



## **Diversity and Inclusion Efforts on Leadership Promotion**

**Cultural Competence**

**Employment and Labor**



When discussing diversity and inclusion in employment, the emphasis is often placed on hiring candidates rather than elevating employees to higher management levels. However, hiring diverse candidates does not automatically create diversity and development of employees at higher

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management levels.

While employers' efforts to position themselves to be more attractive to diverse candidates are well-intentioned and laudable, certain research studies suggest that in addition to diverse hiring, there is an equivalent need to identify existing contributors who have the potential to elevate employee talent levels. Otherwise, roadblocks like the lack of internal mechanisms and management focus mentioned in *The Wall Street Journal* article [“Where Are All the Women CEOs?”](#) can create challenges for women and other minority groups to rise in the corporate ranks.

However, labeling an initiative or creating a committee for diversity and inclusion can be insufficient or potentially viewed as a dilution of corporate efforts unless reinforced by action. More successful promotions occur when there exist objective goals for promotions, management buy-in, a meaningful communications plan with the employee in focus and a deliberate and realistic timetable for achievement.

This article discusses both a more recent, purposeful example involving promotional opportunities and other employment policies and practices with success for in-house counsel to consider for their departments and their companies. While these concepts may be useful, they are not complete and exclusive solutions. The information provided in this article is based on discussions with other general counsel regarding best practices at their companies.

## **Successful promotion strategy**

Some in-house legal departments mandate a more transparent and objective approach to promotion, which has resulted in the elevation of more diverse attorneys. The strategy involves taking calculated risks — or mitigating against them — to advance the careers of attorneys in more aggressive timetables. Providing objective, measurable goals and avoiding prolonged delays has proven successful in these cases.

This process involves identifying the requisite skills and experiences needed at different job levels within the department and developing objective criteria in written job descriptions that attorneys can understand and consider with prior notice to better focus work assignments and interactions with business leaders to make a promotional opportunity a tangible reality. Inherent in this effort is the reduction of more subjective hurdles to advancement. The key to this effort is transparency, along with clear, plain, and relevant goals.

It's also critical that leaders effectively communicate to set expectations and a timetable for measurement. Typically, this involves an open dialogue with the employee to discuss the necessary steps leading up to the promotion. However, use of more aggressive time frames is encouraged. How many times have you heard someone say, “This candidate is not ready yet, but I think they will be there in six months”? Instead, leadership is encouraged to consider whether waiting for those six months will make a meaningful difference. When a candidate demonstrates readiness, moving ahead is encouraged.

## **Policies and other company initiatives**

Employers can help themselves by designing and introducing corporate leave policies that support career advancement for caregivers in particular. While a number of states more recently enacted family-friendly workplace laws that require paid time off and in some cases job-protected leave, those

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laws frequently become the minimum baseline for employers operating in multiple jurisdictions, where among several states, at least one location will have a statutory leave obligation.

Employers seeking to create advancement opportunities for working parents have introduced paid parental leave benefits to supplement or provide an equivalent benefit for employees who work in a state that does mandate paid parental leave and/or job protected leave. By launching and promoting a voluntary paid parental leave program, an employer demonstrates a commitment to diversity and inclusion.

Yet, in addition to offering a generous paid benefit, the benefit is only as good as the corporate culture that embraces it. Therefore, a cogent agent of diversity and inclusion can be the company's executive management that endorses a family-friendly workplace culture where working parents can reach the executive suite.

Another important contributor is a department or team that helps its employees to avail themselves of the paid family leave policy. In a recent example, one company modified its commission policy to make salespeople eligible to receive a full commission while on paid family leave; the employees on the sales team who remain to cover for the employee on leave do not share in the commission.

While such a mandate could cause dissension amongst the remaining sales employees providing coverage without splitting commissions, the employer decided that those who cover may later benefit from the arrangement. Further, the employer determined that continued exposure to other clients and situations will help to round out the employee experience and foster potential future opportunities.

## **Representation in the boardroom**

A handful of states more recently passed or introduced legislation aimed at increasing the representation of women on company boards of directors. These laws are not directed at the representation on corporate boards by individuals in other protected classifications. Since several are new for 2020, their impact remains unknown.

