

大成 DENTONS

In-House Counsel CLE Webinar Series: Grow, Protect, Operate and Finance

February 2, 2022

The Great Resignation

Why Employee Retention Isn't Just Good Business, It's Legal Necessity

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Agenda

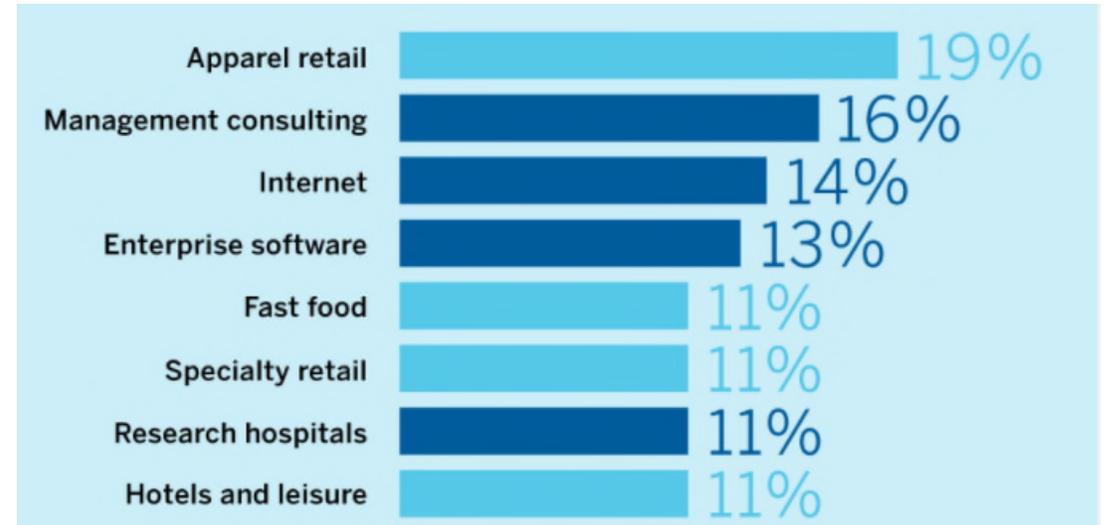
Part I. Why Employees Are Quitting

Part II. Legal Implications for Employers

Part III. Mitigating Legal Risks in Hiring

Quantifying Employee Quits

- 4.53 million workers quit in November 2021 – the largest monthly total in 20 years
- Attrition does not mean unemployment: not all of these employees stayed unemployed. Many quits were to take a better job.



Industries with highest attrition rate across 38 industries from April through September 2021.

Joe Andrew, "Winning the Great Transition," *The Hill*, Jan. 11, 2022.

Donald Sull, Charles Sull, Ben Zweig, "Toxic Culture Is Driving the Great Resignation," *MIT Sloan Management Review*, Jan. 11, 2022.

Where did 7 million employees go?

- The changes in the workforce are part of a more inexplicable change in the economy
 - Increased consumption, but heightened supply constraints
 - Booming economy, but approval rating on economy is falling
 - Wages are rising, but inflation is rising faster
 - GDP has increased, but economy is down about 7 million workers

COVID deaths

Fiscal policy response

Decreased spending

Decline of working age
population

Early retirements

Derek Thompson, "Where Did 7 Million Workers Go?" The Atlantic, Oct. 23, 2021.

Part I: Why Employees Are Quitting

Do people really “not want to work?”

Maybe, maybe not...

- Employers are feeling frustration that workers are quitting in masses, but the phenomenon of “opting out” is happening all around the world.
- Young workers in China have coined the phrase “lying flat,” which expresses the idea of renouncing the old-fashioned high-stress work ethic of previous generations. The movement protests the “996” culture, which refers to the practice of working from 9 a.m. to 9 p.m. six days a week, particularly in the tech industry.
- One in three German companies reported a lack of skilled workers.
- Latin American and Caribbean countries experienced a high unemployment rate during the pandemic, while the jobs that returned are mostly informal and low-paying.

David Bandursky, “The ‘lying flat’ movement standing in the way of China’s innovation drive,” Brookings, Jul. 8, 2021.

