[BIAS INTERRUPTERS] small steps big change

WORKLIFE LAW UNIVERSITY OF CALIFORNIA HASTINGS COLLEGE OF THE LAW

WHITE PAPER

Keeping Diversity Metrics While Controlling for Legal Risk:

The Risks of Diversity Data are Changing[1]

Joan C. Williams, Director of the Center for WorkLife Law, University of California, Hastings

Jamie Dolkas, SVP of Strategy and Research, WorkLife Law, UC Hastings

When businesses conclude they have a problem, typically they define their goals, identify metrics, and keep trying different strategies until their metrics show they've achieved their goals. Businesses use metrics to solve any problem they truly care about, so the absence of metrics in the diversity/equity/inclusion (DEI) arena is striking. As companies use metrics in an ever-increasing range of contexts, the absence of diversity metrics seems increasingly out of sync.

Without metrics to establish baselines and measure progress, DEI efforts are shooting in the dark. No doubt for that reason, in our work with companies we have seen a sharp increase in willingness to collect diversity data in the past two years. This reflects growing competition for employees due to the Great Resignation and increased pressure from shareholders, customers, and employees to show actual progress on DEI, as opposed to just good intentions. In the wake of Black Lives Matter and #MeToo, the potential reputational costs of an unsuccessful DEI initiative are large. Many companies understand they simply cannot afford to take the shoot-in-the-dark approach to DEI that has proved ineffectual for decades.

However, too often, we find that the head of HR or DEI wants to keep and report out on diversity metrics, but the in-house employment lawyer vetoes this on the grounds of legal risk. The in-house lawyer is just doing her job, which is to protect the company from legal risk; there is no denying the fact that certain types of diversity metrics might be useful to plaintiffs' employment lawyers suing the company, and that sharing data internally without well-thought-out plans and protocols can create risk.

Keeping diversity metrics is not risk-free…but failing to do so may be worse. Key diversity metrics are readily discoverable in a lawsuit; the risk is that a company first learns that its metrics don't look good only after it is sued.[1] And, of course, documents reflecting company efforts to

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leverage DEI metrics in support of positive change can be *helpful* in litigation: they can demonstrate a company's commitment to achieving DEI goals, which can show good faith, compliance attempts, and potentially the absence of intent to discriminate. In some circumstances, they may be helpful in defending reverse discrimination lawsuits challenging targeted DEI programming designed to address shortfalls.[2]

Diversity metrics are indispensable, but that doesn't mean that there aren't smarter and savvier ways to collect and disseminate them. This White Paper provides a path for keeping diversity metrics while controlling for legal risk. There's no mystery about how to do it. Many companies already have in place data protocols for handling sensitive information, whether it's product-recall secrets or DEI data, as well as procedures for conducting sensitive internal investigations. They need to use those protocols for handling sensitive diversity metrics, too.

This White Paper is designed for CEOs, HR, chief diversity officers, and in-house counsel. It provides a simple ten-step roadmap to help companies build best-practice DEI programs while controlling for legal risk. For more information about DEI best practice, visit www.biasinterrupters.org for free, open-access, evidence-based toolkits to interrupt bias in hiring, performance evaluations, access to opportunities, and hybrid work. Because companies' risk tolerance varies, every attempt has been made to provide alternatives that represent different levels of risk tolerance.

TWO CORE PRINCIPLES

Your company should not be less willing to shoulder risk in the DEI context than in other arenas. Otherwise, the company is inadvertently signaling a lack of concern for diversity and inclusion. The first message may be the most important one: the decision about how much risk to shoulder in the DEI context should lie in the C-suite, not solely with in-house employment counsel (as important as counsel are to managing risks associated with corporate strategy). Diversity metrics can make lawyers apprehensive because their job is to control risk. Lawyers often worry that metrics that document a lack of diversity or the presence of bias will be used by plaintiffs' employment lawyers as evidence that the company was discriminating against a protected group. Given the importance of metrics for an effective DEI initiative, leaders need to give lawyers clear direction on the risk tolerance in this arena, as they do in other arenas. Leaders should also involve legal counsel throughout DEI initiatives so they understand the full scope of work and can help to minimize risk at all stages.

