Morgan Lewis

REPORT

DEI AND BEST PRACTICES IN CORPORATE AMERICA

HARVARD/UNC ONE YEAR LATER

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DEI AND BEST PRACTICES IN CORPORATE AMERICA: HARVARD/UNC ONE YEAR LATER

All eyes were on the US Supreme Court in June 2023 as the justices were poised to issue their decision in *Students for Fair Admissions v. Harvard & UNC*. As colleges and universities awaited the decision and wondered what it would mean for their admissions programs, many others were watching to see what impact the decision would have on diversity, equity, and inclusion (DEI) more broadly.

Ultimately, the Supreme Court held that race-conscious admissions policies fail strict scrutiny and thus violate the Equal Protection Clause and Title VI of the Civil Rights Act. While the opinion was limited to higher education, the Court's analysis has emboldened legal advocacy groups to challenge race-conscious decision-making in other contexts, including corporate DEI programs.

As the first anniversary of the decision approaches, we examine recent legal developments related to corporate DEI efforts and offer considerations for companies that wish to assess their DEI programs, understand their legal exposure, and implement mitigation strategies. Though this report is current as of the date of publication, the law is quickly evolving. Companies should consult with legal counsel regarding any developments after the publication date.

LITIGATION TRENDS

Recent lawsuits filed against corporations and others challenging DEI have largely been brought under two laws, Title VII of the Civil Rights Act of 1964 (Title VII) and Section 1981 of the Civil Rights Act of 1866 (Section 1981). Title VII is the main federal law that prohibits discrimination on the basis of race, color, gender, national origin, and religion (protected characteristics) in employment. Section 1981, drafted in the wake of the Civil War, prohibits discrimination on the basis of race in contracting. Challenges against federal, state, and local programs have also been based on the Equal Protection Clause.

Most of the lawsuits filed after *Harvard/UNC* have challenged (1) selections or decision-making or (2) preferential treatment or benefits based on race or other protected characteristics. In the corporate sector, these have included challenges to employment practices, grantmaking, and governance.

Employment

More than 200 employment-related "reverse discrimination" lawsuits have been filed since *Harvard/UNC*. In general, they challenge five types of actions or programs: failure to hire, failure to promote, or termination based on a protected characteristic; diversity internship or fellowship programs; targeted hiring programs; aspirational goals; and training programs.

Failure to hire, failure to promote, or termination based on a protected characteristic

Title VII has always prohibited discrimination on the basis of race and other protected characteristics, and white and male plaintiffs have filed Title VII discrimination claims for many years. Such cases, however, have increased since *Harvard/UNC*. Moreover, at least one case has been pled as a putative class action rather than a single-plaintiff case. In that case, plaintiffs alleged that a media company implemented a "reverse race discrimination policy" that resulted in the termination of nonminority employees.[1]

[1] *Bradley v. Gannett Co. Inc.*

Diversity internship or fellowship programs

Many corporate and private sector employers have developed diversity internship or fellowship programs to increase the pipeline of diverse candidates. Legal advocacy groups have challenged a number of these programs, alleging that they are race exclusive. For example, three law firms with allegedly race-exclusive diversity fellowship programs were sued by American Alliance for Equal Rights (AAER), an organization led by Edward Blum, the same person who leads Students for Fair Admissions.[2]

Targeted hiring programs

Similar to diversity fellowships, targeted hiring programs are designed to remove barriers to employment for candidates whose backgrounds are underrepresented in an industry or workforce. In one recently filed case, the plaintiff alleged that a television production company's efforts to diversify its writers' rooms violate Title VII and/or Section 1981.[3]

Aspirational goals

In an effort to increase diverse representation, many companies have also implemented aspirational representation goals, and sometimes have tied those goals to performance management measures or executive compensation. These goals are often characterized as "quotas" by anti-DEI advocates, who are challenging them in a number of contexts.

For example, in a case against a large pharmaceutical company, the plaintiff alleged that the company's "DEI program mandated a company-wide goal to realign its workforce by eliminating its older Caucasian male employees."

And in a case against an insurance company, the plaintiff is alleging failure to promote because, among other things, the company allegedly had a goal to "double the representation of people of color in senior leadership from 10% to 20% by the end of 2025," which they claim demonstrated an intent to favor individuals who were not white.