Ishaan Tharoor, “The ‘Great Resignation’ goes global,” Washington Post, Oct. 18, 2021.

Commonly Cited Reasons for Employee Quits

COVID health and safety

Expectation of remote work

Work-life balance

Wage stagnation

Harassment, discrimination, and uncomfortable workplace interactions

Part II: Legal Implications for Employers

COVID health and safety

Expectation of remote work

Work-life balance

Wage stagnation

Harassment, discrimination, and uncomfortable workplace interactions

OSHA
Whistleblowers,
general duty clause

Is your organization preparing for long-term remote work?

Impact of local laws

Contacting employees after hours, ADA and FMLA provisions, local and paid sick leave laws

Use of signing bonuses, equal pay, local laws

Staying on top of employer obligations

Work-Life Balance

No U.S. law that requires implementation of work-life balance

- Contacting employees after hours
 - Fair Labor Standards Act
- Laws that protect employees when their life might outbalance their work
 - Family and Medical Leave Act
 - Americans with Disabilities Act
- State and local paid leave laws
 - Paid sick leave (COVID-19 and typical)
 - Paid family and medical leave

Harassment and Discrimination

Harassment, bullying, and discrimination are driving employees out of the workforce

Title VII and applicable state and local anti-harassment and discrimination laws still apply

Stay on top of:	Proactively address:
<ul style="list-style-type: none">• Training• Reporting• Responding• Communicating	<ul style="list-style-type: none">• Remote and virtual bullying, discrimination, and harassment• Customer bullying, discrimination, and harassment• Caregiver discrimination

COVID Health and Safety

Section 5(a)(1) of the Occupational Safety and Health Act (the "General Duty Clause")

- Section 11(c) of the OSH Act contains anti-retaliation provisions, prohibiting retaliation for:
 - Filing a complaint with OSHA
 - Participating in any proceeding under the Act
 - Exercising any rights protected under the Act.
- Consider applicable state OSH plans



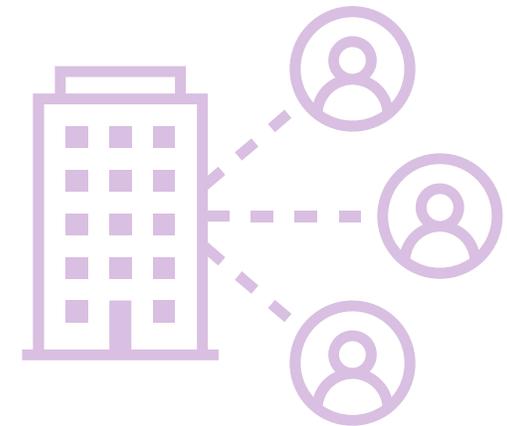
Wage Stagnation

- **Employees calling for pay and benefits commensurate with the work**
- Signing bonuses as retention tool
- Be aware of:
 - Equal Pay Act
 - Fair Labor Standards Act
 - Local and state minimum wage increases
 - Existing employee wages
- Review benefits – not just pay
- Not just retention at risk: unionization

Expectation of Remote Work

No legal requirement that employers provide remote work options – but it's now the expectation for many

- Business case
- Americans with Disabilities Act
- Compliance with the pay and labor laws of the locality in which the employee lives
 - Rest and meal breaks
 - Wage payment, timing, and delivery
- Tax implications and business registration
- Monitoring work – privacy laws
- Workers Compensation laws
- Principles and guardrails for hybrid work



Part III: Mitigating Legal Risks in Hiring



Posting



Vetting



Offering

Posting

Avoid Turnover through Retention

1. Workplace value proposition (culture)
 - What do you offer your employees?
 - Why do they stay?
2. Are employees supported?
 - Flexibility
 - Opportunities
3. D & I
 - Disparate Impact & Disparate Treatment



*Ryan Pendell, "7 Gallup Workplace Insights: What We Learned in 2021," Jan. 1, 2022