Don't share diversity analytics if you do not intend to make persistent, good faith efforts to remedy any problems you find. The best legal advice is, "don't bite off more than you can chew, and if you don't want to chew, don't bite." If you publicize that you have a problem and then do nothing to address it, that's a recipe for liability. Obviously, you will not likely be in a position to guarantee that you will fix everything that you find in short order. But before you release diversity analytics beyond a narrow circle within the company you need to have a sufficient organizational commitment to make persistent, good faith efforts to address any problems your data identify.

BACKGROUND: Why best practice requires diversity data

The commonplace assumption is that keeping diversity data entails counting, and making public, the number of women and people of color (and perhaps other groups) a company has at a given level or in a particular kind of job. These types of ***outcome metrics*** are vital for establishing a baseline against which progress can be measured, and for assessing the effectiveness of various interventions. Though outcome metrics are a good indicator of potential bias, they don't tell you where the problem arises or how to fix it. That requires a different sort of metric: ***process metrics***, which pinpoint whether and where bias is playing out in basic business processes such as hiring, performance evaluations, sponsorship, etc.

Outcome metrics provide a baseline, measure progress – and avoid wasting money. A key new audience in the diversity conversation is CFOs. That's because about $8 billion a year is spent on diversity initiatives that achieve remarkably few results.[3]

"We treasure what we measure." A company would not be taken seriously if it decided to fix its problem in sales by having an earnest conversation about how much the company values sales and putting on programming for National Celebrate Sales Month. This approach will be similarly ineffective in the DEI context. The simple message is that to address DEI challenges, companies should use the basic business tools they use to address any business challenge: evidence, metrics and persistence. Metrics are crucial to establish baselines and measure progress.

Process metrics pinpoint at what stage of a complex process bias is creeping in. An initiative to increase sales also would collect metrics on processes (such as the time spent on each call) that pinpoint where things are breaking down. DEI initiatives are no different. Hiring provides a good example. DEI challenges in recruiting and hiring may reflect one (or more) of five different things: 1) the pool from which candidates have been drawn is not diverse; 2) the resume review process is flawed; 3) the interview process is flawed; 4) the process by which decisions are made about whom to offer jobs to is flawed; 5) the process by which an offer is negotiated artificially advantages one group. Bias can arise at each stage; if it does, at each stage there is a different fix. Correcting for an overly homogeneous initial pool will require outreach, for example to historically black colleges and universities, or controls on referral hiring. Correcting for bias in resume review may have a tech fix and/or a training to empower people to spot common ways bias arises in hiring. Correcting for bias in interviews will require structured interview questions, and training, e.g., to avoid Tightrope bias (whereby some groups have to carefully balance authority and approachability, whereas others just have to display authority, which is much simpler).

Put differently, there's no reason to rollout diverse slates through the Rooney Rule if the problem is actually with onboarding or retention, or with the final round of interviews that occur after the slates have been identified. Organizations need to pinpoint where a problem arises in order to fix it. This is important to avoid quotas slapped on at the end of a flawed process, which can damage morale and lead to lawsuits.[4]

Process metrics uncover commonplace forms of bias. Research pinpoints how specific kinds of bias can play out in specific workplace systems. For example, an informal study found that 66% of women in tech, but only 1% of men, received comments about their personalities in performance evaluations.[5] Another study by our team found that 90% of people of color, but only 72% of white people, received personality comments.[6] If you are not interrupting this form of bias, it's probably happening at your organization. Carefully designed evidence-based metrics can uncover commonplace forms of bias.

Both process and outcome metrics can provide a bounceback. Another use of metrics is the "bounceback": individual feedback when metrics show that an individual manager may be influenced by bias, for example when a given manager always ends up only promoting members of one group. The bounceback uses metrics as the springboard for a conversation that assumes good intentions and avoids harsh judgments. This may be a particularly effective approach with groups like engineers and others in tech, who tend to want to see the data.

