Moral Money Forum

FT FINANCIAL TIMES

Rescuing diversity from the DEI backlash

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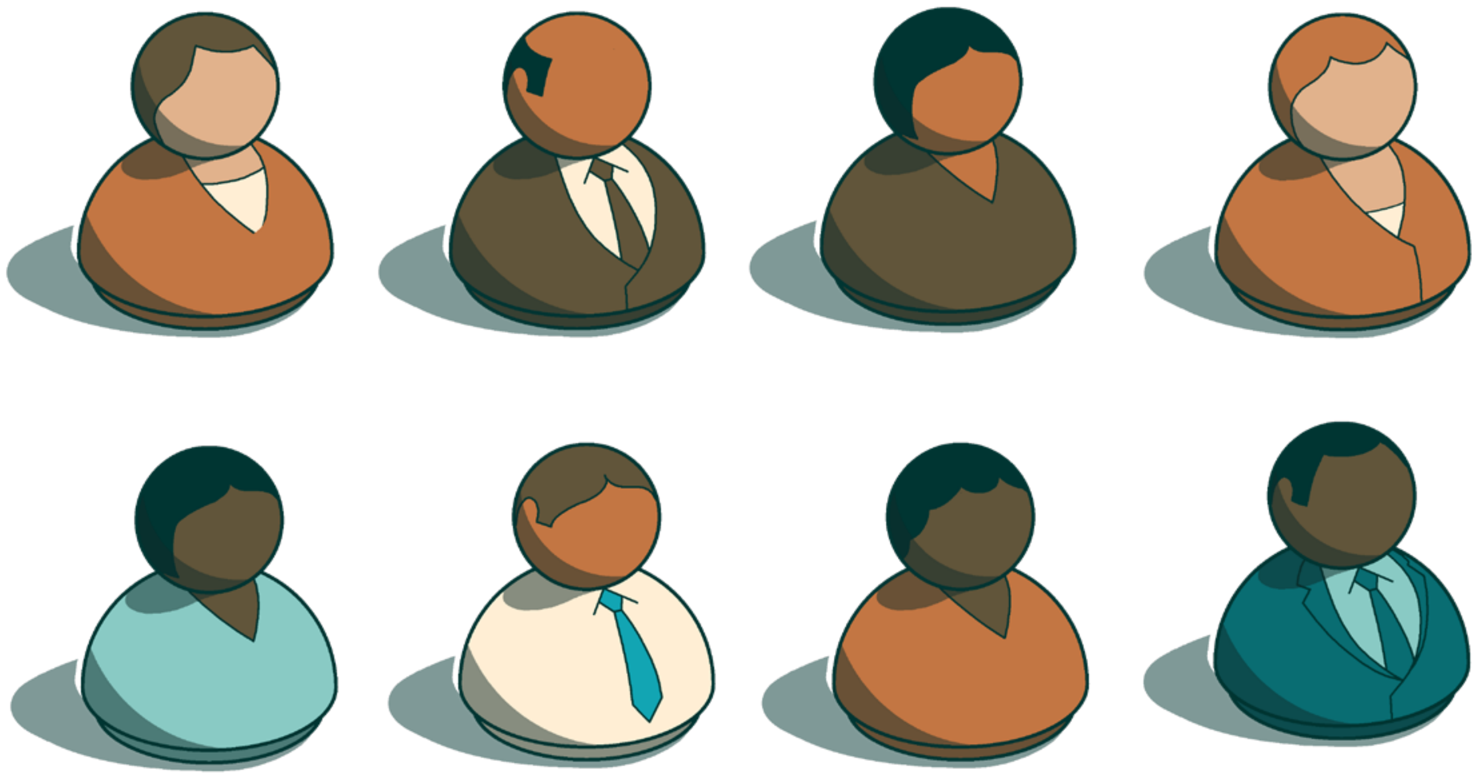

Illustration: Matt Kenyon

Foreword

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As companies consider their diversity and inclusion efforts in the face of a swelling culture war, it's worth taking a moment to reflect on what is at stake.

The phrase "stay woke", which so infuriates some in politics and the media, originated in the African-American community as a reminder to be alert to discrimination and social injustice.

Those challenges remain very real for minority groups and women in every part of the world. And even if they might be leery of accusations of "woke capitalism", business leaders would be foolhardy not to take these issues seriously. Amid intensifying competition for talent in major industries, companies that fail to build a diverse and inclusive culture will be putting themselves at a serious disadvantage — as well as missing an opportunity to contribute to positive social change.

White men might make up the majority of chief executives at big US and European companies, but they're a minority of global talent — and companies that recognise this will reap benefits. Those that fail to do so risk being spurned by those they try to hire, with young graduates increasingly prioritising diversity and inclusion at the companies they consider working for.

Investors, too, are putting growing pressure on the companies they invest in to have serious strategies on these issues. And with disclosure regulations driving increased transparency, they have an expanding amount of information to work with.

But even the best-intentioned chief executive could be forgiven for wondering how to tackle these challenges. Even as these subjects have surged up the corporate agenda, it remains unclear to many what is best practice — what a really effective business approach to diversity, equity and inclusion looks like.

That is the focus of Sarah Murray's latest in-depth report for the Moral Money Forum, and the two accompanying articles by our partners White & Case and Vontobel. We hope you'll find this a rich source of ideas and insights on a subject that is now at the centre of the global business conversation.

Simon Mundy
Moral Money Editor
Financial Times

Rescuing diversity from the DEI backlash

Diverse workforces are here to stay. Companies need to find new ways to manage them. By *Sarah Murray*

In his annual letter to shareholders this April, JPMorgan Chase chief executive Jamie Dimon reaffirmed his bank's commitment to its diversity, equity and inclusion efforts, saying that they "make us a more inclusive company and lead to more innovation, smarter decisions and better financial results for us and for the economy overall".

