

Embedding a formal EDI policy: takeaways for in-house counsel

Meg Lewis Wednesday 24 August 2022



With equity, diversity and inclusion high on the agenda for corporates, *In-House Perspective* considers how counsel can help drive effective change.

Corporations worldwide have declared equity, diversity and inclusion (EDI) a strategic imperative, but the adoption of a formal EDI policy outlining a company's position on the issue is far from a simple, catch-all solution.

In-house counsel can play a pivotal role in designing an effective EDI strategy which goes beyond legal compliance and adds real value to an organisation's operations, from improving employee wellbeing and engagement, to boosting profit margins.

EDI policy: a North Star for business

'For many companies there is a genuine, deep conviction, at different levels of the organisation, that EDI leads to a stronger and more successful company with better results, better communication, better retention,' explains Graham Wladimiroff, Chair of the IBA Corporate Counsel Forum and Vice President and Assistant General Counsel at Avery Dennison, who's based in Hong Kong.

This conviction is underpinned by countless studies over recent years that have proved the causal link between a business' focus on EDI and financial performance. For example, in *Diversity wins: How inclusion matters*, global management consultants McKinsey & Company followed the trajectories of 1,000 companies across 15 countries from 2014 to 2020.

The study found 'ample evidence that diverse and inclusive companies are likely to make better, bolder decisions' and that a visible commitment to EDI is 'likely to strengthen companies' global image and license to operate'.

For Iván Suárez, Co-Chair of the IBA Diversity and Equality Law Committee and a partner at Suárez de Vivero in Barcelona, EDI has become an 'unstoppable movement'. He compares making a public commitment to EDI as akin to adopting an environmental policy for private sector companies, which have heard the message loud and clear that those that don't embrace it will see the impact on their balance sheets.

'Organisations know that what's on your corporate agenda is very important,' says Suárez. 'As a company, you'll find it increasingly difficult to sell your products without a visible commitment to EDI over the coming years. And internally, without instilling an EDI culture, you will struggle to recruit – and keep – talent. Employees are demanding employers uphold their promises to improve EDI.'

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Suárez warns that while an EDI policy is 'a fantastic marketing tool, it doesn't automatically guarantee that you are practising positive EDI – nor that you have a structural framework in place to protect it. A formal policy should reinforce a company culture, rather than stand as proof of it.'

Wesley Bizzell, Senior Assistant General Counsel and Managing Director of Political Law and Ethics Programs at financial services company Altria Client Services, agrees that having a publicised mission is not enough.

‘Organisations are mission and values-driven from a business and financial perspective,’ he says. ‘A formalised EDI statement that is used both internally and externally is important, as it sets the standard and goals of the organisation’s values and outlines where they want to be as an entity. Without it, organisations can lose sight of what they’re trying to achieve.’

But, he stresses, ‘you need to have the practices and procedures in place to effectuate cultural change internally’.

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Putting policy into practice

In early 2022, the IBA European Regional Forum Diversity and Inclusion Working Party carried out a survey to understand how EDI is perceived by European law firms. One result from the survey was that the majority of law firms don’t have an internal policy on EDI.

‘While it’s not a must for a workplace to have a written EDI policy, it is a must for it to follow EDI principles in practice,’ says Antonia Verna, Vice-Chair of the Working Party and a partner at Portolano Cavallo.

‘But, in our opinion, having a written policy does make it easier for the institution to follow those principles, for everyone to be on the same page about what those principles are, and to monitor whether they are being followed,’ says Margareta Sovova, Chair of the Working Party and a partner at bnt attorneys in Central and Eastern Europe.

Verna and Sovova explain that of the EDI policies in place, they found that the majority are very general. In the main, policies outline the importance of EDI but don’t identify specific actions or provide a concrete programme for cultural change.

The next step in the project is therefore to draft an EDI toolkit (due to be published in early 2023), ‘to help firms begin thinking of how to draft and implement EDI policies. The aim is to embed the idea that a successful EDI policy involves putting concrete and effective actions into practice,’ says Verna.

While this resource is targeted specifically at law firms in a region where, Margareta explains, ‘most countries have no regulations for legal services or businesses when it comes to EDI,’ its approach may well be relevant for corporates around the world as the focus on EDI gathers momentum.

Ajay Singh Solanki is Co-Chair of the IBA Disability Rights Working Group and Leader of the Labour & Employment Law Practice at Nishith Desai Associates in India.

