

Treading Carefully – Sustaining Diversity While Managing Legal Risks in Today’s Corporation Environment

In today’s business environment, Diversity, Equity, and Inclusion (DE&I) initiatives have become central to corporate strategies aimed at fostering innovation, enhancing workplace culture, and improving societal impact. However, shifting political, social, and economic dynamics—coupled with new legal challenges—are forcing organizations to rethink their DE&I strategies. As public and regulatory scrutiny increases, corporations are under pressure to balance their DE&I commitments with legal obligations, navigating a complex landscape of anti-DEI legislation and affirmative action rulings. Missteps can result in significant reputational, legal, and financial risks, making it critical for organizations to carefully assess and adapt their DE&I initiatives.

Corporate counsel are at the forefront of navigating the evolving legal frameworks surrounding DE&I, ensuring compliance with federal, state, and local laws while safeguarding their organizations from potential litigation. Several anti-discrimination laws directly affect DE&I practices, including Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, religion, sex (including sexual orientation and gender identity), and national origin in employment-related decisions. Another critical law is 42 U.S. Code §1981, commonly referred to as Section 1981, which prohibits race-based discrimination in the formation and enforcement of contracts, including employment agreements. Additionally, the Equal Protection Clause of the U.S. Constitution prohibits government entities from denying individuals equal protection under the law, frequently cited in challenges to public sector DE&I initiatives.

Many organizations implement targeted programs aimed at uplifting underrepresented groups, such as scholarships, grants, fellowships, internships, mentorships, and sponsorship programs. While these initiatives play a critical role in fostering diversity, they are increasingly targeted by anti-DEI lawsuits. These lawsuits often claim that targeted programs violate anti-discrimination laws by excluding certain demographic groups based on race, gender, or other protected characteristics. A recent lawsuit, for example, challenged an internship program offered by the National Museum of the American Latino, which limited eligibility to Latina, Latino, and Latinx students. Though the case was ultimately settled, it highlights the legal risks associated with such programs. Other types of lawsuits include:

Directors’ Duties: Balancing Fiduciary Obligations and DEI Goals

Corporate directors are bound by fiduciary duties of loyalty and care, requiring them to act in the best interests of the company and its shareholders. Critics of DEI programs argue that these initiatives, particularly diversity targets and quotas, may expose directors to claims of *breach of fiduciary duty* by:

- **Allegations of Reverse Discrimination:** Plaintiffs argue that setting diversity targets for leadership or board composition constitutes unlawful discrimination against non-minority candidates.

- **Shareholder Derivative Suits:** Shareholders may claim that DEI programs dilute merit-based hiring or promotion, leading to alleged losses in financial performance or shareholder value.

Diversity Targets: Quotas vs. Aspirational Goals

One of the most contentious areas of DEI litigation involves diversity targets. Plaintiffs often argue that such targets are thinly veiled quotas that violate anti-discrimination laws under Title VII of the Civil Rights Act or the Equal Protection Clause of the 14th Amendment.

Diversity Training: A Double-Edged Sword

Mandatory diversity training has become a common feature of workplace DEI programs. However, these trainings are increasingly being challenged under claims of compelled speech and religious discrimination.

- **Free Speech Challenges:** Some employees allege that DEI training forces them to adopt or endorse views they disagree with, violating their First Amendment rights in the public sector or analogous state laws in private employment.
- **Religious Accommodation Claims:** Employees may assert that certain DEI training content conflicts with their sincerely held religious beliefs, triggering protections under Title VII.

Freedom of Speech and Religion: Navigating Legal Protections

Anti-DEI lawsuits frequently invoke constitutional protections of free speech and religious freedom, particularly in public sector or government-affiliated organizations. Plaintiffs may argue that DEI policies suppress dissenting viewpoints or penalize employees for expressing religiously motivated objections.

Government Programs and School Admissions: Affirmative Action in the Crosshairs

The U.S. Supreme Court's decision in *Students for Fair Admissions v. Harvard* significantly curtailed the use of race-based affirmative action in college and university admissions. This precedent is now being leveraged to challenge similar DEI initiatives in government programs and public sector employment.

