

The Business of Diversity

By Kendal Tyre

The numbers don't lie. The U.S. is changing and the changes are coming more quickly than one might imagine. Recent census information and demographic trends show that the United States' white majority is yielding to a rapidly expanding population of minorities; minorities that are having, and will continue to have, a profound impact on U.S. society and the U.S. economy. What does this diversity mean for U.S. business? And how are these businesses preparing for these changes? In part, U.S. businesses are turning to their legal counsel to help them navigate the new dynamics of a more diverse society.



The United States marketplace and workforce are being changed by the three most prominent minorities: Hispanics, African-Americans and Asians. Some industry leaders already recognize the importance of making diversity an essential part of their everyday business life. Dave Sampson, Marriott International's senior vice-president of diversity initiatives, succinctly noted in April 2006, "We see diversity as a business issue." As the demographics of America change, the businesses that respond to the change are more likely to survive and succeed.

Here are a few statistics that highlight the changes:

The Past to the Present

- In 1950, 9 out of every 10 Americans were white;
- In 2004, 1 out of every 2.5 Americans was a person of color; and
- This number rises to 1 person of color out of every 1.5 Americans for children under the age of nine.

The Present

- Minorities have become the *majority* in a significant portion of the largest 100 cities in the United States;
- Hispanics are now the largest ethnic minority group in the United States, having surpassed African-Americans in 2003; and

- During 2005, 85% of those entering the workforce were women, people of color or immigrants.

The Future

- African-Americans, Asians, Hispanics, and Native Americans will represent 90% of the projected population growth in the United States over the next 50 years;
- The Hispanic population in the United States is expanding by more than 1.7 million people each year; and
- By 2050, nearly half of the population of the United States will be people of color.

Our consumer-service oriented marketplace is starting to adapt to these powerful trends:

- Minority purchasing power was \$1.3 trillion in 2000 and is expected to surpass \$2 trillion in 2015 and \$3 trillion in 2030;
- From 1997 to 2002, the number of Hispanic-owned businesses increased 31%, the number of Asian-owned business increased 24% and the number of black-owned businesses grew by a whopping 45%;
- By 2045, minority purchasing power may reach \$4.3 trillion (in 1998 dollars); and
- There was a nearly 22% increase in the share of businesses owned by ethnic minorities from 1997 to 2002.

Given the changing demographics, clients have increasingly looked to their lawyers to guide them through the process of analyzing their own diversity to help them minimize the consequences of serious public diversity crises. Organizations are also seeking counsel to assist them in establishing or enhancing their diversity programs and profile. In providing this assistance, corporate diversity counsel provide guidance and practical problem solving on a wide range of corporate diversity matters. Here are descriptions of the specific types of services typically offered:

Diversity Action Plans

The counseling any organization regarding diversity generally starts with an comprehensive diversity assessment to assist in the development, implementation and monitoring of diversity action plans to achieve identified diversity goals. Often, the assessment includes reviewing programs and initiatives that enhance the diversity within the organization and analyzing whether these activities fall within the boundaries of what is legal. There is no currently no specific law governing “diversity” per se. The legal framework for diversity is, however, shaped by judicial interpretations of actions taken to affect diversity that violate equal opportunity or constitutional rights. As a general guide, diversity initiatives should:

1. Be flexible and non-mechanical. The company must be careful not to establish any set-asides or quotas;

2. Adopt a holistic approach. In hiring an employee, the company should consider the total applicant. For example, it can not focus on race as a sole determinant in the selection process;
3. Keep the selection process competitive;
4. Narrowly tailor the company's objectives (no trammeling on others' rights); and
5. Keep the initiative temporary (no more than 25 years).

Organizations working with corporate diversity counsel will develop plans that meet or exceed the diversity "best practices" of their client's industry peers and are customized to the company's particular needs, corporate culture and resources.

