

Water Cooler Talk: ‘Late Night’ Shows DEI Is More Than Optics

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The 2019 film “Late Night,” written by and starring Mindy Kaling, tells the story of a late-night talk show host, Katherine Newbury, played by Emma Thompson, whose all-male, all-white writing staff scrambles to add a female writer for the sake of good optics.

The movie shows the struggles of surface-level diversity hiring, before “DEI” became the buzzword heard around the world.

The film, while a (fictional!) comedy, reflects a very real challenge in corporate America: How can organizations approach diversity, equity and inclusion in a way that goes beyond optics and fosters meaningful change, while not running afoul of the Trump administration’s current efforts to dismantle public and private DEI programs?

In the wake of George Floyd’s murder in 2020, corporate America saw an unprecedented surge in DEI commitments. Companies released public statements, pledged financial support to racial justice organizations and implemented new diversity hiring initiatives. Many employers also created DEI leadership roles for the first time, aiming to make systemic changes within their workplaces.

However, just a few years later, the momentum has shifted. The initial urgency behind these efforts has given way to growing legal and political scrutiny, especially with several executive orders and government memoranda rolling back prior DEI mandates.

This includes Executive Orders No. 14173 and 14151, which are respectively titled “Ending Illegal Discrimination and Restoring Merit-Based Opportunity” and “Ending Radical and Wasteful Government DEI Programs And Preferencing,” as well as Attorney General Pam Bondi’s Feb. 5 memorandum, titled “Ending Illegal DEI and DEIA Discrimination and Preferences.”

In response, organizations have now begun to scale back their DEI programs. The challenge is no longer just about launching DEI initiatives; it is about eliminating quotas, preferences and aspirational goals, and instead focusing on inclusion and belonging — i.e., ensuring that employees have equal opportunities and a seat at the table, in compliance with applicable federal and state antidiscrimination laws.

We spoke to Nicole Edmonds, our partner and DEI committee chair at Troutman Pepper Locke LLP, to discuss the

evolving corporate DEI landscape and how employers should handle challenging decisions about their diversity efforts.

The Legal Backdrop: New Challenges for DEI Initiatives

Corporate DEI programs began facing increased scrutiny after the U.S. Supreme Court's 2023 decisions in *Students for Fair Admissions Inc. v. President and Fellows of Harvard College*, and *Students for Fair Admissions v. University of North Carolina*, which struck down race-conscious college admissions policies.

Even though these rulings do not directly apply to private employers, they added to the DEI conversation in corporate America and contributed to increased skepticism about workplace DEI initiatives.

Adding to the already building uncertainty, among many other executive orders issued in the initial days of the new administration, was President Donald Trump's Executive Order No. 14173, issued on Jan. 21.

The executive order directed federal agencies to "combat illegal private-sector DEI preferences, mandates, policies, programs, and activities," and instead encouraged private employers to implement the Trump administration's policy of "individual initiative, excellence and hard work."

Trump also directed all federal agencies, through the Office of the Attorney General, to report their plans to target what they perceive to be illegal DEI programs of private employers, and to specifically identify nine targets for compliance investigations, among other things.

While portions of that executive order were enjoined on Feb. 21 by the U.S. District Court for the District of Maryland in *National Association of Diversity Officers in Higher Education v. Trump*, the case currently is on appeal.

Further, statements from many of the new administration's agency heads have indicated that regardless of the fate of any executive order, the priority of the federal government has, at the least, shifted away from DEI.

For example, Andrea Lucas, the acting chair of the U.S. Equal Employment Opportunity Commission, announced increased enforcement of Title VII against employers who express preferences against American workers.

On the other hand, there is also evidence that states may step in to try to fill the gap. For example, 16 state attorneys general came together in a recent joint guidance to reaffirm their commitment to DEI programs.

Certainly, this is a hot-button area that is developing quickly amid the shifting political landscape, and it has left many employers questioning their next step.

Reverse Discrimination Lawsuits: A Growing Concern

One concern some employers have identified is the risk of reverse discrimination claims, where a member of what has traditionally been considered a majority group claims they were unlawfully discriminated against because of that status, or in favor of a minority group.

The Supreme Court recently heard oral arguments in *Ames v. Ohio Department of Youth Services*, a case that could reshape the legal standard for reverse discrimination claims when a decision is made later this year.

In this case, the court has the opportunity to resolve a circuit split regarding the evidentiary threshold required for such a claim by deciding whether a plaintiff must show additional background circumstances evidencing discrimination.

If the court lowers the threshold, it may become easier for employees to bring, and potentially succeed on, reverse discrimination claims. This could possibly lead to increased litigation, which may, in turn, prompt employers to reassess and potentially scale back their DEI initiatives.

The Future of DEI

In “Late Night,” Katherine initially resisted change. She hired a female writer, Molly Patel, but did not do it with the purest of intentions. However, as Molly, played by Kaling, proved her talent and brought fresh perspectives, Katherine embraced the value of diverse voices.

By the end of the film, Katherine’s once homogeneous writing staff evolved into a diverse and dynamic team, ultimately revitalizing her show and making it a hit once again.

While some companies are scaling back their DEI efforts due to legal concerns, research consistently shows that diverse teams outperform uniform ones.[1]

Organizations should conduct a thorough evaluation of existing DEI programs, identifying what initiatives are in place, assessing potential legal risks and aligning efforts with business objectives that foster a culture of inclusivity.

Meaningful inclusion, and businesses that integrate DEI authentically, can drive innovation and long-term success.

Key Tips for Employers

Given the shifting legal landscape, we recommend that companies continuously monitor legal and political developments to stay informed.

Additionally, now is a good time for companies to conduct a DEI-related risk assessment to identify any areas that may be of concern in the current legal environment. Companies should align initiatives with business goals while maintaining legal compliance.

When conducting such an audit, companies should move away from quotas or programs focused on one protected category. However, they should not abandon their DEI initiatives altogether. Instead, focus on fostering a workplace where all employees feel like they belong.

Like Katherine learned in “Late Night,” maintaining a workplace focused on talent, where all employees feel included and respected, is critical for innovation and growth.

[1] See, e.g., <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-matters-even-more-the-case-for-holistic-impact>.

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