



Meltzer Center
for Diversity, Inclusion,
and Belonging
NYU School of Law

HOW TO DEFEND INCLUSIVE PROGRAMS

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THE AFTERMATH OF *STUDENTS FOR FAIR ADMISSIONS*

DEI under siege: Why more businesses are being accused of 'reverse discrimination'

 [Jessica Guynn](#)
USA TODAY

Corporate America Tweaks Diversity Initiatives Amid Pushback

Legal pressure and other criticisms have led to a quiet rethinking of the programs

By [Richard Vanderford](#)

Wall Street Banks Begin a DEI Retreat as Fear of Backlash Looms

HOME • NEWS

Despite Some People's Death Wish, DEI Is Still Here

The Legal Assault on Corporate Diversity Efforts Has Begun

Conservative groups are challenging Amazon, Comcast and others using many of the same arguments that boosted minority representation in the workforce.

Jan 10, 2024 - Business

Executives say they're still committed to DEI, new survey finds



Emily Peck, author of [Axios Markets](#)



RELEVANT LAW

Laws at issue in *SFFA*

Equal Protection Clause: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

Title VI: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

Laws affecting workplace DEI

Title VII: “It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.”

42 U.S. Code § 1981: “All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and to the full and equal benefit of all laws . . . as is enjoyed by white citizens.”



THE THREE P_s OF LEGAL RISK



EXAMPLES OF RED PROGRAMS

PROGRAM	DOES IT CONFER A PREFERENCE?	ON A PROTECTED GROUP?	WITH RESPECT TO PALPABLE BENEFITS?
Hiring quotas (“make sure at least 45% of our incoming hires are women”)	YES	YES	YES
Tiebreaker decision-making (“if you’re choosing between two similarly strong candidates and one is white and the other is a person of color, pick the person of color”)	YES	YES	YES
Group-specific internships and fellowships (“let’s create an internship that limits eligibility to Black and Latinx/a/e/o talent”)	YES	YES	YES
Tying manager compensation to diversity goals (“you will get a bonus if you hire more women and people of color on your team”)	PROBABLY YES	YES	YES



EXAMPLES OF GREEN PROGRAMS

PROGRAM	DOES IT CONFER A PREFERENCE?	ON A PROTECTED GROUP?	WITH RESPECT TO PALPABLE BENEFITS?
Developing merit-based hiring criteria and adopting structured interviews to reduce bias in recruitment	NO	NO	YES
Offering a leadership development program to employees of any background who have a commitment to DEI and pass a competitive selection process	YES	NO	YES
Celebrating heritage months through events, volunteer opportunities, and book clubs	NO	YES	NO



EXAMPLES OF **YELLOW** PROGRAMS

PROGRAM	DOES IT CONFER A PREFERENCE?	ON A PROTECTED GROUP?	WITH RESPECT TO PALPABLE BENEFITS?
Giving preference to groups that could be considered proxies for race	YES	MAYBE	YES
Diverse slate requirements	YES	YES	MAYBE
Diversity targets	MAYBE	YES	YES



DEI RISK ASSESSMENT

CONSIDER RISK

- Conduct a self-audit with legal counsel to divide programs into risk zones of red, yellow, and green
- Factor in legal risks from the other side
- Factor in social risks from both sides

CONSIDER IMPACT

- Factor in the **impact** of the programs in achieving your DEI goals

DECIDE HOW TO PROCEED

- All things considered, decide whether to **maintain** the program with awareness of risk, **abandon** the program with awareness of risk, or **adjust** the program to safeguard it





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HOW TO ADJUST RISKY PROGRAMS

RECOMMENDED SHIFTS

MOST RISKY DEI

HOW TO MITIGATE RISK

CONFERRING PREFERENCES

AVOID PREFERENCES

- From **lifting to leveling**

ON PROTECTED GROUPS

AVOID PROTECTED GROUPS

- From **cohorts to content** (up-switching)
- From **cohorts to character** (down-switching)
- From **cohorts to cohorts** (side-switching)

WITH RESPECT TO PALPABLE
BENEFITS

AVOID PALPABLE BENEFITS

- From **adverse to ambient**




AVOIDING PREFERENCES (LIFTING TO LEVELING)


Rather than giving “preference” to some groups over others, think about DEI actions that are identity-neutral but help level the playing field, such as:



Creating a structured recruitment and promotion process with clear, transparent, merit-based criteria



Purging stereotypical language from job advertisements and evaluation processes



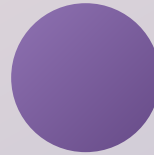
Reviewing employee benefits policies to ensure they are being applied equitably



Putting managers through unconscious bias training before they consider candidates

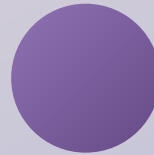


AVOIDING PROTECTED GROUPS



From cohorts to content (up-switching)

- Example: Expanding a racial equity program to welcome anyone who is committed to racial equity, regardless of their identity



From cohorts to character (down-switching)

- Example: Asking candidates to write an essay explaining "how race affected [their] life, be it through discrimination, inspiration, or otherwise"



From cohorts to cohorts (side-switching)

- Example: Developing initiatives that advance diversity and inclusion along lines of socioeconomic status, age, and disability



AVOIDING PALPABLE BENEFITS (ADVERSE TO AMBIENT)

Rather than directly affecting people's conditions of employment (e.g., hiring and promotion), think about DEI programs that improve the overall culture of the organization, such as:

Conducting employee education on topics such as bias, allyship, or inclusive leadership

Creating a more physically inclusive office environment, such as through all-gender bathrooms, nursing rooms, and childcare facilities

Building relationships with diverse professional groups (e.g., National Association of Black Accountants, Society of Hispanic Professional Engineers)

Support community organizations focused on DEI issues, such as through pro bono work and philanthropy





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THE FUTURE OF DEI

HOW TO STRENGTHEN DEI IN THE NEW LEGAL LANDSCAPE

Debias systems, drawing on *SFFA*: “Eliminating racial discrimination means eliminating all of it.”

Use universal frameworks, such as psychological safety, allyship, and authenticity

Upskill your workforce in **inclusive leadership** through education and DEI hours requirements



OTHER EXAMPLES OF LOW-RISK DEI WORK

- ✓ Invest in pipeline programs
 - ✓ Expand outreach to broaden candidate pools
 - ✓ Adopt pay transparency
 - ✓ Purge stereotypical language from job advertisements and other communications
 - ✓ Set clear and merit-based criteria for recruitment and promotion
 - ✓ Implement structured interviews
 - ✓ Adopt formal mentorship, sponsorship, and coaching programs with content-based criteria (commitment to DEI) rather than cohort-based restrictions
- ✓ Review employee benefits policies to ensure they are being applied equitably
 - ✓ Expand flexible work arrangements, parental leave, and childcare support
 - ✓ Reward contributions that disproportionately fall to women, such as office housework
 - ✓ Develop programs that advance diversity and inclusion along lines of socioeconomic status, age, and disability
 - ✓ Support community organizations focused on DEI issues, such as through pro bono work and philanthropy
 - ✓ Require decision-makers to undergo rigorous anti-bias training before making employment decisions



JUSTICE SOTOMAYOR (IN DISSENT)

“

Notwithstanding this Court's actions, however, society's progress toward equality cannot be permanently halted. Diversity is now a fundamental American value, housed in our varied and multicultural American community that only continues to grow. The pursuit of racial diversity will go on.

”





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Q&A