Posted Positions

**Job
Descriptions**

**Essential
Functions**

**Accommodation
Language/
Discussion**

**Hybrid/Remote
Expectations**

1. Residency Requirement?
2. Impact of out-of-state employees

**Vaccination
Requirement?**

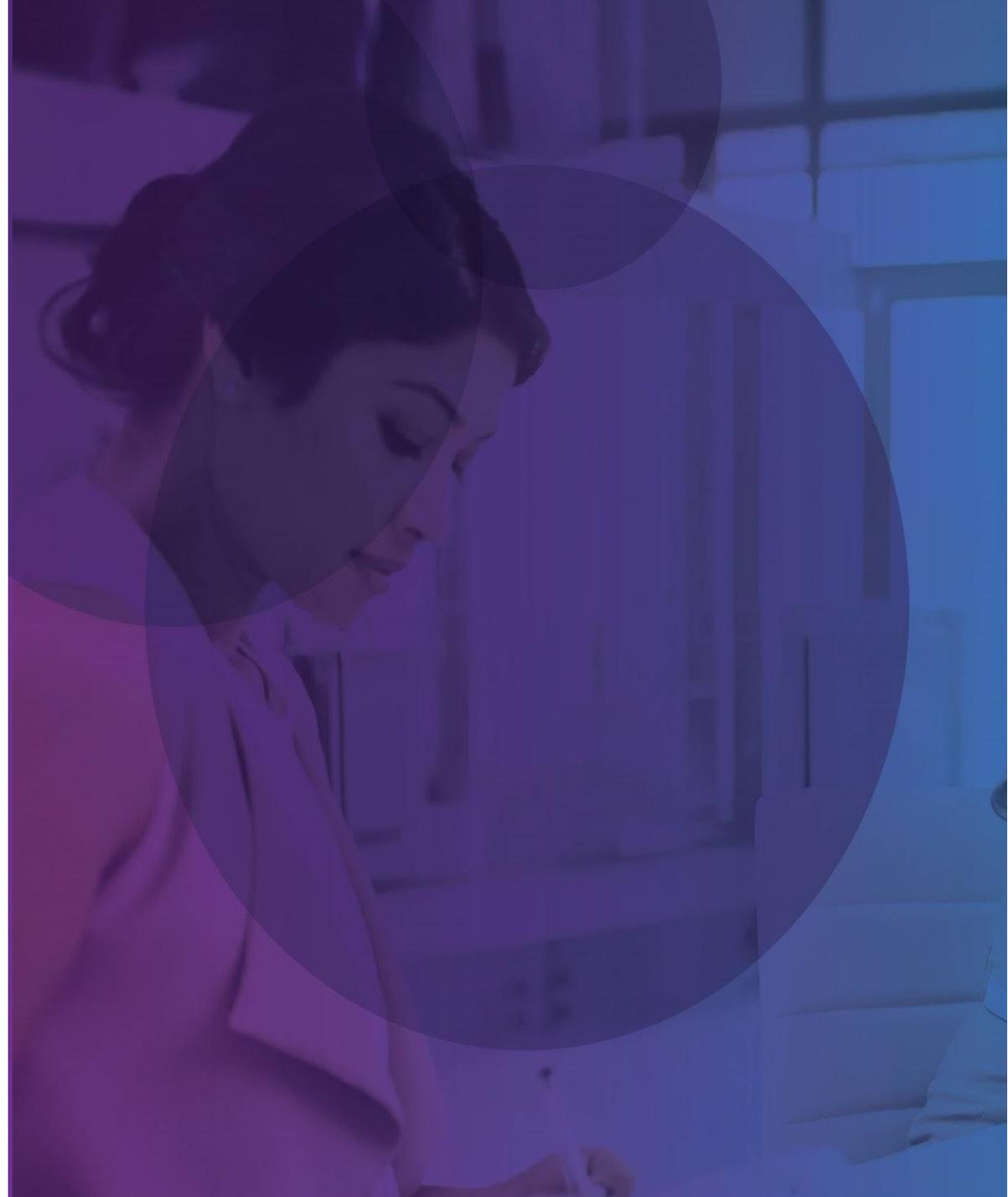
Vetting

- Restrictive covenants
 - Executive Order
 - Additional costs in hiring candidate with covenant
 - Possible intentional interference claims
 - NCA/Confidentiality/Internal controls
- Background checks (FCRA or social media)
- Ban the Box



Noncompete Agreements

- New Executive Order – unclear, aimed at banning/limiting NCA to increase competition through mobility



Offering

Failure to hire *or* Promote

Interview notes/retention requirements

Negligent Hiring *or* Retention

**Age Claim
“Replaced by a Younger Worker”**

Examples

Failure to hire/interview
“Kalisha” over “Sarah”

New hire and you learn
they were arrested

Offer pending and you
receive unsolicited news

Thank you!

