

# Diversity & Inclusion

## Insurance Industry Insights

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# Learning Objectives

- Understand current diversity-related exposures & lawsuits
- How does D&O insurance respond in these situations?
- How could current trends impact D&O insurance?



*Learning Objectives*

# Responsibilities Have Changed



There is one and only one responsibility of business: to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game.

— Milton Friedman —

# Responsibilities Have Changed

- Balancing profits vs social conscience
- Legal minimums or beyond?
- Duty of Sustainability as Director or Officer
  - Effectiveness of the company
  - Legal exposure
  - Regulatory exposure
  - Workforce
  - Community or consumer



# Cost or Opportunity?

- 2019 McKinsey study showed that companies with diverse executive teams are 25% more likely to have above average profitability. Roughly +20% by gender and +30% by ethnicity
- Talent management advantage as diverse company
- Diversity very important to Gen Y (25-40)
- Broader customer base. In Europe, 80% of purchasing decisions are made by women. By 2025 they will own 60% of all personal wealth and control more in expenditures than males.
- The opportunity is making Diversity & Inclusion part of corporate mission

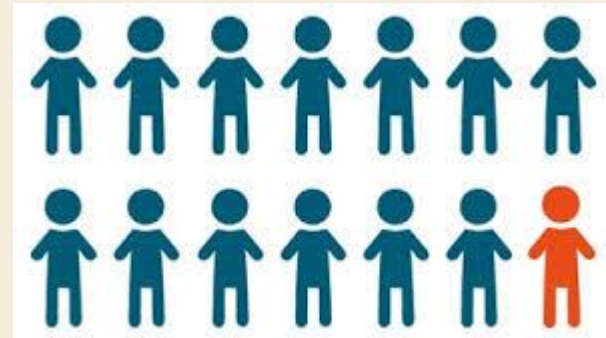
# New Laws

- California - SB 826 (gender quotas in board elections)
- New laws requiring at least one director from an “underrepresented community”
- Illinois and New York, others likely to follow



# Lawsuits

- Oracle
- Facebook
- Norton aka Symantec
- GAP
- Danaher (DC)
- 2020 Newsweek article calling out several companies in the US (Procter & Gamble, Cisco, Adobe, Oracle, Bristol-Myer Squibb, Broadcom, Phillip Morris, Intuit, CSX...)
- Common theme is derivative lawsuit against board due to lack of action around diversity issues/initiatives
- Will private & non-profit companies be next?



# Management Liability Insurance

- Directors & Officers Insurance
  - Individual or entity coverage
  - Derivative actions
  - Outside directorship liability
- Common Exclusions
  - Bodily injury/property damage (mental anguish exceptions) for claims against D&O's which does not apply to entity coverage
  - Insured versus insured (employment related and limited exceptions)
  - Personal conduct (fraud/willful violation of law or regulations. Severability & final adjudication needed)
  - Personal injury (libel, slander, defamation, invasion of privacy) entity coverage excluded
  - Fines/penalties





# Management Liability Insurance

- Employment Practices Liability Insurance
  - Discrimination, harassment, retaliation, wrongful employment decision or wrongful termination
  - First party
    - Applicants or current employees
    - Retraining or other costs due to a settlement
  - Third Party (optional, higher retention may apply)
  - Common Exclusions
    - Fines/penalties
    - Bodily injury/property damage – mental anguish/emotional distress exception
    - Benefits due (work comp, disability..) retaliation claim exception
    - Labor management relations – right to engage in or refrain from engaging in activities. Strikes, picketing, boycotts... exception for retaliation claim

# Potential Impact on D&O Insurance

- Substantial legal defense costs and settlements may lead to higher premiums and retentions
- Higher retention for class action/multiple plaintiff lawsuits
- Additional underwriting surrounding Diversity & Inclusion
  - Review of SEC requirements on transparency concerning diversity
  - Is there a Chief Diversity Officer?
  - Confirmation of a Diversity & Inclusion company policy

# Questions?



# **Legal Insights Regarding D&I Initiatives**

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# Be Careful!



- Diversity in the workplace is a good thing!
- But we need to be very careful in how we do it.
- D&I initiatives may violate anti-discrimination laws if done the wrong way.

# D&I Initiatives from the News

- Some well-known companies have committed to:
  - Fill a minimum of 30% of all new positions with African American and Latino candidates (Adidas)
  - Increase minority leadership by 30% within 5 years (Facebook)
  - Aim for 40% of employees in vice president roles to be women (Goldman Sachs)
  - Double the number of African American leaders by 2025 (Microsoft)
  - Not hire for a position unless an underrepresented group is interviewed (VMWare)
  - Require law firms to have diverse attorneys on all Coca Cola cases (Coca Cola)

# Some Questions . . .

- Are these D&I initiatives legal?
- Are these companies immune from being sued?
- Do you have as much insurance coverage / legal spend as the companies in this list?
- Do you think these companies implemented these initiatives without first conducting a risk/benefit analysis?

