

Curbing Workplace DEI Plans Is A Mistake, Ex-AG Lynch Says

By **Vin Gurrieri**

Law360 (October 20, 2023, 4:21 PM EDT) -- Opponents of workplace diversity, equity and inclusion programs have invoked the U.S. Supreme Court's June decision invalidating race-conscious university admissions policies to target employers, but backing off DEI represents a greater danger than remaining committed, Paul Weiss partner and former U.S. attorney general Loretta Lynch told Law360 in an exclusive interview.

Lynch and fellow Paul Weiss Rifkind Wharton & Garrison LLP partner Liza Velazquez, both of whom are among the leaders of the firm's newly created DEI strategic advisory group, spoke with Law360 on Wednesday about the fallout from the high court's landmark June 27 decision and the legal risks that employers' corporate DEI initiatives are facing.

This interview has been edited for length and clarity.

Why is advancing diversity, equity and inclusion something that should be a priority for employers?

Lynch: I think, frankly, from a business perspective, it's a business imperative.

There are so many studies [showing] that now that we have had roughly a business generation of strong support for DEI, you can see that companies who have greater diversity, particularly at the board level and at the senior executive level where decisions are made, do better. They do better financially, they do better in generating strong results for their shareholders. And particularly, so many companies now are multinational. No matter if you started in the U.S., rarely is a company totally cabined here. Certainly in the international market, clients, customers, [and] business partners expect to interact with people who can connect with different cultures, who can speak with people and work well with people from different cultures, and diversity gives you a huge advantage in doing that.

I think, also, it's important now more than ever because people are taking this Supreme Court case and using it to try and, frankly, attack diversity in the workplace. I think it's very shortsighted, I think it is harmful to American business, but those attacks are there. And they come from a headspace that basically says, 'The way things were was the way things need to stay and continue to be.' It's a mindset that looks backwards, which has never advanced any corporate interest that I'm aware of. Companies have to look forward, they have to move ahead and grow.

Velazquez: Just to add a couple of points: Diversity is really essential for recruiting and retention at all levels. We've seen increasing numbers of job seekers — particularly those in younger generations —

want to work for diverse and inclusive organizations. And surveys show that a significant number of these folks report that they will turn down and not pursue job opportunities because of a perceived lack of inclusion at the hiring organization.

Just to add the legal lens to this, although groups that are pushing back against DEI initiatives have gotten a lot of press lately, there are significant risks associated with not advancing DEI in your organization. Companies that abandon those principles and those goals are subject to significant legal risk and reputational risk. By and large, if you read the employment law press, the majority of lawsuits being filed are traditional discrimination suits by historically underrepresented groups, not 'reverse discrimination' suits.

What are the legal risks associated with scaling back DEI programs that companies may face?

Velazquez: What we've seen is that companies [that] are not able to achieve DEI goals are subject to disparate treatment [or] disparate impact actions by individual employees or groups of employees.

Regulatory investigations, shareholder derivative suits, the additional negative impacts like loss of top talents, harm to employee morale, reduced financial performance, a lot of the issues Loretta talked about. For public companies that have made DEI commitments to investors or other stakeholders withdrawing from those initiatives certainly carries legal risk.

Lynch: Also, just to highlight as Liza had noted, Title VI and Title VII are still the law of the land. And so companies still have an obligation to look for barriers to equity within their systems, and where they see them to push back against them.

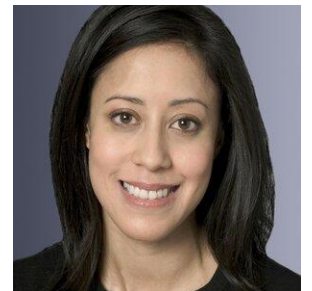
The majority of cases in this area are still cases alleging discrimination of some sort. And that's the challenge that companies face, which is how to train employees to avoid either unconscious bias or explicit discrimination [and] what to do when they discover that their workplace demographics and numbers are showing a disparate impact. How to figure out where's that coming from but more to the point how can we correct it in a way that protects the company and lets the company get the full benefit of diversity from a business perspective.

We really think that, despite all the press the recent Supreme Court case has gotten — and, look, that press was justified. It was certainly a major departure I think from established law, precedent and frankly any established reading of the Fourteenth Amendment that most legal scholars would countenance. But within the reality of corporate life, corporations still do have to worry about people who feel that they have been left out of a system, promotions, programs and opportunities. And that has not changed, that has not changed.

What are the goals of the DEI advisory group that the firm hopes to achieve?

Lynch: I think it's really twofold. One is to help guide our clients through the immediate morass of issues that sprang up after the Supreme Court decision, even though that case was not directly applicable to employment law.

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LIZA VELAZQUEZ
Paul Weiss

Certainly in public commentary, people have pointed towards employers as the next goal to attack diversity [and] there are certain groups that are very much focused on that. Why they think that's an appropriate use of their energy and talents is for them to decide. So there's confusion and there's concern, and most of our clients understand the value of diversity, want to keep successful programs, but as with any issue have an obligation to look at and mitigate legal risks.

Second, it is really to help them maintain their strong commitment to diversity in a way that minimizes the legal risk that has now been occasioned by this change in the legal landscape and the change in the cultural landscape, I would say in terms of how people talk about diversity and how they view it. Companies are also managing their employees' confusion over the issue as well. So those are the two main reasons that led us to start this practice.