He argues that larger organisations will be more likely to implement such processes. In a landscape where in-house counsel are already vying for an adequate slice of the corporate budget, ‘smaller organisations may invariably be more inclined not to pursue these action points as they often require additional infrastructure and financial support’.

And, with some jurisdictions lacking a mandatory obligation for private sector companies to have a formal EDI policy in place, in-house lawyers may also find that there are conflicting expectations and duties when it comes to furthering the EDI agenda – at least in writing.

‘In-house lawyers have a duty to advise the organisation with respect to the legal risks of including a long list of protected characteristics in their EDI policy in the first place,’ Solanki says. ‘For example, if the law of the country in which the corporation operates provides lesser protection to the individual than what is outlined in the company’s EDI policy, what is the level of litigation exposure? In some jurisdictions, having contractual protections in the EDI policy may mean having to defend additional discrimination claims in court.’

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In these cases, a company may need to choose its approach carefully while drafting its EDI policy.

However, D’Arcy Kemnitz, Co-Chair of the IBA LGBTI Law Committee and Executive Director of the US National LGBTQ+ Bar Association, says that having something in writing is ‘a baseline floor’.

‘Having an EDI policy isn’t reaching for the ceiling of celebration of cultural diversity,’ she says. ‘It can be minimal and dry, with the aim of demonstrating an understanding of the law and the legal minimums a company is beholden to.’

Challenges for multinationals

The question of how multinational corporations in particular might enforce even a ‘baseline’ EDI policy internally remains a complicated issue – one that’s based on the specific characteristics protected under the law in local jurisdictions in which they operate.

For example, more than 70 countries worldwide still criminalise consensual same-sex sexual activity – 11 of which are jurisdictions that still impose the death penalty – so while a corporate policy may make a multinational’s global stance very clear, LGBTI employees may still be at risk of exposure to potentially significant problems by bringing their whole selves to work.

And if an international company policy recognises a protected characteristic under its EDI policy, but the local jurisdiction doesn’t, escalating an issue to the courts is fraught with challenges.

‘Employment laws are mostly specific to the location, and it can be very difficult for an individual to go through the international human rights system. Even assuming the whole thing was done pro bono, it’s slow, traumatic and exposing,’ explains Joseph J Catanzariti AM, a Member of the IBA LGBTI Law Committee Advisory Board.

Notwithstanding these difficulties, he argues it’s ‘still very important that international companies have EDI policies in place. Employees need to see that the corporation is trying to embrace EDI’.

Having an internal structure for addressing complaints is imperative. But, Catanzariti says, in this context, the position of in-house lawyers can be difficult to navigate.

‘In-house counsel can end up in the middle, standing both as a senior leader and as a regular employee,’ he says. ‘While it’s very important that they have a clear influence in the corporate governance of the company, internal investigations can cause tensions if the employees involved feel they’ve not been treated fairly.’

Outsourcing complaints to an independent body is one solution. Catanzariti is also a vice president of Australia’s independent workplace tribunal, the Fair Work Commission (FWC). The FWC, through Australian legislation, has been given specific powers to deal with bullying and sexual harassment claims.

‘While most cases are focused on monetary compensation, at the FWC we have the jurisdiction to issue a stop order where we believe there is a risk to an individual’s health, safety and wellbeing as a result of bullying or sexual harassment,’ he explains. ‘We also have the power to issue non-monetary orders, such as monitoring a workplace for compliance.’

Catanzariti says the benefit of this model is that it’s focused on stopping the behaviour in the immediate and long-term. ‘If somebody has a judicial finding that says, “This person has engaged in discrimination”, it can be Googled forever. It affects your future employment prospects.’

Leveraging in-house perspective and position

Practising positive EDI in the workplace is undoubtedly a complicated issue. While EDI applies to every company worldwide, the issue cannot be addressed in the same way with the same speed everywhere.

‘Companies oftentimes are looking for that silver bullet, but EDI is too systemic an issue to be addressed by one particular programme,’ says Wesley Bizzell. ‘Companies have to address this on multiple fronts. You can’t have a siloed approach to move the needle on EDI; you have to do multiple things all at once.’

For Bizzell, in-house lawyers are therefore uniquely positioned to effectuate fairly dramatic change in an organisation’s culture from an EDI perspective because they ‘see the full enterprise’.

