

Diversity and Inclusion in Workplace

Incentives and Rewards Better than Mandates and Quotas

In 2020, there was an increased awareness of the consequences of systemic racism and racial inequities in our society, including the need for organizations to think more critically about increasing diversity in the workplace. The California Chamber of Commerce and others emphasized the importance of diversity and what companies can do to continue increasing diversity and inclusion at work. In response to this call to action, many companies announced new initiatives to make diversity a top priority and encouraged others to do the same.

CALCHAMBER LEADERSHIP ON DIVERSITY

To promote fostering diversity and leadership in the workplace, the CalChamber provides a number of important informational and training [resources](#) that organizations can use to educate themselves and learn about best practices. The CalChamber also hosted several panel discussions about diversity.

- In July 2020, CalChamber presented [Putting Racial Justice Words Into Action: Best Practices and Strategies for California Businesses](#), a live panel discussion featuring an esteemed group of experts who shared their expertise on a range of issues related to bias, including how company leadership teams can respond to racism and increase diversity in their organizations. The panel was moderated by Cassandra Pye, executive vice president and chief strategy officer for Lucas Public Affairs. The panel's recommendations to help foster diversity included education about systemic racism and bias, taking a hard look at who organizations are promoting, and thinking critically about how to mentor and mobilize opportunities for everyone rather than "a select few."
- In October 2020, CalChamber Executive Vice President

Jennifer Barrera moderated a discussion entitled "[Women in Leadership: Pathways to Success](#)." The panel included female executives and elected officials who discussed their own personal stories, encouraged women to always bet on themselves and offered advice on how to seek out strong mentors throughout their careers.

- The CalChamber also hosted two diversity and inclusion experts on its podcast, *The Workplace*, to talk about why diversity and inclusion matters to organizations and how to achieve positive results. In those episodes, CalChamber President and CEO Allan Zarembek interviewed Albertsons Companies Senior Vice President of External Affairs and Chief Diversity Officer [Jonathan Mayes](#) and U.S. Navy Inclusion and Diversity Adviser [Dr. Jessica Milam](#) about their experiences in moving the needle on diversity in their organizations and recommended best practices.

The CalChamber resources webpage is located at www.calchamber.com/diversity.

DIVERSITY BENEFITS BUSINESSES

Employers that are committed to increasing diversity have recognized the benefits, not only on morale and innovation, but also on the profitability of their companies. McKinsey & Company's 2020 study entitled *Diversity wins: How inclusion matters* shows that companies in the top quartile of having gender diversity on their executive teams were 25% more likely to experience above-average profitability than those in the fourth quartile. Similarly, those in the top quartile for ethnic and cultural diversity outperformed those in the fourth quartile by 36%.

The more diverse a company's executive team is, the more it is likely to experience profitability and increased positive remarks from its employees. Interviews with employees demonstrated that companies with diverse management teams had high employee morale and employees were excited to contribute to the company's profitability. Those that do not have a diverse workforce often struggle to keep up with innovation, creativity and positivity, and are less likely to implement necessary changes to be competitive in the marketplace.

Agenda for California Recovery

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SUCCESSFUL COMPANIES EXTEND EFFORTS BEYOND HIRING TO ENCOURAGE INCLUSION AND PROMOTIONS OF DIVERSE INDIVIDUALS

As businesses look to expand their efforts to increase diversity, they are turning to those that have been working on these efforts for years. It has become increasingly evident that merely hiring a diverse group of employees is not enough to foster diversity and inclusion in the workplace. The commitment to diversity must be ongoing and that commitment must be reflected in who is promoted within an organization.

Companies with successful diversity programs, such as Albertsons, have recommended ongoing inclusion or unconscious bias trainings and group discussions throughout the year to keep employees engaged and to absorb feedback from employees about ways to improve inclusion efforts. They also recommend taking a hard look at internal management teams, including the percentage of women and people of color on those teams and who is being placed in charge of promotions and hiring within the company.

As McKinsey & Company noted in *Diversity wins: How inclusion matters*, “Hiring diverse talent isn’t enough—it’s the experience they have in the workplace that shapes whether they remain and thrive.”