Velazquez: I can add to that a little bit in terms of the nuts-and-bolts. Given our work in the ESG space, in the racial equity audit space, we come to this with a lot of experience. Oftentimes, when you speak to the in-house legal team, they might not have a complete handle on all their DEI initiatives and policies. Some of them reside within legal, some of them reside within HR, some might reside within the business units or even within employee resource groups.

So our first order of business is to understand sort of the lay of the land when it comes to DEI within an organization [and] understand what the company's goals are with respect to those DEI programs. We speak to stakeholders, and internal subject-matter experts, we try to get a handle on what the company is saying internally and externally about their DEI programs, and how their policies are being implemented in practice and whether there's any daylight there between what they're saying and what folks are being trained to do.

I think the highest praise that we can receive and what we really look for at the conclusion of the DEI audit is to hear from the client that the solutions that we've offered are practical and actionable, that's really the goal here. You know, we want to mitigate risk, and we also want to make sure that our client can advance their DEI goals in a way that is practical, efficient and makes sense for them.

What kind of challenges has the Supreme Court's SFFA decision created in practical terms for employers that want to maintain DEI programs?

Lynch: The first challenge was, I think, the general broad language used. The decision focuses on admissions policies in an educational context, really just on obtaining a slot in an educational institution. So all the analysis flows from this perspective that someone is competing for one particular slot, and corporate DEI is so much broader than that.

But I think the biggest challenge that companies immediately faced was the confusion over the issue that the proponents of the decision sought to sow and did rather successfully — you know, a view that this was automatically applicable to corporate America, a view that the case had broader perspective than it did.

What's happening is, of course, the groups behind the SFFA case are threatening or have brought legal action against a small number of corporate legal diversity programs and so those challenges are going to be viewed through a slightly different lens. But I think the first challenge companies had was the confusion that was generated over the applicability of the holding.

And the second issue that companies face is looking ahead to what they viewed as inevitable challenges

— how could they best protect themselves against those challenges while still maintaining their commitment to DEI.

Velazquez: I think, unfortunately, [the decision] did, you know, have a chilling effect. And I think to the extent that boards and in-house legal teams felt like perhaps they didn't have a handle on all of their DEI programs, and whether those programs were effective, the decision spawned a lot of confusion and concern. I think that's why the need for guidance in this area has been so very acute. Our phones have been ringing off the hook from clients, and really from around the business community for advice and guidance in this space.

What are some elements of DEI programs that you find work well?

Lynch: Some of the things we have found that are hallmarks of strong DEI programs are [those] that open up the pipeline, that expand opportunity, [and] that get as many qualified applicants of a variety of backgrounds in the door for consideration.

We also think it's helpful when companies can clearly articulate what their goals are. For example, it may be difficult to attract women to certain industries, historically difficult I mean. So that can be clearly spelled out and used to support programs and outreach to groups that do attract more women and would therefore bring them within the hiring ambit and the promotion and retention ambit of an organization.

So being clear about the challenges that a company has, being clear about their goals, but again not in a numeric sense because it's never been about quotas or having a percentage. It's been about reaching out and finding the excellence that is in all the various groups around entities.

I think the biggest misnomer about affirmative action is that it takes merit out of the picture. It has never done that, and it was never designed to do that. It was simply designed to expand people's perspectives to find merit in places where they typically weren't looking and frankly that can still be done. As you bring people into the orbit of a company, you increase the likelihood that you're going to get a diverse workforce because you are seeing their value and their merit.

Velazquez: I agree with all of that, recruiting is really essential here. I would also just add retention — developing [and] nurturing the talent that's already within your walls. Do you have unconscious bias programs to ensure that's not getting in the way of decision-making and determinations of who is doing good work? Are folks getting equal opportunities within an organization?

You can bring great folks in the door, but then if you're not keeping them two, three years from now, you're never going to get past square one.

Where do you see this issue headed over the next few years, either in terms of what direction courts might go, or how companies might choose to structure DEI programs?

Lynch: I don't think that corporate America is going to back down from the benefits of diversity because they are quantifiable, and they have a distinct positive impact on the bottom line. So from a business advantage perspective, it would be foolish and increase risk in the other direction to back down from a focus on diversity, equity and inclusion.

I do think that companies are pragmatic, and they recognize well that they want to do it in a way that

minimizes legal risk. They also are aware of the various swirls of cultural and political discourse, and they want to make sure that all of their employees understand why actions are being taken. And this includes employees whom you might assume would not necessarily be supportive of DEI programs.

I think, frankly, making sure that people understand the definition of all of these terms — of diversity, of equity, of inclusion. Because at the end of the day we're all different in some way and at various points in everyone's life and in everyone's work cycle those differences can be held against you in a way that you don't expect. It can be unconsciously done, it can be deliberately done, and so I think making sure that everyone understands the true definitions of these terms I think is helpful and making sure that people understand the reason why these issues are still important to a company, the clear benefits that come from it, and showing those benefits.

So I think companies will move in that direction, as a way of managing the internal issues and questions and confusions that arise whenever you have such a major shift in the law as the SFFA case occasioned. But I don't see them backing down from [DEI programs] because it just would not be practical, and frankly it would be irresponsible to their shareholders.

--Editing by Amy Rowe and Roy LeBlanc.