphasis on diversity metrics have faced challenges claiming their program operated as an unlawful quota system. To ensure their program has contemplated a potential legal challenge, the following questions should be raised:

- Are diversity metric goals being contemplated?
- Are any such goals flexible and aspirational as opposed to fixed and required?
- Has the company emphasized its outreach or inclusion efforts instead of hitting a certain number?
- Has the organization ensured that any preference or decision being given to a “diverse” candidate or employee instead of a “non diverse” candidate is not based on the diverse characteristic alone (e.g., based on race or gender, etc.)?
- How are leaders or managers being held accountable for the D&I effort?
3. Determine the Mechanics of a Proposed D&I Program

There are a host of D&I-oriented initiatives and programs that are intended to address specific organizational needs. Once the needs have been assessed and people are put in place who can credibly communicate the D&I efforts that are underway, the program(s) should be identified for implementation. Although there are a myriad of programmatic areas of focus, the most prevalent employer-driven D&I programs may fall within five categories, which we refer to as the “Top 5 in Workplace D&I.”

D&I-Focused Hiring and Recruitment

In recruiting/hiring, many companies are seeking ways to include underrepresented, diverse groups in their hiring process and are exploring different programs that require a diverse slate of candidates be interviewed or considered for their jobs. These initiatives may include programs that are commonly referred to as “Rooney Rule programs,” referencing a highly-publicized initiative implemented by the National Football League that requires all teams to interview at least one minority candidate for head coaching and senior football operation openings. These and other diverse slate initiatives are seeking ways to expand the pool of qualified diverse candidates and ensure these diverse candidates are not overlooked in the hiring process.

Other diversity-oriented initiatives include implementing bias interrupters in the recruiting and hiring process, such as required anti-bias interviewer training, developing standardized interview question templates for interviewers, and removing names from applications or resumes for a more “blind” screening process. Questions to consider before implementing these initiatives include:

- What are the dos and don’ts of diversity-focused hiring (e.g., aspirational goals versus quotas)?
- Where might the company find the qualified pool of diverse candidates?
- Are there existing institutions or partners with which the company might partner to expand its pool?
- Can the company require a diverse panel of interviewers or diverse slate of candidates be presented?
- May the company include a referral bonus for other hiring incentive?

D&I-Oriented Training

Training on diverse-oriented subjects such as managing a diverse workforce, unconscious bias, and cultural competence remains a priority for companies that are trying to establish some foundational knowledge. These examples are viewed as effective training topics because the topics recognize that all people have a culture, a lived experience, and a bias -- and no one is exempt.

Organizations are also exploring new training modalities in order to better engage expanding, multi-generational, and multicultural workforces. Companies can conduct customized trainings either in person or electronically in a variety of ways that maximize available technologies.

- What type of training is needed, for whom, and what should it look like?
- Have new modes of training been considered?
How can the audience engagement be maximized and how can the actions post training be facilitated (not forgotten)?

**Employee Resource Groups**

Companies across the country continue to roll out Employee Resource Groups (ERGs) or Business Resource Groups (BRGs) of affinity. ERGs or BRGs have historically been viewed as a resource and support network for employees who self-identify within the defined group. However, companies are thinking more creatively about how to structure these groups, how much involvement to have with them, and how the organization may utilize these groups as a resource in the company’s policy creation, product development, consumer market expansion, and community relations initiatives, among other things.

Recognizing the opportunity for dialogue and engagement that these groups can provide, companies are being more deliberate in involving their business leaders among others who may not self-identify within the defined group, and they are defining roles and responsibilities for the groups’ leadership to ensure the goals are accomplished. These groups can be resources for both employees and companies. Some questions to consider before rolling out BRGs include:

- Should the company create diversity-based affinity groups?
- How are those affinity groups formed and who will lead them?
- What structure might the company place around affinity groups?
- What other opportunities might exist to increase diverse employee retention efforts?
- Should the company’s policies (e.g., parental leave, employee benefits) be revisited given feedback from the affinity group?
- What employment laws might be implicated in the development and implementation of these groups, and how can the company minimize risk of disparate treatment claims in particular?

**Succession Planning, Evaluation & Promotion**

In order to guarantee diverse groups are included in succession planning, performance evaluation, and promotion processes, many organizations are building experience and skill-set development programs to ensure various diverse groups develop the necessary skills and experiences to be positioned for success. Companies are also monitoring leaders and managers to ensure that unconscious (or conscious) bias is not a factor in succession planning and promotion decision making.

Many companies are also tackling systemic barriers that may have historically kept diverse groups from advancement. For example, companies are making real efforts to ensure there is fuller transparency and objectivity by publishing internal job requirements, defining required skills and experiences, and publicizing promotion processes. Those tasked with implementing a diversity-focused succession planning, evaluation, and/or promotion program might consider the following questions:

- Might leadership or other talent development programs be developed for underrepresented groups?
- What are the processes around promotion, evaluation, and compensation decisions?
Might there be opportunities for more transparency and the elimination of potential bias in promotion, evaluation and compensation decision making?

