

The Intersection of Inclusion, Diversity, and Risk Management in the Construction Industry

By Lance Currie, Amy Iannone, and Claudia Mandato



Lance Currie



Amy Iannone



Claudia Mandato

Many construction companies are embracing the need for a vibrant and diverse workforce, making strong efforts to build diverse and inclusive cultures. Study after study shows profitability and ingenuity are directly tied to inclusivity and diversity, as diverse peoples spark innovative ideas. Beyond the benefits, companies also recognize the risks involved in failing to create a healthy, diverse, and inclusive culture. Indeed, limited workforce diversity has been named a “top 20” risk facing the construction industry.¹ This article addresses many aspects of the intersection of inclusion, diversity, and risk management, with a goal of shedding light on why so many companies and business groups recognize how critically important it is to improve inclusion and diversity throughout the construction industry.

State of Diversity and Inclusion in the Construction Industry

The construction industry, like many others, has seen some improvements in the diversity of its workforce, but there is significant room to grow. Women make up 51% of the U.S. population and 52% of the workforce,² yet only 9.9% of the workers in the construction industry were women in 2018.³ This number is up, however, from 9.1% in 2017.⁴ Race has also seen incremental change, with approximately 57.7% of the construction industry identifying as non-Latino whites in 2018, down from 59% in 2017.⁵

Leadership in the construction industry still appears to consist primarily of white men. Of construction managers as defined by the Bureau of Labor Statistics, 91.8% identified as white and only 7.7% were women in 2018.⁶ Note that those who identify as white includes many

Latinos, with 89% of Latinos in the workforce identifying themselves as white.⁷ Nevertheless, those who identify as Latino made up only 15.3% of construction managers and 23% of construction supervisors, despite constituting 30.7% of the overall construction industry. In contrast, Latinos made up 47.6% of construction laborers.

But while the construction industry is lagging in some areas, trends point toward a more diverse future. According to a report issued in 2018 by the Diversity & Inclusion Council of the Associated General Contractors of America (AGC), it was projected that by 2020 more than 50% of businesses entering the construction industry will be minority or female owned.⁸ Efforts across the industry are working to drive change. AGC’s Diversity & Inclusion Council provides leadership development and career advancement opportunities, as well as business development through education and networking.⁹ Many construction companies have initiated diversity and inclusion efforts. But much more progress is needed.

Risks Affiliated with Lack of Diverse Workforce

Opportunity Risks

Having a comprehensive diversity and inclusion program is not only a sound business and legal strategy for a construction industry employer, it is sound risk management. Workforce management and talent optimization has been identified as one of the leading risk management challenges that the construction industry will face over the next 10 years.¹⁰ Understanding and implementing appropriate diversity and inclusion strategies will help companies attract and retain top talent.

Over the past decade, the construction industry has been struggling to recover from a downturn in the economy that left the industry without a sufficient number of qualified workers to handle the volume of construction that is being performed across the country today.¹¹ When millions of workers were laid off in the economic downturn starting in 2006, many of them did not return to the industry.¹² Contractors, design professionals, and construction owners have since been strategizing on how to best attract, train, and retain talent in their firms. At the same time, “[t]he construction industry is not viewed as an attractive employer,” in part because of a “lack of diversity in the workforce.”¹³ Thus, creating a diverse and inclusive work environment is a big piece of

a comprehensive strategy to maximize talent and maintain a competitive business.

Many construction industry employers have adopted diversity and inclusion programs to assist them in attracting, retaining, and motivating their workforces.¹⁴ Construction is a people business, and companies in the industry are all competing for the best talent. Creating a company culture that supports inclusion, empowerment, and respect for individuals can result in a competitive advantage.¹⁵

Initially, it is important to understand that “diversity” and “inclusion” are two different things.¹⁶ The concept of “diversity” is to hire a workplace that embraces “the full spectrum of human demographic differences—race, religion, gender, sexual orientation, age, socio-economic status, or physical disability. A lot of companies consider lifestyles, personality characteristics, perspectives, opinions, family composition, education level or tenure elements of diversity, too.”¹⁷ On the other hand, the concept of “inclusion” is much more distinct. To achieve inclusion in the workplace, the workplace’s diverse population must feel accepted and comfortable to be themselves in the workplace environment.¹⁸ When employees feel like they belong and are included, they are more likely to share their ideas and unique perspectives.¹⁹ When diverse perspectives are shared and people feel like they belong, a company becomes more innovative and the work environment is energized.

Diversity and inclusion work together to create employee engagement, productivity, and company loyalty.²⁰ But diversity and inclusion don’t “just happen,” especially in the construction industry. Construction employers must make a concerted effort to bring diversity and inclusion philosophy to their workplaces. Gallup research has shown that, in order to be successful, a diversity and inclusion program in the workplace must be based on three strategies: (1) respect the employee, (2) identify and value employee strengths, and (3) cultivate trust in leadership, which is fostered by leaders in the company doing the right thing and embracing a culture of openness and respect.²¹

It is risky for an employer in the construction industry to choose not to embrace diversity and inclusion. Some of these risks are quite evident when studying the current national focus on eliminating sexual violence and harassment in the workplace.²² However, there also are more discrete negative outcomes for such employers. Companies that do not embrace diversity and inclusion often have a loss of engagement, productivity, and loyalty and find it hard to attract and retain the best talent in the workforce.²³

Failing to embrace diversity and inclusion results in higher turnover and employee dissatisfaction and underperformance. The construction industry historically has experienced a turnover rate of almost 25%.²⁴ This statistic, coupled with the industry’s current scarcity of skilled and qualified labor, has made employee retention a key

focus for industry participants. Studies have proven that when employees feel included, employee turnover is mitigated.²⁵ And even where employees do not leave a company, when employees do not feel included, employee productivity is compromised.²⁶ A University of Houston study has confirmed that

employees lose an average of 53 minutes per day for 2.5 days each week over a 7.8-week time period from being impacted by an exclusive behavior. This equates to approximately 17.2 hours of paid time lost per employee per incident. For a company of 100 employees, 71% say they are exposed to an exclusive behavior an average of four times per year (total of 284 incidents). Of those, 18 (25%) employees are impacted, resulting in lost time because of the incident. That’s a total loss of 4,885 hours of productivity due to exclusive behaviors.²⁷

Further compounding the issues, technological advances and scarcity of labor have made the construction industry ripe for industry disruption.²⁸ Companies that fail to adopt a diversity and inclusion culture are less innovative,²⁹ and as such are more susceptible to industry disruptions.

