Creating an Effective (and Legally Defensible) Metrics-Driven Workplace Diversity, Equity, and Inclusion (DEI) Program

March 31, 2021

There is a strong and well-documented business case for workplace diversity, which has grown even more compelling over the last several months. Indeed, given a renewed national focus on social justice issues and a growing expectation that organizations will work harder to prevent discrimination and remove artificial barriers to opportunities for all, now is an especially good time for organizations to build greater structure, discipline, and intentionality around their diversity, equity, and inclusion (DEI) efforts.

When managed properly, diversity metrics can be an indispensable component of a meaningful, solutions-oriented DEI program. It is often said, “What gets measured gets done.” Thus, one of the primary advantages of DEI metrics is that they can help to facilitate evaluation and drive accountability. Nevertheless, as with so many important business strategies, when considering the efficacy of diversity and inclusion metrics, another cliché is equally appropriate: “the devil’s in the details.”

Many companies seeking to boost their DEI efforts collect a range of evaluative information and use it to set measurable goals for attaining certain DEI objectives. To be truly meaningful and sustainable, DEI metrics must be consistent with and link to corporate business goals and strategy, but also be designed and implemented in such a way as to avoid noncompliance with workplace anti-bias laws.

Here, we describe some of the advantages of establishing and maintaining DEI programs and offer tips on how to achieve measurable results without conflicting with the law.

What Is a Diversity, Equity, and Inclusion Program?

Workplace DEI programs are voluntary corporate initiatives that go beyond compliance-oriented workplace nondiscrimination and EEO efforts by building an organizational commitment to ensuring that individuals from broadly diverse racial, ethnic, gender, cultural, and other backgrounds are recruited, hired, retained, valued, and fully supported at work.

As its name suggests, DEI describes three critical components: (1) attracting, recruiting, and hiring a diverse workforce ("diversity"); (2) ensuring nondiscrimination and EEO ("equity"); and (3) building a respectful, supportive, and inclusive environment that allows all employees, regardless of demographic background but especially those from marginalized or underrepresented groups, to thrive at work ("inclusion").

What Is a Metrics- or Data-Driven DEI Program?

A metrics- or data-driven DEI program uses both qualitative and quantitative data and measures to set, advance, and evaluate an organization's DEI outcome goals. Metrics-based DEI programs can be very effective both in promoting action and in holding organizations accountable for achieving positive results such as, for instance, by linking individual or organizational performance and/or compensation determinations to the attainment of DEI goals.

What's the Difference Between a Data-Driven DEI Plan and a Formal Affirmative Action Program?

Many organizations that do business with the federal government are legally required to develop comprehensive, formal affirmative action programs designed to help ensure nondiscrimination and equal employment opportunity for women, minorities, individuals with disabilities, and protected veterans. Covered federal government contractors are required each year to develop and implement written affirmative action plans (AAPs), review and analyze compensation and employment transactions data for indicators of potential discrimination, and evaluate their organization's positive outreach and other good-faith efforts to promote and advance equal employment opportunity and nondiscrimination.

A data-driven DEI program may incorporate certain elements of a formal affirmative action program, but typically is broader in scope and, most importantly, is a *voluntary* form of affirmative action, which as described below has important practical and legal implications.

What's the Value of Investing in a Data-Driven DEI Program?

Diversity metrics can provide a "snapshot" of an organization's overall demographic makeup, as well as areas in which particular challenges and opportunities may exist. At bottom, and among other things, they can help to drive success by helping to identify program gaps and successes, and providing a basis for action and accountability.

DEI metrics operate best when they are based on and consistent with a broader business strategy, which often focuses not only on workplace demographics and culture but also on supply chain and other dimensions of diversity. In the employment context, well-designed metrics that align with the corporate business strategy can boost DEI efforts at every stage of the talent life cycle — from outreach and recruitment to hiring, retention, and advancement.

What Are the Potential Risks of Implementing a Data-Driven DEI Program?

Risk of Unintended Discrimination. Because DEI programs are almost entirely company-driven initiatives, their structure, content, and efficacy can vary significantly from organization to organization — even with respect to how broadly the term "diversity" is defined. That said, although most employers generally are not required to maintain DEI programs, they are obligated to ensure that such programs are lawful and reinforce, rather than undermine, equal employment opportunity and nondiscrimination.