Leadership Engagement and Development Efforts

Companies have also realized that in order for D&I to be successful, leadership must be engaged and at all levels. D&I initiatives typically focused solely on those who self-identified as belonging to one of the diverse groups of focus. More recently, companies are implementing programs and processes to ensure learning and development opportunities are available throughout the organization and for all employees with a managerial role or an interest in one. These leadership development programs build leaders who are equipped with the D&I knowledge and resources they need to effectively lead an increasingly diverse workforce. Companies should consider evaluating the following questions:

- Who is the best person(s) to promote this D&I program to ensure the program is valued and well-received?
- Is there a person or group of persons who will be responsible for implementing the program and ensuring it is successful who are not a part of D&I or HR?
- Have all (e.g., those who self-identify as diverse as well as those who do not) who need to be familiar with the D&I program been prepared or trained to deliver the message, execute the program, or serve as a D&I ambassador?

C. Strategic Business Integration

Those organizations that appear most equipped to embrace changing demographics and that desire a competitive advantage in the marketplace are focused on creating a workplace culture of inclusion and not simply “a D&I program.” These organizations recognize D&I not as a stand-alone or silo activity, but as a strategically-integrated business practice. And these companies pursue means to foster cross-department and systems integration ensuring the D&I practitioner or department is working with marketing/communications, human resources, talent management, recruiting, business groups, operations, and others. When assessing how to integrate D&I goals within the totality of business operations, ask the following questions:

- Has the company communicated the D&I effort as furthering a culture of inclusion (and not exclusion) where all are valued and given opportunities to succeed?
- Has the business justification for the D&I effort been communicated?
- Has a culture been developed around D&I where it is viewed as a key business goal?
- Has a structure been put in place to establish management’s buy-in, such as a subcommittee with business managers included?
- Are there company-wide tools of measurement and accountability that ensure everyone is involved in the D&I efforts?
Implementing Excellent Diversity and Inclusion Programs

Presenters
Shafeeqa Giarratani (Austin) and Kimya Johnson (Philadelphia)

Moderator
Nonnie L. Shivers (Phoenix)

Presenter Introductions

Shafeeqa Giarratani
- Shareholder
- Co-Chair, D&I Practice Group

Kimya Johnson
- Senior Counsel
- Co-Chair, D&I Practice Group
Agenda

- New developments in D&I
- Potential D&I legal and compliance issues
- Practical strategies for creating and implementing a successful D&I program

Polling Question

- How many have a diversity and inclusion program at your company?
- How many are satisfied with the program?
Why Diversity & Inclusion?

- NOW a priority within many organizations
  - Impact on bottom line
  - Creativity and productivity
  - Retention, development, and culture efforts
  - New customer markets
- BUT implementing a legally-compliant and effective program is a challenge

D&I: Organizational Development

- Assessment & Compliance
- Planning & Implementation
- Strategic Business Integration
D&I: Assessment & Compliance

Issues to Consider

- Discrimination Claims
- Federal Agency Shift
- National Demographic Changes
- Multi-national Context
- Generational Differences in Understanding
- Expansive Nature of Diversity
Compliance

- Policy review
- Complaint process
- Required training
- Federal contractor status and obligations
- Pay equity

Qualitative Assessment

- Not one size fits all!
- Key questions
  - How are we doing now?
  - What do we need to do?
- Assess
  - Crisis areas
  - Culture audit/climate survey
  - Prior efforts
  - Resource groups
  - Policies/training
Quantitative Assessment

- Collecting data
- Accessing data
- Sharing data
- Analyzing data
- Reporting data
- Using data to drive

D&I: Planning & Implementation
The D&I Plan

- Articulate goals for the program
- Determine program focus area(s)
- Identify stakeholders/structure
- Set budget, timelines, deliverables
- Determine how to measure progress

Issues in Goal Setting

- Over-emphasis on diversity metrics can be challenged as unlawful quotas
  - Case example
    - *Frank v. Xerox Corp. (5th Cir. 2003)*: “Balanced Workforce Program” called for racial and gender groups to be proportionately represented at various levels in the company.
D&I Program Goal Setting

- **Do**
  - Make goals flexible/aspirational
  - Emphasize outreach instead of hitting a number
  - Focus on inclusion efforts

- **Don’t**
  - Use quotas (think creatively!)
  - Give preference to candidates based on diverse characteristic alone

D&I: Areas of Programming

- **Major Areas of D&I Focus**
  1. Recruitment/Hiring
  2. Training
  3. Employee Resource Groups
  4. Succession Planning/Evaluation/Promotion
  5. Leadership Engagement/Development
D&I Programming Areas

- **Diverse recruitment and hiring**
  - “Rooney Rule” programs and diverse slate initiatives
  - Efforts to expand the pool of qualified diverse candidates
  - Bias interrupters

- **Diversity and/or inclusion-oriented training**
  - Resourceful and innovative training topics
  - Creative training options/modes
  - Not mandatory, but most inclusive training

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D&I Programming Areas

- **Employee Resource Groups**
  - A defined purpose or mission that is open to all
  - A business resource

- **Succession Planning, Evaluation & Promotion**
  - Experience or skill-set development programs
  - Transparency and objectivity to process

- **Leadership Engagement & Development**
  - All who lead/manage included throughout
Strategic Business Integration

Current D&I Movement

- D&I as a fully-integrated program
  - Movement to creating a workplace culture of inclusion vs. D&I as a stand-alone or silo activity
  - D&I found across departments and job titles
    - HR, Legal, and Compliance Depts. engaged in the effort?
  - Organizational systems and processes
    - Website, communications, business/operations teams, leadership, managers, Board composition, vendors/suppliers, service providers, company products/services
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