Research has confirmed that there is a strong link between diversity and a company’s financial performance.³⁰ A recent McKinsey report, using a data set of more than 1,000 global companies, affirmed that the likelihood of financial performance above national industry medians is greater when a company is in the top quartile for gender and cultural diversity.³¹

The McKinsey report also indicates a correlation between gender diversity on executive teams and superior financial profitability of the company.³² When a company has more women executives in “line roles” as opposed to “staff roles,” this correlates more closely with the company’s financial outperformance.³³

The McKinsey report also finds that ethnic and cultural diversity on executive teams correlates to higher profitability when compared to peer companies with less executive ethnic and cultural diversity.³⁴ A study at MIT also has shown that gender-diverse companies generate 41% more revenue than non-gender diverse companies.³⁵

The McKinsey report hypothesizes that the reason why companies that are more diverse on a gender and ethnic basis are more profitable is because they “are better able to attract top talent; to improve their customer orientation, employee satisfaction, and decision making; and to secure their license to operate.”³⁶ Companies that fail to embrace diversity and inclusion will ultimately suffer financially as they fall behind in both innovation and top talent.

Relationships are of critical importance in the construction industry, and many construction consumers are focused on diversity and inclusion as part of their own business objectives. As society continues to evolve

and become more diverse, companies must adopt a more diverse company culture in order to foster new relationships. For these reasons, it makes good business sense for construction employers to focus on diversity and inclusion. To attract clients, construction employers must be able to relate to those clients and their employees and cultures.

Additionally, clients in the construction industry are seeking out construction partners that are innovative and will focus their expertise towards designing and building high-performing facilities for the least cost. As previously mentioned, diverse and inclusive companies have the innovative advantage over those that do not embrace diversity and inclusion.

Clients are not the only focus. Construction participants should also be looking towards developing a diversity and inclusion culture in their supply chain ranks. The use of supplier diversity programs has been proven to have many advantages. Supplier diversity has been shown to increase a company's market share.³⁷ It also helps companies be more innovative, provides access to many more procurement channels, drives up competition, spurs economic growth in the community, and gives companies access to a whole new network of potential customers and suppliers.³⁸ The community impacts of supplier diversity programs cannot be overemphasized. Minority businesses are more likely to create jobs and employ workers in minority communities.³⁹

Safety Risks

Understanding today's diverse construction workforce and creating a safety culture that is inclusive of diverse backgrounds are critical to the success of a construction safety program.

The stress of feeling excluded from a workplace culture has been shown to increase workplace accidents.⁴⁰ Safety at work can be impacted by "an employee's understanding of work and their relationship to their coworkers and employers; how they perceive dangers at work; how they adapt to those dangers; and how these understandings are similar and different from other groups of workers and the existing company culture."⁴¹ For these reasons, it is important for construction employers to make it their business to understand their workforce's cultural differences and how cultural background may influence worker behaviors.⁴²

Overcoming language barriers, of course, is a vital piece of the safety puzzle. Multiple studies have recognized that language differences can render training ineffective.⁴³ OSHA recognizes the importance of making sure employees can understand safety instructions. OSHA requires training and instructions, but there is no OSHA requirement that such information be conveyed and understood in English. For example, 29 C.F.R. § 1926.21(b)(2) states, "[t]he employer shall instruct each employee in the recognition and avoidance of unsafe conditions and regulations applicable to his

Diverse and inclusive companies have the innovative advantage over those that do not embrace diversity and inclusion.

work environment to control or eliminate any hazards or other exposure to illness or injury."⁴⁴ The OSHA Training Standards Policy Statement dated April 28, 2010, states, "the terms 'train' and 'instruct,' as well as other synonyms, mean to present information in a manner that employees receiving it are capable of understanding."⁴⁵ This is consistent with numerous other OSHA guidance statements.⁴⁶ Courts likewise agree that an employer has not adequately communicated when it does not communicate rules to a non-English-speaking employee in a language he or she can understand.⁴⁷

While breaking down language barriers is an important part of safety integration, just as important is understanding cultural aspects of integration.⁴⁸ When employers do not make it their business to understand the various cultures that make up their workforce, they can miss important differences within the workforce that may impact behaviors.⁴⁹ These may include not recognizing various dialects within a language, levels of construction industry experience, or education.⁵⁰ Failing to recognize significant cultural or language challenges inherent in a diverse workforce can lead to lack of understanding by the workers and significantly increase the safety risk.

Further complicating safety issues is the interaction between the industry and immigrants. Take this example: In July 2005, flyers appeared in both English and Spanish on a site in North Carolina announcing to a group of contract workers that a mandatory workplace safety meeting sponsored by OSHA was to be held later that day, along with the free donuts and coffee.⁵¹ At the end of the day, 48 immigrant workers attended the meeting. Unfortunately for them, it was really a sting operation conducted by U.S. Immigration and Customs Enforcement, and the workers were arrested.⁵² The message to immigrants: OSHA safety training can lead to their arrest and deportation. Discouraging attendance makes the jobsite less safe, of course, and OSHA did not approve.⁵³ Nevertheless, the law does not afford immigrants the same levels of protection as other laborers. The Supreme Court held in *Hoffman Plastic Compounds, Inc. v. NLRB* that undocumented workers are not entitled to the protections of the National Labor Relations Act.⁵⁴ Working to balance the concerns of these immigrants with the need for safety training and safe onsite practices is necessary to cultivate a safe work environment.

