

Live from CCC2023 Ep. 3: DEI and ESG Beyond the Imperative

By Monica H. Khetarpal, Laura A. Mitchell, Tanya A. Bovée, Michael D. Thomas, Samia M. Kirmani & Michelle E. Phillips

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Meet the Authors

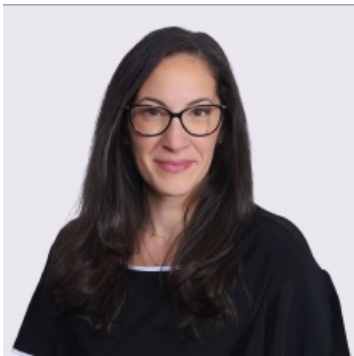


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Details

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Welcome and thank you for joining us for this special edition of We Get Work, live from Jackson Lewis' Corporate Counsel Conference, CCC2023, at the Waldorf Astoria Monarch Beach resort in Orange County, California. What follows are high level conversations on conference programs and why they were important topics to present now.

Jackson Lewis P.C. · Live from CCC2023 Ep. 3: DEI and ESG Beyond the Imperative



Transcript

Alitia Faccone:

Welcome and thank you for joining us for this special edition of We get work™, live from Jackson Lewis's Corporate Counsel Conference CCC2023 at the Waldorf Astoria, Monarch Beach Resort in Orange County, California. What follows are high level conversations on conference programs and why they were important to present now? In this episode, we focus on some very important capital letters that when you put them together, have a critical impact on every organization. Jackson Lewis Lawyers, Monica Khetarpal and Laura Mitchell are joined by special guest, Marquis Miller, vice President of DEI of the Barack Obama Foundation to discuss ESG from the Breakroom to the Boardroom: Evaluating Your Organization's Culture, Values and Corporate Identity. JL lawyers, Tanya Bovee and Michael Thomas. Share information on Diversity, Equity & Inclusion Initiatives for Now: Moving Away from Numbers and Toward Structural Changes, Inclusive Leadership, and Psychological Safety. And JL Lawyers, Samia Kirman and Michelle Phillips are joined by Senior Director and Associate General counsel, global head of employment Law, Nick Murray of Twilio to explain the The DEI

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Push and Pull: DEI Measures Face Backlash.

Alitia Faccone:

Good afternoon and thank you for joining us for Jackson Lewis's. We get work™ podcast live from CCC 2023. I'm here with Laura Mitchell, Marquis Miller, and Monica Khetarpal. Can you tell us a little bit about you, where you're from and your practice at Jackson Lewis, or what you do at your organization. Laura?

Laura Mitchell:

Great. Thanks, Alitia. This is Laura Mitchell. I'm a principal in our Denver office and I have the pleasure of heading up our ESG Client Services group. I'm also a principal in our pay equity and affirmative action practice groups.

Alitia Faccone:

Monica.

Monica Khetarpal:

My name's Monica Khetarpal, I'm a principal in our Chicago office. I am co-chair of our higher education group and also a core member of our ESG group and an active member of our corporate diversity counseling group. About half of my practice is in diversity, equity and inclusion consulting and counseling of all sorts.

Alitia Faccone:

And Marquis?

Marquis Miller:

Hi, I'm Marquis Miller. Good afternoon. I'm Vice President of Diversity, Equity and Inclusion for the Obama Foundation. I'm also a trustee of the Museum of Contemporary Art Chicago, and I am now co-chair of the Inclusion, Diversity, Equity and Accessibility Task Force of the Trustees.

Alitia Faccone:

Monica, the title of your presentation today was ESG from the Breakroom to the Boardroom: Evaluating Your Organization's Culture, Values and Corporate Identity Can you tell our listeners a little bit what your program was about and why it was important to present this topic this year at CCC2023?

Monica Khetarpal:

I'd be happy to Alitia, we started with a broad discussion of what is ESG. Everybody knows it's environmental, social, and governance, but we put a little bit of structure around those definitions and also talked about how the concept of ESG is not new. It's actually used to be what we called corporate responsibility and every organization needs to define it for themselves. Then we got into a little bit more of the nitty gritty of how to do ESG, what to do, and some of the landmines that organizations may face and the legal guardrails that are important to put into place as you go through this process.

Alitia Faccone:

Laura, what were some of the important issues that resonated with our attendees during your presentation?

