

The Responsibility of Corporate America Post 2016 Presidential Elections



Corporate Counsel Roundtable



UN FAIR

The 2016 presidential campaigns and ultimate election of Donald Trump has caused a significant portion of the United

States population to express dismay and concern about not only the potential that there is no way to have a semblance of unity in this country, but also the potential that all of those things that have been perceived as gains for ethnically diverse residents of the United States will not survive through the next four years.



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Have Things Really Changed Since November 8, 2016?

It is unlikely that anyone who is even a casual observer of American politics would say that there hasn't been some significant shift in attitudes and perceptions in this country since the results of the 2016 election became clear. The real question, however, is not whether they have changed, but what is different.

For many who are enthusiastic about the changes that were promised on the campaign trail, there is a sense of hope that the incoming president, and those who he appoints, will adopt policies that are more U.S. centric with respect to issues of foreign trade and the restoration of jobs that have

been lost to the efficiencies of technology and the pressures of capitalism.

At the same end of the spectrum are those who believe that the incoming administration will further the agenda of the "alt-right" or white nationalism because of expressed concerns that there is a proliferation of individuals of color in the country who may overtake whites in the United States. Carol Morello and Ted Mellnik, *Census: Minority Babies Are Now Majority in United States*. Washington Post. May 17, 2012. Whites reportedly represent more than seventy-five percent of the United States population. <http://www.census.gov>.

For many who were not supporters of the incoming administration, there are also changes in the world as they knew it, or believed it to be, only a few short months ago. For many people, including many people of color, there is the looming fear that some will be rounded up and deported, despite having lived in the United States for the entirety of their lives. Others fear that the overtly racist activities that have increased since the election will become the norm and accepted.

Why Would Such a Large Segment of Those Who Reside in the United States Have Such Concern?

Although the answer may be considered by some to be complex, the answer is really quite simple: America is perceived by many as a country in which race, power, privilege, and bias have been and continue to be the dominant factors that drive the behaviors of many people in the United States.

Now that I have your attention, let's move forward and have the uncomfortable conversation about race, bias (implicit and explicit), power, and privilege in this coun-

try and corporate America's responsibility with respect to these issues.

The definitions for terms used in this article are set forth below. These definitions are derived from the thoughts of individuals who are considered to be scholars in the field of bias and racism in America.

Definitions

Race: In its census questionnaire, the United States government states that race is a definition that is socially accepted and recognized in the United States. *A Brief History of the OMB Directive 15*. American Anthropological Association, 1997 and *Questions and Answers for Census 2000 Data on Race*. United States Census Bureau, March 14, 2001. In other words, race is not a scientific concept; instead it is a social concept that, consciously or otherwise, forms the basis of perceptions, attitudes, and beliefs. Michael Omi has suggested that geneticists, biologists, and anthropologists agree that race is not a scientific concept. However, there is also consensus that "race is commonly and popularly defined in terms of biological traits—phenotypic differences in skin color, hair texture, and other physical attributes, often perceived as surface manifestations of deeper underlying differences in intelligence, temperament, physical prowess and sexuality." Michael Omi, *America Becoming: Racial Trends and Their Consequences* (Vol. 1, 2001) p. 243.

In the United States, the attribute that is most prevalently considered in the concept of race is skin color. However, not even this attribute can be considered dispositive, since many individuals of color are born into mixed race families or families that have some ancestral familial background that includes ancestry that derives its roots from an Anglo-Saxon base.

Privilege: In the context of this discussion and the recent events in American politics and the election, this term will be used to refer to the concept that many white Americans believe their experiences, policies, procedures, practices, actions, words and beliefs to be "normal" and that things outside of those parameters are abnormal. See, C. A. Gallagher, *Rethinking the color line: readings in race and ethnicity* (2007). The term privilege has also been slightly redefined and modified by Dr. Robin DiAngelo

to the term "white fragility" and is defined as "a state in which even a minimal amount of racial stress becomes intolerable, triggering a range of defensives moves. Those moves include outward displays of emotions such as anger, fear and guilt, and behaviors such as argumentation, silence and leaving the stress-inducing situation." DiAngelo, *White*

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Fragility: Overcoming Racism, 3 International Journal of Critical Pedagogy (2011).