Training

A number of recent cases involve allegations that DEI training programs created hostile work environments. For example, in a case against a large university, a professor alleged that his employer created a hostile work environment by requiring him to participate in anti-racism trainings and meetings that allegedly included a video training titled "White Teachers Are a Problem" and a meeting on "antiracist pedagogy," which he alleged endorsed more lenient grading standards on the basis of race.[4]

EEOC Complaints

There also has been an uptick in highly publicized Equal Employment Opportunity Commission (EEOC) complaints against corporate DEI programs. Since the *Harvard/UNC* ruling, America First Legal (AFL), a conservative legal advocacy group, has requested that the EEOC investigate more than 18 major companies and organizations. It is important to note, however, that the AFL letters have no legal import. Rather, they are simply requests to EEOC commissioners to initiate commissioner charges, which commissioners are authorized but not required to do. Since the existence of a charge is confidential

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[2] *AAER v. Morrison & Foerster; AAER v. Perkins Coie; AAER v. Winston & Strawn. See also AAER v. Zamanillo.*

[3] *Beneker v. CBS Studios Inc.*

[4] *De Piero v. Pa. State Univ.*

under Title VII, it is not known whether any charges have been filed or investigations launched as a result of AFL's requests.

Race-Exclusive Grantmaking

Employment practices are not the only corporate practices being challenged. In the grantmaking context, plaintiffs have filed several cases arguing that philanthropic grants (including those made by corporate foundations) create contractual relationships between the grantor and grantee, thus allegedly bringing the grants within the scope of Section 1981. For example, in one of the first anti-DEI cases filed after the *Harvard/UNC* decision, plaintiffs alleged that a foundation violated Section 1981 by operating a grant program that offers $20,000 grants solely to Black women who are small business owners.[5] In a similar case filed by AFL, a plaintiff alleged an insurance company's grant program, which helps small Black-owned businesses purchase commercial vehicles, discriminated against him on the basis of his race.

Similar challenges also have been filed against state and local government grant programs under the Equal Protection Clause. While these cases are constitutional challenges, the courts' analyses in these cases could impact how courts analyze and apply Section 1981 to corporate grantmaking.

Corporate Governance

In recent years, pro-DEI shareholders have used litigation and proxy proposals to hold companies accountable for their DEI commitments. More recently, anti-DEI advocates have started to use similar strategies to challenge corporate DEI commitments.

In a case against a food and beverage retailer, plaintiff shareholders sought a declaratory judgment to stop the company from implementing its DEI programs and policies, including aspirational representation goals, a Board Diversity Action Alliance, and a diverse supplier program.[6] In another case, plaintiff shareholders challenged a retailer's LGBT Pride campaign.[7]

In addition to sending letters to the EEOC, AFL has started challenging corporate DEI programs by sending letters directly to boards of directors. These letters allege fiduciary duty breaches and federal securities law violations based on alleged civil rights violations in employment and contracting.

RECENT DEVELOPMENTS

The law regarding corporate DEI practices is evolving rapidly. Those interested in advancing DEI while mitigating legal risk will need to monitor developments closely. Based on a review of recent court decisions, some early themes have emerged.

Courts Disagree About Whether Advocacy Groups Have Standing to Challenge DEI Programs

Numerous organizations are challenging corporate DEI practices without identifying individuals who allegedly have been harmed. Recently, the Second and Eleventh Circuits have reached opposite conclusions regarding advocacy groups' associational standing to sue on behalf of unnamed, pseudonymous members.

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[5] *AAER v. Fearless Fund.*

[6] *Nat'l Ctr. for Pub. Policy Research v. Schultz.*

[7] *Craig v. Target Corp.*

In a case against a large pharmaceutical company, the Second Circuit held that an advocacy organization plaintiff lacked associational standing because it failed to identify any of its individual members who were harmed by the challenged policy by name, rather than by pseudonym.[8] The Eleventh Circuit, however, held that an advocacy organization plaintiff had standing in a case against a charitable foundation where it identified plaintiffs by pseudonym only.[9] Whether other circuits follow the Second or Eleventh Circuit's lead will have a significant effect on the ease or difficulty with which these advocacy groups can bring these cases.