California introduced its law following a study conducted by Credit Suisse regarding company stock performance during a specified time period involving those with female representation on the boards of directors compared with all-male boards. The preamble to the [California Women on Boards Law \(Senate Bill 826\)](#) states:

*Credit Suisse conducted a six-year global research study from 2006 to 2012, with more than 2,000 companies worldwide, showing that women on boards improve business performance for key metrics, including stock performance. For companies with a market capitalization of more than US\$10 billion, those with women directors on boards outperformed shares of comparable businesses with all-male boards by 26 percent.*

The California Law requires that all publicly held domestic or foreign corporations whose principal executive offices are located in California have at least one female director on their boards by December 31, 2019. Boards can accomplish this obligation either by filling an open seat or by adding a seat.

By December 31, 2021, companies will be required to have one or two more women directors, depending upon the size of the public company's board. The required minimum number of members

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increases to two women directors if the company has five directors, or to three women directors if the corporation has six or more directors.

This corporate governance obligation is achieved simultaneously with the company's filing an SEC 10-K Form. The complete list of companies with female board members is published on the California Secretary of State's website. The penalty for a first-time violation is US\$100,000, which increases to US\$300,000 for subsequent violations.

Similarly, Maryland passed the [Gender Diversity on Boards Law](#) requiring certain Maryland businesses and nonprofits to report the number of women on their boards as part of an annual report which companies and nonprofits must file annually by April 15 with Maryland's Department of Assessments and Taxation. The Maryland law is effective January 1, 2020.

The requirement to file the report includes nonprofit organizations with an operating budget exceeding US\$5 million annually and publicly traded companies with sales exceeding US\$5 million annually. Privately held companies are subject to the filing requirement and only exempted if at least 75 percent of the shareholders are family members. The State Comptroller publishes a report each year on its website with the ratio of female board members.

Unlike the California statute, the Maryland statute does not mandate representation by women but merely is a disclosure obligation without associated penalties for non-compliance. Also note that the California law is facing a legal challenge in a lawsuit by a company comprised of an all-male board that is challenging it as unconstitutional.

Other states, such as Illinois and Massachusetts passed earlier resolutions encouraging companies to diversify their boards with female participation. The [Massachusetts resolution](#) goes farther for public companies to encourage all diversity (not limited to women) representation in senior management roles too and to measure their progress annually.

The [Illinois resolution](#) based in part on the aforementioned Credit Suisse study and one by McKinsey & Company finding that "companies where women are most strongly represented at board or top-management levels are also the companies that perform the best," encourages female representation on public boards with female seats proportional to the size of the total seats on the board.

In 2018, the New Jersey Assembly proposed bill No. 4726 closely resembling the California Women on Boards Law. The proposed bill was carried over to 2020. It remains to be seen whether the New Jersey proposal will gain any momentum and any other states take on similar initiatives.

## Legal backdrop

Unlike corporate initiatives, certain minimum compliance obligations are set by law, such as Title VII of the Civil Rights Act of 1964 (Title VII) and equivalent state and local law and the Equal Pay Act (EPA) and its state and local equivalents, prohibiting unequal treatment in the workplace. While Title VII and the EPA are intended to realize similar treatment for diverse and female employees; they do not prescribe corporate initiatives or formulas to foster increased representation at higher level executive management and board roles.

Likewise, Executive Order 11246, requiring federal contractors to develop affirmative action plans to hire and promote women and minorities, is limited to government contractors. The overwhelming

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majority of companies are not regulated by the Executive Order, allowing them to set their own diversity and inclusion initiatives — if at all.

## Conclusion

The pronouncement of a diversity and inclusion strategy for employers — and particularly for corporate legal departments or high-level executive management roles — is just part of the solution to maximize results. Demonstrated commitment to diversity and inclusion, and visible results, requires an intentional plan.

In addition to corporate initiatives, a generous paid family leave benefit or policies promoting inclusion can yield significant returns. Setting the tone at the senior corporate policy and program levels encourages opportunity and helps avoid biases and presumptions, such as a working parent is unlikely to travel or be available for special assignments, or a diverse employee cannot handle the rigors of a corporate boardroom for lack of experience. Achieving measurable advancement takes a carefully planned effort.

Remember the boardroom is only a token of the overall employee population at companies. Female representation at the board level can relay a profound message about corporate culture. But it also could be viewed as more superficial unless other diversity and inclusion initiatives complement its board representation. One-size-fits-all approach does not necessarily exist but a combination of meaningful — and sometimes lower key but communicated — initiatives have had delivered results.

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