

COMMITTEE NEWS

Employment and Labor Law

Diversity & Inclusion: Strategies for Progress in the Workplace

The May 25, 2020 killing of George Floyd sparked anger, fear, and renewed conversations about racial injustice. Protests and attention from around the globe prompted employers to rethink and prioritize efforts to combat racism and promoting diversity and inclusion. Employers have a renewed focus on forging a more equitable future. To help better understand the issue, Kate Bally, Director of Labor & Employment, Thomson Reuters, Practical Law, sat down with Sophia Khan, Thomson Reuters Vice President, Diversity & Inclusion.



Sophia Khan
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Vice President Diversity and Inclusion

Prior to joining Thomson Reuters, Sophia was leading the Global Inclusion, Diversity and Engagement

How do you define diversity and inclusion (D&I), and how do those terms differ?

Diversity is a fact, what makes us unique. It's about all of us. When we show up to work each day, we each bring a different perspective to the table. What we say and the way we act pulls from our experience and makes us diverse.

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Civil Rights Ruling Delivers Historic Victory for LGBT Employees

Until recently, the rights of lesbian, gay, bisexual, and transgender (LGBT) employees in the workplace have been, at best, uncertain. The Supreme Court decision in *Bostock v. Clayton County, Georgia*¹ changed that. In light of the decision, the rule is clear: Under Title VII, an LGBT employee can no longer be discriminated against on the basis of sexual orientation or gender identity.

1. Background

Just over five years ago, in *Obergefell v. Hodges*², the Supreme Court declared that same-sex couples have the same fundamental right to marry as couples of the opposite sex. The question of equal rights for LGBT individuals came to the Court with the acknowledgment that they had undertaken a long stigmatized, demeaning, and arduous journey just to be legally recognized:

Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.

For much of the 20th century, moreover, homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973. Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable.

[Read more on page 13](#)



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The Black Lives Matter (BLM) Movement and the Workplace

The Black Lives Matter (BLM) movement began in July 2013 after the acquittal of George Zimmerman in the death of Trayvon Martin. BLM—both as a social movement and as a loosely constituted chapter organization—has most recently been a constant fixture in the news since the death of George Floyd in Minnesota. Employers across the nation are grappling with the appropriate way to deal with the many issues raised by the BLM movement—issues involving workplace diversity, racial justice, the criminal justice system, and systemic discrimination. They are trying to determine what they can do as organizations to both support the BLM movement and their employees of color, while at the same time maintaining workplace harmony without alienating other employees, customers, or other constituents. Employers' concerns seem to revolve around two central themes: company leaders speaking out about or taking action in support of the BLM movement or employer regulation of BLM images in the workplace on clothing or other paraphernalia.

Employers actively supporting the BLM movement through statements, donations, or community action should be mindful of several important concepts. First, employers should be aware that there will likely be critical and/or unexpected feedback about the employer's actions (whatever they are) from employees, vendors, customers, or other constituents. For some, the expressed support may be too far reaching, while others may believe that the support does not go far enough. For these reasons, employers should clearly and carefully articulate their core values as part of their expressed support for BLM and only take actions that are consistent with these expressed values. Whether investing in local organizations promoting racial equity, creating internship or pipeline initiatives to recruit people of color, creating Employee Resource Groups (ERGs) as part of a diversity initiatives, or just expressing a belief in the BLM movement through public or private statements—employers should be sure to explain how their support squares with their organizational values and aligns with their business goals. If the support for BLM seems forced, disingenuous or insincere—the employer's support will be unsuccessful and tend to discourage rather than inspire employees.

Second, employers should realize that their initial discussions or manifestations of support will likely be the beginning of a much broader, and sometimes very difficult, conversation. Many organizations are finding that pent up frustrations and past indignities are being included in discussions regarding the BLM movement. One best practice for employers to consider is providing consistent and regular opportunities for healthy workplace dialogue (i.e. town-halls, listening sessions and/



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or facilitated conversations) that will allow the issues raised by the BLM movement to be respectfully and meaningfully discussed in the workplace. Employers should likewise be aware that their support for the BLM movement will likely lead to more intense scrutiny of their racial equity practices by employees, other constituents, and potentially the media. Thus, employers should be prepared to answer questions about their workplace practices, particularly those instances where their actions might seem inconsistent with articulated aspirational goals. Employers should also review relevant policies and practices for opportunities to become more fair and equitable as an organization.

