

DEI and the Surge in States' Workplace Legislation

By Richard I. Greenberg & Samia M. Kirmani

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Meet the Authors



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Transcript

INTRO

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Samia M. Kirmani

Principal, Boston

Hi, everybody. My name is Samia Kirmani, and I am the co-leader with Michael Thomas of the Corporate Diversity Counseling Practice Group at Jackson Lewis. With me is Richard Greenberg, my old friend and longtime colleague.

Rich, do you want to introduce yourself before we get started?

Richard I. Greenberg

Principal, New York City

Hi everyone. Thank you, Samia. My name is Rich Greenberg. I'm in the New York City office of Jackson Lewis and I am one of the co-leaders of the renamed Multi-State Solutions Practice Group.

Kirmani

Rich and the team do provide, which is how we got to know each other over the years, help understanding multi-state rules statutes and obligations. Most importantly, marrying them so that we can understand how to implement them in practical ways.

Rich, we're supposed to be talking about ballot initiatives this year. I can go on and on and talk about what's happening in my space and the DEI space. But let's start with you. The way I see it, we're still in this space where some states are trying to pass laws that provide more employee protections than federal laws provide. What's going on in your world?

Greenberg

What's going on in my world is exactly what you just described. It's harder and harder to be a day-to-day human resource professional or managing legal in an organization, due to the myriad of differences between state and local laws. That requires an analysis of whether we want to go to the lowest common denominators, which involves consideration of stakeholders and costs, or whether we have the ability to operate different policies and systems in different states, which then interacts with IT and systems. It requires an overall analysis of where the organization wants to be.

Now we have another issue that we always need to think about, which is humanity. I don't know about your perspective, Samia, but from my interactions with clients individuals have more expectations for treatment in the workplace. The importance of policies that make people feel that they're treated well and go beyond the law often militates toward national approaches.

One other thing I also always talk about with clients is when I started doing this, drum roll please, 28 years ago, to say individuals in different states didn't know what happened to each other. They didn't communicate with each other. Now, with social media and internal and external networks, you could roll out a policy in one jurisdiction, not intending to cover people in other jurisdictions, and they learn about it 30 seconds later. Then they're knocking on HR's door a minute later saying, why are you treating me so poorly compared to my colleagues in XYZ? It requires a very, very broad analysis of your culture, your goals, your retention, interests and turnover rates in order to determine policies with the overlay of what state and local law require.

Kirmani

It's not easy, right? Because state, local and federal laws are changing and changing quite rapidly. I want to tee off something you said though, which really resonated. The piece about culture is so important and that's where kind of my world comes in.

We're in this space right now where we're seeing more of the push and pull with a whole chunk of the population advancing DEI (diversity, equity and inclusion), and a chunk of the population is trying to retreat from it. The focus right now in terms of ballot initiatives is on federal and state initiatives that are purporting to ban or curb DEI. As we all know, Republicans are ready to take control of both

chambers and the White House. So, we'll see more of this. Vice President-elect J.D. Vance proposed a bill to curb DEI initiatives at businesses that have federal contracts. Interestingly, the bill classifies directors on boards of public companies as employees rather than independent contractors, subjecting them to the same anti-discrimination and perhaps other laws as company employees. This has implications that go beyond just DEI. The bill also prohibits federal agencies from establishing and implementing DEI initiatives. It prohibits funding for such programs and prohibits requiring people to participate in organizational DEI programs. This is all part of the White House agenda. As I'm sure people have been reading, opponents of DEI will blame DEI for having too many workers in the federal government, for example, for discrimination or even for companies' safety problems.

So, there was a big Supreme Court decision in 2023, *Students for Fair Admissions*. Up until that decision, we were seeing an uptick in so-called reverse discrimination claims. We were seeing that long before that decision came out, and we've certainly seen it since. There's been a ton of attention on companies that are retreating from their DEI programs. In terms of ballot initiatives, there are at least, by my rough count, 19 state bills pending that, in one way or another, aim to curb DEI programming and initiatives. For example, Montana, even New Jersey, South Carolina and Texas. Interestingly, there are federal bills pending with the same purpose. They're all about public agencies, higher ed institutions and federal and state contractors. But there's a push and pull. Also interesting is that there are state bills pending that advance DEI, like adding to the list of protected characteristics or appointing state DEI oversight offices. There are federal bills pending to advance DEI, like a bill to recognize the term woke. We're seeing so much legislative activity.

I don't know what you think, Rich.

Greenberg

Samia, when I hear this, I always ask a very simple question. I'd be really interested in your thoughts on this. When you look at this proposed legislation, do you think the drafters really understand what DEI means, what the goals of DEI are and that a good DEI program is not about quotas and the political issues that so often jump to the forefront in speeches and things like that?

Kirmani

That's such a great question, Rich. We didn't rehearse this, but it brings me to what I think is the most interesting thing here. People are banding for or against something called DEI, but they're often talking substantively about different things.

Just stepping back for a second the law hasn't changed. It's always been against the law to make employment decisions, for example, based on protective characteristics like race or gender. DEI done right simply means trying to understand and break down barriers to ensure equal employment opportunity without discrimination. That's not just lawful, it's actually required.