There was a time when this statement might have passed without notice among the countless similar pronouncements from businesses. Yet it stood out more than it might have done in 2020, when the murder of George Floyd in Minneapolis led to a rush to introduce corporate DEI programmes and chief diversity officers became the hottest senior-level hires.

That's in part because in June 2023, a ruling by the US Supreme Court changed the diversity landscape, preventing American academic institutions from considering race in their admissions processes. While not directly affecting companies, the decision triggered lawsuits targeting the DEI programmes at a number of groups, sending corporate lawyers scrambling to review their companies' diversity policies.

The US is not alone in questioning approaches to workforce diversity. "So much of this is driven by the Supreme Court, but that didn't spring from nothing," says Kenji Yoshino, director of NYU Law's Meltzer Center for Diversity, Inclusion, and Belonging.

Nor are other parts of the world exempt from having to tread carefully with respect to the law. In the EU, for example, GDPR legislation on information privacy can make it hard for companies to collect and use monitoring data on the diverse attributes of their workers, such as race, ethnicity and sexual orientation.

Legal concerns aside, in many markets, there is an increasing recognition that diversity is not just about achieving balance in the make-up of the workforce, but also whether or not diverse employees feel able to thrive. And definitions of diversity are expanding from gender and race to diversity of education, thought, economic background and neurodiversity (referring to those with physical differences that affect how their brain works).

Yet uncertainty still surrounds what a diversity strategy means — and the rush to adopt yet another acronym in the sustainable business landscape has not helped. "DEI stands for three distinct concepts," says Joelle Emerson, chief executive of Paradigm, a US diversity consulting firm. "It's confusing to make an acronym a household name without pausing to make sure everyone has a shared understanding of what that acronym means."

Levels of commitment to workforce diversity vary. In our survey of FT Moral Money readers, 43 per cent said it ranked equally with other sustainability challenges in their organisations and 30 per cent said it was seen as moderately important. Only 18 per cent saw it as a top priority.

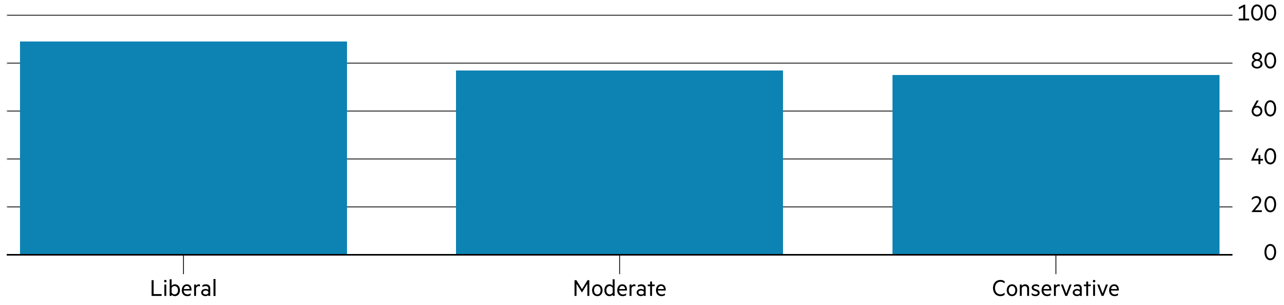
Even so, the closure of DEI programmes that some predicted after the Supreme Court's ruling seems not to have materialised. When in the fourth quarter of 2023 the Conference Board think-tank asked 194 chief human resources officers about their plans for 2024, none said they intended to scale back diversity initiatives.

The shifts in society, culture and demographics permeating the workplace suggest that companies cannot afford to take their foot off the DEI pedal. Emerson cites the fact that employees who are millennials or younger now make up about 60 per cent of the workforce.

"These generations are far more diverse than any before them across a range of dimensions," she says. "So companies that want to be around for the next five-to-10 years will need to figure out how to attract and keep people from an increasingly diverse set of backgrounds."

US business leaders of all political persuasions back diversity measures

Business leaders who said diversity initiatives were "very important" to their company's overall strategy (%)



Survey of 325 US business leaders, January 2024
Source: Morning Consult

A very American story

While building a diverse and inclusive workforce is something companies around the world grapple with, recent developments in the US have put corporate America in the most challenging position. Since last summer, when a majority of Supreme Court justices ruled that the use of affirmative action in university admissions was unconstitutional, executives have been reviewing their diversity programmes.

While the justices did not directly address corporate diversity programmes, the decision unleashed a wave of legal action from conservative activists, including Stephen Miller, a former adviser to Donald Trump, and Edward Blum, a conservative campaigner who led the legal efforts to end affirmative action at universities.

Blum, for example, challenged the legality of programmes such as the diversity fellowships at law firms Perkins Coie and Morrison Foerster. Consumer-facing companies such as Target, Kellanova (formerly Kellogg Company) and Starbucks were targeted by similar legal threats.

US companies reacted. Accounting firm PwC dropped some of its diversity targets in the US and ended race-based eligibility criteria for two programmes — a student internship and a scholarship that helps candidates prepare for professional accounting exams. Others, including pharma group Pfizer, opened up diversity fellowships to people of all races.

The result, says Yoshino at NYU School of Law, is that US diversity professionals have had to get up to speed on the legal implications of their work. "It used to be thought that DEI was above the law," he says. "But now the law has come crashing down on that entire enterprise, so we have to think of this as a newly regulated space."

