

How Forward-Thinking Oregon Companies Can Avoid Implicit Bias

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By Jollee Patterson and P.K. Runkles Pearson

Companies everywhere are working hard to diversify their workforces and address workplace discrimination. This makes good ethical, financial and legal sense. Improving racial and gender diversity correlates directly with better financial success and more innovative ideas.

But what if your company's employees are *implicitly biased* — that is, they don't harbor bias consciously, but they are unconsciously prone to discriminating? Growing social science research shows that most of us harbor implicit bias, just as a growing number of courts are making new case law about the issue.

Courts can move slowly. But forward-thinking companies are already addressing implicit bias by identifying and mitigating the automatic stereotypes, feelings, and associations that most people have.

This is not easy: Implicit biases can be hard to identify and tough to overcome. We develop them over years, often as the result of personal experiences and cultural exposure. And, in fact, people often hold implicit biases that directly contradict their stated beliefs.

Consider a 2014 study about implicit bias¹. The study centered on a memo from a hypothetical young lawyer who graduated from a top law school. The memo intentionally included errors. Researchers sent the memo to a diverse group of 60 experienced attorneys as a "writing analysis study."

They told the half the attorneys the writer, "Thomas Meyer," was Caucasian. They told the other half that "Thomas Meyer" was African-American. The result? The attorneys awarded significantly higher scores when they believed Thomas Meyer was Caucasian.

The attorneys caught far fewer of the grammatical and spelling errors for Caucasian Meyer.² The comments for Caucasian Meyer³? "Good analytical skills" and a "generally good writer." The comments for African-American Meyer? "Needs lots of work," "average at best," and "can't believe he went to NYU."

Employers often wonder whether it's possible to measure the extent of an individual's implicit bias. It is. The Implicit Association Test⁴ from Harvard University's Project Implicit is one of the most popular methods currently available. And the IAT can be eye-opening, because it confronts individuals with biases they may not have understood.

But there are legitimate criticisms of using the IAT in the workplace. While it is important to discuss implicit bias with employees, we do not advise that employers use the IAT or any implicit bias test of an employee as a factor in an employment investigation or decision. Such results could be evidence in future litigation.

This is important, because the theory of implicit bias is also appearing more frequently in court. Plaintiffs' lawyers use implicit bias to support employment discrimination claims, sometimes relying on expert witness testimony to argue that an employer made discriminatory decisions caused by implicit — and discriminatory — bias. Some courts have found that stereotypes and unconscious bias can be the cause of illegal discrimination, so we expect the reliance on implicit bias theories to continue to grow.

1 https://www.americanbar.org/news/abanews/aba-news-archives/2015/02/each_of_us_has_impli.html

2 <https://www.bizjournals.com/portland/search/results?q=Caucasian%20Meyer>

3 <https://www.bizjournals.com/portland/search/results?q=Caucasian%20Meyer>

4 <https://implicit.harvard.edu/implicit/india/takeatest.html>

What's a forward-thinking company to do?

Because implicit bias can affect the health and fairness of the workplace, and to mitigate risk, we advise employers to take concrete steps to address these concerns:

1. **Hire an experienced trainer.** Handle discussions of implicit bias with sensitivity, and have an experienced trainer lead such discussions. Skilled trainers can help employees realize how implicit bias impacts workplace decisions. Awareness of implicit bias is the first step towards neutralizing it.
2. **Consider how your workplace will address future concerns.** Questions and concerns related to implicit bias are likely to increase. How will you and other managers answer questions about implicit bias? Which concerns or complaints should you investigate? Would your company use methods like the IAT? Consider the answers to these questions before you are faced with them.
3. **Continue to support diversity and equity.** Continue to hire diverse employees (diversity) and support them in achieving their fair share in the workplace (equity). Encourage and support diverse employees in finding mentors or sponsors. Continue to support problem-solving to avoid and address misunderstandings and miscommunication. Work to change stereotypes about groups of people by ensuring there are positive images of diverse people in the workplace.
4. **Improve your hiring and performance review processes.** Create objective factors for evaluating employees, rather than relying on subjective factors like opinion or “fit.” Encourage as much transparency in hiring or promotion decisions as possible. Include diverse employees in these processes.
5. **Consider an internal audit.** Your own internal data can show if implicit bias may be impacting hiring, job assignments and promotions, and the data can improve your internal processes. But before you audit, have employment law counsel assist you. Legal advice can help you develop and conduct your audit and assess the results—and it can protect the audit under attorney-client privilege. Remember that audits and studies of implicit bias could become discoverable in future employment discrimination cases.

With appropriate care and planning, acknowledging and addressing implicit bias can be a powerful step towards a more fair and inclusive environment, and it sends a strong signal that you believe in opportunity for all employees.



Jollee Patterson works with a wide range of education and public institutions. She supports clients in a variety of areas including civil rights, constitutional issues, employment, Title IX, governance, public meetings and records, and policies and procedures.

Direct: 503.205.2390 | **Email:** jollee.patterson@millernash.com



P.K. Runkles-Pearson represents employers and managers in litigation and before administrative bodies on a full array of employment issues, including discrimination, harassment, retaliation, accommodation, family/medical leaves, whistleblowing, wage and hour, and more.

Direct: 503.205.2314 | **Email:** pk.runkles-pearson@millernash.com