



Senator Robert Menendez Steps Up Pressure on *Fortune* 500 Companies Slow in Responding to Diversity Survey

Sen. Robert Menendez (D-N.J.) sent an unofficial diversity survey to *Fortune* 500 companies to determine how many minorities, women and disabled people serve as their top executives or members of their boards. Sen. Menendez has also requested that the companies disclose their suppliers' demographic makeup. This request comes from Sen. Menendez's office and purports to be on behalf of a "taskforce." It is not from an official or established Senate committee or sub-committee.

Under the terms of Sen. Menendez's request, information from companies responding to the request will be kept anonymous and aggregated in a report Sen. Menendez plans to issue later this year. In addition, Sen. Menendez has stated that he will publicize the names of any companies that do not participate in his survey. As of March 25, according to Senator Menendez, 400 companies had not responded.

Companies receiving Sen. Menendez's request should consider that the content of their response – or their decision not to respond – has important employment law, public relations and congressional oversight implications. These factors are interrelated and, in some instances, might be in tension. For example, a company wishing to disclose the demographic make-up of its suppliers, as called for in Sen. Menendez's letter, might risk violating federal and state employment or privacy laws by gathering or disclosing the information to Sen. Menendez. In addition, each company receiving Sen. Menendez's survey is unique, with different histories of diversity initiatives and different levels of diversity on their boards, on the executive team and among suppliers. Many recipients will have formal affirmative action plans, as required for covered government contractors. Recipients should consider their responses in light of these

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factors.

Employment Law

- For those recipients who chose to respond, information should be gathered and released in accordance with federal and state employment and privacy laws.
- Any data gathered to respond to Sen. Menendez's request, as well as the responses, may be discoverable in the event of subsequent employment litigation despite assurances from Sen. Menendez that he will keep responses confidential.

Congressional Oversight

- Though Sen. Menendez's request is personal, not a request or subpoena from a Senate committee or sub-committee, responding companies should anticipate the possibility that a Senate or House committee might initiate hearings and solicit testimony after Sen. Menendez releases the survey result or discloses the names of unresponsive companies.
- Responding companies should work with their congressional liaison staff on the scope and timing of their responses, as well as on any privacy or other concerns.

Public Relations

- Sen. Menendez has indicated he will call out companies that do not respond. For example, Sen. Menendez said in one media report that if a company opts out of the survey, "We're just going to simply say these companies didn't think enough of trying to help the Latino community come to an understanding of where the aggregate numbers are in terms of Latino representation" in companies. ([See article](#)).
- Companies proud of their diversity accomplishments might wish to publicize them, and companies that are still working toward their diversity goals should consider the pros and cons of providing context

in describing their diversity efforts.

- In any event, companies should develop a proactive plan in anticipation of the release of Sen. Menendez's report and for any congressional hearings, as well as any potential adverse media attention, legal action, or congressional scrutiny arising from their responses.

While Sen. Menendez's request is targeted at *Fortune* 500 companies, it may lead to broader efforts by congress or other interest groups to create greater corporate transparency on diversity issues. Orrick's [Employment Law](#) Practice Group has advised clients on the broad range of legal issues intertwined with diversity planning, affirmative action obligations and compliance under EEO laws. Our [Public Strategies and Crisis](#) Practice helps clients manage issues and crises at the intersection of law and investigations, media and public policy.

For more information about this alert please contact our employment law partners, [Mike Delikat](#), [Gary Siniscalco](#) or [Jill Rosenberg](#), or our public strategies and crisis partners, [Joshua Galper](#) or [Adam Goldberg](#).

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