

PUBLICATION

How Leaders Can Retain Diverse Talent During the COVID-19 Pandemic

Second Quarter 2020

As COVID-19 continues to fuel uncertainty and financial loss, resulting in furloughs, layoffs, terminations, reduced salaries, and other tough business decisions, recent headlines provide fresh perspectives on the reality that the last time this country faced a significant crisis – the 2008 Recession – a disproportionate number of lawyers of color were the first to experience layoffs and terminations as workloads declined. Businesses, including law firms, that are not intentional and vigilant about how short-term, economic-based employment decisions could impact their diverse talent could easily repeat history. Consequently, while maintaining diverse and inclusive work environments is critical during the current pandemic, retaining diverse talent is equally important.

In 2010, the American Bar Association (ABA) released a report that explored how the 2008 recession impacted diversity efforts in the legal profession. The report, [Diversity in the Legal Profession: The Next Steps](#), provided recommendations for how various segments of the industry, including law firms and corporate law departments, could advance diversity. The recommendations addressed planning, culture, assessment and accountability, hiring, retention and advancement, and outreach. These recommendations hold true today for corporate legal departments and law firms seeking to make diversity and inclusion a priority through the current pandemic. More specifically, leaders in the profession should follow their existing plans or create new plans in light of the pandemic, continue to foster a culture of diversity and inclusion, assess whether their plans are functioning as desired, hold other leaders accountable, and perform creative outreach efforts, particularly in this time of remote work. Another area that the ABA study addressed and that is still critical today is retention. Below we outline four steps that corporate legal departments and law firms can easily implement now to strengthen retention efforts and avoid undoing the gains of the past decade in advancing diversity in the profession.

1. Prioritize Diversity

Corporate legal departments and law firm leaders should prioritize diversity, notwithstanding the pandemic. The business case for diversity is clear and supported. Diverse companies and teams provide better counsel and more creative solutions, and diverse teams financially outperform less diverse teams. Increased diversity also results in increased client satisfaction. Further, law firms and corporations gain significant market share, brand recognition, and reputation by leading internally and externally with diverse and inclusive teams.

Given the undeniable benefits of creating and maintaining a diverse workforce, leaders should prioritize diversity during these uncertain times when creative solutions, excellent client service, and profitability are key concerns given the financial stress caused by and widespread impact of COVID-19. This can be accomplished by considering effective and simple internal measures to provide pathways to success for diverse talent, (e.g. regular check-ins with diverse professionals on their workload and asking non-diverse professionals to consider diverse professionals when they need assistance), and consistently communicating the significance of diversity and inclusion throughout the organization.

2. Keep Diversity in Mind When Deciding Who Stays and Who Goes

Do not make separation decisions in a vacuum. As corporate legal department and law firm leaders consider ways to cut costs through furloughs, layoffs, and salary reductions, they should consider the potential disproportionate impact these decisions could have on diverse attorneys. Leaders might respond that the employment decisions made during the recession in 2008 were based on billable hours and the overall productivity of the attorney. However, such decisions do not account for potential subjective factors impacting the diverse attorney's billable hours and productivity, including confirmation bias, which is the tendency to interpret new evidence as confirmation of one's existing beliefs or theories.

When asked about COVID-19's impact on diversity, Caren Ulrich Stacy, CEO of Diversity Lab, stated, "When law firm leaders select who stays and who goes, they often unconsciously choose to keep the person who looks like them. Since most leaders in the upper echelons of firms and corporations are white men, this may not bode well for diverse lawyers. For example, if a diverse associate has fewer billable hours than their go-to associate, the partners may feel justified in their decision. In social science, that's called confirmation bias. But loads of data and research reveal that the diverse lawyer likely has fewer billable hours because he or she is unconsciously being left out of the work allocation process, client meetings, and the Thursday afternoon golf game."¹

3. Combat Confirmation Bias and Increase Retention

Institute measures to overcome confirmation bias and increase inclusivity and retention. To combat confirmation bias, "[corporations and] law firms need to fix their systems and processes so that the humans involved can make better, more fair decisions for the benefit of everyone."² This can include being intentional about assignment distribution during this time of increased teleworking to ensure that diverse attorneys have work and that there is an equitable distribution of assignments. Leaders can address the challenges presented by confirmation bias by implementing the following recommendations, many of which were addressed in the ABA report:

- Re-examine prior diversity goals and programs;
- Identify your organization's specific challenges and resources, and update goals and programs in light of this data and the impact of COVID-19 on budgeting and other areas;
- Draft, publicize, and implement an updated diversity and inclusion action plan, which includes measurable goals and mechanisms for regular assessment and meaningful accountability;³
- Survey lawyers frequently to check in on how they are doing personally and professionally and to determine what they need to effectively support the organization and its clients. Analyze the survey responses by gender, race, and other demographics to be sure everyone feels supported equally;
- Pay attention to who is and isn't getting work in the downturn. This should include monitoring work allocation to ensure your diverse lawyers are getting their fair share; ⁴
- Ensure that all attorneys, especially your diverse lawyers, have assigned champions who can answer their questions and direct them during this uncertain time. This could include encouraging virtual mentoring and sponsoring to keep diverse attorneys and others within the organization connected; and
- Seek opportunities to cross-train attorneys, including diverse attorneys, where appropriate.

Leaders who undertake these efforts would not only combat confirmation bias but could also strengthen retention efforts and demonstrate to diverse attorneys that they are valued.

4. Respond to the Call to Action

Over the course of the last decade, hundreds of corporate legal department general counsel and chief legal officers signed open letters and issued calls to action for law firm and industry leaders to focus on, prioritize,

and enhance diversity in the profession. The Leadership Council on Legal Diversity (LCLD), which is making excellent strides in investing in the success of diverse in-house and outside counsel, was created in response to one of these calls to action. New creative measures to address the diversity and inclusion issues in the legal profession should continue. As Caren Stacy stated, "You have the power to reward firms that manage their talent and sustain their diverse workforces, and to punish the ones that don't. Use your power for the good of diversity and inclusion in law. Don't let firms backslide. Require them to take actions like becoming Mansfield Rule certified and continuing to participate in LCLD's Pathways Program for diverse midlevel lawyers. Take those same actions for the benefit of your own teams, too."⁵

As industry leaders create plans to weather COVID-19, which is impacting everyone regardless of race, national origin, gender, sexual orientation, religion, socioeconomic status, or any other differences, remember how the last major crisis unraveled years of progress for diverse attorneys across the industry. To avoid repeating history, ensure that your organization's plan prioritizes diversity, focuses on inclusion, and retains diverse talent.

¹ Helem, Lisa, Diversity Lab CEO's Recession Advice for Law Firm leaders? Double Down on Diversity, Law.com, April 6, 2020.

² See *Helem*.

³ Diversity in the Legal Profession: The Next Steps, American Bar Association, 2010, April, ABA Presidential Initiative Commission on Diversity.

⁴ See *Helem*.

⁵ See *Helem*.