In April 2024, a US district court dismissed for lack of standing a putative class action alleging an ecommerce company's diversity grant program available to eligible delivery service providers violates Section 1981. The plaintiff alleged the grant program deterred them from applying to become a delivery service provider for the company because, as a white woman, she would be ineligible to receive a stipend of $10,000 via the diversity grant program. However, the court found that because the plaintiff "willingly refused to apply to the [diversity grant] program, she has not satisfied the general standing requirement that a plaintiff submit to a policy before bringing an action to challenge it."[10] In May 2024, a different district court dismissed for lack of standing another putative class action challenging the same program.[11]

Also in May 2024, a district court dismissed for lack of standing a putative class action against an automobile insurance company that offered 10 grants to Black-owned small businesses. The plaintiffs, who never applied for the program, sought damages for a grant program that closed before the suit was commenced, and injunctive relief against a program that had already ended, and which the defendant had no intention of renewing. The district court held the plaintiffs lacked standing to seek damages because they could not show that they would have been selected but for the challenged preference. The court held they lacked standing to seek injunctive relief because, with the grant program over and no plans for renewal, there was no imminent threat of future injury.

One Circuit Court Has Held that Charitable Grantmaking Is Not Expressive Conduct Protected by the First Amendment

A possible defense to Section 1981 claims challenging race-based grantmaking is that charitable grantmaking is expressive conduct protected by the First Amendment and thus not subject to Section 1981 challenges. In *AAER v. Fearless Fund*, the district court held that the First Amendment likely applies to the Fearless Foundation's Fearless Strivers Grant Program for Black women entrepreneurs, denying AAER's motion for preliminary injunction on that basis.[12] However, AAER appealed the district court's decision to the Eleventh Circuit, and the court held that although the First Amendment protects "expressive conduct," "it does not protect the act of discriminating based on race."[13]

The court distinguished the Fearless Foundation's Grant Program from *303 Creative*, in which the Supreme Court held that a wedding website designer had a First Amendment right to refuse to create wedding websites for same-sex couples, notwithstanding a state antidiscrimination law that prohibits discrimination based on sexual orientation. The Court held that the wedding website designer in *303 Creative* had not claimed a right to refuse to serve same-sex couples entirely, but only refused to create their wedding websites. In this regard, the Court held, the First Amendment only protected her from

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[8] *Do No Harm v. Pfizer.*

[9] *AAER v. Fearless Fund.*

[10] *Bolduc v. Amazon.com Inc.*

[11] *Alexandre v. Amazon.com Inc.*

[12] *AAER v. Fearless Fund* (N.D. Ga. decision).

[13] *AAER v. Fearless Fund* (Eleventh Circuit decision).

having to express a certain message with which she disagreed, as opposed to protecting her from having to serve a particular customer based on their protected characteristics.

The Court said that the Grant Program was more analogous to *Runyon v. McCrary*, in which the Supreme Court held that a private school's First Amendment right to freedom of association did not permit the school to deny admission to students of color because even if "invidious private discrimination may be characterized as freedom of association," it has never been accorded "affirmative constitutional protections."

Private Employer DEI Trainings Are Protected by the First Amendment But Might Be Susceptible to Challenge Under a Hostile Work Environment Theory

The Eleventh Circuit held that Florida's so-called Stop WOKE Act, which placed strict limitations on the topics private employers in Florida could discuss at DEI trainings, violates the First Amendment because it regulates private speech.[14] This decision could have a chilling effect on other states considering enacting similar laws. It does not, however, impact state laws regulating training in public universities or government agencies. Nor does it affect Title VII cases alleging that DEI training can create a hostile work environment.

Indeed, the Tenth Circuit recently acknowledged that DEI training could contribute to a hostile work environment in violation of Title VII.[15] The court held that a single training was neither severe nor pervasive and thus did not create a hostile work environment. However, the court went on to note:

> Mr. Young's objections to the contents of the DEI training are not unreasonable: the racial subject matter and ideological messaging in the training is troubling on many levels. As other courts have recognized, race-based training programs can create hostile workplaces when official policy is combined with ongoing stereotyping and explicit or implicit expectations of discriminatory treatment. The rhetoric of these programs sets the stage for actionable misconduct by organizations that employ them.