Outcome metrics may be required by law. Depending on your organization's size and type, you may already be legally required to disclose certain outcome metrics. The following are just a few examples:

<u>Department of Labor ("DOL"):</u> Covered federal contractors and subcontractors are required to create, implement, record, and annually updated Affirmative Action plans.[7] Covered employers with federal contracts must take affirmative action to recruit and advance qualified minorities, women, disabled persons, and covered veterans.[8]

<u>Equal Employment Opportunity Commission ("EEOC"):</u> Employers with more than 100 employees (lower thresholds apply to federal contractors) that are subject to Title VII are required annually to provide workforce data to the EEOC.[9] The data is collected annually using the EEOC's report template[10] and is used for enforcement, for self-assessments by employers, and research. Data regarding gender and race or ethnicity by job grouping is collected, regardless of whether an EEOC charge is filed. Although the data is confidential, aggregated data is available to the public. Often during the hiring process, some employers collect sensitive information through the EEOC's voluntary self-identification form.[11] Under the Equal Pay Act[12] and Fair Labor Standards Act, covered employers are required to maintain payroll records for every employee, including the employee's sex and occupation.[13]

<u>Securities and Exchange Commission ("SEC"):</u> In 2020, the SEC issued a final rule regarding the Modernization of Regulation S-K Items 101, 103, and 105, which regulates companies' non-financial reporting requirements.[14] Under the amendments, certain publicly traded companies must disclose the number of employees and a description of its human capital measures and

objectives if those measures or objectives are material to the management of the business.[15] Additionally, in 2021, the SEC issued an order approving proposed rule changes submitted by The Nasdaq Stock Market LLL relating to board diversity and disclosures.[16] The order requires each Nasdaq-listed company, subject to certain exceptions, to have at least two diverse board members: at least one who self-identifies as female and at least one who self-identifies as an underrepresented member of a racial or ethnic minority or as LGBTQ+.[17] If the Nasdaq-listed company does not have at least two diverse board members, or one if the board has five or fewer members, the company must disclose why it does not meet the applicable diversity objectives.[18]

If your company is global, other countries may have other requirements. Large global companies with locations in the European Union are required, under Directive 2014/95/EU, to publish reports on the policies they implement in relation to social responsibility, treatment of employees, and diversity on company boards in terms of age, gender, education, and professional background.[19] Covered employers, such as large public-interest entities with 500 or more employees, are expected to disclose material information on social and employee matters, including equal treatment in employment and occupation by age, gender, sexual orientation, religion, disability, ethnic origin, and other relevant aspects. For example, a company may disclose Key Performance Indicators (KPIs) based on aspects including gender diversity; employees entitled to parental leave, by gender; the number of persons with disabilities employed; and other relevant KPIs.

One final point: it's important to keep metrics on Asian-Americans, not just URMs (underrepresented minorities). This is because of extensive research showing that, even in companies where many Asian-Americans are hired, often very few Asian-Americans rise to leadership positions.[20]

ROADMAP

Ten steps can help your company achieve DEI best practice while controlling for legal risk.

1. *Assess your risk tolerance.*

The first step is to assess your company's risk tolerance. Some approaches to DEI involve very low risk, whereas others involve more risk but potentially more rewards. Companies can choose the approach to DEI that best reflects their preferred risk profile.

Highly risk-tolerant. Increasingly, companies believe that effective diversity measures are an expression of core company values, and they are willing to assume reasonable legal risk in order to achieve this important business goal, just as they do for other important business goals.