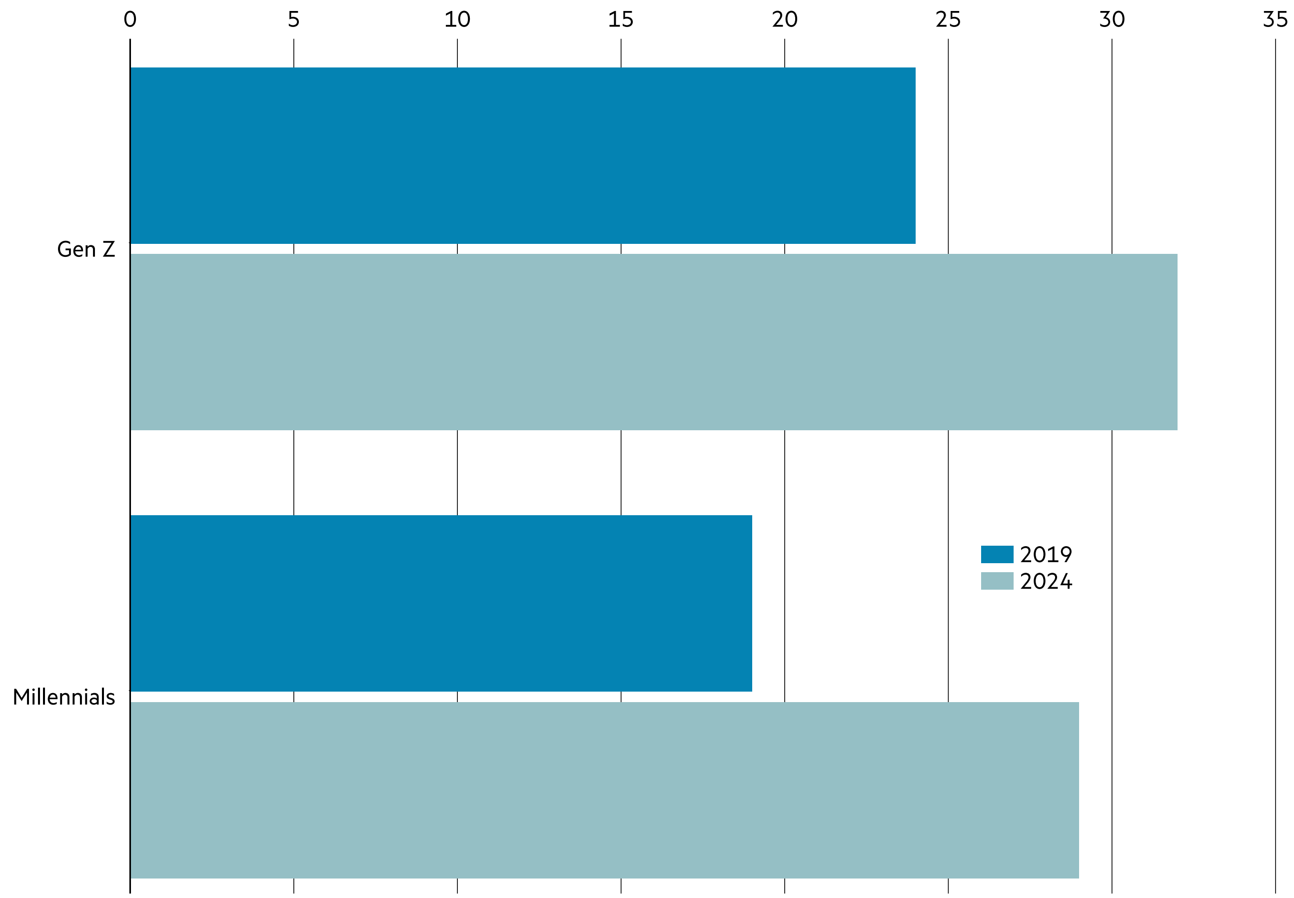
For Johnny Taylor, president and chief executive of the Society for Human Resource Management, the worry is that this new legal landscape — combined with the continued need for companies to comply with laws preventing workplace discrimination — will prompt a retreat from efforts to foster workplace diversity. "My fear is that employers will go back to purely legal compliance because that's the safest thing," he says.

Our survey of FT Moral Money readers suggests that compliance is a priority for many companies, wherever they are located. Asked about how their organisations were addressing diversity, most (64 per cent) pointed to their DEI strategy. However, ranking second was compliance with relevant laws and regulations (57 per cent).

Still, Yoshino sees a silver lining to the increased legal attention being paid to corporate diversity programmes. DEI professionals must now work far more closely with general counsels and chief executives than in the past, he says: "In many cases, it's actually strengthened the hand of DEI professionals in the organisation."

More younger workers think their employers are doing well on DEI

Respondents who said they were "very satisfied" with their employers' DEI efforts (%)



Data sourced from separate surveys in 2019 and 2024
Source: Deloitte Global Gen Z and Millennial Survey

Could do better

The flurry of legal and political activity around workplace diversity is largely an American story. Across the corporate sector globally, however, approaches to diversity are coming under review — not for their legality but over whether they are making any difference.

"We've been trying to sort this out for at least 35 years," says SHRM's Taylor. "And the data would suggest that we haven't done a particularly good job."

In a 2023 EU survey, more than half of respondents pointed to widespread discrimination in their country on the basis of factors such as skin colour and sexual orientation, and cited workplaces as one of the main sources of this discrimination.

The unemployment rate among Black Americans has consistently been twice that of white Americans, according to the Economic Policy Institute, while in a 2021 Gallup poll, one in four Black and Hispanic workers in the US reported recent discrimination at work.

Progress on other forms of diversity appears to be equally discouraging. In the UK, adults with disabilities were half as likely to be in employment in 2021 as non-disabled adults. Women continue to be paid less than men, with their gross hourly earnings across the EU almost 13 per cent lower on average than those of men in 2022.

