

The Impact of Diversity and Inclusion on Management Liability

In recent years, senior leadership teams have been held increasingly accountable for their organizations' failures by shareholders, stakeholders and the general public. Specifically, organizations' diversity and inclusion practices have garnered additional scrutiny.

Certain social initiatives—such as the Black Lives Matter and #MeToo movements—have helped elevate awareness on the importance of promoting diverse representation and adopting effective inclusion measures within the workplace. As such, senior leaders who fail to uphold these practices risk severe reputational damages, potential lawsuits and an increased likelihood of directors and officers liability (D&O) claims.

Keep reading to better understand the ramifications that senior leaders could face from poor diversity and inclusion measures, the latest legislation regarding such measures and top tips for fostering diversity and inclusion within the workplace.

Consequences of Lacking Diversity and Inclusion in the Workplace

First and foremost, senior leaders who fail to promote diversity and inclusion are missing out on various organizational advantages. By establishing diverse representation and maintaining an inclusive environment, organizations can benefit from unique employee perspectives, a deeper talent pool, increased innovation and boosted workplace morale. In fact, a recent study from McKinsey & Company found that organizations with diverse workforces are 25% more likely to outperform their less diverse counterparts.

Apart from missing out on key organizational benefits, it has become increasingly common for senior leaders to face lawsuits due to poor diversity and inclusion practices—namely, shareholder derivative lawsuits. Such suits entail a shareholder suing specific senior leaders on behalf of an organization for their alleged failures.

These lawsuits have stemmed from allegations that senior leaders breached their fiduciary duties by:

- Not following through on previously stated commitments related to developing workplace diversity and inclusion initiatives
- Misrepresenting the diversity of senior leaders or failing to ensure diverse leadership altogether
- Retaliating against individuals who voice workplace diversity and inclusion concerns

Some major organizations have been impacted by shareholder derivative lawsuits in recent years—including Facebook and Pinterest. Such cases carry not only severe reputational damages but also substantial legal and defence costs.

Additionally, these lawsuits can lead to D&O claims. As a result, underwriters in the D&O market are expected to ask more questions and seek additional documentation regarding policyholders' diversity and inclusion practices.

Legislation on Diversity and Inclusion

At the federal level, the Canadian Business Corporations Act (CBCA) was amended in 2020 to include reporting obligations about the diversity of corporate directors and senior management for distributing corporations. These requirements ask public companies to disclose if they have adopted policies on the identification and nomination of “designated groups” and details of such adopted policies, including assessment of progress.

“Designated groups” are:

- Women
- Aboriginal people
- People with disabilities
- Members of visible minorities

Organizations must also disclose whether the board or nominating committee considers the level of representation of designated groups on the board and in senior management and whether it has adopted targets for each designated group. They must also include the percentage of each designated group on the board and in senior management, including its major subsidiaries. If action has not been taken on adopted policies or targets, the company must disclose why it has not done so.

Best Practices for Promoting Diversity and Inclusion in the Workplace

In order to promote diversity and inclusion among both their senior leadership teams and overall workforces, organizations should consider implementing the following measures:

- Take steps to ensure diverse representation within the senior leadership team. Adjust or expand existing leadership positions as needed.
- Require the senior leadership team and the remainder of the workforce to participate in routine training on diversity and inclusion topics.
- Allocate additional resources toward hiring, mentoring and promoting employees who belong to underrepresented communities. Doing so should provide these employees with further opportunities related to professional development.
- Create an annual workplace diversity and inclusion report. This report should provide data regarding the organization’s hiring, advancement and compensation practices for employees who belong to underrepresented communities.
- Consider establishing a diversity and inclusion officer or department. This individual or department should be responsible for ensuring the organization not only upholds its diversity and inclusion initiatives but also remains compliant with all applicable legislation regarding such initiatives.
- Keep detailed documentation of all workplace diversity and inclusion initiatives. Be prepared to share this documentation with D&O insurers.
- Consult a trusted insurance professional to determine specific D&O coverage needs as it pertains to diversity and inclusion concerns.

If you have questions specific to your business, or would like additional information, please reach out to your local advisor.

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