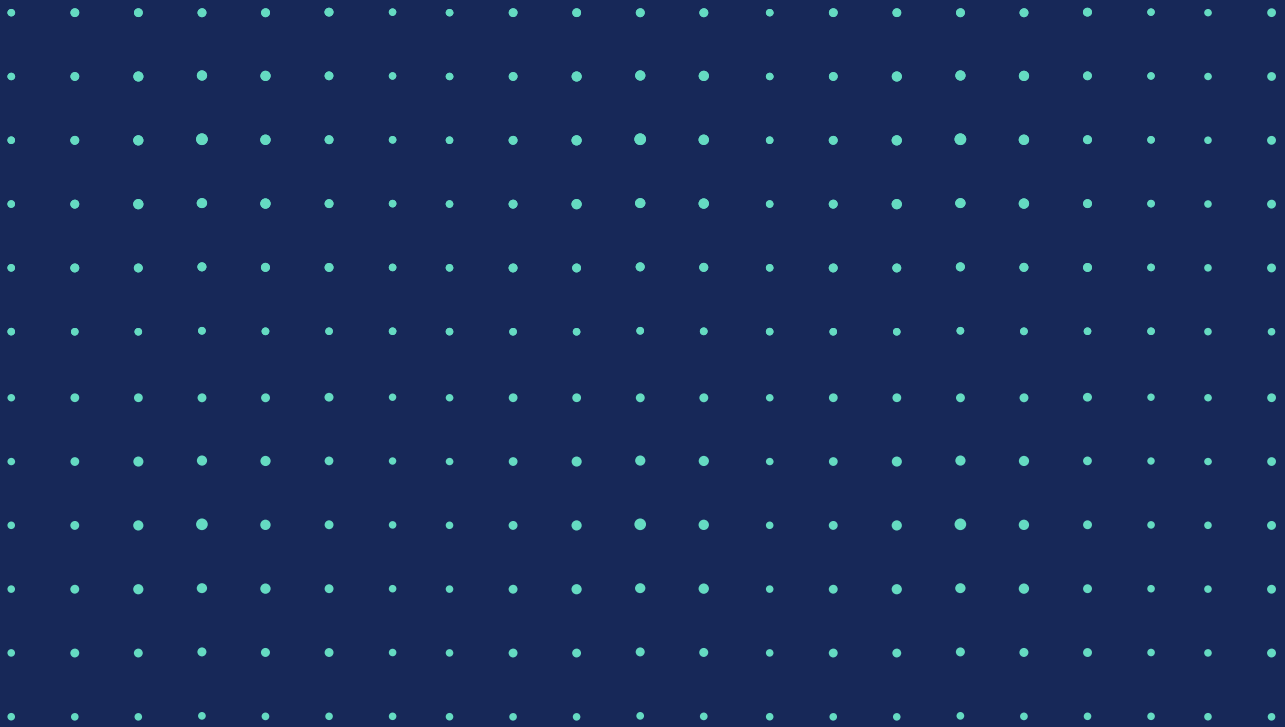


Corporate DEI in the Time of Polarization

Event Recap



Event Recap | July 10, 2024

The Berkeley Center for Law and Business hosted its first installments to its webinar series “The Buzz w/ BCLB” by diving into Corporate DEI (Diversity, Equity, and Inclusion) in the Time of Polarization. The discussion examined the evolving landscape of corporate DEI, addressing critical issues amid societal polarization and legal scrutiny.

DEI as a Strategic Imperative

Speakers Afra Afsharipour, Senior Associate Dean for Academic Affairs and Professor of Law at UC Davis School of Law, Mahlet Getachew, Managing Director of Corporate Racial Equity at PolicyLink, and Leo E. Strine, Jr., Of Counsel at Wachtell, Lipton, Rosen & Katz and former Chief Justice of the Delaware Supreme Court, shared their insights on the challenges and strategies organizations face today.

In setting the stage for the conversation, Getachew shared that the ultimate purpose of DEI is to “ensur[e] the company's doors are truly open to everybody, regardless of their background; it means ensuring the company's policies and practices, from talent recruitment and advancement to the workplace culture, to procurement practices and ways of engaging with communities, that it's all fair, it's respectful, it promotes equal opportunities, doesn't discriminate, or causes harm.”

The conversation explained the strategic advantages inherent in DEI—from preventing groupthink to helping corporate goals match pace with evolving stakeholder needs. And as a result, the speakers noted, DEI has now evolved from a minor initiative to an essential part of holistic business strategy.

Risks Posed by Political Backlash

The conversation then delved into the political backlash against DEI initiatives. The speakers explained how corporate DEI commitments are under immense scrutiny driven by cultural and ideological divisions from opponents and proponents alike using the examples of Tractor Supply's public retreat from DEI commitments and customer backlash against Bud Light's advertisement featuring a transgender influencer.

“I want to remind corporations, going to the Tractor Supply case, that dialing back from DEI commitments can also pose really serious risks, including greenwashing-like claims and traditional Title VII discrimination cases,” said Afsharipour.

The conversation emphasized the need for corporate leaders to take on a broader definition of DEI to include diversity of thought while also centering the historical racial inequities in the US to understand the political backlash against DEI.



Global Legal Developments

The speakers compared DEI approaches between the US and Europe noting that European standards often include human rights perspectives more thoroughly in ESG (Environmental, Social, and Governance) frameworks. This difference creates compliance challenges for multinational corporations and implicates global DEI strategies.

The webinar dived into legal implications created by the Supreme Court's reversal of affirmative action in *Students for Fair Admissions v. Harvard College*. The case has raised concerns about potential setbacks to DEI initiatives at private organizations, especially with recent litigation led by Edward Blum (founder of the plaintiff organization in *Students for Fair Admissions*) against law firm DEI programs. However, Afsharipour confirmed that while the case is significant for higher education, it doesn't directly prohibit private-sector DEI programs. Edward Blum has since ceased litigation efforts against law firms.

When asked about how DEI may even be a fiduciary duty owed to shareholders by corporate boards, Strine stated that "the first duty of corporations, under states' law, is not to make profits; it's to do only lawful business by lawful means." He went on to explain that DEI "relates to businesses' mission, it relates to their impact, why they're trying to put together a workforce and how that will make them a profitable company, how they're trying to attract and serve their customers well. And it's also how to make them the most accountable because that's what they control."

Strategies to Navigate Backlash

Among the strategies discussed to navigate backlash against corporate DEI, Strine suggested that "the full board needs to be involved and have a discussion about 'How is this company going to be a good company and how do we relate what we're doing in these areas to the fact that we are a business?'"

Leaders also need to educate themselves on these issues, employ rigorous data collection, and analysis on the experiences of workers, suppliers and customers, and design long-term goals. "I don't mean quotas. I mean goals around workplace sentiment, customer sentiment, the impact of your products and services, the reach of your products and services, how broadly the company's casting, its talent, recruitment net, and alike. You would want to measure what your impact is going to be," Getachew explained.

The dialogue highlighted the need for organizations to 1) take a broader view of DEI and stay attuned to stakeholder changes, 2) deepen surface-level DEI programs and understand the implications of retreating from previously stated commitments, and 3) ensure that DEI priorities are implemented cross-functionally using goals, data, and communication.