EMPLOYERS MUST EXERCISE CAUTION SO AS NOT TO VIOLATE STATE OR FEDERAL LAW

Developing strategies to increase diversity requires employers to think critically about the best way to accomplish that goal without running afoul of anti-discrimination laws. California’s Fair Employment and Housing Act (FEHA) explicitly prohibits employers from making employment-related decisions such as hiring and firing based on race, national origin, sex, sexual orientation and other protected characteristics. Title VII of the Civil Rights Act of 1964 (Title VII) similarly prohibits employers nationwide from discriminating based on race, color, sex, religion or national origin.

Employers must therefore be careful that any hiring decisions or decisions about whom to promote do not violate FEHA or Title VII and subject them to allegations of employment discrimination. For example, the Supreme Court has held that allowing public employers to use quotas is permissible in some instances, such as allowing the use of “one-for-one” promotional quotas until a certain percentage of upper ranks were held by Black individuals, but quotas have largely been deemed impermissible in other situations.

Recommended strategies such as diversifying hiring panels, educating employees on race and bias, holding group discussions

about diversity and developing a way to ensure applicants are being recruited from diverse communities and backgrounds are best practices to promote diversity while adhering to FEHA and Title VII.

RECENT EFFORTS AIMED AT INCREASING DIVERSITY

There have been recent political efforts to increase diversity in both the private and public sectors. While well-intentioned, many of these efforts rely on quotas or other mechanisms that may not pass muster under existing laws and confound employers’ flexibility to address their particular circumstances. Rather than using incentives to reward companies that are leading the way, the initiatives have come in the form of mandates or quotas.

One example of this is SB 826 (Jackson; D-Santa Barbara; Chapter 954, Statutes of 2018), which mandated that all publicly held corporations headquartered in California have at least one female director by the end of 2019 and additional female directors by the end of 2021, depending on the size of the corporate board. The law permits the Secretary of State to impose hefty fines of up to \$300,000 for violations. In signing the bill, Governor Edmund G. Brown Jr. warned that “serious legal concerns” had been raised and that he would not “minimize the potential flaws that indeed may prove fatal to its ultimate implementation.” The bill’s opponents had additional concerns that SB 826’s focus only on gender would come at the expense of other protected classifications as companies try to improve overall diversity.

Indeed, shortly after its implementation, two lawsuits were filed to invalidate the law.

- *Meland v. Padilla* was filed by a shareholder of a publicly held corporation arguing the law violated the 14th Amendment. Judge John Mendez of the Eastern District of California granted the state’s motion to dismiss the lawsuit for lack of standing, explaining that as a shareholder the plaintiff did not show he had suffered any injury and that the company was in compliance with the law, so no fine had been levied against it. The case is currently on appeal at the Ninth Circuit.

- The second, *Crest v. Padilla*, was filed in the Los Angeles Superior Court. It was filed by taxpayers seeking to enjoin the state from expending taxpayer funds in carrying out alleged illegal acts permitted by SB 826. The state also demurred to this complaint on the grounds that the plaintiffs lacked standing, but the motion was denied. The case is set for trial in June 2021.

Last year, Assembly Members Chris Holden (D-Pasadena), Cristina Garcia (D-Bell Gardens) and David Chiu (D-San Francisco) authored a similar bill, AB 979, which mandates that publicly traded companies headquartered in California have at least one director from a minority community by the end of

2021, with that number increasing the larger the board. Failure to achieve these quotas may result in costly penalties against the company. The new law was signed by Governor Gavin Newsom and applies to more than 500 companies. The same group that filed *Crest v. Padilla* also filed a lawsuit in October 2020 challenging the legality of the law under the same theory as SB 826.

Again, while the purpose behind these laws is to foster diversity among corporate leadership, the use of mandatory quotas is difficult to implement and, as set forth above, legally questionable. It may mean that certain people are forced to resign or retire early from a position so that the company can satisfy the quota. Further, the quotas are based on protected information about employees, including gender, race, sexual orientation, ethnicity and national origin. An employer cannot mandate that employees disclose this information and some employees do not feel comfortable doing so.

In the public sector, one effort to increase diversity was Proposition 16 on the November 2020 ballot. The proposition would have repealed the prohibition on preferential treatment in public employment, education, and contracting. The CalChamber Board of Directors voted to support Proposition 16 based on the need to improve diversity and opportunity in California's public workforce and educational institutions. The proposition ultimately did not pass.

CALCHAMBER POSITION

The CalChamber is committed to helping businesses foster diversity and inclusion in the workplace. However, imposing mandatory quotas to achieve diversity could create unintended consequences. The Legislature should seek ways to incentivize diversity and reward those companies that are putting in the work to increase diversity.



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January 2021