Employers should also ensure that all employees are well-trained on respect in the workplace principles and that supervisors are trained in de-escalation techniques. There have been anecdotal incidents where disagreements about BLM have degenerated into loud shouting matches in the workplace, or in rarer incidents, more severe workplace violence incidents. More frequently, these more intense discussions play out on social media platforms and impact the workplace via concerns about workplace safety or third-party complaints regarding specific employee comments or posts. A best practice here is for employers to critically review their social media policies and ensure compliance with the same, including investigation of all complaints.

The display of BLM images in the workplace via decals, facial coverings, or clothing has also become an increasingly controversial subject for many employers. What employees wear or display at work is usually governed by the employer's dress code, workplace conduct policies and/or any applicable laws in the relevant jurisdiction. Employers that support the BLM movement have three discrete options in this area: 1) Disallow all displays or images supporting political movements; 2) Allow all such displays or images consistent with anti-harassment/anti-discrimination policies; or 3) Only allow BLM displays or images while excluding all other displays or images. Each approach provides unique workplace benefits and challenges.

Disallowing all political displays or images in the workplace is the easiest policy for employers to administer. It is a viewpoint neutral policy that treats all political views in the exact same fashion—not allowing them. This practice also has the added benefit of decreasing the likelihood of workplace conflicts between employees with opposing viewpoints. However, employer policies or practices that restrict all political displays and images, which also includes those expressing support for BLM, have been heavily criticized by BLM supporters. Employers that strongly support BLM have found that they cannot simultaneously restrict BLM displays or images without sacrificing some of their credibility.



Similarly, allowing all political displays or images in the workplace is also easy to administer. Like disallowing all such displays or images, this approach is content neutral and treats all viewpoints equally. However, this approach more frequently leads to workplace clashes involving opposing viewpoints or prompts responsive counter-speech. This approach encourages more displays and images and is thought to incentivize employees to express themselves more provocatively in their clothing and workplace displays. The primary concern with this approach is that it can more frequently lead to allegations of harassment as tensions rise, or even complaints about workplace violence to the extent an employee feels threatened or unsafe.

Finally, many employers have decided to allow only expressions of support for BLM (and perhaps similar movements like PRIDE) in the workplace in clothing and displays, but not allow expressions of any other political movements or causes. This typically means disallowing displays or images supporting “All Lives Matter,” “Blue Lives Matter” or “Make America Great Again (MAGA).” These employers are drawing a distinction between supporting BLM and other social/political movements. They assert that BLM is a significant societal movement consistent with its organization values, while the other expressions are “purely political” and/or not consistent with its values. Allowing BLM displays and expressions shows strong support for causes typically important to employees of color, but sometimes alienates employees with opposing or contrary views. This is particularly true in instances where there is discipline associated with other displays or expressions, but not BLM. Employers with this type of policy also open themselves up to more frequent allegations of discrimination/harassment or, in some jurisdictions, even allegations of political discrimination.

In sum, employers desiring to support BLM in its actions, statements, policies, and practices are well advised to think through the issues carefully. Any statements or actions supporting BLM should be well articulated and consistent with the employers’ institutional values. Employers should expect their actions to be heavily scrutinized and questioned, and company leaders should be prepared to answer difficult questions. Dress code and workplace conduct policies should be clearly and thoughtfully drafted or reviewed, and consistently enforced to avoid claims of discrimination or harassment. Selecting the most appropriate ways to support BLM and manage BLM images and displays in the workplace are employer-specific decisions that should not be taken lightly. ➤



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Diversity... Continued from page 1

Inclusion is a choice, it requires action. Inclusion may not come naturally to us. It requires going the extra mile. Like often attracts like, and that may feel more comfortable. What may be harder is challenging our assumptions. Inclusion requires pausing and considering your decisions. It requires questioning yourself. What we do with that is what matters. You must pause and consider your decisions and question yourself. Once you have questioned yourself, you can turn a thoughtful eye toward systems, organizations, and impact.