Laura Mitchell:

I think one of the biggest points that we heard, the feedback during the presentation, it was fantastic, was this concept of ESG is not so political as folks think that it actually has become politicized. But really when you think about the concept of ESG, take it back to this notion of corporate responsibility. It really comes down to your organization's identity, the values, your core beliefs, whatever they are, whichever side of the spectrum that you are on, and that really should be the foundation for your ESG practice. We joked that we really should have called the series Demystifying ESG. That would've been a better title for it. So I think that that was really one of the main takeaways that folks appreciated.

Alitia Faccone:

Thank you. So Marquis, speaking of key takeaways, what do you think employers should keep in mind when addressing these issues in their organizations and how do you address them?

Marquis Miller:

Well, I would say that employers should keep a couple of things in mind. One that as was stated a moment ago, these are not issues that are as political as people think they are, but they do have to be thoughtful about how they are aligned with their organization values, what they say they stand for, whether it's what they stand behind from a product standpoint to how they support their employees and the communities where they get their employees and their profits from. The other thing is they want to make sure that they think about how they use data in a way that allows them to support or substantiate the decisions that they're making. It's important to think about this not from a straightforward data driven decision standpoint, but in thinking about how to use the data in relevant ways because all data's not good data, but all bad decisions are made without data.

Alitia Faccone:

Laura, Monica, how is Jackson Lewis, how are you and your colleagues at Jackson Lewis providing assistance to organizations like the Obama Foundation to tackle some of these issues today?

Monica Khetarpal:

So from a DEI perspective, which is obviously part of ESG, we offer pretty much soup to nuts advice. So sometimes our clients are calling and saying, "I have a quick question about how I should formulate or run or regulate my employee resource group." Sometimes they're calling us and saying, "How can we increase the diversity of our candidate pool? How can we create pipelines? Can we do diverse slates? What can we do and what can't we do?" Other times they're calling us because they see some problems, maybe some trends in complaints or concerns

that are raised, something problematic that goes beyond just an initial investigation. And we help resolve that by rolling up our sleeves, talking to people, looking at data and offering creative and really tailored solutions. And sometimes they need something much bigger and broader. Enterprise-wide race equity audits or civil rights equity audits. Sometimes they're driven by shareholders or by customers or other stakeholders. And we help our clients address all of that and make sure that whatever they're doing with DEI fits their corporate values and is really tailored to each client's needs and goals.

Laura Mitchell:

And from a broader ESG perspective, we really get to capitalize on the synergies that we have within the firm to provide advice and counsel on policy development stemming from human trafficking policies or development of human capital disclosures in response to regulations or pay equity audits or reviews or diversity analytics that go hand in hand with what Monica just described, or advising on 401(k) fiduciary duty laws. So it really runs the gamut, and we have all of those services to provide now under this ESG umbrella.

Alitia Faccone:

Laura, Monica, thank you, Marquis thank you for being our special guest behind the We get work™ podcast mic, and I hope you enjoy the rest of the conference.

Monica Khetarpal:

Thank you.

Laura Mitchell:

Yes, thank you.

Marquis Miller:

Thank you.

Alitia Faccone:

I'm here with Tanya Bovee and Michael Thomas. Good afternoon. Can you tell us each a little bit about yourself, where you're from and your practice at Jackson Lewis?

Tanya Bovée:

Sure. So I'm Tanya Bovée. I am a principal in the Hartford Connecticut office for Jackson Lewis. My practice is a lot of DEI these days, so a lot of strategic planning and implementation. I also do advice and counsel, affirmative action, a little bit of litigation. And then interestingly, I sit on the board for the firm. And so one of my areas of strategic focus for the firm is diversity, equity, and inclusion. Michael?

Michael Thomas:

And my name is Michael Thomas. I'm a principal in Jackson Lewis's Orange County office. In my practice typically falls in really kind of two buckets. One is

DEI like Tanya, strategic planning implementation, also some workplace training, and then I also a lot of class action and litigation under the Private Attorney General Act, which is California specific.

Alitia Faccone:

Thank you. Not surprisingly, the title of your presentation this afternoon was Diversity, Equity & Inclusion Initiatives for Now: Moving Away from Numbers and Toward Structural Changes, Inclusive Leadership, and Psychological Safety. Tanya, can you provide our listeners with a brief summary of what was covered in your program and why you and Michael believed it was important to present this topic at CCC?