It is also vitally important for the construction industry to break away from the past culture of perceived “male toughness.”⁵⁵ Today’s construction workforce is made up of people of various age groups, sexes, body types, and physicality. The construction workforce is also made up of many baby boomers who, as they age, are potentially more prone to injuries.⁵⁶ “Perceived male toughness” can be detrimental to the workplace’s ability to work safely, due to the stigma it can create. For example, workers trying to fit in and be “tough” may overexert themselves and get hurt. They may be afraid to speak up when critical safety issues are present (e.g., the lack of personal protective equipment that fits their body type).⁵⁷

The results of companies creating an inclusive culture where it is okay, and expected, to speak up about any safety issue encountered or witnessed on the project site without fear of retaliation or harassment are safer worksites.⁵⁸

Legal Risks

A common misconception is that increased diversity leads to a reduced risk of antidiscrimination claims. But diversity alone focuses only on numbers, rather than the people, and diversity without inclusion may have little impact on reducing such claims. Suppose an organization suffers from a culture unwelcoming to people of color. The company, recognizing a problem, might react by hiring more people of color. But if done without a concerted effort to include people of color into the broader workforce culture, then the organization is merely adding more targets of hostility. Instead, reducing the risk of antidiscrimination lawsuits depends upon changing the culture so that all feel welcome, included, and able to participate.

The research reflects that companies that not only hire diverse workforces but also implement successful plans to address bias and promote inclusion are more successful in mitigating legal risk. Traditional tools have included diversity training to reduce bias on the job, hiring tests and performance ratings to reduce bias in hiring and promotions, and creation of grievance systems.⁵⁹ The *Harvard Business Review* describes these as tools “designed to preempt lawsuits by policing managers’ thoughts and actions” but explains that “studies show that this kind of force feeding can activate bias rather than stamping it out.”⁶⁰ Instead, interventions like “college recruitment, mentoring programs, self-managed teams, and task forces have boosted diversity in business.”⁶¹ These latter tools address the bias in the culture itself, rather than manage only the symptoms of that bias.

Of course, there are numerous laws designed to combat discrimination. The Equal Pay Act prohibits employers from paying different wages based on gender.⁶² Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, color, religion, gender, or national origin.⁶³ The Age Discrimination in Employment Act prohibits employers from discriminating on the basis of age.⁶⁴ The Rehabilitation Act of 1973 prohibits employment

discrimination on the basis of disability by the federal government, along with federal contractors with contracts of more than \$10,000.⁶⁵ The Immigration Reform and Control Act of 1986 prohibits discriminating against anyone (except unauthorized immigrants) on the basis of national origin or citizenship status.⁶⁶ And the Americans with Disabilities Act of 1990 prohibits discrimination based on real or perceived physical or mental disabilities.⁶⁷ In other words, if employers cannot stamp out bias or discrimination, they run the risk of violating numerous antidiscrimination laws.

On the flip side, one of the great benefits of increased diversity and inclusion is that the resulting diversity of opinion enhances group decision making, which can in turn reduce legal risk. A recent study published in the *Journal of Corporate Finance* found that companies “with greater female board participation experience significantly fewer environmental lawsuits.”⁶⁸ The study found that for every additional woman appointed to a corporate board, the company experienced an average 1.5% reduction in litigation risk.⁶⁹ Research related to other types of lawsuits appears to be limited. But if it is true that better diversity and inclusion lead to better decision making, then perhaps the reduction in litigation risk will persist across different types of litigation.

Reputational Risks

While there are certainly many legal risks for companies that do not embrace diversity and inclusion, the reputational aftermath of being viewed as a company that does not support diversity and inclusion can ruin a business. A company’s reputation for diversity and inclusion impacts its ability to attain and retain the best talent. It is also highly scrutinized by clients, potential clients, suppliers, investors, and regulators.⁷⁰

More than a few companies and institutions in the United States have recently experienced severe reputational impacts to their organizations because they allowed—or turned a blind eye to—a culture of harassment, as opposed to being focused on inclusion. One example is the Harvey Weinstein Hollywood sexual harassment scandal that resulted in Mr. Weinstein being removed from his own company, bankruptcy, and multiple civil lawsuits that are currently being handled by the company’s insurers.⁷¹ Another example was at Michigan State University, where the gymnastics team physician, Larry Nassar, was able to sexually abuse his gymnast patients for years unchecked, with the University administration not taking action on many complaints it received during his tenure.⁷² The Michigan State University scandal resulted in the removal of the University athletic director; the removal of the president of the university, Lou Anna Simon; the imprisonment of Larry Nassar; the removal of the interim president of the university, John Engler; multiple civil lawsuits; hundreds of thousands of dollars in settlements; continued federal investigations; and criminal charges.⁷³ Scandals like Weinstein’s and

Michigan State's have been the impetus that has spurred the international “#MeToo” movement.⁷⁴ These scandals have increased the focus and scrutiny on a business's culture to a heightened level in the current economy.

Another highly publicized scandal that illustrates the impact of reputation on a business's profitability involves Uber. In 2017, the spotlight shown on Uber when a former employee, Susan Fowler, a company engineer, complained in a social media blog about sexual harassment from a manager who was being protected by the human resources department.⁷⁵ Subsequently, more information surfaced about improprieties by the CEO of the company himself, who allegedly gave advice to others on how to approach co-workers for sex and was caught on video berating employees. The board of the company, after investigating, made some drastic changes, including hiring a new CEO and a diversity and inclusion officer.⁷⁶ But the damage at that point had been done, with customers starting a campaign to delete the app from their devices (#DeleteUber).⁷⁷ The company has been trying to rehabilitate itself ever since. This harassment scandal, followed by some other scandals the company subsequently experienced (related to accidents and crimes) still severely impacts the company's business and continues to turn away many customers.⁷⁸ In 2018, the company posted \$1.8 billion in losses. Its investor regulatory filings from the first quarter of 2019 reveal a company that admits these scandals are still impacting it and are likely to have a continued impact in the future.⁷⁹

Google's parent company, Alphabet, was recently sued for allegations of shielding senior executives from accusations of sexual misconduct.⁸⁰ Google allegedly inconsistently applied its sexual misconduct policies, terminating low-level employees while retaining or paying enormous severance packages when senior executives were accused of the same behavior.⁸¹ This led not only to litigation, but to a global protest where thousands of Google employees walked out of their offices at untold costs to company productivity.⁸² In the end, Google ended its forced arbitration policy and promised to provide more transparency around sexual harassment investigations.⁸³

The law firm Jones Day has faced and continues to face multiple lawsuits alleging its compensation and employment practices are discriminatory against women.⁸⁴ McDonald's has faced three EEOC complaints for sexual harassment in the last three years.⁸⁵ Papa John's Pizza CEO and founder faced accusations of both racism and allegedly entering into confidentiality agreements with at least two women, one of whom accused him of sexual harassment.⁸⁶ Fox News paid \$2.5 million to settle sexual harassment claims made by a frequent guest against a host.⁸⁷ These are but a few of the many lawsuits and embarrassing stories that have arisen from alleged discrimination. And without commenting on the merits of any of these allegations, their existence alone can damage these companies' reputations in the market and their relationships with customers.

