Employer Accountability for Diversity Measures in a Time of Racial Reckoning

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- Veronica Root Martinez & Gina-Gail S. Fletcher, *Equality Metrics*, 130 **Yale L.J. Forum** 869 (2021).
- Katrina Lee, *Discrimination as Anti-Ethical: Achieving Systemic Change in Large Law Firms*, 98 **Denv. L. Rev.** 581 (2021).

Veronica Root Martinez and Gina-Gail S. Fletcher as co-authors of a Yale Law Journal Forum essay, *Equality Metrics*, as well as Katrina Lee as an author of a Memphis Law Review article, *Discrimination as Anti-Ethical: Achieving Systemic Change in Large Law Firms*, have 2021 papers that offer excellent reads and make important contributions to the discussion of ways to evaluate and hold employers accountable for their diversity commitments to their employees. In recognizing that employers have a responsibility to deliver results in response to their diversity commitments, the paper by Martinez & Fletcher and the paper by Lee both focus on transparency and accountability by seeking measurable means to determine diversity successes in the workplace.

Martinez and Fletcher focus on corporate entities of all types and Lee focuses on law firms. Both employer groups responded with increased diversity commitments and training efforts in support of the Black Lives Matter movement when heightened concerns about systemic racism arose after the senseless killing of George Floyd in July 2020. With the resulting backlash toward workplace diversity training after an Executive Order by President Trump and related initiatives, the importance of measuring diversity consequences became a key issue for 2021 that both papers seek to address.

In *Equality Metrics*, Martinez and Fletcher assert that there are specific and concrete steps that institutional investors may take to make sure corporations adopt what they refer to as "equality metrics" that disclose the current demographic diversity of their workforces as well those of related businesses within their supply chain and identifiable measures to meet improved racial equity goals. The co-authors acknowledge that many corporations had responded to George Floyd's death through statements that involved "performative actions that met the moment without doing more" or without "actions likely to create sustained, meaningful change throughout their organizations." As a response, their paper focuses on "starting at the top" to make changes by having institutional investors use their power and influence as an incentive for corporations to be accountable for their diversity pledges.

Martinez and Fletcher note that institutional investors possess "approximately eighty percent of the outstanding equity in the top 500 companies." Although corporations and investors have historically shied away from taking positions on controversial social issues, the co-authors suggest that changing societal expectations have led to corporations taking more public and progressive stances on environmental, social, and governance matters.

In particular, the co-authors highlight as a key example the actions taken in 2020 in response to the Black Lives Matter movement by institutional investor BlackRock, the world's largest asset manager. BlackRock provided transparent information about its workforce diversity along with concrete goals on how it intended to increase Black representation at various levels within its organization. But, BlackRock went further by also asking corporations that it invests with to publish specific diversity data.

The co-authors also explained that their solution of relying on institutional investors to encourage corporations to make voluntary disclosures and chart specific measures for diversity success represents an alternative to using an external regulatory source such as the Securities Exchange Commission (SEC) which has issued a rule seeking some

disclosure of diversity information. They note that there are some limits and doubts as to whether the SEC may mandate corporate diversity actions.

Finally, in what I consider the most important aspects of the co-authors' arguments, they explain how the pressure by institutional investors to encourage more transparent data on diversity demographics and to seek more specific measures to deliver concrete results will have a synergistic effect on other market participants in addressing systemic workplace discrimination based on race. Specifically, they assert that creating a database of information "measuring a firm's current state of demographic diversity, setting a goal, measuring the firm's progress toward that goal in light of the strategies it employed" can lead to identifying broad and "valuable insights for not only the firm itself, but also for the market more generally."

This data set can establish a baseline for more comprehensive empirical analysis as to what measures are successful and those measures proving to be ineffective. Also, this transparent database of "equality metrics" can guide institutional investors and lead to changes in corporate behavior while debunking critics who do not accept the existence of any systemic discrimination and challenge any diversity efforts as being unnecessary and discriminatory.

Likewise, Lee pursues the same agenda of making employers more transparent in providing diversity data and being held accountable for their diversity pledges. Unlike corporate entities, Lee focuses on large law firms in her article, *Discrimination as Anti-Ethical: Achieving Systemic Change in Large Law Firms*, Lee describes how large law firms in the United States responded to the killing of George Floyd and also Breonna Taylor in 2020 by "issuing statements acknowledging systemic inequities and bias" while also pursuing "their commitment to diversity and inclusion, and to racial justice."