Power: Power is defined as the ability to cause or prevent an action, to make things happen; the discretion to act (or not) without any concomitant responsibility. <http://www.businessdictionary.com>. Although this definition of power captures the general understanding of power and its impact, for purposes of this topic, a more plain-spoken definition like that proffered by Kevin Phillips, former Republican political strategist, who is often credited with the rise of the Republican party in the Nixon/Goldwater era, is appropriate. Phillips was instrumental in the political strategy known as the "Southern Strategy," which was an appeal to racist attitudes harbored against African Americans by white southerners. James Boyd, *Nixon's Southern Strategy 'It's All In the Charts'*, New York Times, May 17, 1970). Phillips defined power in the following manner: "What is power? It is the ability to tell people what the problem is, who is responsible and what should be done about it. That's what power is."

Hidden and Implicit Bias: Different groups who have studied the subject have variously defined hidden or implicit bias. Unlike ex-

PLICIT bias, which reflects the attitudes or beliefs that one endorses at a conscious level, implicit bias is the bias in judgment and/or behavior that results from subtle cognitive processes (e.g., implicit attitudes and implicit stereotypes) that often operate at a level below conscious awareness and without intentional control. The underlying implicit attitudes and stereotypes responsible for implicit bias are those beliefs or simple associations that a person makes between an object and its evaluation that "...are automatically activated by the mere presence (actual or symbolic) of the attitude object." Dovidio, Gaertner, Kawakami, & Hudson *Why Can't We Just Get Along: Interpersonal Biases and Interracial Distrust*, 2002, p. 94. <http://psychotherapy-and-psychoanalysis.com>. A similar definition of implicit thoughts and bias can be found in the writing of the Perception Institute. That organization describes implicit bias as follows: "Thoughts and feelings are 'implicit' if we are unaware of them or mistaken about their nature. We have a bias when, rather than being neutral, we have a preference for (or aversion to) a person or group of people. Thus, we use the term 'implicit bias' to describe when we have attitudes towards people or associate stereotypes with them without our conscious knowledge." The Perception Institute is a consortium of researchers, advocates, and strategists who translate cutting edge mind science research on race, gender, ethnic, and other identities into solutions that reduce bias and discrimination, and promote belonging.

The evolution of bias: According to many who have studied the subject, implicit biases begin very early in life and continue throughout a lifetime, often based on concepts and beliefs of one's parents. See Albert Bandura, *Self-Efficacy: The Exercise of Control*. (1997). Many of those biased attitudes are deep seated and impact the decisions of those who have sworn to remain impartial in their decision making process. See *Implicit Bias is a Challenge Even for Judges*. <http://www.abajournal.com>. Other sources report that many attitudes of implicit bias are reinforced by things that are publicized in the American press and on social media. See *Social Science Literature Review: Media Representations and Impact the Lives of Black Men and Boys*, The Opportunity Agenda, 2011.

The United States has attempted to address issues of bias through the enactment of laws. See Christine Jolls, *Antidiscrimination Law's Effect on Implicit Bias*, Yale Law School; National Bureau of Economic Research (NBER) October 2005. However, it is equally important for the reader to understand that in the same manner that America's political leaders have made an effort to control the impact of both implicit and explicit bias through legislation, legislation and other forms of law also have been a primary vehicle for perpetuation of bias. The latter has been true since the inception of this country as embodied in the interpretation of the U. S. Constitution as well as the Naturalization Act of 1790, which limited naturalization of those who were coming into the United States to a "free white person of good character." Restrictive laws have continued through the era of Jim Crow laws, the Dred Scott decision, and through the internment of Japanese Americans during WWII. Although these events may seem remote in time, recent events have given rise to concerns that a return to such activity through the proposed required registration of members of the Muslim religion would be akin to internment.

Why Should Corporate America Care?

Corporate America has not only an ethical and moral responsibility to ensure that those they employ are treated with dignity and respect and in conformity with the law, there is also a fiduciary responsibility to the shareholders and individual owners of corporations to ensure that they are receiving the best benefits from the work that is being performed by those within the workplace. These obligations are on top of the obligations of employers to minimize the corporation from unnecessary litigation risks.

