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Despite Attacks, DEI's Foundation is Sound

Cultural Competence



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Cheat Sheet

- **Embracing DEI.** Diversity, equity, and inclusion can drive innovation and profitability in legal practice.
- **Cognitive diversity.** An environment fostering different thought processes improves decision-making and financial performance.
- **Reputation and retention.** Diverse workspaces enhance recruitment, retention, talent development, and can capture new market shares.
- **Legal considerations.** Navigating DEI initiatives requires legal guidance to remain within federal and state anti-discrimination laws.

A contentious climate

Is DEI up for debate? It certainly seems that way with controversial lawsuits, US states cleaving into different camps, and the potential for a US Supreme Court ruling that could do for DEI in the workplace what it did for race in the college admissions process.

[Recent lawsuits reveal a complex landscape for companies](#). Companies are walking a tightrope between fostering diversity and ensuring they don't inadvertently marginalize any group.

Indeed, after the Court's decision that Harvard and the University of North Carolina's [race-conscious admissions practices are unconstitutional](#), it is imperative that leaders in the legal field strike a careful balance between encouraging inclusive work environments and avoiding unlawful preferences based on protected characteristics.

In this article, we dive into the ever-evolving landscape of DEI and why many companies view it as a strength. General counsel and law firm leadership have emerged as crucial actors making meaningful efforts to maximize profits and improve DEI, all while thoughtfully remaining within the bounds of federal and state anti-discrimination laws. By striking this balance, legal professionals can pave a path that is ethically commendable, financially advantageous, and legally robust.

Diversity strengths: Innovation

Through careful planning and partnership with employment counsel, the legal industry can benefit from DEI because it fosters renewed perspectives, inspires creative litigation strategies, and drives innovation in case management.

DEI helps to anticipate shifts in consumer needs

The power of DEI is evidenced by McKinsey's May 2020 Report, [Diversity wins: How inclusion matters](#). McKinsey, a management consulting firm, found — based on a data set covering 15 countries and over 1,000 large companies — that “the most diverse companies are more likely than ever to outperform non-diverse companies on profitability.”

For example, companies with more than 30 percent women on their executive teams were significantly more likely to outperform those with between 10-30 percent women, and companies in the top quartile for ethnic and cultural diversity outperformed those in the fourth by 36 percent in terms of profitability in 2019, slightly up from 33 percent in 2017 and 35 percent in 2014. One reason for this, according to McKinsey, is that companies that value DEI are likely to “radically innovate and anticipate shifts in consumer needs and consumption patterns.” In other words, where businesses embrace DEI, innovation and creativity abound.

Applying these findings to the legal industry, McKinsey's report tends to show that legal teams with diversity in characteristics (e.g., age, physical and cognitive ability, gender, race and ethnicity, or geographic culture), can more closely reflect and better assist the ever-broadening client base that large companies and law firms serve.



In comparison with non-diverse companies, diverse legal teams are more innovative and can better assist the needs of all clients. RysaVector / Shutterstock.com

Diversity strengths: Decision-making and financial performance

One critical aspect of DEI is openness to cognitive diversity. As highlighted in Boston Consulting

Group's 2017 Report, [The Mix That Matters: Innovation Through Diversity](#), an environment where employees feel free to speak their minds and are encouraged to consider opposing ideas and engage in "constructive conflict" is a fundamental element of effective decision-making. To foster such an environment in a legal setting, both in-house legal departments and law firms need to exemplify what the report calls "participative leadership behavior." When leaders genuinely listen to employees' suggestions and make use of them, diversity's benefits multiply and decision-making improves exponentially.

Revenue from new products increases with diversity

Based on a survey of 171 companies across Germany, Switzerland, and Austria, BCG also found that diversity has a statistically significant positive correlation with innovation revenue, defined as the percentage of revenue derived from new products and services over a three-year period. Companies with higher diversity scores demonstrated an impressive 38 percent increase in revenue generated from innovative products and services compared to companies with lower diversity scores.