Legal Challenges of Diversity and Inclusion Initiatives

More and more companies are implementing diversity and inclusion initiatives, with the commendable goal of expanding opportunities for those who have been under-represented. Communities, likewise, have implemented various programs for disadvantaged business programs, such as M/WBEs. But employers and government entities must be careful, as there are limits.

Employer Diversity and Inclusion Initiatives

While an employer can consider minority status and sex in recruiting and outreach efforts, “individual employment decisions must be made without regard to protected statuses.”⁸⁸ Employers must balance their efforts to create more diversity and inclusion with the laws governing acceptable hiring practices.

When affirmative action programs started in the 1960s in an effort to help offset the historical imbalances experienced by people of color in the workforce, these practices had to pass scrutiny under Title VII of the Civil Rights Act of 1964. As noted above, Title VII prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion.⁸⁹ In 1979, the Equal Employment Opportunity Commission issued guidelines to help employers institute affirmative action programs without exposing them to affirmative action liability.⁹⁰ A voluntary affirmative action program complies with Title VII if “(1) an analysis reveals that existing or contemplated employment practices are likely to cause an actual or potential adverse impact; (2) a comparison between the employer's workforce and the appropriate labor pool reveals that it is necessary to correct the effects of previous discriminatory practices; and (3) a limited labor pool of qualified minorities and women for employment or promotional opportunities exists due to historical restrictions by employers, labor organizations, or others.”⁹¹

In *United Steelworkers v. Weber*, the Supreme Court addressed the permissible scope of voluntary affirmative action programs.⁹² In *Weber*, the union and business entered into a collective bargaining agreement that included a plan to combat “racial imbalances” in the business's predominately white employees.⁹³ The plan reserved 50% of the slots for a training program to black employees, and Weber, who was denied admission to the program, asserted he had been discriminated against because he was white.⁹⁴ The Supreme Court upheld the plan, establishing what is now known as the *Weber* criteria: (1) the plan must be remedial in nature, designed to break down patterns of racial segregation in occupations typically closed to minorities; (2) it must not unnecessarily impede the interests of white employees; and (3) it must be temporary, aimed at achieving racial balance and not maintaining it.⁹⁵

Subsequent cases found that programs that failed to adhere to the *Weber* criteria violated Title VII. In *Taxman v. Piscataway Board of Education*, the Third Circuit struck down a program designed to promote “racial diversity”

Counteracting subconscious bias is typically a two-step process: employees need to be made aware of their implicit biases, and then some active intervention must follow.

that resulted in a black teacher being retained over a white teacher who was laid off.⁹⁶ The teachers were equally qualified and with equal seniority, but the board chose to retain the black teacher to help maintain a “culturally diverse” faculty.⁹⁷ The Third Circuit found that the plan that led to this outcome allowed the board to grant racial preferences by whim, was not temporary, and resulted in a severe loss to the interest of white employees—namely, job loss.⁹⁸ Likewise, in *Cunico v. Pueblo School District No. 60*, the Tenth Circuit struck down a program with goals of creating “a diverse, multi-racial faculty and staff” and “equity for all individuals through equal opportunity employment policies and practices” because there was no evidence the goals were necessary to remedy past discrimination.⁹⁹

It was not until 2003, in the Supreme Court’s decision in *Grutter v. Bollinger*, which dealt with the University of Michigan Law School’s admissions policy, that the Supreme Court for the first time recognized “diversity” as a compelling state interest.¹⁰⁰ The Court relied on multiple amicus briefs that argued that racial diversity in the student body would lead to better-prepared students in an increasingly global marketplace.¹⁰¹ The Seventh Circuit, relying on *Grutter*, upheld an affirmative action program in the Chicago Police Department, arguing that there was also a compelling interest in having a diverse police force protecting a racially divided city like Chicago.¹⁰²

It thus seems that the law is trending toward recognizing that diversity is a value in and of itself, and that programs designed to promote diversity are surviving scrutiny. That said, the safest route to take if a company is looking to implement a diversity program that will affect hiring, training, etc. is to recognize the historical imbalance the program is trying to address, limit negative impacts on nondisadvantaged employees, and view the program as temporary or otherwise being reevaluated regularly to ensure it remains tailored.

Government Diversity and Inclusion Initiatives

Federal, state, and local governments have also implemented laws to promote diversity and inclusion. Some of those laws are explicitly directed at the construction industry to support

hiring of diverse contractors and subcontractors on government construction projects. These include the Disadvantaged Business Enterprise (DBE) Program and the Minority and Women-Owned Business (M/WBE) Program. The laws governing government diversity and inclusion programs, including DBE and M/WBE programs, focus on the Constitution rather than Title VII. Notably, federal programs enacted by Congress are treated differently than programs created by states and municipalities.

The first key case dealing with DBE programs is the Supreme Court’s decision in *Fullilove v. Klutznick*, which held that a congressional program requiring a certain percentage of federal construction grants be awarded to minority contractors did not violate equal protection.¹⁰³ *Fullilove* dealt with the minority set-aside contained in the Public Works Employment Act of 1877.¹⁰⁴ The act was designed to boost the economy by spurring investment in public works projects but contained a requirement that at least 10% of grants were to go to minority business enterprises. The Court found that under section five of the Fourteenth Amendment, Congress was blessed with a special remedial power to enforce equal protection guarantees.¹⁰⁵ As such, the Court gave great deference to Congress’s determination that it needed the set aside after it concluded that traditional procurement processes could perpetuate the effects of past discrimination.¹⁰⁶ The Court also noted that waivers could be sought and obtained where minority businesses were not available to fill the 10% requirement.¹⁰⁷ Thus, given the Court’s deference and the ability to circumvent the requirement if it could not be met, the Court held that the Act was a valid exercise of Congress’s broad remedial power.