Numerous studies have demonstrated that there is a strong causal connection between diversity and innovative thinking, problem solving, and productivity. See K. Esty, R. Griffin, and M. Schorr-Hirsh. *Workplace Diversity. A Manager's Guide to Solving Problems and Turning Diversity into a Competitive Advantage* (1995); *Better Decisions Through Diversity: Based on the research of Katherine W. Phillips, Katie A. Liljenquist and Margaret A. Neale*, Kellogg

Insights, October 2011; Sara Hunt, Dennis Layton, and Sara Prince, *Why Diversity Matters*. McKinsey and Company, January, 2015. <http://www.mckinsey.com>.

Finally, corporate America must also be aware that the results of the campaign and the election have begun to show up in the work place in much the same way that they are showing up in America's schools. See Bitter Presidential Race Breeds Workplace Tensions, <http://www.wsj.com>; Delta

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apologizes for not removing Trump supporter who went on bizarre rant about President-elect and asked 'We got some Hillary b****es on here?', <http://www.dailymail.co.uk>; 'Make America White Again': Hate speech and crimes post-election, <http://www.cnn.com> (last accessed on 11/10/2016).

The presence of such conduct in the workplace exposes companies to liability in litigation.

What Should Corporate America Do to Respond to the Current Environment?

First, corporate America must recognize that an increased challenge does exist and must be committed more than ever to respond to issues within the workplace that violate the law, policies, and procedures in a proactive manner. The 2016 elections did not in any manner cancel laws that have had as their primary purpose the protection of Americans from discrimination and retaliation. Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Equal Pay Act, and their concomitant state laws continue to exist. Moreover, it

is highly unlikely that there will be much, if any, success in rolling those laws back.

Second, it is best that corporate America try to facilitate education of those within their work spaces about the importance of diversity and the value that a diverse workforce brings to each participant in the workplace, both individually and collectively.

One very visible effort in this area has already begun by Ernst and Young, which instituted pre-election survey that initially targeted understanding what the reactions within the workplace might be to having a female president, but that very quickly changed to a response to questions from all over the business about issues ranging from concern about immigration status to concerns about women's rights. Global Diversity Officer at EY Talks Workplace Inclusion Post-Election, <http://fortune.com>. The decision by Ernst and Young to engage, instead of shying away from a full fledge discussion of the issues, is one of the predominant methods by which corporate America will assist in beginning to heal the further divide that exists between Americans since the nomination and election of Donald Trump.

Since it is highly unlikely that there will be a rollback of the laws protecting individuals from discrimination and retaliation, employers should take the opportunity to remind their employees of their responsibilities under the law. One of the primary things that employers should address is the popular misconception held almost universally by employees that they have a constitutional right to free speech. This misconception can lead employees to believe that making hateful and divisive comments in the work place is somehow protected activity. Employers should explain to employees in no uncertain terms that such conduct will not be tolerated. Of course, employers must be aware of the restrictions found in the National Labor Relations Act, which permit discussions about terms and conditions of employment. However, such restrictions do not transcend the rights of employees to be free from discriminatory or retaliatory conduct. Employers should also be cognizant of the restrictions in various state laws that permit employees to engage in political expression.

Corporate Responsibility > page 75

Another alternative is the presentation of workshops to all individuals in the work place that will assist people in understanding that each and every one of us is filled with some type of bias about which we are not really cognizant. This process could start with having employees take the implicit bias test that appears online <https://implicit.harvard.edu>. This test was developed by psychologists from Harvard, the University of Virginia, and the University of Washington, and is intended to educate the takers about their own implicit biases on issues of gender, race, sexual orientation and other issues. Taking such a test can allow people to begin a transformative process if they are open to recognizing that they harbor beliefs that are different from those of which they have a conscious awareness.

Additionally, employers should undertake a review of their existing policies and ensure that there are sufficient safeguards to prevent discriminatory conduct.

Finally, corporate America has an opportunity to help alleviate the fears that have begun to manifest themselves in the workplace, perhaps by engaging in education about the political cycles in America. It is undisputed that America has gone through multiple cycles where the pendulum has either swung or threatened to swing from what can be viewed as one extreme political view to another. It is also undisputed that if Americans continue to have faith in the system, the safeguards that exist to protect the interest of those who fear disenfranchisement will work.

Conclusion

Although these are not the only things that can be done to address issues of bias in the workplace following the election cycle, these suggestions are intended to initiate a dialogue among those who are in control of the workplace, and to focus on the foundations of a productive and successful workforce—a safe environment for all, a focus on productivity and teamwork, mutual respect so as to restore calm, and providing constructive leadership so everyone can move forward productively. 