Diversity metrics can take different forms. For example, an organization might track and analyze the number of job applicants for technical jobs by demographic group, then set a goal to increase targeted outreach and recruitment efforts based on the results of its analysis. However, it is generally unlawful to make employment selection decisions based on protected traits like race or sex in the absence of a valid affirmative action plan.

For example, if after reviewing hiring data the employer in the above example sets a DEI goal of increasing the representation of Asians by 25%, and hiring managers made race-based selections to achieve that goal, the employer would run afoul of federal EEO law (specifically, Title VII) unless it meets the legal criteria for practicing voluntary affirmative action. Under long-standing Supreme Court principles, a DEI program that sets hiring goals for a particular protected group, for example, must be remedial in nature and narrowly tailored in how it achieves those remedial objectives. A best practice is to establish goals that are based on an observable underrepresentation of certain groups based on availability in the relevant labor market.

Thus, although EEO and nondiscrimination are foundational elements of any meaningful corporate diversity initiative, sometimes well-meaning organizations can place their programs at risk by establishing overzealous goals, timetables, and/or other mandates calling for “more” of one group or “fewer” of another group that are unrelated to actual representation and availability data.

Missed Opportunities in Failing to Properly Analyze, or Act Upon, Results. Implementing a data-driven approach is likely to raise expectations among staff, investors, and others that the organization actually will review the results and take appropriate action to address issues that may be impeding its DEI efforts. Failure to do so can leave the mistaken impression that the organization’s DEI program is merely a “paperwork exercise” or public relations gimmick.

That sentiment, in turn, can lead to many of the very issues such a program is intended to avoid — dissatisfaction, mistrust, avoidable staff turnover, etc. Failure to act on culture issues that may come to light as a result of a DEI analysis also can come back to haunt the organization in subsequent litigation.

Tips for Building a Robust, and Defensible, Metrics-Driven DEI Program

Align DEI Efforts With Business Objectives. As noted above, even the most well-intentioned DEI initiatives can pose compliance challenges if not properly aligned with a thoughtful and evidence-based business plan. How do your DEI objectives support the organization’s mission, vision, and values? One obvious practical benefit of business-aligned DEI efforts to build an organizational culture of support and respect for individuals of different backgrounds, cultures, and experiences is that it invariably translates to happier, more engaged, efficient, and motivated employees, which ultimately will contribute to the business bottom line.

Identify Any Specific Concerns That May Define Scope. How do you define “diversity?” What are the desired outcomes? What are the main indicators of success?

Collect and Review Baseline Information, such as workforce demographic information, prior or existing DEI plans, employment policies and procedures, industry best practices, etc.

Determine What Data and Information Should Be Analyzed. For example, if Asian employee retention were a particular concern, would it be helpful to analyze promotions data and/or look at internal complaint activity for clues to potential problems? What helpful information may be gleaned from employee engagement survey results? Exit interviews?

Collect, Review, and Analyze Data. What are your benchmarks? There is a variety of possible sources of information for analysis beyond just data on employment transactions (applicants, hires, promotions, terminations).

Whenever embarking on quantitative workplace data analyses, it is important to consider what steps should be taken to preserve data confidentiality and prevent unwanted disclosure of the data and/or study methodology and results. To the extent possible and appropriate, the review and analysis of quantitative DEI data should be conducted by, or at the direction of, legal counsel.

***Devise a Plan for Correcting Issues Discovered Along the Way*,** such as statistical indicators of possible discrimination, possible patterns of harassing or retaliatory behavior, gaps in training and development programs, etc.

***Set Appropriate Goals*.** Use the results of the data analysis to help set outcome goals and accountability measures consistent with the organization’s standard practices. There are myriad ways in which organizations evaluate performance — of a particular line of business, research initiative, or employees. Metrics-driven DEI goals and benchmarks can and should operate in similar ways.

A Note About Compliance Training

Because all DEI programs must operate within the parameters of nondiscrimination laws, organizations are well advised to ensure that all employees, particularly any personnel tasked with supporting and implementing corporate DEI initiatives, are regularly trained on applicable EEO and nondiscrimination legal principles and expectations. Doing so will help not only to minimize legal risk but also to drive the success of the organization’s DEI programs.

Related Practices

Labor & Employment