Why does inclusion matter?

We underestimate the sense of belonging in the workplace. Deals can be unraveled by a single employee who feels like an outsider. An inclusive workplace does not require that everyone gets along. It is a common misconception that inclusion is about perfect harmony. That isn't it at all. Inclusion is about creating healthy teams that welcome new perspectives and accommodate change.

When you have a shared sense of belonging within a diverse collective, you can tap into the best and highest use of talent. Inclusion may feel uncomfortable or prescriptive, but that environment can create opportunities for progress and insight. Diverse and inclusive teams create a healthy tension that can serve as a catalyst for greater perspective, insight, and innovation. Many companies have a diverse client base, and a diverse base of employees is required to see and meet the needs of those customers.

What are the most important features of a successful D&I program (for example, focusing on diversity of applicants, mentors, leaders, etc.)?

The most important element is vision. Success requires having a clear vision from leadership on why diversity and inclusion matters to the organization. Apart from vision, the next most important part is the strategy that will account for positive changes across all metrics. Accountability for execution of that strategy should be made a part of leadership goals. Again, inclusion requires action, and leaders should be on notice that inaction will not suffice.

It isn't always clear what that action should look like, but embracing empathy, allowing for uncomfortable conversations, recognizing there are no perfect solutions can help move employers move toward positive change. Exploring the systems in place and the pieces of that system that accelerate or derail inclusion is vital.

When companies have articulated their vision for diversity and inclusion, they should explore their networks. Do those networks lend themselves to bringing in

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diverse talent? After exploring their network, they should consider the employee life cycle. Does the employee's experience make them want to remain with the organization? Does it give them opportunity for advancement? Do they want to be part of the organization's success? Is there meaningful engagement across sectors of the company? Answering these questions can help determine how best to move forward.

How do you measure progress when it comes to D&I?

We want a workplace where all employees come to work and feel valued for the contributions they make and the person they are. Measuring progress against this goal requires asking employees about their individual workplace experiences. Progress in this arena is subjective, and measurement of it depends on a subjective experience.

It is common for companies to measure progress annually or against a five-year plan. To achieve diversity and promote inclusion, more regular reflection is a better plan. Measuring small increments of success, quarterly or even monthly, can build rigor and create a cadence of forward movement. If plans to achieve goals and assessments of achievement are not on the agenda, they simply will not happen.

Measuring progress does not have to exist only in external surveys and recognition. It can, and ideally should, be embedded into regular meetings and informal conversations. It can be a conversation in a roundtable format. It can be an assessment of promotions, attrition, departures, and hiring. The most important thing is regularly collecting data, feedback and building transparency across the organization. You cannot fix problems you cannot see.

Companies committed to progress should also steer clear of leaning on councils and affinity groups to tackle diversity and inclusion challenges. Outsourcing the hard work of creating an equitable and welcoming corporate culture to a smaller subset of the company will rarely create meaningful change. Leadership at the top must take responsibility.

Did George Floyd's killing change the conversation about D&I in the workplace, and if so, how?

Absolutely. It is not entirely clear why Mr. Floyd's killing drew national attention when so many injustices before him did not. It was a moment we did not expect, but this tragedy became a global headline immediately, and people finally seemed to say, "enough is enough." It was a cultural tipping point during which people could no longer fall back on apathy.

When you have a shared sense of belonging within a diverse collective, you can tap into the best and highest use of talent. Inclusion may feel uncomfortable or prescriptive, but that environment can create opportunities for progress and insight.



People from all backgrounds had to acknowledge that violence against people of color was happening regularly. Across the globe, we had to acknowledge the problem, and it meant, among many other things, refocusing on how these inequities play out in the workplace.

What are effective ways to get company leaders to support D&I values and initiatives?