Some district courts are denying motions to dismiss hostile work environment claims based on workplace training and allowing those claims to proceed to discovery.[16] These decisions suggest that Title VII challenges to DEI training may be viable if plaintiffs sufficiently allege that the training, particularly when combined with other conduct, creates a hostile work environment.

At Least One Circuit Court Has Found DEI Programs Can Be Used as Circumstantial Evidence of Discriminatory Decision-Making

The Fourth Circuit recently upheld a multimillion-dollar jury verdict and found that evidence about the context surrounding plaintiff's termination supported the jury's conclusion that plaintiff's "race, sex, or both motivated [defendant's] decision to fire him."[17]

The court noted that the plaintiff "was fired in the middle of a widescale D&I initiative . . . which sought to 'embed diversity and inclusion' throughout the company." It highlighted the fact that the company sought to achieve this goal by benchmarking its DEI levels and developing DEI metrics, "committing to

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[14] *Honeyfund.com Inc. v. DeSantis.*

[15] *Young v. Colorado Dep't of Corrections.*

[16] *De Piero v. Pa. State Univ.*

[17] *Duvall v. Novant Health.*

'adding additional dimensions of diversity to the executive and senior leadership teams,'" and "evaluating the success of its efforts and identifying and closing any remaining diversity gaps."

The court also noted that there was an increase in diverse workers and leaders and a decrease in white workers and leaders over the life of the DEI plan. Finally, it highlighted implementation of a financial incentive plan that tied executive bonuses to closing gaps in the Hispanic and Asian workforce and found that "a jury could reasonably see these race-based bonuses as a formal recognition of a preexisting policy of using race in decision-making."

The Federal Government's Presumption of Social Disadvantage Based on Race May Violate the Equal Protection Clause

In cases challenging government programs, two district courts cited the *Harvard/UNC* decision and enjoined presumptions of social disadvantage based on race under the Equal Protection Clause.

Under the statute authorizing the Minority Business Development Agency, certain racial demographic groups—including Black or African American, Hispanic or Latino, American Indian or Alaska Native, Asian, and Native Hawaiian or other Pacific Islanders—were presumed to be socially disadvantaged and thus eligible for the agency's programs. While finding that combatting racial disparities in federal contracting was a compelling government interest, the district court in *Nuziard v. Minority Business Development Agency* held that the racial presumption was not sufficiently narrowly tailored to further that interest. The court found that the presumption was both under- and overinclusive, arbitrarily excluding certain minority businesses, such as those owned by individuals from the Middle East, North Africa, and North Asia, while at the same time including many groups in the presumption despite there being no evidence in the record of those groups being systemically excluded from public contracting. The court also noted that the presumption was based on racial stereotypes and had no logical endpoint.

Similarly, the Small Business Administration used a "rebuttable presumption" that certain racial groups are socially disadvantaged for purposes of qualifying for the Section 8(a) Business Development program. As in *Nuziard,* the district court in *Ultima Services Corp. v. Dep't of Agriculture* found that even if there was a compelling interest for the presumption, it was not narrowly tailored. The court noted that the lack of specific remedial objectives "shows that the Defendants are not using the rebuttable presumption in a narrow or precise manner." It also found that the rebuttable presumption was overinclusive because "the rebuttable presumption sweeps broadly by including anyone from the specified minority groups, regardless of the industry in which they operate" and underinclusive because "certain groups that could qualify will be left out of the presumption."

While these cases challenged government programs, they highlight some courts' skepticism of any race-based eligibility criteria.

Race-Neutral DEI Programs Designed to Advance Racial Diversity Without the Use of Race-Based Decisions Remain Viable

In *Coalition for TJ v. Fairfax County School Board,* plaintiffs alleged that a public magnet high school violated the Equal Protection Clause by considering "experience factors"—such as family income and attendance at an underrepresented middle school—when admitting students.