Highly risk-averse. Other companies are highly risk-averse with respect to diversity metrics. As noted above, the first question is whether the company is simply risk-averse in general, or whether it is willing to shoulder many kinds of risk but virtually no risk when it comes to diversity. This scenario signals that the company does not actually value diversity (even if it says it does), and also can actually increase risk if the company's inaction is used as evidence of intent to discriminate. Companies that are consistently highly risk-averse can still use an evidence-based approach without using metrics –although, without a baseline, it will be impossible to measure progress. An example: if hiring is overly homogeneous, reach out to different networks, e.g., HBCUs. If your company is allergic to diversity metrics, a good HR person often has a "sixth sense" about what is going wrong, and where. For other examples, see [www.biasinterrupters.org.](http://www.biasinterrupters.org)

Somewhat risk-averse. Most companies are willing to shoulder some, but not infinite amounts, of risk.

> *2. Differentiate clearly between different levels of risk associated with different kinds of data, and with whether diversity data is made public.*

Outcome metrics about demographic breakdowns at the company or in certain jobs typically present low risk. This information already exists or is readily available anyway, so the only thing a company can control is whether it first learns that it has a problem after it has been sued. Courts generally hold that plaintiffs are entitled to the basic kinds of data necessary to pursue their discrimination claims, and demographic-breakdown metrics typically will fall under this rubric.

For process metrics that test for specific types or locations of bias, it's a trade-off. Given that it can be downright embarrassing to disclose the same low diversity numbers year after year, companies already committed to disclosing outcome metrics would be well advised to use process metrics to pinpoint whether and where common forms of bias and/or ineffective HR processes exist. Keeping such metrics can help an organization avoid liability, because – remember – an organization that becomes aware of a DEI challenge needs to take persistent steps to address the problem in order to avoid liability.

Organizations that do not disclose demographic breakdowns need to weigh the cost/benefit. The downside of process metrics that pinpoint commonplace forms of bias is that they could show up, in some instances, as part of a pattern of proof supporting an inference of discrimination in a disparate treatment or pattern and practice lawsuit. The downside of *not* keeping such metrics is that, without them, a company is flying blind: if you don't know where bias might be creeping in, you can only make guesses about how to interrupt it effectively. An additional risk is that, as companies move towards keeping metrics about virtually everything, the lack of diversity metrics may be read as a signal that a company is trying to hide something. Given how important process metrics are, the best approach often will be to combine information collection with need-to-know limits on dissemination, a proactive document retention policy that ensures that the information is not kept longer than necessary to achieve DEI goals, and other measures described below.

An important message is that corrective action plans, and comments about metrics, may well be more sensitive than the metrics themselves. Training is vital to avoid off-the-cuff comments; the protocols described below can help control potential risks associated with corrective action plans.

Which types of diversity data should be made public? Part of the anxiety surrounding diversity metrics rests on the assumption that everything will be made public, fueled by the idealism of some tech companies that made a commitment to keeping and disclosing outcome metrics about the demography in their companies several years ago. In practice, the kind of demographic-breakdown metrics released by most companies merely provide information that is already compiled, could readily be compiled, or is obvious. Other kinds of metrics will be shared only on a need-to-know basis (as discussed below). Just as a company would not widely publicize the challenges it faces with respect to products' liability, or sales, or intellectual property, few companies will want to publicize DEI challenges, either (at least until they've solved them).

3. Make sure you have buy-in and budget to take persistent, reasonable measures to remedy any problems you find.

This is crucial for every company. It includes buy-in at the top, consistent messaging, and – often though not invariably – budget. Once you get a sense from your metrics of whether you have a problem and where, take steps towards a solution. Remember that you do not need to solve the problem immediately, but you do need to be able to point to persistent, reasonable steps taken to do so. The first step need not be perfect, but it needs to be prompt. Don't wait around for six months or a year. If you need budget in order to begin working on something, secure that in advance.

Risk-averse companies may want to limit written communications until the company decides which problem to focus on first. If a company finds challenges in five areas, present the data orally at a meeting with no notes to the management group that will decide which to address first, and then initiate the written communications necessary to initiate a pilot to address that issue. Another way to control risk is to ensure that the data that helped the company identify which issues to work on has a short shelf life, in compliance with the company's document retention policy.