‘We have a special perspective to understand cultural differences that may exist in different parts of the organisation,’ he adds. ‘Having someone who is passionate about EDI in the legal department who is working hand-in-hand with the broader EDI advocates is really essential.’

For Wladimiroff, while every employee has a responsibility to make the EDI agenda a success, he underlines the large role the Human Resources department plays in supporting the company and its management to drive the EDI agenda.

‘In-house teams can contribute through ensuring the agenda can be as effective as possible in a given local legal environment, as well as support the effort in applying a degree of judgement where it comes to communication and policies, in particular in regions where some aspects of the EDI agenda can be quite sensitive,’ he says.

Furthering the EDI agenda

Going beyond legal compliance, there are other specific actions in-house lawyers can take to further the EDI agenda in their organisations and more widely.

Solanki emphasises the importance of in-house counsel ‘seeking examples from across the globe’ and bringing these lessons into their day-to-day practice. Attendance at conferences and seminars is essential, he says. ‘There are so many examples and experiences from across the world that may be picked up in these specific legal forums.’

Suárez echoes this sentiment. ‘What lawyers learn from those forums about how to communicate, combined with their understanding of the local jurisdiction, means in-house counsel can really help in shaping a company’s training programme for HR managers, business partners, etc on how to be truly inclusive.’

He also highlights in-house lawyers’ role in signing off the fine print, from who best to contact in case of a problem, to outlining the company’s stance on whistleblowing and confidentiality. ‘These things are so important for in-house counsel to advise on, as their inclusion in formal policies bring clarity and certainty on a company’s position, which strengthens trust in the organisation.’

Catanzariti, meanwhile, places emphasis on in-house counsel having a hand in developing training – and undergoing it themselves. ‘As much as people think repetitive training isn’t useful, the aim isn’t to learn facts but to change behaviour. Interactive training modules should be repeated every 12 or 18 months, with the organisation making sure they’re short, friendly, pitched at different levels, clear and practical.’

Another tangible way in which in-house counsel can make an impact in the EDI space is to learn lessons from their organisation’s consumers; that is, by using their buying power as leverage – in particular when it comes to their suppliers.

And law firms are increasingly aware of this. During Verna and Sovova's study for the Diversity and Inclusion Working Party, they learned that this is a specific motivation for law firms to implement EDI policies.

'In speaking to law firms, we learned that if corporate clients have an EDI policy in place, they expect the law firm to have one as well,' explains Sovova. 'It's a bit of a driving force for the law firms. Even though it might not be the ideal motivation, it creates the impetus for law firms to embark on this journey.'

It's not a moment too soon. Despite anti-discrimination laws having been in existence for decades in many jurisdictions, in the main corporate law firms have dragged their feet when it comes to incorporating EDI into the typical partnership structure.

Indeed, a 2021 Bloomberg investigation found that major global companies such as Facebook, HP and Novartis have warned 'they'll take their work elsewhere or cut fees unless they see more racial and gender diversity in the law firms they hire'.

Many corporates are following suit, increasingly building EDI targets into their procurement practices as a standard procedure and requesting the data to prove it.

'Requests for proposals are often accompanied by questions not only around a law firm's EDI policies, but what the data shows in terms of gender ratio, percentages of protected characteristics, geographical area, educational background, etc,' says Solanki.

He emphasises, however, that this is a two-way conversation. 'Similarly, corporates approach their law firms not just for legal advice but also for best practice and insight as to how other clients are implementing such policies.'

A duty to fairness and equality

For D'Arcy, the duty of in-house counsel – and indeed all lawyers – goes beyond their day-to-day services to the organisation that employs them.

'In the United States, we have a public obligation to carry out neo-platonic justice that other professionals, such as journalists or doctors, just don't have,' she says. 'For example, we have an obligation for continuing legal education credits and for dedicating a certain amount of hours to pro bono work.'

'People come to us to answer really hard conversations about what is "fair" and "equal" and we're supposed to have answers,' she explains. 'In-house lawyers, then, not only have a certain privilege and standing within their organisation to influence its approach to EDI from the top down, but an obligation to have answers that they can pass out and apply in a fair and equal manner to all colleagues and stakeholders who come to them for advice.'

D'Arcy gives the example of a franchise structure, where the in-house counsel employed by the parent organisation are in a position to advise independent business owners on EDI issues they may be facing.

'We're trusted advisors, and in order to maintain that privilege and trust, you have to really earn it by leaning into these conversations across the board,' she adds.

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