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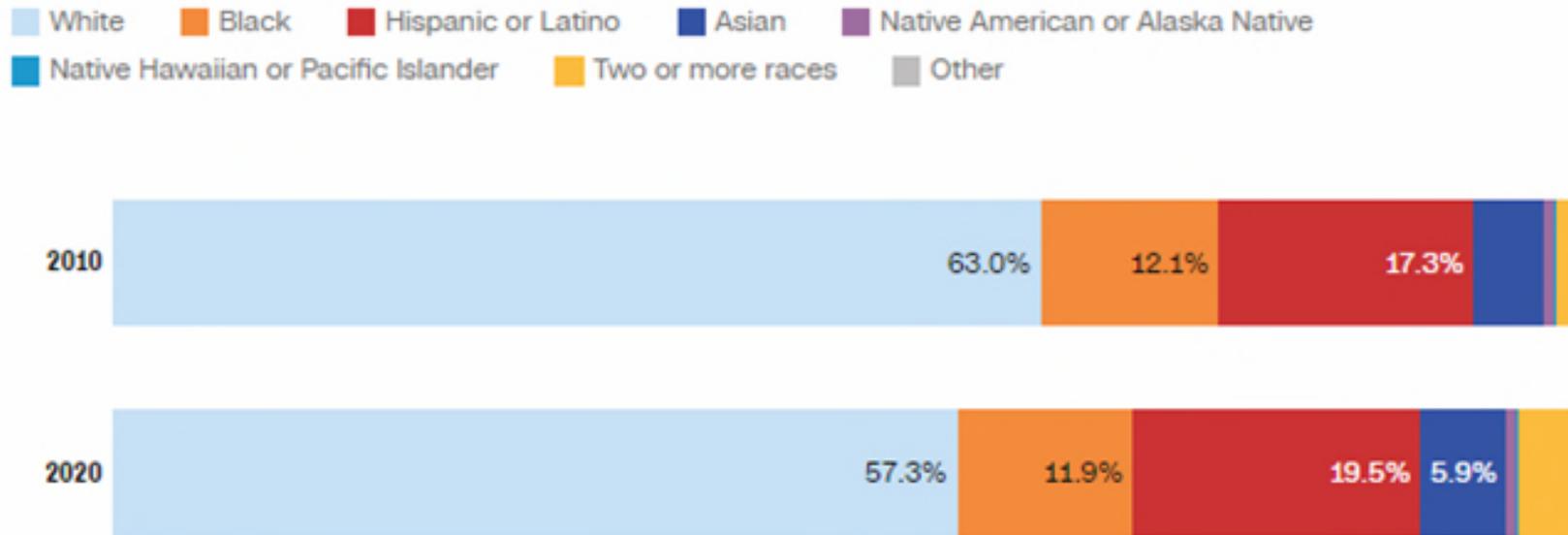
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Bridging the Gap Between Diversity and IP Law

Success Stories from the Trenches

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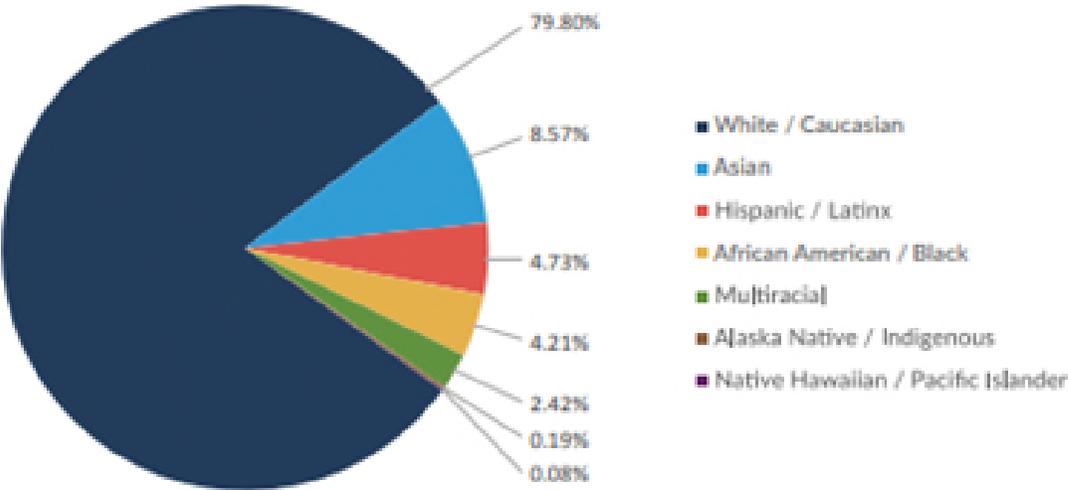
The US is moving towards a multiethnic and multiracial society...