In contrast, the City of Richmond’s minority business enterprise program was struck down by the Supreme Court in *City of Richmond v. J.A. Croson Company*.¹⁰⁸ There, the city of Richmond, Virginia, required prime contractors to subcontract at least 30% of the dollar amount of the contract to one or more minority business enterprises.¹⁰⁹ The plan declared that it was remedial in nature and would be in effect for five years.¹¹⁰ Proponents noted in part that the general population of Richmond was 50% black, but only 0.67% of Richmond’s prime construction contracts had been awarded to minority businesses in the five years prior to enactment.¹¹¹ The Supreme Court began its analysis by distinguishing *Fullilove* and explaining that states and municipalities are not given the same remedial powers by the Constitution as Congress.¹¹² Indeed, section one of the Fourteenth Amendment is an explicit constraint on states and their political subdivisions.¹¹³ Applying a strict scrutiny standard, the Supreme Court found the justifications from the race distinctions used in Richmond’s plan were lacking.¹¹⁴ As justification, Richmond stated that it was attempting to remedy discrimination in the construction industry as a whole and pointed to the disparity between the overall population of Richmond and the number of contracts awarded to minority businesses.¹¹⁵ But the Supreme Court held that Richmond needed to tailor the

program to specific discrimination in Richmond's construction market.¹¹⁶ For example, Richmond needed to analyze the percentage of minority businesses available and qualified for the specific work at issue and compare that number to the number of contracts awarded.¹¹⁷ Richmond could then potentially set the program to remedy that gap. But the 30% quota required by Richmond was not narrowly tailored to remedy the specific discrimination at issue and was struck down.¹¹⁸

The result of *Croson* is that states and municipalities must tie their DBE and M/WBE programs to specific data identifying disparities, and then tailor their programs to address those disparities. Such programs are lawful but must be carefully implemented to pass muster.

Recommendations

Practical Tips

This section reflects the collective experiences of the authors, but by no means should be considered exclusive. That said, here are several recommendations your company could consider.

- *Engage a consultant.* When clients need an expert on the law, they call a lawyer. Likewise, there are trained professionals that specialize in working with companies to improve their diversity and inclusion initiatives. These professionals can work with you to perform a “cultural audit” and recommend policy enhancements and other initiatives to help you build a more diverse and inclusive workforce.
- *Participate in implicit bias training.* As discussed below, we all have biases that we cannot see. Though a consultant may be able to help you with this, consider asking your staff to participate in implicit bias training. Harvard University's Project Implicit is online and available to anyone and can be found at <https://implicit.harvard.edu/implicit/takeatest.html>.
- *Examine your hiring practices.* Consider advertising your positions with different organizations. When hiring lawyers, for example, post your positions with bar associations focused on specific affinity groups. Also, expand the schools you recruit from, and consider including historically black colleges and universities.
- *Create a mentoring program.* One of the challenges the diverse employee faces is finding a sponsor to help him or her advance. Create a program to pair employees and foster this sponsorship.
- *Create an intern program.* Intern programs help create a pipeline of new diverse talent into your industry. Look to your local high schools, trade schools, or universities to provide opportunities for those looking to work in construction.
- *Allow employees to honor other religious observances.* We are a nation of many peoples, with a variety of diverse faiths and backgrounds. Recognize that your organization likely is made of differing faith

traditions, and establish policies allowing your employees to practice those traditions fully.

- *Acknowledge awareness days and months.* Acknowledge observances, such as Black History Month, International Women's Day, Asian Pacific American Heritage Month, and many others. For example, at the start of each observance, send a note to your employees recognizing the occasion and noting why it matters.

The Importance of Implicit/Unconscious Bias Training

Implicit/unconscious bias is much more prevalent in the workplace than conscious bias.¹¹⁹ Unconscious biases are less overt but can nevertheless have a severe impact on company culture, diversity, and employee morale.¹²⁰

To implement a successful diversity and inclusion program, companies have found that implicit bias training is an important first step to begin to cultivate a culture of understanding and inclusiveness. Companies have found that the introduction of such training “open[s] a dialog around more inclusive language and behavior.”¹²¹ These companies realize that “[i]nclusion, unfortunately, doesn't just happen” and to truly create an inclusive environment, it takes a concerted effort.¹²² Employees must be trained to understand exactly how their implicit biases impact the inclusive environment in order to break down barriers.¹²³

Counteracting subconscious bias in the workplace typically is a two-step process: employees need to initially be made aware of their implicit biases, and then some active intervention must follow so as to reduce the effects of any remaining bias.¹²⁴

A recent *Forbes* article describes a tool that can be used to implement a successful unconscious training program.¹²⁵ The tool is the acronym “UNBIAS,” which is meant to remind companies that unbiased training will not be successfully implemented without focus on the following six steps:¹²⁶

- *“Understand”:* In this step, the employer tries to determine the “key moments” when implicit bias occurs and tries to curb it at these moments.
- *“Notify”:* At this step, the leadership must commit to changing the culture and their own behaviors. If they are reluctant to change, they may need to be removed.
- *“Broaden”:* In this step, the company should examine not just racial and gender bias, but other “invisible” biases: mental disability, sexual orientation, socioeconomic status, familial status, etc.”¹²⁷
- *“Implement”:* At this step, the company, after understanding, notifying, and broadening, implements the cultural shift. “Once vulnerabilities are identified, processes are retooled and new norms are established, accountability must take center stage. Leave nothing to interpretation; spell out your policies as clearly as possible, and enforce them uniformly across the organization. No exceptions.”¹²⁸

- “*Analyze*”: In this step, the company must measure the effectiveness of the implementation. Without measurement, there is no telling if the implementation has been successful.
- “*Survey*”: In this step, the company surveys its employees to make sure they are feeling included and understood.¹²⁹

Ultimately, it takes a committed leadership team, at every level, to make sure that the culture of diversity and inclusion is supported.¹³⁰

To succeed, construction companies must continue to grow and adapt. In today’s diversifying society, this means construction companies must recognize the importance of diversity and inclusion and work to build inclusive workforces welcoming to all. Doing so will ensure the construction industry remains ready and able to build the society of our future.

Lance Currie is a partner with Carrington Coleman in Dallas, Texas. Based in Redwood City, California, Amy Iannone is DPR Construction’s insurance leader. Claudia Mandato is an executive vice president with Lockton Companies in Kansas City, Missouri.