4. Start small.

Starting with a small pilot helps you fine-tune your intervention in an iterative fashion until it works. This is best both from an organizational-change and a risk-management standpoint. Starting small also helps ensure that you can identify an effective way to make progress towards the goal without undue delay. Pilots should include an effective executive sponsor and be led by a diversity champion, or someone who is open-minded and willing to be led by HR or your Project Team: a cross-disciplinary change management team with a clear mandate, specific goals, and a limited timeframe. Don't try to boil the ocean, and keep in mind that making progress on a single issue may require a multi-faceted intervention.

5. Limit the circle on a "need to know" basis and provide guidance, particularly for corrective action plans.

Companies commonly limit the circle of people who have access to any form of sensitive information. That means that many companies already have a protocol for handling sensitive information, whether it's trade secrets or DEI data. Limiting the circle helps control risk, particularly if you can limit the circle to people who are familiar with how to handle sensitive information. If people are not familiar with handling sensitive information, make sure they receive guidance.

Keeping the circle tight also may also be important for morale: after all, if you find challenges, it might well take you some time to correct for them. Of course, people cannot interrupt bias if they don't know what it looks like, so a company will commonly be providing training or workshops. But it may not be necessary to tell everyone involved what metrics you are keeping to assess the need for, and success of, your efforts.

The real question is this: who needs to know the diversity metrics in order to create an effective DEI program? For many types of data, the circle will be small; the same is true of corrective action plans developed to address DEI challenges. Obviously, someone will be analyzing the data and developing the plan, typically someone in HR. The head of HR, the DEI officer, and the Project Team will also be inside the circle, as will the executive sponsor to whom the Team reports to. Some highly risk-averse organizations adopt a privilege protocol to maximize their ability to claim attorney-client privilege (see #9 below).

6. Control expectations through effective messaging.

Don't create expectations you can't fulfill. The most effective messaging is that the company has a whole commitment to unlocking the potential of its most important asset – its human capital.

The Project Team needs to understand that bias is pervasive even among people of goodwill, is built into our cognitive processes, and is often embedded into organizational processes at many different points. That means that bias is often not a simple thing to interrupt, but that the company is committed to making persistent, reasonable efforts to address the problem.

The communication challenge will likely be getting support from the managers implementing DEI programs without sharing the underlying rationale. If the Project Team focuses on launching revised recruiting or performance review tools, for example, that aim to mitigate bias, the underlying data may not need to be shared beyond the Project Team.

7. Create a DEI data protocol (or use your existing one).

Businesses commonly create data protocols to handle sensitive information. Drafting such protocols has become more complex as the GDPR and state statutes impose specific data privacy restrictions. Use your existing data protocol or create a new one. A data protocol that applies to DEI metrics should have the following elements:

(a) Give an official name to each project (e.g., Performance Evaluation Project) and set forth who is on the Project Team.
(b) Identify the scope of work for the Project Team carefully.
(c) Identify who is authorized to have access to the information by listing those people in the protocol and stating that the information cannot be shared with anyone who is not listed in the data protocol without written permission from a data protocol officer who is identified in the protocol.
(d) Establish a procedure for bringing other people into the group.
(e) Ensure that the data protocol officer is well informed and trained.
(f) Develop thoughtful principles and protocols to govern sharing of information outside the group. Consider stating that information should be shared on a needs-only basis.
(g) Take particular care to identify the people who are authorized to do analyses of your data, prohibit others from doing so, and develop separate procedures for handling sensitive analyses and reports.
(h) Apply appropriate privacy protections for personal information, which should be anonymized where possible.
(i) Specify that violation of the data protocol can lead to disciplinary action.
(j) Don't just hand out a memo saying all this. People often don't read memos. Have a team meeting and go through the Data Protocol for each specific project point by point.
(k) Often the problem is not the metrics themselves, but the conversations, conclusions, discussions, emails, and notes amongst the Project Team or from the team to others. Unless the team is familiar with handling sensitive information, they will need guidance to understand the kind of information that can be shared verbally but is too sensitive to share in writing.
(l) They also need to be trained not to draw legal conclusions, for example about sexual harassment, that could result in liability for the company. Process metrics that test for specific kinds of bias that have been documented to be pervasive should not be linked to conclusory statements about discrimination – which is a legal conclusion, not the social science data point. No joking on paper: often that's where the trouble starts.
(m) Once the analysis is complete, designated members of the Project Team will meet with management to give an oral report, with no notes taken. Again, the company