**<https://www.cnn.com/2021/08/12/politics/us-census-2020-data/index.html>*

But the legal profession still needs to catch up...

LAW FIRM ATTORNEYS*



IN-HOUSE ATTORNEYS**



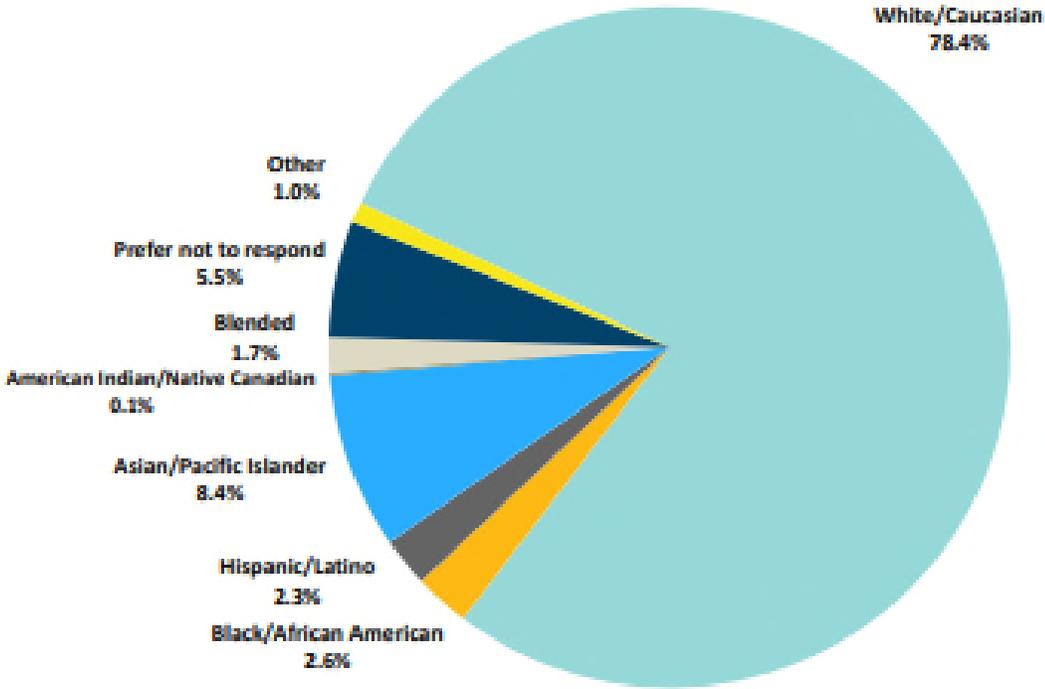
*MCAA™ Law Firm Diversity Survey 2021.

**Minority Corporate Counsel Association, Sustaining Pathways to Diversity:® A Comprehensive Examination of Diversity Demographics, Initiatives, and Policies in Corporate Legal Departments, 2011 MCCA Corporate Demographic Survey Report, <https://www.mcca.com/wp-content/uploads/2017/04/Book11-Teal.pdf>, and 2017 Executive Summary, <https://www.mcca.com/wp-content/uploads/2018/05/Corporate-Demographic-Survey-Executive-Summary.pdf>.

IP Law does not buck the trend...