In complex organizations, the relationship between diversity and innovation revenue was statistically significant, accounting for up to 18 percent of the variation in innovation revenue. Notably, the study also emphasizes the role of favorable work environment conditions in amplifying the positive impact of diversity on innovation revenue. Companies that fostered a supportive and inclusive workplace environment generated 33 percent of their revenue from innovative products and services, compared to 24 percent for those that failed to create such conditions.



Having more women in senior roles shows a greater return in innovation revenue. 27SaturnO / Shutterstock.com

Finally, like McKinsey, BCG's report highlights the influence of gender diversity on innovation revenue. Companies with the highest gender diversity, having 8 out of 20 managers as female, generated around 34 percent of their revenue from innovative products and services. In contrast, companies with the lowest gender diversity (only 1 in 20 managers being female) generated only 25 percent of their revenue from innovation.

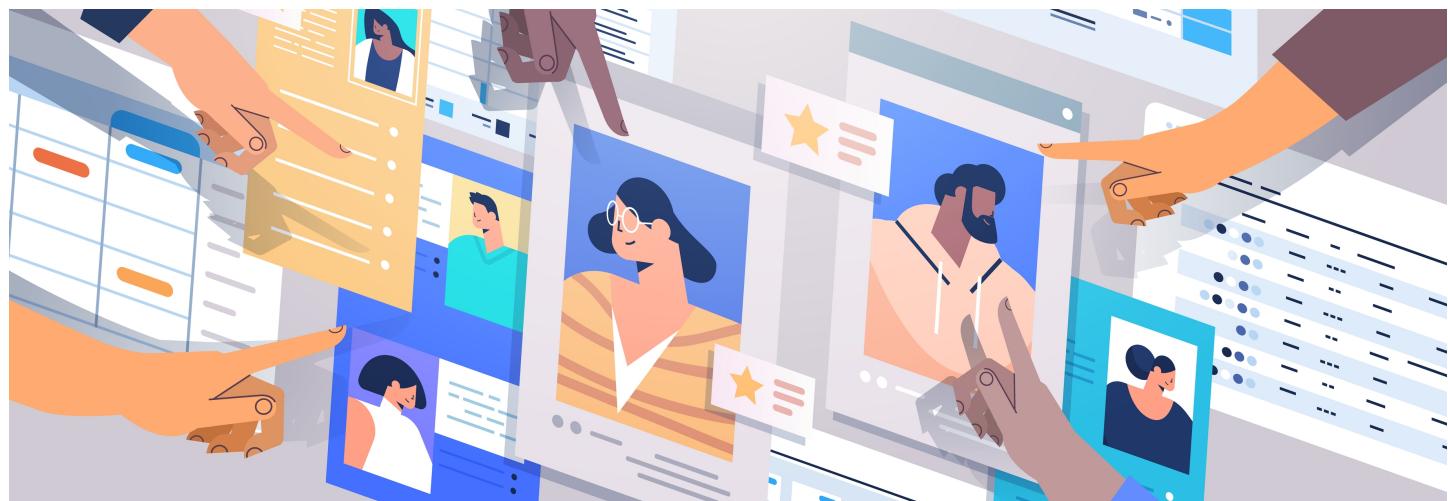
While there is no doubt that law firms and legal departments employ problem-solvers and quick-thinkers, the legal industry tends to lag in modernization and innovation — particularly compared to tech giants and other similar companies. After all, the legal industry is one that relies heavily upon history and precedent.

Thus, McKinsey and BCG's findings are pertinent, especially in a world in which artificial intelligence is beginning to transform legal services delivery and impact the relationship between firms and in-house counsel. Embracing DEI can inspire adaptability and creativity, essential qualities for improving financial performance in an evolving legal landscape.

Diversity strengths: Reputation and retention

DEI brings an advantage in recruiting

Legal departments and law firms with a history and reputation for meaningfully providing an inclusive and diverse work environment — where all employees can bring their authentic selves to the workplace and feel a true sense of belonging because their opinions are valued, considered, and included in the decision-making process — can also benefit in recruitment, retention, development, and advancement of talent and clients.