needs to commit to make prompt good-faith efforts to address issues its metrics identify: often the best first step will be a workshop, which can be rolled out quickly. A successful approach should have some short-term responses that can be adopted quickly (for example, a company-wide training on recognizing and disrupting bias, and/or having everyone review a 2-page Bias Interrupter toolkit before engaging in hiring or evaluations or whatever business system is an issue), plus longer-term interventions to tackle the problem in-depth.

(n) Bouncebacks should be given orally by someone who has been trained to give them. See Appendix A.

8. Create a data retention policy (or, preferably, use your existing one).

Every business should have a data retention policy and most already do. The ideal is to use your existing retention policy to avoid the optics of having to explain why certain records no longer exist even though the regular data protocol policy indicates that they should. Whether you create a data retention policy or use your existing one, the general principle is that metrics should be retained only as long as necessary to measure whether specific procedures adopted are effective. Local and other laws should be consulted when crafting any data retention policy to ensure that failure to retain records is not an issue.

9. Consider structuring critical documents to maximize the chances they will fall within attorney-client privilege – although there is no guarantee.

Some highly risk-averse companies choose to structure critical documents to maximize the chances they will fall within attorney-client client privilege. This is definitely better than not keeping or analyzing metrics at all – but there is a cost to structuring your DEI initiative in this way. Research shows that the best way to position a DEI initiative is by showing concretely to different audiences, including the Board of Trustees, the C-suite, and individual managers, how improving diversity and inclusion will enhance their ability to do their jobs effectively.[21] Framing a diversity initiative as a response to litigation makes this more challenging, and research shows that training that is framed in terms of legal compliance is less effective than training framed around a business case.[22] Framing DEI initiatives as a response to legal risk drive people into a defensive crouch, which is not a good stance from which to increase inclusion.

Nonetheless, some organizations will want to structure certain critical documents (including but not limited to corrective action plans) to maximize their ability to claim attorney-client privilege. This section will help them do so.

Attorney-client privilege provides that confidential communications between an attorney and the client cannot be revealed. Because organizations commonly structure internal communications related to internal investigations this way as to maximize the chances that sensitive information will be protected by attorney-client privilege, many companies will already have a protocol for doing so. For companies that don't, the following provides a roadmap.

If your company has been sued for discrimination and you frame your DEI initiative as a response to litigation, this is the strongest case that the information will be protected by attorney-client privilege. Paperwork should reference the litigation.

If you have not been sued for discrimination, the next strongest claim for attorney-client privilege is to hire outside counsel to do an analysis and advise on a path forward. Companies routinely hire outside employment counsel to do "barrier analysis": to analyze the barriers to diversity and inclusion within the company and inform the company about what it should be working on in a way that maximizes the ability protect the data within attorney-client privilege.

Of course, this may also be more expensive than using in-house counsel. If you use good hygiene, you can also have a robust claim to attorney-client privilege without hiring outside counsel. The key is to loop in outside counsel in contexts that make it clear that they are being consulted for their legal opinion, not (just) in their business capacity.

Attorney-client privilege does not cover facts. It can cover conversations, conclusions, discussions, emails, notes, and analysis of DEI data, which is the kind of evidence that plaintiffs' lawyers often find most useful when suing the company. Here's a roadmap:

(a) Sensitive paperwork should be labeled PRIVILEGED AND CONFIDENTIAL – ATTORNEY WORK PRODUCT. Treat the information as confidential (see data protocol above). Material shared with top managers is more likely to be held confidential than material widely shared throughout the company.