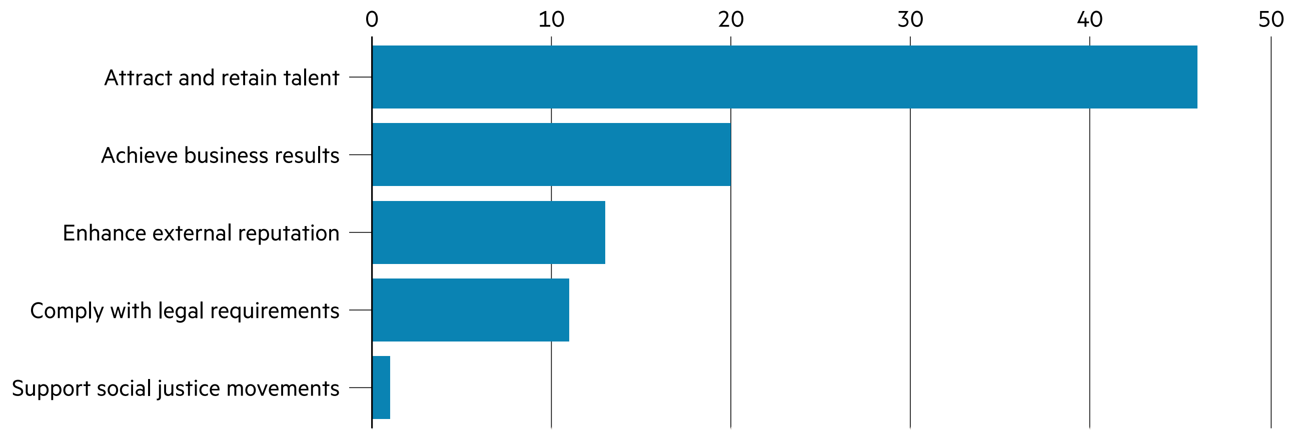
And age discrimination persists. In 2020, almost one in six adults over the age of 50 working or seeking employment told the AARP, the organisation for older Americans, that in the previous two years they had not been hired for a job they applied for because of their age.

"I've been doing this work for 25 years and what progress have we really made?" asks MaryAnne Howland, director of equity, inclusion and justice at corporate social responsibility advisory BSR.

While Howland believes there has been tangible movement on gender diversity globally, she sees little to celebrate in other forms of workforce diversity. "There's no other category where you see any kind of difference," she says. "That doesn't make any sense after all this time."

Talent retention seen as the key goal for DEI strategies

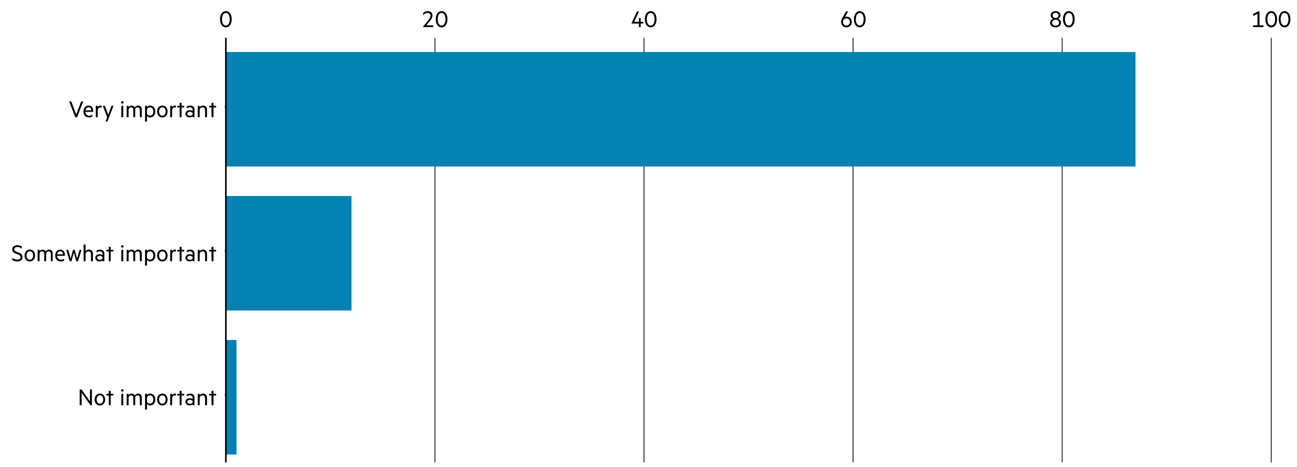
Respondents saying the primary objective of DEI is to… (%)



Survey of over 6,000 individuals in more than 50 countries
Source: PwC Global DE&I Survey 2022

Gen Z workers see DEI as a top priority

Responses to the question "How important is diversity, equity and inclusion to you in the workplace?" (%)



Survey of "Gen Z" workers, born in 1996 or later
Source: Tallo

Talent at stake

If companies are falling short on diversity, Diana Scott offers one reason: its complexity. "On the surface it includes things that involve visible difference, like race, gender or age," says Scott, who leads the US Human Capital Center at The Conference Board. "But it also involves less visible aspects of diversity such as socio-economic background, sexual orientation, even cognitive styles."

At a recent roundtable meeting of Conference Board members, Scott says, most companies expressed concerns about the complexity of managing diversity.

Nor is making the business case simple, with differing views on whether a diverse workforce has a material impact on the bottom line and whether the link between diversity and profitability is a case of causation or correlation.

In November 2023, a BlackRock study of the MSCI World index found that between 2013 and 2022 companies with more gender-balanced workforces outperformed their least-balanced peers by up to 2 percentage points annually.

And in the latest of a series of reports on leadership diversity and company performance, McKinsey declared the business case to be "the strongest it has been since we've been tracking".

Yet in a blog post, Alex Edmans, professor of finance at London Business School, said the consultancy's methodology was flawed and subject to confirmation bias. McKinsey, he pointed out, had used 2017-21 financial performance data and 2022 diversity data, suggesting strong financial performance funded investments in diversity, rather than diversity causing a profitability boost.

Debates over this kind of data will no doubt continue. However, the demographic and cultural shifts making their way through the global workforce are hard to dispute.

For example, more than one in five Gen Z Americans (those currently between the ages of 12 and 27) now identify as LGBTQ+, according to Gallup. And in OECD countries, 27 per cent of the workforce will be Gen Z by 2025, according to the World Economic Forum.