A diverse workforce is a key factor job seekers and employers value during the recruitment process.
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Employers with high diversity in leadership were 45 percent likelier to report that their company market share increased over the past year and 70 percent likelier to report that their company captured new market share during the same period. Also, in the current market (one still reeling from the "[Great Resignation](#)"), inclusive and diverse workforces provide a company with an advantage in recruiting. For example, [Glassdoor's 2020 Diversity & Inclusion Workplace Survey](#) found that "more than [three quarters] of job seekers and employees (76 percent) report that a diverse workforce is an important factor when evaluating companies and job offers."

DEI drives up retention

Employee retention and advancement are also critical to the financial success of legal departments and law firms. Indeed, the National Association-Law Placement reports that turnover costs can range from US\$200,000 to US\$500,000 for an associate, and over US\$1 million for a partner. The costs associated with turnover include that of recruiting, hiring, on-boarding, training, loss of institutional

knowledge, decrease in employee morale, and much more. And while the number of attorneys in underrepresented groups continues to increase at law schools and entry level of the legal professions, it nonetheless significantly declines at higher levels of the legal profession (i.e., attorneys leave the profession). Thus, prioritizing an inclusive, equitable and diverse work environment can improve the likelihood that these employees stay, advance, and in return mentor/help others.



Upholding a positive DEI work environment will help ensure employee retention. Nadya_Art / Shutterstock.com

Ask your colleagues how DEI has impacted them



Edward Chyun, Shareholder,

[Littler Mendelson, P.C.](#)

Finally, speaking from personal experience, one of the authors ([Chyun](#)) can personally attest that his firm's ongoing commitment to DEI (demonstrating to him that he could succeed at the firm) contributed to him deciding to join the firm, staying (16 years and counting), advancing at the firm, and developing and expanding current and new clients.



Lysette M. Roman, Associate,

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Likewise, another author ([Roman](#)) can echo that she was drawn to her current law firm as a junior associate because of its investment in her talent, recognition of her unique perspectives, and appreciation for her self-expression.



Markus Hartmann, General Counsel, [Mister Car Wash](#)

In the same vein, another author ([Hartmann](#)) was attracted to his current public company, not only because of its rapid growth, but also due to its impressive commitment to IE&D at the highest executive levels, where four of the five of the named executive officers are diverse.

Current legal considerations

As demonstrated by the referenced reports and studies, the legal industry can benefit both culturally and financially by embracing DEI in the workplace. But developing and instituting *lawful* DEI initiatives requires careful planning, and employers should consider partnering with experienced employment counsel for legal support and guidance.

Careful planning is exceedingly important considering the Court's decision in *SFFA*. While the opinion addressed race-conscious admissions practices in the higher education context only, various state actors have interpreted the *SFFA* decision as extending evenly to the employment context. Title VII of the Civil Rights Act, which governs employers, has always prohibited the use of race and other protected characteristics in employment decision-making.

For instance, on July 13, 2023, the Attorneys General of 13 different states

Kansas, Tennessee, Alabama, Arkansas, Indiana, Nebraska, Iowa, South Carolina, Kentucky, West Virginia, Mississippi, Missouri, and Montana

issued a [letter](#) to Fortune 100 CEOs, cautioning them against using racial preferences in employment decisions given the *SFFA* decision. Likewise, on July 17, 2023, Senator Tom Cotton sent a [letter](#) to 51 law firm leaders, stating that the firms' clients' (and the law firms') IE&D programs may be violating federal law following the *SFFA* decision. Both letters threatened scrutiny and legal action by the state or federal actors.

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But on the other hand, on June 19, 2023, Attorneys General from 20 states

Nevada, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington

and the District of Columbia sent their own [letter](#) to Fortune 100 CEOs, arguing that *SFFA* does not directly address or govern the behavior or the initiatives of private sector businesses. While these AGs agreed that race-based employment discrimination is unlawful, they also believe that corporate efforts to recruit diverse workforces and create inclusive work environments "comply with the spirit and the letter of state and federal law." Indeed, these AGs emphasize that corporate DEI efforts — when thoughtfully carried out — "are ethically responsible, good for business, and good for building

America's workforce."