Although the high school did not consider race when admitting students, the plaintiffs alleged that the high school still engaged in discrimination because it considered race-neutral criteria that it knew would result in a more racially diverse class. The Fourth Circuit rejected that argument and ruled that the school district's policy was lawful. The Supreme Court declined to consider the case, thus ending (for now) the claim that using race-neutral programs to further diversity is unlawful. Plaintiffs, however, continue to challenge similar programs in other contexts.

At Least One District Court Has Expressed Skepticism Toward Shareholder Actions Filed by Anti-DEI Advocates

In a shareholder derivative action challenging a company's DEI initiatives, the district court ruled against the plaintiff public interest law firm, concluding that their actions were politically motivated and did not fairly and adequately represent the interests of the corporation or its shareholders.[18] The opinion noted that "courts of law have no business involving themselves with reasonable and legal decisions made by the board of directors of public corporations." It further noted that the plaintiff owned only 56 shares of company stock and did not file the action to enforce the company's interests, but rather "its own political and public policy agendas." The judge concluded his opinion by explaining that "[i]f Plaintiff remains so concerned with [the company's] DEI and ESG initiatives and programs, the American version of capitalism allows them to freely reallocate their capital elsewhere."

DEI Programs Might Be More Susceptible to Challenge Under Title VII

On April 17, 2024, the Supreme Court held in *Muldrow v. City of St. Louis* that to make out a Title VII discrimination claim, a plaintiff must show that a discriminatory employment decision caused "some harm" to the terms or conditions of the plaintiff's employment, although the harm need not be significant.

While the facts of *Muldrow* involved a job transfer, we can expect litigants to argue that the same analysis applies to any Title VII case involving a decision that allegedly impacts the terms, conditions, or privileges of employment. As a result, even though DEI programs do not cause material harm to those who do not participate in them, we expect certain litigants to argue that an employee's ineligibility for a DEI program is enough of a harm, under *Muldrow*, to support a *prima facie* Title VII claim.

Another recent decision, *Ames v. Ohio Dep't of Youth Services,* held that in a reverse discrimination lawsuit, the plaintiff must demonstrate "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority."[19]

The test, which is applied in some circuits but not others, requires an evidentiary showing that a member of the relevant minority group made the allegedly discriminatory decision or that there is a pattern of discrimination against members of the majority. Given the circuit split, *Ames* is seeking Supreme Court review of the Sixth Circuit's decision. *If* the Court decides to grant certiorari, and *if* the Court strikes down the background circumstances test, it might become easier to challenge DEI programs in the circuits in which the test is currently applied.

As noted above, the decisions discussed here are early ones in a rapidly evolving area of law. But as companies chart their path forward, they provide at least some guideposts.

DEI AUDITS & ASSESSMENTS

As evidenced by the above discussion regarding litigation trends, implementing DEI programs and strategies is not without risk. But neither is pulling away from DEI altogether.

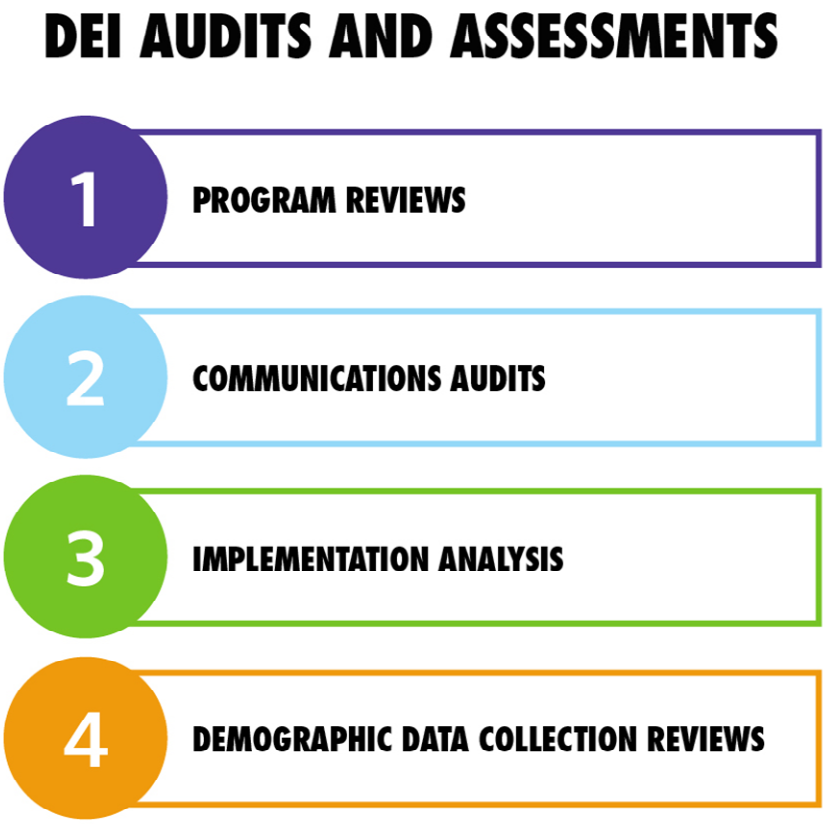
On the one hand, DEI programs and strategies can raise the risk of a reverse discrimination lawsuit and related publicity, especially in the current legal and political climate. But appearing to back away from DEI commitments can raise the risk of a traditional discrimination lawsuit, criticism from internal and external