As the workforce becomes increasingly diverse, this is changing what employees expect of their employers. Glassdoor, the jobs review site, found that diversity at work is important to many job seekers, particularly to under-represented employees, a third of whom said they would not apply for a position at a company that lacked a diverse workforce.

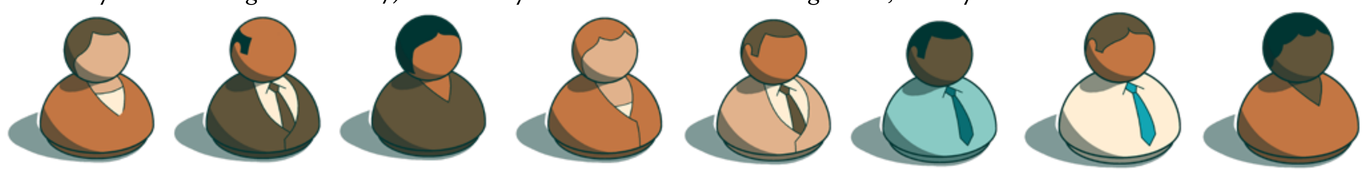
For Emerson at Paradigm, such statistics point to the most compelling reason for a business to embrace diversity and inclusion. "When it comes to talent, it's pretty clear there's a business case for it," she says. "It's an existential question of building the talent pool needed to survive."

FT Moral Money readers agree. When asked to pick the three benefits of a successful diversity strategy, most (77 per cent) selected the ability to attract and retain talent, followed by better innovation and creativity (74 per cent). Only 16 per cent selected increased profitability.

Meanwhile, for companies that fail to keep up with the demands of an increasingly diverse workforce, there are talent risks. For 72 per cent of FT Moral Money readers answering our survey, high staff turnover was the biggest risk posed to a business that neglects diversity.

"Creating an inclusive workplace culture is critical," says Bahare Haghshenas, global head of sustainable transformation at EQT, the Swedish private equity group. "You'll come to a point, especially with the young generation, where talent will leave if the commitments are just words and not reality."

At Standard Chartered, Rachel Plaistowe, the bank's global head of wellbeing, points to an additional talent risk. "All the evidence suggests that if you don't have an inclusive workplace, wellbeing suffers," she says.



Reverse engineering

Whether companies like it or not, their workforces are becoming more and more heterogeneous. In a 2023 workplace trends report global recruiter ManpowerGroup identified demographic shifts as one of four key forces shaping the future of work.

But while it is one thing to recognise this, managing the changes is another. The ManpowerGroup report suggests companies need to do a better job: it found 68 per cent of Gen Z workers were unsatisfied with their employer's performance on creating a diverse and inclusive work environment.

The main problem, says BSR's Howland, is that corporate leaders are not asking themselves the right questions. "Typically companies say they need a diversity programme, hire someone — who may or may not be expert in the field but is often picked for their representation — and charge them with developing something."

This can lead to a strategy that is a blunt instrument rather than one that addresses the specific gaps facing a company. If the goal is attracting entry-level minority talent, for example, this requires a different strategy from one aimed at advancing and retaining female executives.

Geography and culture matters, too. Companies with operations in Japan, with its highly homogeneous workforce, might choose a different diversity strategy than would businesses in the US and UK, where the population is far more diverse. In India, the caste system poses unique challenges to workforce diversity.

SHRM's Taylor likens an increasingly diverse workforce to a household. "As your family grows, you keep adding rooms," he says. "I understand it, and you're trying to accommodate — but in practice we've designed something that's well-intentioned but clunky."

He sees the first step as recognising the nature of the challenge.

"HR people are being asked to do something that people don't fully appreciate is incredibly complex," he says. "And the answer lies in being willing to step back and not add a new bedroom to the house. We have to consider knocking it down and building a new smart home."

For Howland, the way to do that is for companies to ask themselves why they are investing in workplace diversity in the first place, and what disparities they want to eradicate. "You start there and work backwards," she says.

The inclusion imperative

A diversity strategy was once seen as a means of redressing workforce imbalances, such as underrepresentation of women or ethnic minorities. Today, while these gaps remain, companies are starting to look beyond the numbers and at whether their culture is inclusive and welcoming to people of all backgrounds.

This is not to say that numbers are not important. At EQT for example, rather than set quotas for leadership diversity, the private equity firm aims for a senior executive leadership in which no more than 60 per cent of the cohort is made up of the same gender, cultural background or socio-economic origin — an approach it is extending to its portfolio companies. “We’ve been expanding our view from looking at representation to looking at the total team composition,” says Haghshenas.

However, as well as striving for numerical balance, companies are also looking to ensure that employees from diverse backgrounds feel accepted and valued once they are in the workforce.

This is easier said than done. “The data overwhelmingly tells you most workplaces are significantly more diverse than they were 20 years ago but they’re also more divided, which means we traded one problem for another,” says SHRM’s Taylor. “So our focus needs to be on building an inclusive model where everyone, including white men, feel included.”

For Moral Money readers, the picture on inclusion is mixed. Some 75 per cent told us their organisation was successfully ensuring that employees from all backgrounds felt equally valued, but only 9 per cent described this as “very” successful with the balance (66 per cent) seeing performance as modest.

The strategies being used to achieve an inclusive workplace culture are themselves diverse. When we asked FT Moral Money readers what they were doing to ensure employees from all backgrounds felt equally valued, most (58 per cent) said they were either implementing codes of conduct or providing training on issues such as unconscious bias.

More than half (55 per cent) prioritised regular internal communications while for 45 per cent, overhauling hiring practices was important. Some looked at the pay packet, citing more equitable remuneration (21 per cent) or offering an employee share scheme to all staff (27 per cent).