Tanya Bovée:

Well, we really focused on three points that we thought were really important for the meaningful implementation of DEI initiatives. And so that would be the necessity for inclusive leadership because really if you're able to recruit and bring people into the door, the other piece is making sure that they stay. And so having that stickiness, making sure that we are being inclusive in all aspects. Another is structural changes, so really looking to see what are our processes and how is it that we might make changes to embed DEI throughout all of those different processes. And then the last I would say is psychological safety. And Michael, maybe you want to add a little bit in regards to psychological safety.

Michael Thomas:

Yeah, so psychological safety is really the concept of creating an environment where employees feel like they can fully participate, where they feel like they can belong, they can ask questions, acknowledge mistakes, ask for what their needs might be, and not be treated negatively or be viewed with repercussions for acknowledging that you don't know something. So it's more of a growth and learning environment than it is one where you're actually questioned. And so for diverse employees, it becomes really important because the employer doesn't know what they don't know. And so if you create an environment where an employee can actually speak up, they can let you know what their needs are, you can create that environment where you can actually benefit from all your employees.

Alitia Faccone:

So Michael, given the issues that Tanya and you just described, what were some of the important concerns that resonated with our attendees during your presentations? What did they really want to know?

Michael Thomas:

Yeah, there were really kind of three points that they really wanted to know. One was really kind of customizing your DEI initiative, and so not using a DEI initiative that somebody else is using. So how do you make it really specific for your organization, your culture, your employees, your customer base, how people are going to react when you brought an initiative, how do you do that? That

becomes really important. And the second one, they want to know what's working, right? People have been talking about DEI and implementing initiatives for a while, but what's really working that's out there? And that kind of ties in with customization. And then the third one is really how do you create that inclusive piece where everyone feels like they belong? So not just your diverse employees, but your white men as well.

Alitia Faccone:

And Tanya, were there other questions, given the breadth of this topic that concerned the attendees during your presentation?

Tanya Bovée:

Some of the questions are, for example, if you have an organization where your leadership has no diversity, how is it that you can really try to move the needle for diversity? And I think that's a common question that a lot of employers are grappling with. We talked a lot about taking action. So rather than just having conversations about DEI but rather actually making meaningful change, and we talked about doing hard work in the sense that sometimes with DEI, we really look at how is it that we can add more diverse employees, and yet the hard work is actually in the sourcing, looking at ways, and perhaps we can add more DEI in our benefits, maybe in our workforce, our culture, looking at how it is that we make promotions, teaching, growth, things like that.

Alitia Faccone:

Michael, what do you believe to be the key takeaways that employers should keep in mind when addressing these issues in their organizations?

Michael Thomas:

Yeah, I think there's largely three key takeaways. The first is, and Tanya talked about this is structural changes. We all think about individuals can make decisions that involve a bias. So we do unconscious bias training, but your systems and your structures, how you prepare your resumes, your hiring process, all those things can contain a bias as well. So it's important to review them to see if a bias is embedded within them.

The second point is to not operate as a silo. So we often can think that the DEI in your workplace is for the DEI department only, or maybe HR, but really almost every department can have some insight that can benefit DEI because different departments have different lenses. So can you bring all those different departments together to look at DEI to create something that's collective for the entire organization? And then the third is courage, right? And it's really, this goes to something Tony was mentioning, having the courage to take action. There's aspect of DEI, that's a journey for all of us, and you're going to make mistakes. And so hopefully those mistakes are calculated mistakes that are minimal in terms of negative impact, but it's very much a journey. So having the courage to stay on that path.

Alitia Faccone:

Thank you. Tanya. How are you and Michael and your Jackson Lewis colleagues providing assistance to organizations?

Tanya Bovée:

Well, there's a whole team of attorneys that work on this, and DEI really covers so many different things. So for example, we do have our affirmative action and OFCCP Law Advisor, which is a blog. We did a podcast on psychological safety. So Michael and I taped that in the middle of the pandemic. Michael wrote a recent article, which Michael maybe you could talk about in just a second. And then I guess I would just talk a little bit about, we have our corporate diversity practice group where we do so many different things, like Michael mentioned the training. So we do workplace training, we do audits, we do voluntary affirmative action plans. We do policy work, climate surveys, data analytics, really anything that you can think of in the grand scope of DEI. And that can involve our data analysts, our data statisticians, as well as the attorneys. Michael, can you talk a little bit just about your article?