In noting that large law firms in the partnership ranks "remain very white and very male," Lee seeks to discover a mechanism that "holds large law firms accountable for perpetuation of systemic discrimination." Lee proposes that states should modify attorney ethics rules of professional conduct to require diversity transparency in pay practices, measures for self-assessment in obtaining milestones, and financial incentives to obtain compliance. Specifically, Lee seeks to modify Rule 8.4(g) of the ABA Model Rules of Professional Conduct and corresponding state ethics rules concerning discrimination and harassment in the legal profession.

In pursuing this objective, Lee catalogs the significant history of systemic bias and gender discrimination by large law firms in their partnership compensation decisions. Lee then explains how numerous initiatives aimed at increasing diversity and inclusion have failed in improving the representation of women and women of color at the partnership level. Lee asserts that current attorney ethics rules including Rule 8.4(g) regarding discrimination and harassment merely operate as "window-dressing . . . with no disciplinary force" to make law firms accountable to address terms and conditions including salary disparities. As a response, Lee argues for changes through a combination of state legislation and state modifications of the adopted Model Rules to mandate specific policies and procedures that law firms must comply with or face ethical sanctions.

In particular, and what is most salient to the issues identified in this Jot, Lee's proposal would require large law firms to provide transparency in pay information decisions and a self-assessment and reporting of progress in achieving stated milestones developed by either the state supreme court or by the ABA in its model rules as adopted by the states. The firms must report mean and median pay data across the law firm, including for both associates and partners, and also provide the gender and racial make-up of those assessing partner compensation. The milestones might include "bias-interrupting suggestions [to] include instituting a formal succession planning process; annualizing billables based on the average of months the attorney was at work; and accounting for a ramp-up and ramp down period." Lee views the self-assessment information as being extremely helpful in educating all firms in compliance with the diversity-related goals of the firm that have to involve more than just diversity training.

Lee ends her proposal by suggesting that there must also be a financial incentive for firms to comply with the transparency goals to achieve diversity and inclusion and to take efforts to meet established milestones. Such financial

incentives might encompass payment of an administrative fee subject to refunding when goals are met or having state authority to punish non-complying firms with a donation as a financial penalty.

Lee recognizes that there are barriers to state adoption of her proposal including a lack of state resources, a need for law firm autonomy, unintended harms to lawyers in underrepresented groups due to financial penalties that may end up providing less opportunities for advancement, and the current problem that many states have not even adopted Rule 8.4(g) and would be even more unwilling to do so with the modifications Lee suggests. Lee argues, however, that law firms and their leaders who have heartfelt concerns that led them to adopt diversity pledges in response to the Floyd and Taylor deaths in 2020 will be helped by having state bar disciplinary bodies as an enforcing function when responding to those who object to their diversity pursuits.

As the papers by Martinez and Fletcher and by Lee highlight, employers must be incentivized to meet the need for transparent data aimed at adopting successful measures to achieve diverse workplaces. Regardless of whether their suggestions of using institutional investors or state ethics rules will result in the development of such transparent data will be a question for future development. These papers have independent and immediate importance by clarifying how necessary it is to find ways to obtain this data in the midst of employer responses to a desire for a racial reckoning in our society related to Black Lives Matter and related 2020 deaths. With little indication that diversity training and other related initiatives have moved the needle in any fashion in accomplishing key racial improvements in the workplace, these papers unearth different methods to provide employer transparency regarding their diversity results.

By also seeking to provide transparency about self-assessment of various measures, this Jot emphasizes the significant value presented by both papers in seeking to establish key databases that will assist with ongoing empirical assessments to address systemic workplace discrimination. Then employees will have the benefit of employing tools to measure and hold employers accountable for their diversity commitments rather than being subjected to empty statements and useless actions.

Michael Z. Green, *Employer Accountability for Diversity Measures in a Time of Racial Reckoning*, JOTWELL (June 14, 2022) (reviewing Veronica Root Martinez & Gina-Gail S. Fletcher, *Equality Metrics*, 130 **Yale L.J. Forum** 869 (2021).; Katrina Lee, *Discrimination as Anti-Ethical: Achieving Systemic Change in Large Law Firms*, 98 **Denv. L. Rev.** 581 (2021).), https://worklaw.jotwell.com/employer-accountability-for-diversity-measures-in-a-time-of-racial-reckoning/.