# Federal Anti-Discrimination Laws

- 14<sup>th</sup> Amendment of the US Constitution (Equal Protection Clause)
- Title VII of the Civil Rights Act
- Other federal anti-discrimination laws
- Most states (and many cities/counties) also have their own anti-discrimination laws.



# 14<sup>th</sup> Amendment (Equal Protection Clause)

- Prohibits states (including state and local employers) from taking any action that deprives individuals of the equal protection of its laws
- When decision-making takes race into account, courts apply a “strict scrutiny” test to the program:
  - There must be a compelling governmental interest and
  - The program must be narrowly tailored to serve the interest
- D&I program may be struck down as unconstitutional if it does not pass this test

# Title VII of the Civil Rights Act

- Prohibits employment discrimination on the basis of:
  - Sex (including sexual orientation / gender identity)
  - **Race**
  - Religion/Creed
  - **Color**
  - National Origin
- Applies to public and private employers
- Prohibits discrimination in all types of employment decisions (recruiting, hiring, promoting, transferring, training, disciplining, discharging, assigning work, measuring performance, providing benefits, etc.)

# Penalties Under Title VII (Public Employers)

- The goal of the law is to put the victim in the same position (or nearly the same) that he/she would have been if the discrimination had never occurred.
- Possible remedies:
  - Back pay
  - Front pay
  - Injunctive relief (reinstatement, etc.)
  - Compensatory damages (out of pocket expenses, pain and suffering, etc.) up to maximum amounts based on number of employees.
  - Attorneys' fees

# “Reverse” Discrimination Lawsuits

***City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)**

- City required contractors to subcontract at least 30% of the total dollar amount of the contract to minority-owned businesses
- US Supreme Court analyzed program under equal protection clause of the 14<sup>th</sup> Amendment
- Court found that program did not pass strict scrutiny test and struck down the program
  - Alleged past discrimination in the entire construction industry was too broad and could not constitute a compelling interest
  - 30% quota was not narrowly tailored (city did not consider race-neutral alternatives)

# **“Reverse” Discrimination Lawsuits (Cont.)**

## ***Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995)***

- US Supreme Court considered US DOT affirmative action program awarding bonuses to contractors if they employed minority subcontractors
- Court again found that program did not pass strict scrutiny test under 14<sup>th</sup> (and 5<sup>th</sup>) Amendment and struck down the program

# **“Reverse” Discrimination Lawsuits (Cont.)**

***United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 US 193 (1979)***

- The Supreme Court held that Title VII does not prohibit all voluntary race-conscious employment efforts.
- However, the Court ruled that such efforts are only permissible when:
  - (1) intended to “eliminate conspicuous racial imbalances in traditionally segregated job categories”; and
  - (2) the rights of nonminority employees are “not unnecessarily trammled”—meaning the plan neither requires the termination of such employees and their replacement with minority employees, nor creates an absolute bar to advancement (no quotas or hiring preferences); and
  - (3) temporary in their duration.

# “Reverse” Discrimination Lawsuits (Cont.)

## Google lawsuits

- **Damore v. Google** – White male employee claimed he was fired for circulating an anti-diversity paper. His suit included claims for discrimination based on his sex and his “Caucasian race.” The employee has dismissed the lawsuit (possibly after a confidential settlement).
- **Wilberg v. Google** – White male employee (a recruiter) claimed Google discouraged hiring whites and Asians and favored Hispanics, African-Americans, and women. This lawsuit is still pending (arbitration).

# What Can We Do?

- Conduct a detailed, fact-based assessment of the diversity of your workplace (focusing on particular positions / job categories) and current hiring processes.
- Determine whether you have any “clear imbalances” in any “traditionally segregated” job categories (i.e. are minorities disproportionately underrepresented in particular positions / job categories when compared to the outside population)?
- Look at the language used in job descriptions, consider whether it may discourage candidates from protected groups.
- Review policies to determine whether any may have unintended disparate impacts.
- Conduct a pay equity audit.
- Assess the equity of other employment decisions such as promotion, salary increases, and job assignments.
- Avoid requirements that could unfairly prejudice a certain group.
- Avoid the use of quantitative goals / quotas.



- Avoid the use of race-based preferences.
- Focus on efforts to ensure that diverse candidates/demographics are considered rather than the result (goal/quota) of hiring a certain percentage of minority candidates.
- Focus on removing barriers to entry and increasing applicant pool over meeting quotas.
- Conduct diversity training for supervisors and non-supervisors.
- Train managers that any D&I initiatives are not quotas, that all hiring decisions should focus on best qualified candidates, and that diversity cannot be a deciding factor in employment decisions.
- Have plan / program reviewed by counsel for compliance with federal, state, and local law.
- Once plan is established, do not deviate from it (no ad hoc decisions).
- Still no guarantee! This is an evolving area, and we anticipate more court challenges.

# Questions?

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