[18] *Nat'l Ctr. for Pub. Policy Research v. Schultz.*

[19] *Ames v. Ohio Dep't of Youth Services.*

stakeholders, and related reputational harm. As a result, companies should be mindful of their legal exposure and determine how much risk, if any, they are willing to take on—and in which direction.

Before taking any action, companies should consider conducting a comprehensive and privileged review of their DEI programs, policies, procedures, and practices, under the direction of legal counsel. This review consists of both an audit, or collection of information, and assessment of legal risk.



A DEI audit can include the following features:

Program Reviews

Program reviews identify all DEI initiatives and programming across all business lines and support functions. This includes not only the DEI department, but talent acquisition, human resources, talent development and engagement, procurement, corporate philanthropy, and, where appropriate, investment, to ensure the review captures the full range of DEI programming at the company. Program reviews also look at DEI programs initiated at the business level.

Communications Audits

Communications audits review all documents and communications that address DEI programs. This includes public-facing materials, such as a company's website, proxy statement, 10-K, ESG/sustainability

report, and DEI report. It also includes internal materials, such as announcements of new programs, training materials, data dashboards, internal newsletters, and even email communications. Such audits look for language that suggests the existence of decision-making based on race or other protected characteristics—even when that might not actually be the case—as such language can raise the risk profile.

Implementation Analysis

In addition to reviewing program materials and communications, it is important to understand how employees are implementing the programs. For instance, if a program is described as race neutral, but in practice gives preference to one or more racial groups, there would still be legal risk despite what the official documents say. An implementation analysis gathers information by speaking with program administrators and determining whether their actions align with written policies and procedures. For larger programs, it also audits documentation on how hiring, promotion, grantmaking, procurement, and investment decisions are actually made.

Demographic Data Collection Reviews

Demographic data collection reviews look at the type of data that the company collects, as well as how it is analyzed, with whom it is shared, and how it is used. For example, benchmarks used to track progress toward aspirational goals can create legal risk if the goals are not realistic and achievable based on current representation, available talent pools, and predicted growth and attrition.

Characterizing progress toward goals as red, yellow, or green or tying executive compensation to the achievement of goals can also create risk to the extent that the goals are perceived as favoring certain groups or incentivizing managers to make decisions based on protected status to meet the goals. Finally, data should be reviewed to determine whether there is a statistical underrepresentation of any demographic group as such an underrepresentation can be used to support certain DEI initiatives.

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After gathering a complete picture of the company's DEI programs, communications, implementation, and data, companies should, under the direction of legal counsel, determine whether such programs pose low, moderate, or high legal risk under Title VII and/or Section 1981. Risk assessments are highly fact-specific and should be conducted on an individualized basis, in consultation with legal counsel.