Keep these guardrails in mind

Amidst this back-and-forth, legal departments and law firms should be mindful that organizational DEI initiatives, even those supported by the best intentions, may be subject to heightened scrutiny and legal challenges by individuals, groups, and federal and state legislative and regulatory agencies. How can employers lean into DEI trend without running afoul of anti-discrimination laws? To start, employers should keep the following guardrails in mind:

- Employers should make all employment decisions based on *objective, business-related criteria* — not protected characteristics.
- Employers should not interview or hire individuals from historically marginalized communities *simply to meet a quota or quantitative goal*.
- Decision-makers (such as hiring managers, supervisors, human resource professionals, and even recruiters) should be *trained* on federal and state equal employment and anti-discrimination laws so they understand the legal framework governing their employment decisions.
- Employers may consider incorporating *unconscious bias training* to further prevent unlawful (albeit inadvertent) employment decisions based on protected characteristics but should consult with counsel to ensure that such training does not run afoul of "anti-Woke" laws in certain jurisdictions.
- Remember that in successful DEI programs, *one size does not fit all*.

Balancing act: Nurturing DEI in a contentious legal climate

Legal professionals can significantly benefit from embracing DEI in the workplace on many levels, including recruitment, innovation, productivity, decision-making, employee engagement, and financial goals. Considering recent events, it's evident that while the path to creating an inclusive environment is filled with challenges, it's also ripe with opportunities.

Legal departments and law firms can — and should — be torchbearers in promoting and advancing inclusive and equitable workplaces where *all* employees can flourish, while simultaneously adhering to all applicable anti-discrimination laws. As such, leaders in the legal field should stay abreast of legislative and regulatory developments across the country and seek employment counsel for guidance in the ever-evolving legal landscape of DEI.

2 minutes with an ACC Docket Author

Check out this clip from *Docket* author Markus Hartmann as he comments on his most recent article, "Despite Attacks, DEI's Foundation is Sound."

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Markus Hartmann is the general counsel for Mister Car Wash (NYSE: MCW), the largest car wash operator in North America, with over 440 locations across the country and headquartered in Tucson,

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Edward Chyun is a shareholder in the Cleveland, Ohio office for Littler Mendelson, P.C., the largest law practice in the world exclusively devoted to representing management in employment, employee benefits and labor law matters. Chyun has extensive experience handling and resolving a broad range of issues in state and federal courts at both the trial and appellate levels, as well as in arbitrations, Equal Employment Opportunity Commission hearings, and the National Labor Relations Board hearings. Chyun also advises and counsels employers with day-to-day employment and labor relations concerns, and provides training on various employment and labor issues. Further, Chyun is

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Chyun currently serves as co-chair of the firm's Diversity and Inclusion Council, and the firm's 'Ohana affinity group (which provides support, development and networking opportunities for Asian, South Asian, Middle Eastern, North African and Pacific Islander attorneys). Chyun is a founding member and treasurer for the Asian American Bar Association of Ohio. He also served as the co-chair of the National Asian Pacific American Bar Association (NAPABA)'s Labor & Employment Committee, and was named a Fellow to Legal Counsel on Legal Diversity in 2016. In 2015, he was appointed to serve on the Ohio Supreme Court's Language Services Committee, which works with the Ohio Supreme Court in improving access to the courtroom for non-English speakers and the hearing impaired. Chyun has been recognized as a Rising Star, Super Lawyer, and Best Lawyers in America since 2009.

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under state and federal law. Roman also creates and presents training materials for management-level employees on equal employment opportunity, anti-discrimination laws, and other best practices in the employment life cycle. Further, Roman is committed to ensuring equal employment opportunity and advancing Inclusion, Equity, & Diversity in the workplace. As such, Roman is a part of Littler's IE&D Practice Group, through which she advises clients of all sizes in implementing legally-compliant IE&D programs and policies. Finally, during law school, Roman was co-president of the Hispanic Law Student Association and senior tech editor to *War Crime Prosecution Watch* online publication.