Endnotes

1. WILLIS TOWERS WATSON, CONSTRUCTION RISK INDEX 2017: DECONSTRUCTING RISK 19 (Apr. 2017), <https://www.willistowerswatson.com/-/media/WTW/Insights/2017/04/construction-risk-index-wtw.pdf>.
2. *QuickFacts U.S.*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/LFE046217> (last visited May 28, 2019); *Women of Working Age*, U.S. DEP’T OF LAB. (2016), <https://www.dol.gov/wb/stats/NEWSTATS/latest/demographics.htm#DistLFAgeSex>.
3. *Labor Force Statistics from the Current Population Survey: 18. Employed Persons by Detailed Industry, Sex, Race, and Hispanic or Latino Ethnicity [2018]*, BUREAU OF LAB. STATS., U.S. DEP’T OF LAB., <https://www.bls.gov/cps/aa2018/cpsaat18.htm> (last modified Jan. 18, 2019) [hereinafter BLS 2018 Table 18].
4. *Labor Force Statistics from the Current Population Survey: 18. Employed Persons by Detailed Industry, Sex, Race, and Hispanic or Latino Ethnicity [2017]*, BUREAU OF LAB. STATS., U.S. DEP’T OF LAB. (Dec. 2018), <https://www.bls.gov/cps/aa2017/cpsaat18.htm> (last modified Jan. 16, 2019) [hereinafter BLS 2017 Table 18].
5. Compare BLS 2018 Table 18, *supra* note 3, with BLS 2017 Table 18, *supra* note 4.
6. *Labor Force Statistics from the Current Population Survey: 11. Employed Persons by Detailed Occupation, Sex, Race, and Hispanic or Latino Ethnicity [2018]*, BUREAU OF LAB. STATS., U.S. DEP’T OF LAB., <https://www.bls.gov/cps/aa2018/cpsaat11.htm> (last modified Jan. 18, 2019).
7. See *Labor Force Characteristics by Race and Ethnicity, 2017*, BLS REPS., no. 1076 (U.S. Dep’t of Lab., Aug. 2018), <https://www.bls.gov/opub/reports/race-and-ethnicity/2017/home.htm>.
8. AGC DIVERSITY & INCLUSION COUNCIL, AGC OF AM., THE

BUSINESS CASE FOR DIVERSITY & INCLUSION IN THE CONSTRUCTION INDUSTRY 5 (2018), https://www.agc.org/sites/default/files/Files/Advocacy/AGC%20Report%20on%20Biz%20Case%20for%20D%26I%20FINAL%20OCT%202018_Small.pdf.

9. *Id.*
10. Paul Becker, *Building Diversity and Inclusion in the Construction Industry*, INSIGHTS BLOG (Mar. 16, 2018), <https://blog.willis.com/2018/03/building-diversity-and-inclusion-in-the-construction-industry/>.
11. See AGC OF AM., PREPARING THE NEXT GENERATION OF SKILLED CONSTRUCTION WORKERS: WORKFORCE DEVELOPMENT PLAN (2015), https://www.agc.org/sites/default/files/Files/Communications/Workforce_Development_Plan.pdf.
12. *Id.*
13. WILLIS TOWERS WATSON, *supra* note 1, at 24.
14. See, e.g., *Giving the Industry a Nudge: Leading a Healthy Dialogue on Diversity and Inclusion*, DPR CONSTR. (Mar. 6, 2019), <https://www.dpr.com/media/blog/women-in-construction-europe-2018>; Scott Wittkop, *Building a Strong Industry for the Future: Workforce Diversity in Construction*, MCCARTHY BLOG (Nov. 8, 2018), <https://www.mccarthy.com/insights/building-strong-industry-for-future>; Brian Murray, *Why Diversity Is the Key to the Construction Industry’s Future*, BRASFIELD & GORRIE BLOG (Oct. 13, 2015), <https://www.brasfieldgorrie.com/blog/why-diversity-is-a-key-to-the-construction-industrys-future/>; *Inclusion and Diversity*, GILBANE BLDG. CO., <https://www.gilbaneco.com/one-family/diversity-inclusion/> (last visited Aug. 12, 2019).
15. Shahrokh Shah, *A Recipe for Talent Management Success*, BMO HARRIS BANK (July 5, 2016), available at <https://commercial.bmoharris.com/en/resource/engineering-construction/business-strategy/recipe-talent-management-success/> (Discussing DPR Construction’s Talent Culture with Mike Humphrey, DPR’s Talent Manager).
16. Ella Washington & Camille Patrick, *3 Requirements for a Diverse and Inclusive Culture*, WORKPLACE (Sept. 17, 2018), <https://www.gallup.com/workplace/242138/requirements-diverse-inclusive-culture.aspx>.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. See, e.g., ME TOO MOVEMENT, <https://metoomvmt.org/> (last visited Aug. 12, 2019).
23. Washington & Patrick, *supra* note 16.
24. AGC DIVERSITY & INCLUSION COUNCIL, *supra* note 8.
25. *Id.*
26. *Id.*
27. *Id.* at 5.
28. Soren Kaplan, *Silicon Valley’s Next Target: Disrupt the Construction and Real Estate Industries*, INC. (Mar. 28, 2019), <https://www.inc.com/soren-kaplan/silicon-valleys-next-target-disrupt-construction-real-estate-industries.html>.
29. AGC D&I COUNCIL, *supra* note 8, at 7 (“Facilitating a diverse and inclusive work landscape is at the core for cultivating successful innovation. How? By stepping out of norms.

Homogeneous teams may unknowingly develop products, technology or services that are designed to benefit one type of user, limiting their customer base. Investing the time and resources to develop diversity, the industry sparks invention outside the norm. It sparks true innovation.”).

30. VIVIAN HUNT ET AL., MCKINSEY & COMPANY, *DELIVERING THROUGH DIVERSITY* (Jan. 2018), <https://www.mckinsey.com/business-functions/organization/our-insights/delivering-through-diversity>.

31. *Id.* at 8 exh. 1.

32. *Id.* at 10 & exh. 2 (“In our 2017 data set we found a positive correlation between gender diversity on executive teams and both our measures of financial performance: top-quartile companies were 21% more likely than fourth quartile companies to outperform national industry peers on EBIT margin, but also were 27% more likely than fourth quartile companies to have industry-leading performance on longer-term value creation, as measured using economic profit margin (Exhibit 2).”).

33. *Id.*

34. *Id.* at 13 exh. 4.