However, the initiatives many see as most effective — while also meeting new legal constraints — have one thing in common: they are open to everyone.

Employee resource groups — which 42 per cent of FT Moral Money readers said they were supporting to promote inclusion — are one example of this principle. While these groups bring together workers based primarily on shared identities or life experiences, most companies stress that they are open to anyone of any background.

IBM is among them. “They’re not exclusionary,” says Justina Nixon-Saintil, the company’s chief impact officer, of its employee resource groups. “They are places where people can connect with other employees and have access to resources.”

Also open to all employees is another form of support for inclusion: allyship, in which employees who have an advantage in a certain context are encouraged to look out for people without that advantage and receive support and training to prepare them for this practice. For example, a gay man could support a heterosexual woman in one situation while that woman could support the gay man in another.

Because any employee can participate in allyship, it is also a strategy that is less likely to prompt an anti-affirmative action lawsuit. Allyship is gaining ground among DEI strategies, says NYU’s Yoshino, who says he has seen “a huge uptick” in organisations interested in it.

Even so, allyship practices can backfire if the person being supported does not feel the need for help or, worse, feels the assistance renders them a powerless victim. Advocates of allyship stress the importance of using a take on the “treat others as you would wish to be treated” principle and helping others as they would wish to be helped.

For Canada’s Scotiabank, allyship has become a central pillar of the institution’s approach to diversity. While the bank had introduced initiatives such as employee resource groups and training on recognising bias and combating discrimination, it felt something was missing.

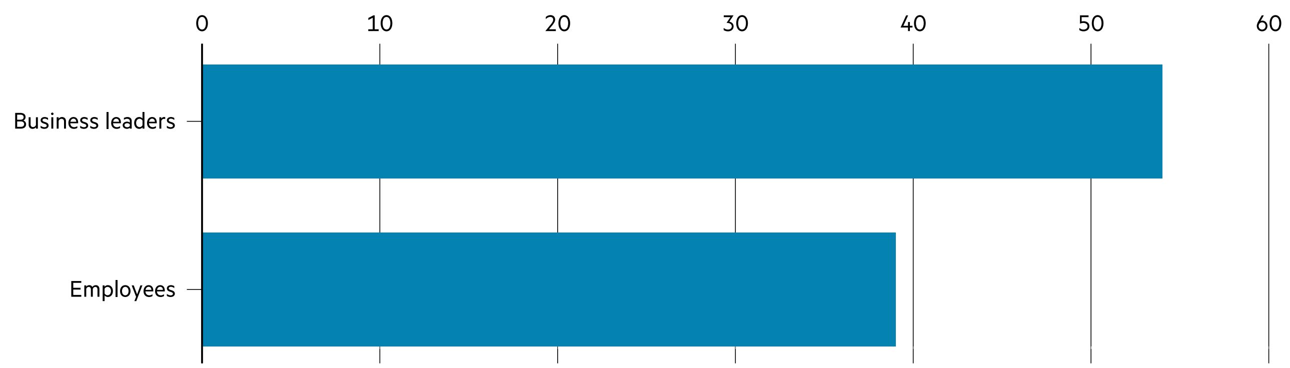
“We had all those pieces in place, but we needed the red thread to connect them and underscore the bank’s culture of inclusion,” says Meigan Terry, chief sustainability, social impact and communications officer at Scotiabank.

Allyship turned out to be the answer. In fact, it has proved so popular that the bank now hosts an annual allyship summit covering topics such as workplace safety, bias and what to do when confronted with discriminatory behaviour.

It is paying off in terms of recruitment and retention, says Terry. “Scotiabank bankers in their engagement ratings tell us that a sense of belonging is a priority,” she says. “And our focus on allyship has been a differentiator for us as an employer of choice.”

Business leaders are more confident about diversity efforts than their employees are

Respondents saying diversity is a stated value or priority area for their organisation (%)



Survey of over 6,000 individuals in more than 50 countries
Source: PwC Global DE&I Survey 2022

Beating bias

A persistent obstacle to achieving an inclusive workplace is unconscious bias — something that, because it is unconscious, is especially difficult to tackle. With businesses still struggling to overcome this barrier to inclusion, some think that new approaches are needed.

Among them is Iris Bohnet, a behavioural economist at Harvard Kennedy School, who uses behavioural design to tackle bias through targeted interventions at specific moments.

In one project, included in a forthcoming book, Make Work Fair, Bohnet and her co-author worked with Swedish technology group Ericsson, which wanted to close gaps in the hiring of members of under-represented groups. Immediately before annual hiring rounds, recruiters watched a five-minute video highlighting the value a company placed on diversity. Data on the number of people interviewed, reviewed and hired in the round showed that the video had helped reduce the targeted gaps.

For Bohnet, the success of this approach lies in developing something beyond box ticking or compliance activities and initiatives that raise awareness of the problem or try to increase empathy for traditionally under-represented groups. “That’s not how we promote change quickly,” she says. “Most of us are just busy with a thousand things and the training won’t impact a decision we make in three months’ time. So we need to build this into our systems, practices and procedures.”

Joan Williams, a professor at UC Law San Francisco, also focuses on small, regular interventions to help people become aware of the biases they bring into all business practices. Williams argues that one-time diversity training does not do enough to shift cultural norms. Instead, people need tools that they can use at any time.

She and her team have developed a series of “bias interrupters”, or tool kits that companies can use to make small changes to existing processes — from hiring, performance management and promotion systems, to the way special projects are assigned or how meetings are run.

One example is a guide to identifying and interrupting bias in performance evaluations, which Williams produced by distilling thousands of pages of research on gender and racial bias into five common patterns described in a two-page document. The patterns include what Williams calls “prove-it-again” bias, in which some groups have to do more to prove themselves than others. In performance evaluation, for example, white men are often judged on their potential as well as their experience, while women and ethnic minorities are often judged only on their experience.