Diversity in the Workforce

With the changing demographics, U.S. companies are witnessing increasing diversity in ranks of their workforce and among their suppliers, partners and consumer base. Corporate diversity counsel and other experts, as needed, regularly conduct workforce diversity reviews that analyze the representation and inclusiveness of the workforce in an organization from senior management positions to entry level positions. They also assist employers in developing programs, policies and practices that recruit, retain and develop skilled workers, including women and minorities.

Assessments of Vulnerability

Corporate diversity counsel conduct legal vulnerability assessments to identify policies and practices that increase exposure to legal and regulatory liability. This is especially important for potentially high-visibility employment discrimination class action claims. Counsel can also help organizations respond to allegations of discrimination, as well as claims of harassment, including hostile work environment. Corporate diversity counsel provide strategic litigation advice, including evaluating, negotiating and confidentially resolving actual or threatened class action discrimination cases to mitigate damaging media exposure and potentially costly jury awards. In addition to developing practical recommendations to remedy existing vulnerabilities, they also create new and enhance existing handbooks, procedures and policies that assist companies in limiting future liability.

Anti-Discrimination and Diversity Training

Training on diversity and EEO issues is an essential practice for minimizing future legal risk and is crucial for obtaining critical "buy-in" of any diversity program within the organization. Often companies retain counsel to provide onsite training for everyone from senior management to support staff to review such matters as:

- anti-discrimination;
- workplace diversity;
- sexual harassment;

- conducting effective workplace investigations; and
- equal employment law

Supplier Diversity

Supplier diversity programs have become an important indicator of a company's diversity commitment. These programs aim to increase the number of minority- and women-owned enterprise supplying goods and services to businesses. Corporate diversity counsel typically assist companies in developing or improving their supplier diversity programs. Through analysis of the supply chain process, they evaluate performance, develop accounting and monitoring infrastructures, and identify ways to partner with diverse suppliers as well as maintain and grow these critical business relationships.

Communications

Every company wants to project a positive image and brand. Counsel can help employers ensure that their organization's commitment to inclusion and diversity is effectively conveyed. They also provide recommendations on integrating a company's diversity commitment into its overall corporate communications plan; developing culturally sophisticated and sensitive media strategies; assisting in managing sponsorships and event marketing; and assisting in the preparation of press releases and speeches.

Diversity in Corporate Governance

Companies are increasingly aware that diversity is a critical attribute to a well-functioning Board of Directors and an essential measure of good corporate governance. The most successful diversity programs have committed leadership from the Board and the CEO and other senior management. Corporate diversity counsel often advise Boards on matters of diversity and help companies identify and recruit diverse director candidates.

Government and Community Relations

Maintaining a positive reputation in minority communities and among women organizations helps recruit and retain employees. It also assists in identifying potential business partners, improving marketing efforts, enhancing revenues and market share, reducing the likelihood of allegations of widespread discrimination and creating a positive and constructive image. A positive relationship with minority officials in the federal, state, and local governments is often an important part of a comprehensive business strategy, including diversity. Companies often look to corporate diversity counsel that have working relationships with key minority elected and appointed officials, national civic leaders and civil rights activists. They use these ties to foster communication and develop coalitions between their clients and key leaders. In addition, they advise on philanthropic efforts designed to increase a company's visibility as a diversity leader and provide feedback on perceptions of their clients' efforts.

With increasing diversity within the United States, organizations must work continually and concertedly to meet the challenge of modifying their company's practices and policies to keep pace with the changing demographics of the nation. The challenge is to develop sound approaches to diversity initiatives that are legally permissible. Corporate diversity counseling is an emerging law of practice that assist clients in addressing these issues, breaking into new diverse markets and gaining market share as the new society emerges.

Kendal Tyre is a partner in the Washington, D.C. office of Nixon Peabody LLP and co-chair of its Diversity Action Committee. Nixon Peabody's successes in diversity were acknowledged by Fortune Magazine and placed the firm for two consecutive years on Fortune's 100 Best Places to Work List in 2006 and 2007. The Minority Corporate Counsel Association awarded the firm its 2007 Thomas L. Sager Award for its programs in recruiting, retention and promoting diverse attorneys.