(b) Practice good document hygiene. Keep statistics in a clear format with no analysis. Attachments should be sent as links (to a cloud-stored document) rather than as attachments.[23] Documents should be single-purpose: don't produce a huge report summarizing all of the data, analysis, and recommendations. Consider communicating sensitive material verbally.

(c) Analyses should identify their legal purpose. Looping in-house (or outside) counsel in is not effective if the document lacks a legal purpose. The strongest way to claim attorney-client privilege is to say that your DEI initiative's goal is to comply with specific laws, notably equal employment opportunity laws, but it's important not to put people in a defensive compliance-only crouch. An example of an effective message:
"Research shows that the traditional DEI tools are often ineffective and that holding people accountable is key. To forge effective tools for achieving [company name]'s goals of offering equal employment opportunities to the full talent pool, the Project Team will keep metrics that signal potential areas for attention, forge tools for addressing them, and assess the effectiveness of those tools."

(d) The Project Team should keep their work product segregated from their other files, labeled separately, and password-protected. They should not produce documents with sensitive information that contain a combination of information related both to their regular jobs and to their role on the Team.

(e) Don't just hand out a memo saying all this. People often don't read memos. Have a meeting and go through this protocol point by point.

10. In a few states and situations, you may be able to structure your initiative to maximize the chances it will fall within the self-examination privilege.

Some courts have held that if an organization is undertaking an internal investigation for purposes of self-examination and self-improvement, the resulting investigation will not be discoverable.[24] This privilege arose in the context of confidential reviews of EEO hiring practices, so it seems relevant.[25] However, a number of federal and state courts have refused to acknowledge the privilege.[26] In most states, the self-examination privilege is so full of holes it will not prove useful for most companies in most circumstances. Here are some good sources.[27]

Conclusion

Companies are failing under increasing pressure to actually deliver on their diversity goals; they will find it impossible to do so without using metrics to establish baselines and measure progress. This White Paper is designed to share best practices to make companies more comfortable with keeping diversity metrics while controlling for legal risk.

Appendix A

When managers' hiring or performance evaluations show persistent bias, they should receive a bounceback (i.e., someone should talk through the evidence with them).

Here is an example of a bounceback in performance evaluations:

In one organization, when a supervisor's ratings of a historically excluded group deviate dramatically from the mean, the evaluations are returned to the supervisor with the message: either you have an undiagnosed performance problem that requires a Performance Improvement Plan (PIP), or you need to take another look at your evaluations as a group. The organization found that a few people were put on PIPs– but that over time supervisors' ratings of historically excluded groups converged with those of majority men. The organization that used this found that all groups found performance evaluations equally fair.

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[1] One common concern is the risk that the DEI analysis will be requested by an employee in a later discrimination lawsuit. *See* FED. R. CIV. P. 26 (Parties to litigation "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim. . .").

[2] *Title VII: Affirmative Action,* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-161 (last visited Feb. 15, 2022).

[3] Rik Kirkland and Iris Bohnet, *Focusing on What Works for Workplace Diversity* (2007), https://www.mckinsey.com/featured-insights/gender-equality/focusing-on-what-works-for-workplace-diversity.

[4] *United Steelworkers v. Weber*, 443 U.S. 193, 208, 99 S. Ct. 2721, 2730 (1979) (held Title VII's prohibition against racial discrimination does not condemn all private, voluntary race-conscious Affirmative Action plans if (1) there was a manifest imbalance, (2) the program does not unnecessarily trammel majority interests, and (3) the program is temporary.) States, of course, may have additional limitations

[5] Kieran Snyder, *The abrasiveness trap: High-achieving men and women are described differently in reviews,* FORTUNE MAG., Aug. 26, 2014.

[6] Joan C. Williams, Denise Lewin Loyd, Mikayla Boginsky, and Frances Armas-Edwards, *How one company worked to root out bias from performance evaluations,* HAR. BUS. REV., Apr. 21, 2021.