Many people ask me how do we make this more than a moment? It requires courage. We need leaders to put aside politics and set a tone for finding common ground. People look to leaders for how to digest world events, and leaders that make caring about racial injustice optional will never inspire change. Those in power need to issue declarative statements about company values and what it intends to do to promote those values.

This new era of remote work arrangements presents many new challenges, and D&I goals are no exception. What are remote workplace strategies for promoting a diverse and inclusive workplace?

Think of who is talking and who is not. Managers can open a dialog if they are willing to hang back and let others speak. Brevity and silence can be useful tools to encourage conversation. Give people time to prepare for meetings. Personalize conversations so employees know you care about their individual experience. It is rare that managers put a premium on listening. Employees do not expect managers to be perfect, and it can be a sign of strength to admit to subordinates that you do not have all the answers. Trying is better than stagnating. ➤

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THE BRIEF



Civil Rights... Continued from page 3

In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance. As a result, questions about the rights of gays and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law.

In addition to these burdens, studies have shown that, compared to their heterosexual counterparts, LGBT persons are more socioeconomically disadvantaged.³ They are more likely to live in poverty, be unemployed, uninsured, food insecure, and have lower incomes.⁴ These realities highlight additional inequalities and the need for change.

Even though LGBT rights have been advanced significantly with the Supreme Court decision in *Obergefell*, until now, there has been no uniform directive at the federal level to protect LGBT employees from discrimination in the workplace. Sex discrimination in the workplace has been prohibited under Title VII of the Civil Rights Act of 1964 (Title VII), but federal courts disagreed on whether discrimination “because of ... sex” included discrimination based on sexual orientation or transgender identity.⁵

In the absence of a clear federal safeguard, many states and local governments stepped up with laws and ordinances prohibiting workplace sexual orientation and gender identity discrimination (see e.g., [State Sexual Orientation and Gender Identity and Expression Discrimination Laws Chart: Overview](#)). Historically, however, millions of LGBT workers living in jurisdictions without similar government directives were still left unprotected and could be legally discriminated against at work because of their sexual orientation and gender identity.⁶

2. *Bostock v. Clayton County, Georgia*

On June 15, 2020, the Supreme Court put an end to this uncertainty in *Bostock v. Clayton County, Georgia*.⁷ In a 6-3 decision, the Court held that Title VII prohibits employers from discharging or otherwise taking an adverse employment action against an employee solely because the employee is gay or transgender. Reading the plain meaning of the Title VII, Justice Gorsuch wrote that when an employer intentionally takes an adverse action against an employee because of the employee’s sexual orientation or gender identity, the employer is unavoidably engaging in unlawful discrimination “because of sex.” In response to the employers’ argument that the drafters of Title VII could have not envisioned the application of



the statute to LGBT persons, the Court conceded the possibility, but concluded that the law, as written, unambiguously applies nonetheless.

Bostock, at long last, legally recognized LGBT workers' employment rights under federal law. However, the decision is not without limits. Title VII applies only to employers with 15 or more employees.⁸ Many state laws prohibiting sex-based discrimination apply to employers with fewer employees, but employees of smaller employers in states without LGBT protections may remain legally vulnerable. However, states with anti-discrimination laws that do not specifically protect LGBT persons may find that courts look to *Bostock* for guidance. If so, an estimated additional 3.6 million LGBT employees would become part of an otherwise unrecognized protected class.⁹

As acknowledged by Justice Alito in his dissent, with which Justice Thomas concurred,¹⁰ the impact of *Bostock* to LGBT individuals could be much broader than just employment. Federal and state laws also prohibit sex-based discrimination in other important aspects of life, including housing,¹¹ health care,¹² education,¹³ and credit transactions.¹⁴ The argument in favor of protections in those contexts is stronger in light of *Bostock*.¹⁵

3. What Now?

The Court in *Bostock* adjudicated the most straightforward instances of discrimination, because the employers therein unapologetically agreed that the LGBT employees were terminated because of their sexual orientation and gender identity. As a practical matter and especially in light of *Bostock*, it will be rare for an employer to admit that an adverse employment action was taken against an LGBT employee because of his or her sexual orientation or gender identity. In those cases, the familiar burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*¹⁶ will apply.