35. AGC D&I COUNCIL, *supra* note 8, at 3 (citing Sara Fisher Ellison & Wallace P. Mullin, *Diversity, Social Goods Provision, and Performance*, 23 J. OF ECON. & MGMT. STRATEGY 465 (2014), <https://economics.mit.edu/files/8851>).

36. HUNT ET AL., *supra* note 30, at 26.

37. AGC D&I COUNCIL, *supra* note 8, at 5 (citing Patrick Connaughton & Laura Gibbons, *Beyond Compliance: Top Supplier Diversity Programs Aim to Broaden Value Proposition*, THE HACKETT GRP. (Sept. 19, 2019), https://weconnectinternational.org/images/supplier-inclusion/HackettGroup_SupplierDiversity_2016.pdf).

38. Roger Blumberg, *5 Advantages of Diversity in Your Supplier Base*, JAGGAER (Nov. 1, 2015) <https://www.jaggaer.com/5-advantages-of-having-a-diverse-supplier-base/>.

39. AGC D&I COUNCIL, *supra* note 8, at 5 (citing G. Whitfeld, *Supplier Diversity and Competitive Advantage: New Opportunities in Emerging Domestic Markets*, 11 GRAZIA-DIO BUS. REV. (2008), <https://gbr.pepperdine.edu/2010/08/supplier-diversity-and-competitive-advantage-new-opportunities-in-emerging-domestic-markets/>).

40. *Id.* at 4 (citing Qian Chen & Thomas Mills, *Dynamic Interplay Between Safety Culture and Workplace Diversity*, <http://www.irbnet.de/daten/iconda/CIB20338.pdf>).

41. *Id.* (citing M. Flynn, *Safety & the Diverse Workforce* (Nov. 10, 2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4641045/>).

42. *Id.*

43. See Jayesh M. Rathod, *Danger and Dignity: Immigrant Day Laborers and Occupational Risk*, 46 SETON HALL L. REV. 813, 827 (2016) (citing Nancy Nivison Menzel & Antonio P. Gutierrez, *Latino Worker Perceptions of Construction Risks*, 53 AM. J. INDUS. MED. 179, 183 (2010); Tom O’Connor et al., *Adequacy of Health & Safety Training Among Young Latino Construction Workers*, 47 J. OCCUPATIONAL & ENV’T MED. 272, 274 (2005); Glenn Pransky et al., *Occupational Risks and Injuries in Non-agricultural Immigrant Latino Workers*, 42 AM. J. INDUS. MED. 117, 120 (2002)).

44. 29 C.F.R. § 1926.21(b)(2) (2015).

45. OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP’T OF LAB., OSHA TRAINING STANDARDS POLICY STATEMENT (Apr. 28, 2010).

46. See, e.g., OSHA Directive CPL 2-2-38(D) (1998) (“If the employees receive job instructions in a language other than English, then training and information to be conveyed under the [hazard communication standard] will also need to be in a foreign language”).

47. See, e.g., *Modern Cont’l Constr. Co., Inc. v. OSHRC*, 305 F.3d 43, 52 (1st Cir. 2002) (upholding determination that training was not “tailored to the needs of those employees with . . . limited understanding of English,” including that “training materials were provided only in English, despite a large number of employees with limited English proficiency”); *Star Brite Constr. Co.*, 19 O.S.H. Cas. (BL) 1687, 1695 n.12, 2001 WL 1668967 (2001) (noting that multiple employees had difficulty understanding English, and that there was no evidence work rules had been translated for these employees).

48. AGC D&I COUNCIL, *supra* note 8, at 4.

49. *Id.*

50. *Id.* (explaining that “employers may group all Hispanic immigrants into one community and fail to consider the significant diversity that exists within the Hispanic population—such as country of origin, primary language, time spent living in the U.S., job- or non-job-related stress, education level, and construction experience”).

51. Steven Greenhouse, *Immigration Sting Puts 2 U.S. Agencies at Odds*, N.Y. TIMES, July 16, 2005.

52. *Id.*

53. *Id.*

54. 535 U.S. 137, 140 (2002).

55. AGC D&I COUNCIL, *supra* note 8, at 4.

56. *Id.* See also Gary Kaplan, *Don’t Let the Shift Hit the Fan*, XL CATLIN FAST FORWARD (Feb. 25, 2016), https://axaxl.com/fast-fast-forward/articles/construction-demographics_dont-let-the-shift-hit-the-fan.

57. AGC D&I COUNCIL, *supra* note 8, at 4 (“Historically, PPE has been designed based on measurements taken from male military recruits between 1950 and 1970. Consequently, the majority of safety clothing and equipment is not designed for a modern workforce that includes women, short-statured men and individuals with unique body shapes.”).

58. *Id.*

59. Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. J. (July–Aug. 2016), <https://hbr.org/2016/07/why-diversity-programs-fail>.

60. *Id.*

61. *Id.*

62. 29 U.S.C. § 206(d).

63. 42 U.S.C. § 2000e et seq.

64. 29 U.S.C. §§ 621–634.

65. *Id.* § 794.

66. 8 U.S.C. § 1324b.

67. 42 U.S.C. §§ 12101–12213.

68. Chelsea Liu, *Are Women Greener? Corporate Gender Diversity and Environmental Violations*, 52 J. Corp. Finance 119 (2018), <https://aicd.companydirectors.com.au/-/media/cd2/>

resources/advocacy/board-diversity/pdf/are-women-greener.ashx

69. *See id.*

70. PwC, *Opening up on Diversity: Getting to Grips with the Reputational Risks* (2017), <https://www.pwc.com.au/financial-services/opening-up-on-diversity-mar17.pdf>.

71. Eriq Gardner, *Weinstein Civil Suits: A Rather Unsettled \$44 Million Settlement*, HOLLYWOOD REP. (June 7, 2019), <https://www.hollywoodreporter.com/thr-esq/weinstein-civil-suits-a-rather-unsettled-44-million-settlement-1215704>.

72. Associated Press, *Michigan State Blasted in Federal Report for Failure to Stop Larry Nassar*, NBC NEWS (Jan. 31, 2019), <https://www.nbcnews.com/news/us-news/michigan-state-blasted-federal-report-failure-stop-larry-nassar-n965216>.