[7] *Affirmative Action*, U.S. DEPARTMENT OF LABOR, https://www.dol.gov/general/topic/hiring/affirmativeact (last visited May 28, 2020).

[8] 41 C.F.R. § 60-2.12 (2019) (Covered contractors conduct a job group analysis to compare "the contractor's comparison of the representation of minorities and women in its workforce with the estimated availability of minorities and women qualified to by employed.").

[9] *EEOC Reports/Surveys*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/employers/eeo-reports-surveys (last visited May 28, 2020).

[10] 29 C.F.R. § 1602.7 (2020).

[11] *Sample Self-Identification Forms*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/employers/sample-self-identification-forms (last visited May 28, 2020).
[12] Equal Pay Act, 29 C.F.R. § 1620.32 (2020).
[13] 29 C.F.R. § 516.2 (Records To Be Kept by Employers Under the FLSA). *See also Fact Sheet #21: Recordkeeping Requirements under the Fair Labor Standards Act (FLSA)*, U.S. DEPARTMENT OF LABOR, https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs21.pdf (2008).
[14] Modernization of Regulation S-K Items 101, 103, and 105, 85 Fed. Reg. 63,726 (Oct. 8, 2020) (to be codified at 17 C.F.R. pt. 229, 239, 240).
[15] *Id.* For example, if a measure of a registrant's part-time or full-time employees, independent contractors and contingent workers, or employee turnover are material to understanding the business, the registrant must disclose that information. Notably, however, the SEC did not provide a definition for "human capital measures."
[16] Order Approving NASDAQ Proposed Rule Changes Relating to Board Diversity, 86 Fed. Reg. 44,424 (Aug. 12, 2021), https://www.govinfo.gov/content/pkg/FR-2021-08-12/pdf/2021-17179.pdf.
[17] *Id.*
[18] *Id.* The SEC has proposed a definition of "underrepresented minority" that is consistent with the EEO-1 categories reported to the EEOC because, among other reasons companies are likely familiar with those categories and could promote efficiency in compliance with the rules.
[19] COMMUNICATION FROM THE COMMISSION*, Guidelines on Non-financial Reporting*, EUR-LEX, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017XC0705(01)#ntc24-C_2017215EN.01000101-E0024 (last visited May 28, 2020).
[20] Buck Gee and Denise Peck, *Asian Americans Are the Least Likely Group in the U.S. to Be Promoted to Management,* HAR. BUS. REV, May 31, 2018.
[21] Joan C. Williams, *Bias Interrupted*: *Creating Inclusion for Real and For Good* (2021).
[22] Frank Dobbin and Alexandra Kalev, *Why doesn't diversity training work? The challenge for industry and academia,* 10 ANTHROPOLOGY NOW 589, 589-617 (2006).
[23] This is because, even if everything in the email is covered by attorney-client privilege, attachments must be separately covered by privilege.
[24] *See, e.g.*, FED. TESTIMONIAL PRIVILEGES 2D, *Self-critical analysis or self-critical evaluation privilege* § 10:8 n.26, Westlaw (Nov. 2019 update) and the cases cited there.
[25] LAW J. PRESS, *Corporate Privileges and Confidential Information* § 6.01 n.5, LEXIS (updated through Nov. 2019) and cases listed there.
[26] *Id.* at n.17.
[27] *See, e.g.*, CORPORATE COUNSEL'S GUIDE TO THE ATTORNEY-CLIENT, WORK-PRODUCT, & SELF-EVALUATING PRIVILEGES, *Introduction* § 4:1, Westlaw (Sept. 2018 Update); LAW J. PRESS, *Corporate Privileges and Confidential Information* 6.01, LEXIS (updated through Nov. 2019); David M. Greenwald, Robert R. Stauffer, & Erin R. Schrantz, 1 TESTIMONIAL PRIVILEGES 3d, *History and evolution of self-critical analysis privilege* § 1:119, Westlaw (Oct. 2017 update).