Ethnicity of all individual respondents to AIPLA Economic Survey*

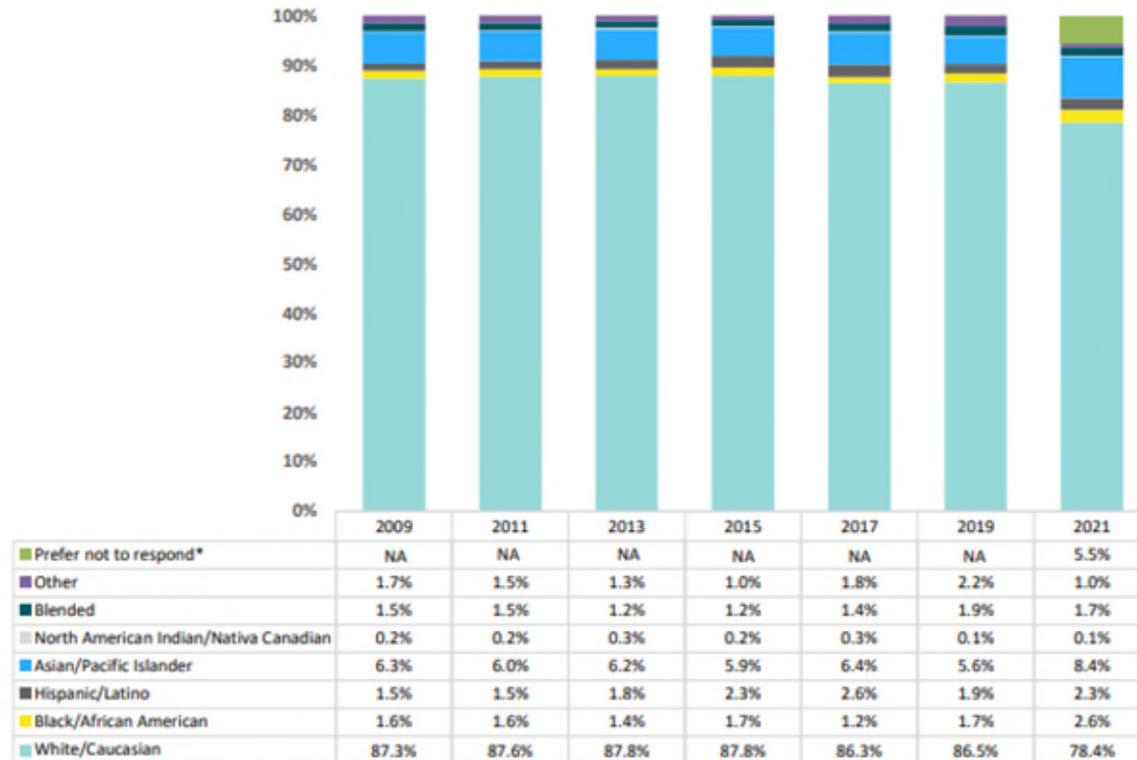
	% of all respondents
White	78.4
Racially/Ethnically Diverse	16.1
Prefer not to answer	5.5



*AIPLA Report of the Economic Survey 2021

And nothing has changed in over a decade...

Ethnicity of all individual respondents: 2009-2021*



*Prefer not to respond was an added option for Ethnicity in 2021

Successfully Bridging the Diversity Gap

DANA RAO

EVP and General Counsel at adobe



Career Highlights:

- VP of Intellectual Property and Litigation at Adobe
- Associate General Counsel of IP and Licensing, Microsoft
- Patent Attorney at Fenwick & West
- Electrical Engineer

PHYLLIS TURNER-BRIM

Deputy General Counsel, Chief of IP at HP



Career Highlights:

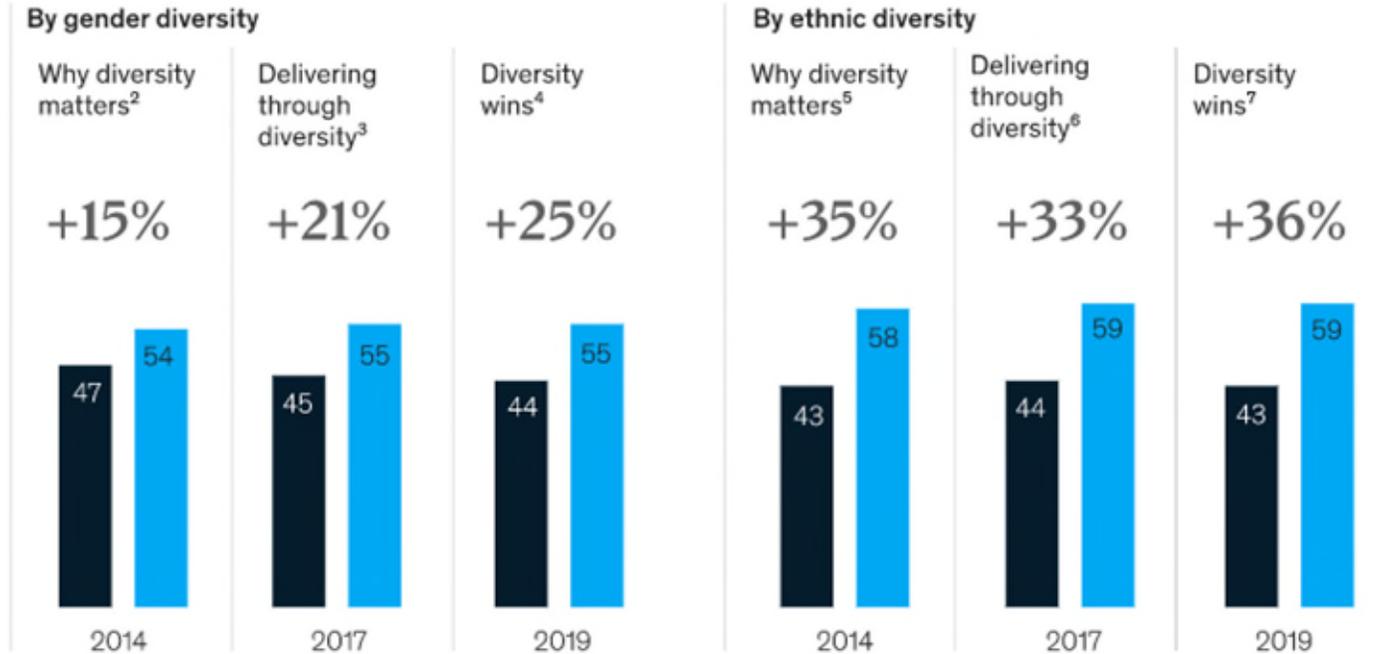
- VP and Assistant General Counsel, Starbucks
- VP, Chief IP Counsel, Intellectual Ventures
- Member, Board of Trustees of Foundation for Advancement of Diversity in IP Law
- Chemical Engineer

Diverse Teams = Increased Revenue

The business case for diversity in executive teams remains strong.

Likelihood of financial outperformance,¹ %

■ Bottom quartile ■ Top quartile



¹Likelihood of financial outperformance vs the national industry median; p-value <0.05, except 2014 data where p-value <0.1. ²n = 383; Latin America, UK, and US; earnings before interest and taxes (EBIT) margin 2010–13. ³n = 991; Australia, Brazil, France, Germany, India, Japan, Mexico, Nigeria, Singapore, South Africa, UK, and US; EBIT margin 2011–15. ⁴n = 1,039; 2017 companies for which gender data available in 2019, plus Denmark, Norway, and Sweden; EBIT margin 2014–18. ⁵n = 364; Latin America, UK, and US; EBIT margin 2010–13. ⁶n = 589; Brazil, Mexico, Singapore, South Africa, UK, and US; EBIT margin 2011–15. ⁷n = 533; Brazil, Mexico, Nigeria, Singapore, South Africa, UK, and US, where ethnicity data available in 2019; EBIT margin 2014–18.
Source: Diversity Wins data set

Building Diverse Teams In-House

- Recruiting diverse teams – law firm pipeline.
- Leadership commitment to building diverse teams.
- Accountability and internal reviews to ensure diversity is reflected in teams.
- Mentoring/sponsorship.
- Introducing flexibility in the workplace.
- Non-traditional career pathways.
- Team commitment to diversity & inclusion.

QUESTIONS?