Michael Thomas:

Yeah, so there's kind of two things like one, I think it's also important to kind of highlight that we also do DEI litigation, which can be defending companies when there's reverse discrimination claims that are brought. But the article that I wrote recently kind of highlights, part of our job as your outside counsel is to engage in thought leadership. So not just looking at where DEI is now, but where is it going in the future. And so one of the trends is this idea of polarization in the workplace where you're getting push back on one side. On the other side, employees are really kind of digging in and asking for more. And so my article really focused on the idea that everyone really wants to feel like they belong in the workplace regardless of whether you're the diverse employee or the white male.

You want to feel valued, you want to feel like you can contribute. And really when you have conversations about DEI, but you do not focus on inclusion, you actually can polarize your workplace. So it's important for employers and leadership to have that inclusive leadership perspective, to be a little bit vulnerable and open in terms of how they communicate and really communicate to everyone so that everyone really is on board. The challenge becomes that sometimes when you do not focus on inclusion groups within the workplace can feel like diversity and inclusion is for somebody else, and it's taking something away from them. And really it's really just kind of expanding that concept of belonging to benefit the workplace as a whole. And so again, part of our job is to be thought leaders in this space and kind of how do you address those trends in the workplace of greater polarization so that your workforce can be productive as it moves forward.

Alitia Faccone:

Tanya, Michael, thank you for joining us behind the We get work™ podcast mic today, and I hope you enjoy the rest of CCC.

Michael Thomas:

Thank you.

Tanya Bovée:

Thank you.

Alitia Faccone:

I'm here with Michelle Phillips, Samia Kirmani of Jackson Lewis, and Nick Murray who's joining us from Twilio. Nick, thank you for being our guest this afternoon. Could you each tell us a little bit about yourself, where you are from, and what you practice at Jackson Lewis, or in your company?

Michelle Phillips:

Yeah. I'm Michelle Phillips, and I'm based in the White Plains, New York office, and I do a whole smattering of things. I love practicing with Samia and Nick on these DEI measures and initiatives, and we litigate the cases, we do advice and counsel, we do training, and I'm just thrilled to be here with all of you today.

Alitia Faccone:

Thank you, Samia.

Samia Kirmani:

And my name is Samia Kirmani. I'm a principal in the Boston office. I co-lead the firm's training group, and I also am a member of the Corporate Diversity and Counseling Group and the Investigations Practice Group. And I'm delighted to be here talking about one of our favorite topics, which is DEI measures.

Nick Murray:

And I'm Nick Murray. I'm Twilio's VP of Litigation and Employment, and I am a strategic partner for our executive team, our people team, and our diversity team working on a variety of initiatives to really push diversity, equity, and inclusion forward at the company.

Samia Kirmani:

And a former Jackson Lewis Denver office attorney.

Alitia Faccone:

Thank you all for being here, Michelle. The title of your presentation this afternoon was the DEI Push and Pull: DEI Measures Face Backlash. Can you tell our listeners why it was important to talk about this topic at CCC in 2023?

Michelle Phillips:

Well, it's interesting because there was three DEI topics, and each of the three different topics that we covered at CCC covered completely different things. In fact, after we went to the second presentation, I thought, what could we possibly cover? But you know what? It was completely different. We gave an insider's look at what is the state of the law right now, both from a discrimination perspective, from a reverse discrimination perspective, what are the standards that are currently being employed depending on what circuit you are in and what's the

legislation? There's the Stop Woke Act, there's the don't say gay bill. And Samia covered a lot of the different cases that were going on. It was very strategic. And how from the inside, what advice can we be? How do we be strategic partners to the various audiences that we serve? So it was just such an amalgamation, and we got great questions from the audience.

Alitia Faccone:

So Nick, speaking of questions from the audience, what issues really resonated with our attendees during your program and from your personal experience at Twilio can you shed some light on those issues?

Nick Murray:

Yeah, we had a really thoughtful group of people. You're talking about a time in which there is uncertainty in this space. We've got laws being passed, you've got cases all the way at the Supreme Court that cast a shadow on the meaning and value of diversity, equity, and inclusion. And so a lot of the folks in the room were grappling with wanting to follow the law and wanting to do the right thing, which really those things shouldn't be countered to one another. But the place that we find ourselves in today is there's a question about whether you can do both of those things. I know that internally at Twilio, it's something that we spend a lot of time on because diversity, equity inclusion is extremely important to our leaders and to our CEO. And so we spend a lot of time to make sure that the programming that we are implementing is lawful, obviously, but very thoughtful that it's actually going to move things forward, that people are going to actually see how it impacts them in their everyday lives at the company in growing their careers.