Another is the “tight rope” which refers to the fact that some groups need to be politically savvier than others in order to succeed. “A white man completely loses it, and people say, ‘Oh that’s just him,’ but a woman of colour raises her voice two notches and she’s become an ‘angry Black woman’.”

In one “bias interrupters” workshop, all participants said it gave them a better understanding of how bias affects people, 96 per cent said they had learned new strategies for addressing bias and 87 per cent said they were likely to use them. “What most people need are the right tools in a context where they can figure out what works for them,” says Williams.

Joining diversity’s dots

The corporate world likes to talk of the need to break down institutional and functional silos. But the challenges of managing diversity offer particularly compelling reasons for taking a joined-up approach.

Some companies are addressing this challenge by rethinking their organisational structure. At Standard Chartered, for example, employee wellbeing, which was once in the benefits department, has been moved to the employee advocacy group, alongside diversity and inclusion and employee relations. “That was a strategic decision,” says Plaistowe.

The Conference Board’s Scott argues that chief diversity officers’ responsibility should go beyond the implications of their work for human resources. “They have to have the ear of the CEO and tie diversity metrics to business metrics,” she says. “One of the biggest mistakes companies make is treating diversity as a standalone or a separate process. That leads to initiatives that are short-lived and don’t address embedded biases.”

At IBM, the holistic approach extends beyond company walls to deepening the talent well from which it can draw. For example, its SkillsBuild free education programme focuses on communities that have traditionally been under-represented in the tech sector.

And in 2016, IBM began removing the four-year degree requirement from many of its job postings. “We tested it out by hiring people without the four-year degree and they were very successful,” says Nixon-Saintil. “So we now prioritise in-demand skills over specific degrees, and we can get more applicants and talent to fill those roles.”

For Yoshino, the backlash against DEI leaves plenty of room for manoeuvre. “There’s so much that companies can do that travels under the banner of DEI that would still be perfectly legal,” he says. “For chief diversity officers it’s finding that sweet spot.”

But he sees that task as critical. “There are broad irreversible trends in society,” he says. “For me, the writing is on the wall as to how we’re going to have to manage a globally connected society.”

Advisory Partners

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Vontobel

Are fatigue and backlash catalysts for transformative change?
Christel Rendu de Lint

The past 10 years have seen a surge in engagement aimed at improving diversity, equity and inclusion in the corporate workplace as a response to a current reality — and indeed history — often characterised by gender, racial, ethnic and sexual homogeneity. This corporate evolution is not taking place in a vacuum — it's a reflection of a larger societal debate on the very same issues. At present, as cited by Sarah Murray's article, some fatigue surrounds this topic. Many ask when the discussion will finally end, and transformative action will follow. Others feel antagonised by it and a DEI "backlash" has arisen in places.

For all of us who care deeply about DEI, we must hear these voices, understand where the concerns are coming from and make sure we can properly address them. Fatigue and resistance are always part of any journey, often catalysing the change capable of propelling us to the next level. Such a jump requires listening to, and taking into account all opinions surrounding DEI.

Personally, I first and foremost see diversity as a responsibility. At its root, corporate diversity is about ensuring equity of access to opportunity, about being fair and objective in assessing all. Much more than gender, ethnicity, or sexual orientation, diversity should encompass many more factors of potential difference, such as background, age, cognitive types and physical disabilities. However, legal concerns around data disclosure often reduce the topic to a handful of specific dimensions, gender in particular. And while gender diversity is necessary, it's not sufficient.

This is where the business case for diversity comes in. In the same way that diversified diets aid our health and diversified investments support portfolios, diversity in business teams can have a beneficial impact. Firms can capture different ways of thinking about problems and opportunities, reducing the risk of complacency and confirmation bias. This very benefit is precisely why diversity can be challenging at times — we're all required to learn how to best interact with and integrate people different from ourselves.

In his book *Range*, author David Epstein speaks about the triumph of generalists in a specialised world. It's full of thought-provoking examples in which teams of experts, including Nasa, faced challenges they were unable to address. These challenges were ultimately resolved by outsiders who made pivotal contributions through their different approaches and angles taken. This range is the real business imperative or (the potential missed) opportunity of diversity.

As an investment firm, we know how important diversity of thought is in delivering value to our clients. Consensus and homogeneity rarely make for a high-performing active investment strategy. We look for diversity among our talents, hone independence of thought — not as an end of itself, but to achieve optimal investment outcomes — and nurture active debate. Debate is in and of itself key to unlocking the power of different viewpoints.

We believe that this diversity of thought is heavily influenced by a diversity of backgrounds, which is why DEI initiatives are not only the "right thing to do", but the smartest way forward for any business. The next generation of talent is watching what we're doing around such initiatives, as younger generations demand and expect diversity to occupy a more prominent seat at the corporate table. This means corporations will have to see through the increasing complexity of legal and regulatory frameworks related to diversity, outlined by Murray as a rising challenge in the US specifically.

Amid the challenges, progress exists, particularly in the realm of gender diversity, which, as mentioned above, is one of the more measurable metrics. Across the EU the number of women holding leadership positions has increased to 35 per cent this year. Vontobel has made significant progress in bolstering gender diversity: 24 per cent of senior managers are women, up from 18 per cent in 2019; and half of our board of directors is comprised of women, up from 30 per cent in 2019. Behind this progress lies concerted efforts to foster female talent, including peer coaching and skill-building initiatives. While we've worked hard to promote an environment of inclusivity — around categories including gender, race, ethnicity and age — our next task is to deepen this progress and extend it to other aspects of DEI.

DEI is a long-term investment with a dynamic discussion. There are observable and tangible improvements that have resulted, at least in part, from the dialectic to date. However, progress is not linear. Perhaps it's good that fatigue has set in — it means an upgrade to the conversation is overdue and we're collectively acknowledging that. It's natural that dialogue changes over and with the times — and this should be welcomed. Challenges and pushback are crucial to a living dialogue and history shows that this is the case whenever the needle is being moved. But because diversity is integral to sound business strategy, its importance isn't in question.

