



## As Attacks on DEI Programs Continue, Employers Should Review and Revise Diversity Initiatives

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*Foster Swift Labor & Employment Law News E-blast*

December 20, 2023

Since our last update on emerging legal challenges to workplace Diversity, Equity and Inclusion (DEI) initiatives, the drumbeat of DEI criticism has grown louder with an accompanying increase in the number of official complaints and lawsuits being voiced or filed by a range of anti-DEI actors.

The primary catalyst for this current wave of attacks on diversity initiatives was the June 2023 U.S. Supreme Court decision that affirmative action used in admissions policies at Harvard University and University of North Carolina was unconstitutional and banned its use in college admissions. (*Students for Fair Admissions (SFFA) vs. Harvard and SFFA vs. University of North Carolina*)

U.S. Equal Employment Opportunity Commission (EEOC) Chair Charlotte Burrows anticipated the chilling effect the high court's ruling would have on workplace DEI programs and took the unusual step of directly addressing those concerns a few days after the decision.

"This ruling does not address employer efforts to foster diverse and inclusive workforces...It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace," noted Burrows.

### **Anti-DEI Fallout from SCOTUS Ruling**

Despite this clear reassurance from EEOC Chair Burrows, the prevailing pushback against DEI efforts began shortly after the ruling was announced and has continued. Dozens of federal lawsuits and related complaints have been filed or voiced since June targeting alleged unconstitutional DEI programs. They include:

- *Constitutional Alliance vs. U.S. Dept. of Agriculture* – This federal lawsuit challenges the USDA's use of diversity, equity and inclusion factors in its grant selection process, arguing it violates the equal protection clause of the Fifth Amendment.

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- *America First Legal vs. Macy's, NASCAR, McDonalds, Starbucks, etc.* – America First Legal, led by ex-Trump advisor Stephen Miller, has asked the EEOC to investigate more than two dozen Fortune 500 companies and respond to its allegations that their DEI programs violate Title VII of the 1964 Civil Rights Act ban against race discrimination.
- *American Alliance for Equal Rights (AAER) vs. Winston & Strawn, Mayer Brown, Morrison Foerster, Perkins Coie, O'Melveny, Winston & Strawn, etc.* – AAER has filed suit against these six Top 50 U.S. law firms and EEOC complaints against others alleging that their DEI initiatives are unconstitutional.
- *Harker vs. Meta Platforms (Facebook)* – James Harker, an advertising production professional, filed suit alleging that Meta's advertising production apprenticeship program was discriminatory and he was denied work opportunities that the defendant had reserved for candidates of color.

### **What Should Employers Do About Their DEI Programs Now?**

Since the pace of inquiries and lawsuits targeting diversity programs began to spike, employers are asking pointed questions about the legitimacy and value of their DEI initiatives – and rightly so. The idea of having to defend your diversity program from the hassle and expensive distraction of a legal challenge is not a pleasant one.

But recent studies on the value of DEI conducted by Pew Research Center, McKinsey & Company and Bridge Partners strongly suggest that diversity initiatives clearly improve company culture, increase business success and enjoy strong support from stakeholders. DEI is worth defending.

Toward that end, there are several protective measures that employers can take to minimize risk and shield their DEI-related policies and programs from legal challenges:

- **Conduct a Thorough Legal Review** – Engage legal counsel specialized in employment and civil rights law to review all DEI programs to identify and address potential legal vulnerabilities, especially any initiatives that might favor specific groups based on protected characteristics or intentionally disadvantage certain groups – even if neutrality is intended.
- **Promote Transparency and Communication** – Clearly and consistently communicate DEI goals, programs and diversity policies to all employees and stakeholders. Regularly assess the effectiveness of DEI programs and establish an accessible, threat-free complaint process for addressing concerns about discrimination or unfairness.
- **Train Employees in Diversity and Inclusion** – Provide mandatory training for new and current workers on unconscious bias, cultural competency and inclusive behaviors. Encourage open dialogue about diversity and inclusion issues. Foster a culture of mutual respect and appreciation for individual differences.
- **Stay Informed and Adapt** – Be aware of the continually evolving legal and political landscape and case law pertaining to DEI. Undertake ongoing reviews of diversity initiatives and update policies and programs to reflect the latest legal developments and best practices.



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To be sure, there's a mountain of evidence that DEI initiatives are an overwhelming net positive for employers. But increasing politicization of DEI concepts may lead to further resistance from anti-DEI interests. Combating this pushback will require continued diligence and the development of a nimble, adaptive strategy to maintain and grow support for your DEI efforts.

*Foster Swift attorneys continuously monitor legal decisions and related developments relating to workplace DEI programs and the ongoing debate over diversity initiatives.*

*If you have general questions or specific concerns about your DEI activities, please contact Cliff Hammond ([chammond@fosterswift.com](mailto:chammond@fosterswift.com) | 248-538-6324) of our Employment Services Practice Group or Ray Littleton ([rlittleton@fosterswift.com](mailto:rlittleton@fosterswift.com) | 248-539-9903) with our Litigation Practice Group.*