And so I think that as part of that conversation today, we really got into those questions of what should we do? What should we avoid? And there's not always a clear answer. And that's why it's so great to work with Jackson Lewis is that, you have an opportunity to work with professionals who practice all over the country. They understand what the law says, they understand what these lawsuits are alleging, and they're really strategic, thoughtful partners for you and meeting you where you are at. Because every organization is different. Every organization has its own challenges.

Alitia Faccone:

So Michelle, given what Nick just said, what other concerns were addressed or what other questions were raised during your program today?

Michelle Phillips:

I coined the title of this program to Newton's Law. So for every action there is an equal and opposite reaction. And I think that's what we're seeing in the last three years. There is this tremendous push forward after the George Floyd murder and after we have anti-Asian hate, and we have anti-Semitism and we have in the LGBTQ plus space, like a 400 laws currently pending, which are looking to take back some of the protections that we've seen over the last five to 10 years.

And so the question is, what can companies do now? And the answer isn't to throw up your hands and say, "We can't do anything because of these new laws." The answer is to be strategic, to be careful to communicate. And I'll let Samia talk to that a little bit. But I think in the area of being strategic, we have to watch out for these big pronouncements from leaders who want to get covered on the news. They want to have a social media platform. People want to do the right thing. We heard an amazing presentation from Life is Good, and it talked about the whole self, like we're socially conscious beings, we're responsible. We want to have an impact. We want to make a difference, but how do we do that in a legally justifiable way? What are the guardrails around what you can and can't do? And I think what's very important is the messaging. And I want to turn it over to Samia to discuss that messaging.

Alitia Faccone:

So Samia, what are some of the key takeaways that employers should keep in mind when going back and addressing these issues in their own organizations?

Samia Kirmani:

Right, and I think like all of the employee relations type initiatives that organizations undertake, it all comes down to communication. And as advisors. So our clients who were in the room are in-house counsel, they're chief diversity officers, they're heads of human resources with a lot of agency in making decisions. And so the key is when they are communicating their various DEI initiatives and their goals of maybe increasing representation of X or Y, that they're not letting anyone in the room walk away with the message. "Oh, that means we have to make decisions based on protected characteristics." And so what we talked about today and what we talked about with the participants in the room, and I say participants because it was a real active dialogue, but what we talked about was, "Okay, so we can add a lot of value by saying, here are the pros and cons of this initiative. Here are the legal implications, and we can provide that kind of legal advice and be real strategic advisors, but make sure that in our communications, that very clear."

And that means being crystal clear with our managers, human resources, DEI, leaders. This does not mean that we're making protected characteristic based decisions. This does not mean that we're not hiring or not promoting the most qualified candidate. And it's that dialogue that remains paramount. So we talked a lot about that, number one. Number two, we talked about the fact that the law hasn't really changed, right? It's still unlawful to discriminate, but it's important to understand, okay, well what is the shape? What are the contours of the cases that we're seeing now? Well, what we're seeing now, which is different from years past, is that the very DEI measures that were implemented are actually being used as evidence of discrimination.

What does that mean? It doesn't mean that we don't do those initiatives. It means that we do them in a thoughtful manner and that the way we communicate about them is paramount because the cases, they really do still turn on what are the statements people made? How were similarly situated employees in similar circumstances treated? What were the statistics? That's all the same information

that's being discussed. And so that's what we talked about. And finally, we talked about the fact that there are these laws popping up that are challenging employer training practices, but they're not saying you can't train. And this has been the case for time in memorial when you endeavor to do a training program, think about what's your objective? What am I trying to achieve and what am I going to communicate? And once you do that and you start looking at your programs, you realize, you know what?

I don't actually think our programs are violating these laws or proposed laws. And a lot of these laws, they're in various stages of being implemented. They're being passed at a frequent clip, if that's the right word. But at the same time, we have to understand that other laws are also being passed. Like California right now is if there's a proposed law to add caste as a protected characteristic. So that's a push in one direction. So what we're seeing here is this pendulum swinging. Is the pendulum swinging is it is Newton's law, whatever it is. It's important as legal advisors, as human resources executives as DEI executives to be aware of that because our business partners are expecting us to know about that and to allow them to make decisions, whatever those decisions are, knowing what's out there. So that's what really we focused on, and I thought it was a great discussion.

Alitia Faccone:

Samia, Michelle, thank you as always. Nick, thank you for joining us and being our special guest behind the We get work™ podcast mic today, and I hope you enjoy the rest of the conference.

Samia Kirmani:

Thank you.

Michelle Phillips:

Thank you.

Alitia Faccone:

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