73. *Id.*

74. #MeToo: *Harvey Weinstein Moves Thousands to Tell Their Own Stories of Abuse*, THE LILY (Oct. 16, 2018), <https://www.thelily.com/metoo-harvey-weinstein-case-moves-thousands-to-tell-their-own-stories-of-abuse/>.

75. *See* Megan Belcher et al., *Lessons on Culture and Leadership from Uber's Ethics and Compliance Struggles*, 36 ACC DOCKET, no. 1, Jan.–Feb. 2018, at 40.

76. Rex Crum, *Uber Stumbles: Can the Ride-Sharing Company Repair Its Reputation Once and for All?*, MERCURY NEWS (July 23, 2018), <https://www.mercurynews.com/2018/07/23/uber-stumbles-can-the-ride-sharing-company-repair-its-reputation-once-and-for-all/>.

77. Johana Bhuiyan, *Uber's Past Is Still Haunting Its Business*, L.A. TIMES (Apr. 11, 2019), <https://www.latimes.com/business/la-fi-tn-uber-initial-public-offering-20190411-story.html>.

78. *Id.*

79. *Id.* (“Our workplace culture and forward-leaning approach created significant operational and cultural challenges that have in the past harmed, and may in the future continue to harm, our business results and financial condition,” the filing says. “Our focus on aggressive growth and intense competition, and our prior failure to prioritize compliance, has led to increased regulatory scrutiny.”).

80. Jillian D. Onfro, *Alphabet's Board Sued for Role in Allegedly Covering up Sexual Misconduct by Senior Execs*, CNBC (Jan. 10, 2019), <https://www.cnbc.com/2019/01/10/alphabets-board-sued-for-covering-up-sexual-misconduct-.html>.

81. *Id.*

82. *Id.*

83. *Id.*

84. Mike Leonard, *Jones Day Ex-Partner Settles Suit over "Fraternity" Culture*, BLOOMBERG LAW (June 17, 2019), <https://news.bloomberglaw.com/business-and-practice/jones-day-ex-partner-settles-her-suit-over-fraternity-culture>; Meghan Tribe, *Three Plaintiffs in Jones Day Gender Bias Suit Reveal IDs*, BLOOMBERG LAW (June 25, 2019), <https://news.bloomberglaw.com/business-and-practice/three-plaintiffs-in-jones-day-gender-bias-suit-reveal-identities?context=search&index=1>.

85. Richard Gonzales, *McDonald's Facing New Charges of Sexual Harassment*, NPR, May 21, 2019.

86. Lisa Fickenscher, *Papa John's Founder Admits to Deal with Woman Accusing Him of Sexual Harassment*, N.Y. POST,

Oct. 1, 2018.

87. *See* Cortes v. 21st Century Fox Am., Inc., No. 18-0414-CV, 751 F. App'x 69, 71 (Oct. 1, 2018).

88. Patrick D. Smith & Katherine E. Anderegg, *Employer Diversity Initiatives*, FOR THE DEF., Jan. 2018, at 56, 57.

89. 42 U.S.C. § 2000e et seq.

90. Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, as amended, 29 C.F.R. § 1608 (2004).

91. Smith & Anderegg, *supra* note 88, at 57.

92. 443 U.S. 193 (1979).

93. *Id.* at 198.

94. *Id.* at 199–200.

95. *Id.* at 208–09; *see also* Johnson v. Transp. Agency, 480 U.S. 616 (1987) (upholding an employer taking gender into account as one factor in promotional decisions in a male-dominated job classification).

96. 91 F.3d 1547, 1550–52 (3d Cir. 1996).

97. *Id.* at 1551–52.

98. *Id.* at 1564.

99. 917 F.2d 431, 437 n.3, 439–40 (10th Cir. 1990).

100. 539 U.S. 306, 328 (2003).

101. *Id.* at 330.

102. *Petit v. City of Chi.*, 352 F.3d 1111, 1114–18 (7th Cir. 2003).

103. 448 U.S. 448, 454, 490–92 (1980).

104. *Id.* at 454.

105. *Id.* at 476–78.

106. *Id.* at 478.

107. *Id.* at 488.

108. 488 U.S. 469 (1989).

109. *Id.* at 477.

110. *Id.* at 478.

111. *Id.* at 479–80.

112. *Id.* at 486–93.

113. *Id.* at 490.

114. *Id.* at 499–500.

115. *Id.*

116. *Id.* at 501–02.

117. *Id.*

118. *Id.* at 499–506.

119. *See Unconscious Bias*, U. CAL. S.F. OFF. OF DIVERSITY & OUTREACH, <https://diversity.ucsf.edu/resources/unconscious-bias> (last visited Aug. 12, 2018); *see also* Jessica Nordell, *Is This How Discrimination Ends?*, THE ATLANTIC (May 7, 2017), <https://www.theatlantic.com/science/archive/2017/05/unconscious-bias-training/525405/>.

120. *See Unconscious Bias*, *supra* note 119 (discussion by Renee Navarro, Vice Chancellor, Diversity and Outreach, UCSF).

121. Cathy Chatfield-Taylor, *Workforce Diversity in Construction Improves Productivity and Profits*, REDSHIFT (June 27, 2018), <https://www.autodesk.com/redshift/workforce-diversity-in-construction/>.

122. *Id.*

123. *See id.*

124. Linda R. Tropp & Rachel D. Godsil, *Overcoming Implicit Bias and Racial Anxiety*, PSYCH. TODAY (Jan. 23, 2015),

<https://www.psychologytoday.com/us/blog/sound-science-sound-policy/201501/overcoming-implicit-bias-and-racial-anxiety> (“Perhaps not surprisingly, one of the best ways of reducing racial anxiety is by having friends or colleagues of another racial group. Mere contact between group members isn’t enough; what’s important is meaningful, ongoing relations. Places where members of different racial groups interact cooperatively and meet as equals—such as in sports teams and the military—are particularly good at breaking down implicit racism. Trust and rapport between racial groups are harder to build in racially homogenous environments.”).

125. Natasha Bowman, *Six Ways to Make Sure Your Implicit Bias Training Actually Works*, FORBES (Nov. 14, 2018), <https://www.forbes.com/sites/forbescoachescouncil/2018/11/14/six-ways-to-make-sure-your-implicit-bias-training-actually-works/#4b291dab78a4>.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*