Advisory Partner

WHITE & CASE

Corporate DEI programmes: emerging legal risks

Clare Connellan, Philip Broke, Lachlan Low, Janina Moutia-Bloom

Following the global spotlight on racial justice after the death of George Floyd in May 2020, companies face mounting scrutiny to refocus boardroom efforts on expanding corporate DEI initiatives. Many have since made significant strides in designing, enhancing and implementing DEI programmes and commitments. Against this backdrop, novel legal, reputational and shareholder activism risks are emerging, and not only in the US.

Scrutiny of DEI disclosures will accelerate due to an inevitable surge in the availability and quality of data with new regulatory requirements across jurisdictions which companies need to monitor, and include:

- In the UK, the Financial Conduct Authority introduced new rules in 2022 for certain companies to include disclosures on ethnic minority and gender representation on boards.
- Subject to transitional measures, Nasdaq-listed companies are now required to disclose board level diversity statistics through a board diversity matrix on an annual basis or disclose why they do not have a minimum of two diverse board members.
- The EU's Corporate Sustainability Reporting Directive will require in-scope companies to make DEI disclosures under the European Sustainability Reporting Standards. These are defined within ESRS S1 (Own Workforce), which cover over a dozen separate data points ranging from key DE&I policies and practices, targets and actions, to workforce diversity and pay equity data.
- In late 2023, California also passed a diversity reporting law requiring certain "covered entities" to report on the diversity of founding members of businesses in which they invested during the previous year. Although targeted at venture capital, the law appears to be worded broadly enough to apply to many private equity funds.
- The International Sustainability Standards Board has also indicated that it would research the development of DEI-specific reporting standards.
- The launch of the Taskforce on Inequality and Social-related Financial Disclosures is expected in the third quarter of 2024, to develop a voluntary baseline reporting framework covering a range of DEI issues. Along with the Taskforce on Nature-related Financial Disclosures framework, the TISFD could follow in the footsteps of the Task Force on Climate-Related Financial Disclosures regime in becoming mandatory in many jurisdictions.

As well as regulatory changes, proxy advisers (such as ISS and Glass Lewis) and institutional investors (like BlackRock and Vanguard) have sought to introduce board diversity requirements or policies.

Pursuing different agendas

Using increased disclosures, anti-ESG sentiment has targeted DEI, with tactics including actual or threatened litigation, state attorney-general investigations, shareholder activism, legislation proposals and federal investigations. All create new risks for companies implementing DEI programmes, commitments and targets. Examples include the National Center for Public Policy Research's lawsuit filed against Starbucks executives and directors in their personal capacity, and America First Legal's civil rights complaints against several companies (eg, Alaska Airlines, Unilever), alleging that their DEI initiatives amount to discrimination. The US Supreme Court's recent decision finding that universities may not make use of race-based admissions systems in higher education (the so-called affirmative action ruling) may embolden claimants to challenge corporate DEI initiatives. In response to the judgment, Strive Asset Management demanded that one of its portfolio companies rescind diversity targets for employees and suppliers.

Investor pressures

According to Georgeson's Investor Voting Insights Report, 140 shareholder proposals were filed on human capital management and DEI in the US in 2023. The DEI resolutions centre around racial equity/civil rights audits, pay gap reports, reports on DEI effectiveness and inclusive hiring, racial justice, board diversity, AI equity and the decline in investment firms' voting records on pro-DEI resolutions at portfolio companies.

Despite the broad range of shareholder proposals, it is likely that most action will take place behind the scenes, as boards seek to negotiate agreements with activists to keep proposals off the ballot or to have them withdrawn ahead of AGMs.

Board engagement

Boards should prepare for the DEI debate moving beyond shareholder proposals; extending into votes on issues such as (i) inclusion of DEI metrics in executive compensation packages (more than 75 per cent of S&P 500 companies link executive pay to ESG metrics with increases in DEI outcomes); and (ii) elections or re-elections of directors or CEOs who have been embroiled in DEI controversies.

Consumer and employee activism

Consumer boycotts or "cancel culture" and employee demands bring new challenges. Campaigns such as Black Lives Matter, Stop Asian Hate and positive activism on behalf of the trans community have prompted changes in practices and marketing.

Mitigating legal risks

Companies at varying stages of building their DEI strategy can accelerate and enhance efforts to mitigate the legal risks with key objectives on the board's agenda:

- Assessing the company's short- and medium-term DEI aspirations, and the roadblocks to achieving desired outcomes.
- Appropriate cross-functional teams to ensure that any goals and challenges are appropriately reflected across DEI-related policies and public disclosures to mitigate the risk of allegations of "DEI-washing" or "DEI-hushing".
- Taking stock of how the company is currently placed to gather the data required to meet existing or emerging legal frameworks.
- Proactively engaging with activist investors to pre-empt and mitigate the filing of resolutions.
- Engaging in meaningful dialogue with internal and external stakeholders to develop the company's DEI strategy/road map, and mitigate the risk of whistleblowing, the filing of grievances, or consumer boycotts.

Taking these steps can help companies not only mitigate risk, but can also help demonstrate both DEI progress and accountability to stakeholders and regulators. Robust data can help to inform DEI-insights, gain a better understanding of the company's progress, and develop an appropriate and effective path forward for delivering stronger DEI outcomes for the future.

About the FT Moral Money Forum

The FT Moral Money Forum takes key issues from the ESG debate and explores them for FT Moral Money subscribers.

The forum highlights macro and philosophical questions and explores the experiences and solutions being proposed. We apply an editorial filter to these and present the most interesting ideas and experiences. We also engage our data visual team to find the best form of presentation.

The forum produces regular reports to highlight the ideas, policies and practices that are making a difference.

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