Not all questions were resolved by the *Bostock* decision. The Court avoided opining on some topics, including gender-segregated bathrooms, locker rooms, and dress codes.¹⁷ However, one of the most important civil rights questions of our time was firmly established: sexual orientation and gender identity are characteristics protected by Title VII. For employers that have not taken actions to prevent disparate treatment of and impact on LGBT employees, now is the time to do so.

Employers should review their policies and practices, such as anti-discrimination, anti-harassment, and leave policies, as well as employee benefits (e.g., health insurance), to make sure that they are inclusive of LGBT employees. Employers should also train their supervisors and managers and help them understand the



necessity of treating LGBT employees fairly and equally as with other employees, as well as not taking into account the employees' sexual orientation and gender identity in making employment decisions. Proactive employers can designate a position, committee or affinity group dedicated to developing, promoting, and consistently implementing diversity and inclusion messages and policies within the organization, including those specifically supporting LGBT workers, such as a [Gender Transition Plan](#) and a [Gender Transition In The Workplace Policy](#). Employers can also embrace diversity and inclusions principles at the top among leadership.

4. Conclusion

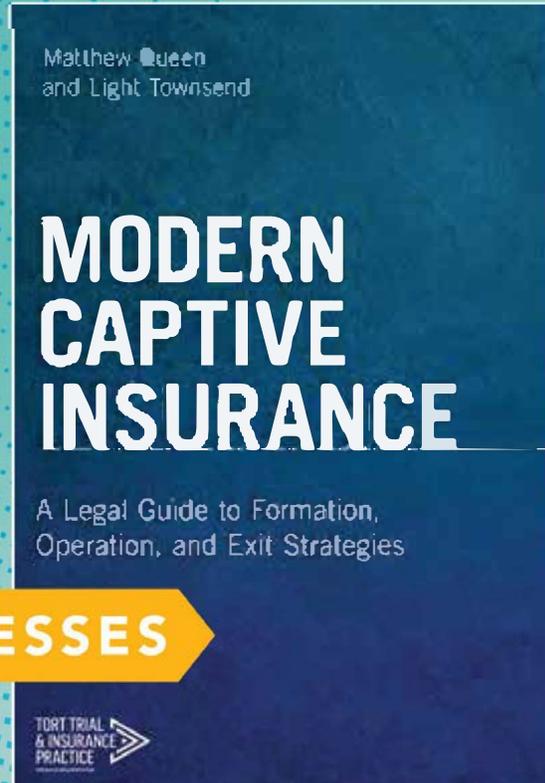
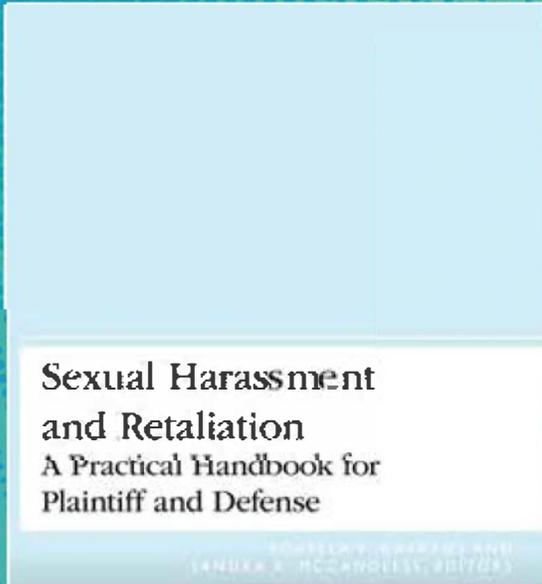
As recognized in *Obergefell*, what has been asked by the LGBT community is rather simple, yet challenging to obtain: "They ask for equal dignity in the eyes of the law."¹⁸ *Bostock* is a momentous decision because it not only it confirms the rights of LGBT employees to be treated fairly in their workplaces, it also has the potential of opening the door to equality in other aspects of life. After years of patchwork challenges, there is now clarity about the bounds of Title VII, and with it, a new respect formally recognized under the law for the LGBT community.