Workplace Discrimination: Managing the Fine Line

Finally, DEI programs themselves may give rise to workplace discrimination claims under Title VII, the Equal Pay Act, or similar state laws. These claims often allege that DEI initiatives result in preferential treatment or create a hostile work environment for majority group members.

Not all targeted programs are inherently risky. Organizations should conduct thorough risk assessments in collaboration with legal counsel and DEI leaders to determine the legal risk of the program, the potential impact of the program on diversity goals, and the reputational and operational risks of abandoning the initiative. If a program poses an unacceptably high legal risk, organizations can consider modifying it to reduce exposure.

Low-Risk Alternatives to Targeted Programs

Organizations can shift from high-risk targeted programs to legally safe alternatives that align with DE&I goals while minimizing legal exposure. One option is to shift from cohorts to content by opening eligibility to candidates of any background who demonstrate a commitment to the program's mission. For instance, a scholarship program originally restricted to women in STEM could be broadened to include all candidates with a demonstrated interest in advancing gender equity in STEM fields.

Another approach is to shift from cohorts to character by selecting participants based on their experiences and perspectives rather than their identity. Rather than selecting participants based on their identity, organizations can ask candidates to describe how their personal experiences—related to race, gender, or other aspects of identity—have shaped their perspective. Applicants might submit an essay on how their background has influenced their career goals or contributions to their community. This approach aligns with the Supreme Court's ruling in *Students for Fair Admissions v. Harvard*, which allows consideration of individual experiences without making decisions solely based on group identity.

The most legally risky DE&I initiatives involve what can be called the “Three Ps”: preference, protected group, and palpable benefit. A DE&I policy is high risk if it provides a preference or advantage to a specific group, if that group is legally protected, and if the preference involves a tangible benefit such as hiring, promotion, or financial support. Organizations can mitigate risk by avoiding at least one of these elements. For instance, debiasing workplace systems by implementing structured interview processes and standardized performance evaluations can reduce bias without triggering legal concerns. Universal DE&I frameworks that promote psychological safety, allyship, and cultural competence benefit all employees regardless of demographic background and are typically considered low risk. Upskilling the workforce through training on inclusive leadership and assessing employees on DE&I competencies during performance evaluations is another effective strategy.

The Role of Outside Counsel: Risk Mitigation and Strategic Support

Outside counsel play a critical role in helping corporations navigate legal challenges while advancing DE&I initiatives. External legal advisors can assist organizations in aligning public DE&I commitments with internal practices that comply with anti-discrimination laws. They can also help develop communication strategies that highlight inclusive practices without exposing the organization to legal risks.

Outside counsel can assist in designing comprehensive compliance programs that align with Title VII, Section 1981, and other relevant laws. These programs may include anti-bias training for

decision-makers, monitoring DE&I progress, and ensuring transparency and accountability. Additionally, outside counsel can offer strategic advice on managing the legal and reputational risks associated with DE&I initiatives, including defending against potential lawsuits.

Proactive Approaches to Fostering Diversity

Despite legal challenges, organizations can continue to advance DE&I through innovative and legally sound strategies. DE&I is not just a compliance issue—it is a strategic asset that enhances reputation, strengthens relationships with clients, customers, and stakeholders, attracts and retains diverse talent, and fosters innovation.

To maintain a positive workplace culture, organizations should communicate the importance of DE&I to all stakeholders, demonstrate leadership commitment through visible actions, and foster collaboration across HR, compliance, and legal teams. Organizations can also leverage DE&I as a competitive advantage by aligning corporate values with inclusive practices, developing fair and transparent recruitment and promotion processes, and supporting community organizations focused on DE&I issues.

Conclusion

As the legal landscape continues to evolve, organizations must carefully balance their DE&I goals with compliance obligations. By conducting thorough risk assessments, adopting low-risk alternatives, and leveraging the expertise of legal counsel, companies can promote diversity, mitigate legal risks, and position themselves for long-term success in an increasingly diverse and dynamic marketplace.