To your point, DEI has come to mean, or it's been morphed to mean, making decisions based on things like race and gender to advance some underrepresented group when really what it has been about and done well is about looking at your workplace. Can we cast a wider net to ensure we're getting the best talent anywhere? There's nothing wrong with that. It means that we're making known the keys to the kingdom in terms of advancement and connections to everyone. We don't have to make protected characteristics-based decisions to do that, and we shouldn't be. So, DEI really once was focused on helping the organization's bottom line by making sure discrimination isn't getting in the way of recruiting top talent, getting more customers or making more money.

We're seeing a lot of talk about companies retreating from DEI, but we're also seeing companies remain committed to DEI and to ensuring equal employment opportunities. I feel like it's being mistranslated into making decisions based on race or gender.

Back to ballot initiatives, it's going to be very interesting to see how the terms are defined in the legislation and what they're interpreted to mean by the courts.

Greenberg

Samia, building on the points you just made, whether or not the debate over any of these issues will go beyond the short attention span, micro discussion points that so much of our world, not just the United States, has turned into. Because these are not simple 'yes or no' questions. They're questions with broader societal goals, trying to ensure everyone has an opportunity to succeed, the famous American dream, for lack of a better term. I just don't think sometimes when people are thinking about these issues that they really understand, even if they're against something, why they're against it, other than they read some bullet points that said, I may lose my job because of a quote.

But turning a little bit to the non-metaphysical and the blacker and whiter, which are the ballot initiatives I'm going to address. Just as a slight precursor, one of the hardest parts about multi-state responsibilities over the last few years has been the growing influx of state laws. Those state laws and local laws cover many of the same areas. Of course, they're never all identical because that would make our life easier, but it's more of a copycat mechanism. Some of those areas covered include minimum wage, paid sick leave, marijuana, captive audience meetings, other psychedelic drugs and rights for rideshare drivers or others in the gig economy. The ballot initiatives this year tied directly into those issues.

Running through them in short summary, minimum wage. In Alaska and Missouri, the voters voted for minimum wage increases. California, shockingly, the voters voted against the minimum wage increase. With that said, I want to note that California already has a very high minimum wage comparatively, and there are also about 15 to 20 local minimum wages. But California is never a state that anyone would have thought there would have been a no to anything that was at all populous. If you're ever having trouble sleeping, go on Google late at night and search for articles about why the California proposition failed. They will put you to sleep, but they're very interesting. What they showed is that

voters outside of high-income areas, the San Francisco Bay area, for example, seem to vote against it in the majority because of the concern of rising prices. Voters in those higher income, higher cost communities voted for it because the cost of living is so tremendous. Again, that ties so much into the dichotomy right now that so many of us are dealing with in the United States.

Similarly, in some jurisdictions in which an employer is allowed to take a tip credit for tipped employees, i.e. pay a sub-minimum wage with a delta made up by tips, some states have tried to move away from that. Massachusetts voters said we are not going to do that. We are going to keep the current structure.

The bane of my existence co-managing a national policy practice is paid sick leave laws and leave for any other reason laws because they require employers to make that decision between that macro policy, extending things nationally, and different policies in different jurisdictions. Three more jurisdictions' voters voted for paid sick leave laws: Missouri, Nebraska, and Alaska. Those are all effective at some point in the near future. Of course, in order to develop good, strong policies, we'll have to wait for guidance.

As to marijuana, while Nebraska voted 'yes' on medical marijuana, South Dakota, North Dakota, and Florida voted 'no' to recreational marijuana. There's been an ongoing trend with recreational marijuana where many, many more states have legalized it for tax revenues. But we're starting to see a little bit of pushback now, which I think may tie into the view of the new administration.

Then in that assorted event, what we had seen were a bunch of states passing laws saying that employers can't hold captive audience meetings. We always felt that it was preempted by the NLRA because those meetings are often held to discuss employer views related to organizing. Alaska, through a ballot initiative, enacted something similar. Since that time, the NLRB reversed years of precedent and also outlawed such meetings. Except it's fair to assume that that law is going to go to switch back when the National Labor Relations Board comes under Republican control.

The final issue I mentioned was how we've transitioned to a gig economy and what are the rights of gig workers. One of the largest realms of gig workers, thankfully, are rideshare drivers. I personally can't imagine what life would be like without rideshare drivers at this point. The concept of finding a local car service to go somewhere it's like anathema. When I talk to my 18-year-old daughter, and I explain this to her, she looks at me like I'm crazy. It's like when I tell her I didn't have a bank machine to go to until I was in college or a cell phone, she looks at me like I have 16 heads, but that's a separate issue. Massachusetts, on a ballot initiative, provided rideshare drivers with the right to certain collective bargaining rights.

In essence, what we saw, is the same thing we're seeing from state and local legislatures. Voters approaching these issues, not in a unanimous way, but with different views. Even if they agree on things, they never agree on them in the same matter. It's that same series of specific issues that require analysis of different state and local laws that make the HR professional's life much harder than it used to

Kirmani

Your point is so well taken. We have gone from #MeToo to #BlackLivesMatter to #StopAsianHate, etc., etc., etc., to COVID. All of these inflection points have caused employee expectations for the workplace to change.

That's the bottom line. I'll go back to what I always say to our HR professional and legal professional friends and clients: look, we've done this before and we'll do it again. With that, we should wish everybody a happy holiday, Rich, and call it a day.

Greenberg

Everyone has a wonderful, safe and healthy new year.

Kirmani

Thank you all for listening.

OUTRO

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