STEPS TO MITIGATE RISK

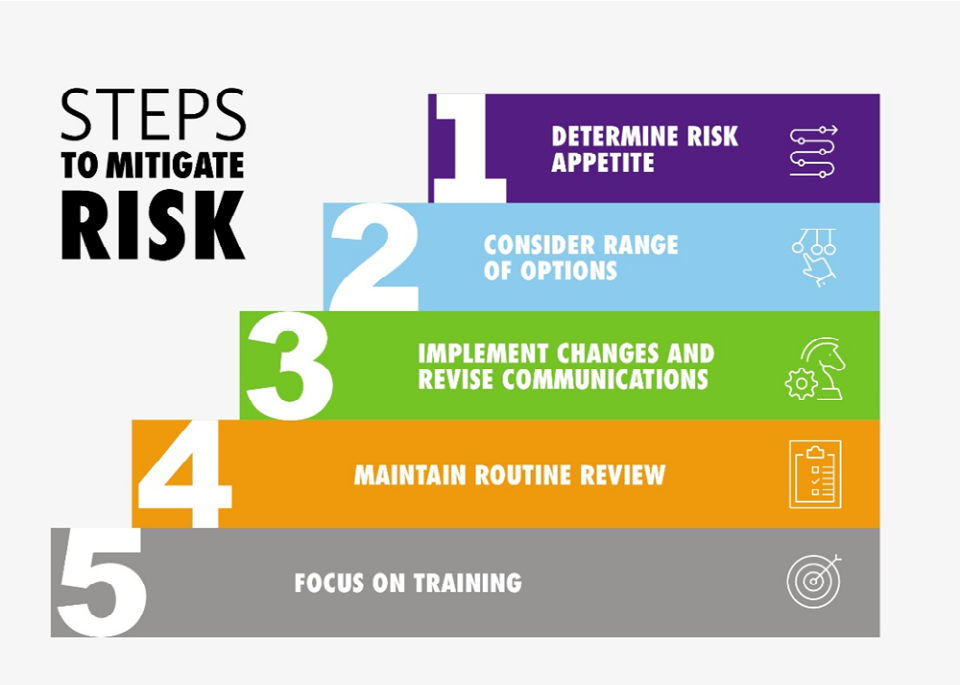
Based on the risk audit and assessment, companies should decide how best to mitigate risk. This generally includes the following steps.

Determine Risk Appetite

Before making changes to or adopting new DEI programming, companies and other organizations should seek legal counsel on the current state and direction of DEI as an appropriate and important business strategy and assess the risk appetite and how such changes or new programming will impact all stakeholders, invite legal challenge, affect corporate strategy, and influence reputation and brand.

Consider a Range of Options

Based on a company's risk appetite, DEI leadership—in consultation with company leadership and legal counsel—can select from a variety of mitigation options, ranging from making no changes at all to modifying the program or its eligibility criteria or completely revamping the program. At a minimum, companies should consider mitigating any unnecessary risk.



Implement Changes & Revise Communications

If changes are implemented, they should be accompanied by updates to messaging and communications, both internal and external. Communications that create unnecessary risk (for example, communications that do not match how programs are actually implemented or that send the wrong message) should be changed as well.

Maintain Routine Review

Companies can establish a system for periodically reviewing internal and external messaging about their DEI programs, including public filings, websites, social media, press coverage, and other reports. A centralized and cohesive understanding of the company's public messaging will be particularly helpful if executives face questions about their DEI programs.

Focus on Training

Once revisions have been made, companies should conduct training to ensure that program owners are implementing their programs in accordance with written policies. In addition to providing training if a program is updated, companies should schedule trainings on a periodic basis to ensure that employees are following proper procedures and that any new employees are being properly trained. Trainings should also address communications to ensure that all messaging is consistent. C-suite executives and boards should also receive training on these topics as appropriate.

NEXT STEPS

These are tumultuous times. Plaintiffs are using laws initially designed to protect minorities and women to challenge programs designed to level the playing field. While these challenges have changed the calculus, the law is still evolving, and much remains unknown regarding how the law will develop.

Fortunately, there are several steps companies can take to prepare for any potential legal challenges. First, companies should continue to monitor the law as it evolves and be prepared to adjust their programs as necessary. Second, companies should audit and assess their range of DEI programs and, in consultation with leadership and their boards of directors, determine their risk appetite. From there, companies can select from a variety of options that allow them to continue achieving their goals while mitigating the legal risk.

These aren't the first legal and political headwinds DEI programs have faced, and they will not be the last. But for companies committed to advancing DEI objectives, there is a path forward.

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