Endnotes

- 1 140 S. Ct. 1731 (2020).
- 2 135 S. Ct. 2584 (2015). In *Bostock*, even the dissent recognized that "it is painful to be reminded of the way our society once treated gay and lesbians." *Bostock*, 140 S. Ct. at 1769-71 (Alito, J., dissenting).
- 3 See Am. Psychol. Ass'n., Lesbian, Gay, Bisexual and Transgender Persons & Socioeconomic Status (2017), <https://www.apa.org/pi/ses/resources/publications/factsheet-lgbt.pdf> (last accessed Aug. 4, 2020).
- 4 *Id.*; see also UCLA, LGBT Data & Demographics, <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#density> (last accessed Aug. 4, 2020).
- 5 Compare *Bostock v. Clayton Cty. Bd. of Commissioners*, 723 F. App'x 964 (11th Cir. 2018), and *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017), with *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 112 (2d Cir. 2018), and *Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018).
- 6 Kerith J. Conron and Shoshana K. Goldberg, LGBT People in the US Not Protected By State Non-Discrimination Statute, UCLA Sch. of Law William Inst., <https://williamsinstitute.law.ucla.edu/publications/lgbt-nondiscrimination-statutes/> (Apr. 2020).
- 7 140 S. Ct. 1731 (2020).
- 8 42 U.S.C. § 2000e(b). There are exemptions from Title VII employment discrimination requirement for foreign nationals working abroad and certain employees of religious organizations. 42 U.S.C §2000e-1.
- 9 Christy Mallory, Luis A. Vasquez, and Celia Meredith, Legal Protections for LGBT People After *Bostock v. Clayton County*, UCLA Sch. of Law William Inst., <https://williamsinstitute.law.ucla.edu/publications/state-nd-laws-after-bostock/> (Jul. 2020) (last accessed Aug. 4, 2020).
- 10 *Bostock*, 140 S. Ct. at 1778.
- 11 E.g., the Fair Housing Act of 1968, as amended by the Fair Housing Amendments Act of 1988, 42 U.S.C. §3601 et seq.
- 12 E.g., Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. §18116. Interestingly, just a few days before *Bostock* was decided, the Department of Health and Human Services revised its Section 1557 regulations to exclude from the definition of sex as its relates to the section sexual orientation and gender identity.
- 13 E.g., Title IX of the Education Amendment Act of 1972, 20 U.S.C §1681 et seq.
- 14 E.g., Equal Credit Opportunity Act, 15 U.S.C §1691.
- 15 See Mallory, supra n. 10
- 16 411 U.S. 792, 802 (1973).
- 17 *Bostock*, 140 S. Ct. at 1753.
- 18 135 S. Ct. 2584, 2608.

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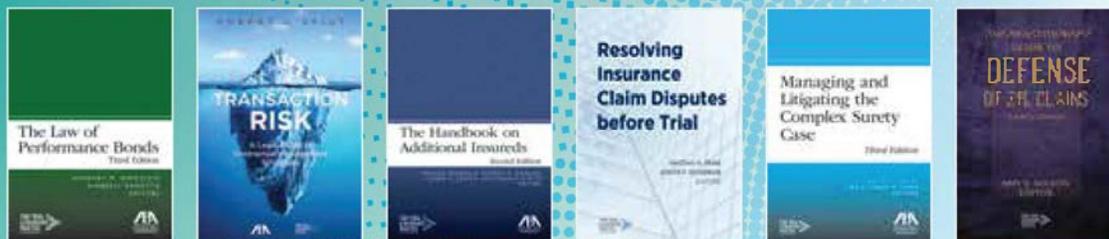
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February 10-14, 2021	Insurance Coverage Litigation Midyear Conference Contact: Janet Hummons – 312/988-5656 Danielle Daly – 312/988-5708	Omni Resort Montelucia Scottsdale, AZ
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