

Diversity matters: the four scary legal risks hiding in your DEI program

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Debates over Diversity, Equity and Inclusion (DEI) efforts are currently thriving, including debates over the degree to which corporate diversity efforts are valuable, whether chief diversity officers can succeed, and whether corporate diversity commitments can produce lasting change.

Over the past year, at least a dozen U.S. state legislatures have proposed or passed laws targeting DEI efforts, including laws aimed at limiting DEI roles and efforts in businesses and higher education and laws eliminating DEI spending, trainings, and statements at public institutions. Moreover, with the U.S. Supreme Court poised to address affirmative action in two cases involving the consideration of race in higher education admissions this summer, debates in the U.S. regarding DEI initiatives are likely far from over.

At the same time, DEI-related legal requirements continue to grow in other jurisdictions, and with global financial institutions facing expanding environmental, social, and governance (ESG)-related trends and regulations in the EU and other jurisdictions, as well as global expectations regarding their role in ESG, including DEI-related corporate developments and initiatives, these matters are likely to continue to work their way into capital allocations and the costs of doing business, as well as into the expectations of certain stakeholders.

This widening gap between global expectations and regulation regarding DEI-related matters and the concerns of some constituents in the U.S. over the role of DEI in corporate decision-making is likely to continue growing for the foreseeable future, putting companies between the proverbial rock and hard place.

What these developments make clear is that corporate DEI efforts are, and likely have been for some time, riskier than many companies may initially appreciate. And the risks associated with DEI initiatives are only positioned to grow and expand as companies look to thread the DEI needle and make a broader and potentially more divergent set of stakeholders happy, or at least less annoyed, with their DEI-related commitments and initiatives.

In this article, we discuss the top four legal risks that companies often fail to address in their DEI efforts.

1. Your DEI efforts have no meaningful compliance or legal oversight but are creating compliance and legal issues. Much like ESG more broadly, DEI and its related corporate initiatives have

often grown up outside of the central compliance functions of the company. For some organizations, their DEI efforts function more like a disparate collection of personal ideas and goals, rather than an organized department of the company.

Without any clear connection to an organization's legal, compliance, or human resources (HR) functions, DEI efforts can be busily creating goals and commitments that may or may not be achievable, statements that may or may not comply with the law, and a corporate record that is likely discoverable and possibly damning, in particular if discriminatory conduct is discovered through such efforts but no remedial action is taken. We address faulty goals, commitments, and statements in the second risk below; here we discuss the risk of creating a discoverable and possibly damning corporate record.

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To be clear: This article is not about how to hide legitimate discrimination or harassment-related claims. Hiding, or attempting to hide, legitimate discrimination or harassment-related claims should never be the goal. In contrast, this article is about acknowledging that companies (a) can collect DEI-related information that is factual, legally effective, and reflective of the corporate culture, even where it suggests there is work to be done, and (b) should involve legal counsel in crafting DEI efforts, reviewing DEI-related claims, and remedying issues as needed.

Collecting DEI-related information increasingly implicates data privacy laws — and a DEI initiative that fails to account for these laws runs the risk of creating very actionable legal claims. In addition, including effective DEI legal counsel in crafting DEI efforts, reviewing DEI-related claims, and taking any and all appropriate and necessary remedial action can help an organization craft more effective and legally durable DEI programs and initiatives, as well as rightly pull certain DEI matters under the umbrella of privilege.

Effective DEI legal counsel should bring an understanding of employment and other nondiscrimination laws, an appreciation

for (and access to) effective data privacy expertise, as well as independence and a commitment to protect the organization over any single individual, including any individual in a position of power.

The benefit of effective DEI legal counsel extends beyond the organization the legal counsel represents to individuals with legitimate DEI-related concerns. Every organization has HR matters that arise from time to time, but if your DEI efforts are functioning as a shadow HR department without proper compliance or legal oversight, those efforts may be creating more problems than they are solving.

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2. Your diversity goals may be subject to legal challenge.

The pressure on companies from both internal and external stakeholders to make year-over-year progress on DEI is real. This pressure often applies regardless of the means by which that progress is measured or delivered, and it can be measured and delivered in ways that are subject to legal challenge. When it comes to how progress is measured, companies should avoid hiding the devil in the details.

With claims of greenwashing on the rise, “social washing” (i.e., a disconnect between a company’s DEI or social goals and its efforts to achieve those goals, or statements that do not reflect the company’s actual practices) and discrimination-related litigation risks are likely not too far behind. For example, is your organization reporting hiring rates, but ignoring turnover? Is the organization focusing on its voluntary efforts to expand the pipeline of diverse candidates, but avoiding discussing employment-related litigation?

While many of these matters can be highly sensitive, the highs (i.e., growing diversity in the team through hiring and retention) and the lows (i.e., growing turnover with respect to underrepresented groups) can still be dealt with in a sensitive and appropriately transparent manner. And companies should remember that many of the internal records regarding these matters are likely to be discoverable.

When it comes to how progress is delivered, the potential for legal challenge expands even further. Companies’ quantitative goals regarding increased diversity are not always informed by what is reasonably achievable given the organization’s geographic footprint, industry, the competitive candidate pool, and — perhaps most important — what the organization can do to achieve those goals in light of the relevant legal landscape.

Diversity goals, including both quantitative and qualitative goals, that are not appropriately informed by these factors may produce a mismatch between what the organization commits to delivering and

what is reasonably achievable, which in turn can create a colorable argument that nondiscrimination laws are being violated.

If not handled carefully and in consultation with experienced counsel, a company’s efforts to achieve DEI goals may pose significant legal risks. For example, if, as part of the company’s DEI initiatives, otherwise qualified candidates who are not in an underrepresented group are not considered for a position because of protected class considerations, those individuals may pursue a discrimination claim. With “reverse discrimination” claims on the rise, organizations are wise to reevaluate their diversity-related goals and efforts for potential areas of challenge.

3. You have not considered the full scope of your DEI-relevant stakeholders or regulatory requirements. Many companies have launched DEI efforts without any meaningful assessment of the full scope of stakeholders who have perspectives on how the DEI efforts may or may not relate to the company’s long-term value. The failure to properly assess the perspectives of those who are part of the organization as well as the perspectives of outside stakeholders on the role of DEI efforts in corporate value creation, may produce a mismatch between what the organization commits to delivering and what the stakeholders believe is the value of the organization.

In addition, skipping over scoping can mean that the organization fails to consider relevant regulatory requirements, including, but not limited to, those that relate to data privacy. DEI efforts will not, and should not, look the same from organization to organization. Engaging in appropriate scoping can help lead to DEI efforts that are more effectively targeted to the organization as well as help the organization meet stakeholder expectations and avoid regulatory missteps.

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4. Your DEI officers do not have access to legal counsel or the board.

Last, but by no means least, is the risk that arises from failing to recognize that DEI efforts have the same significant compliance-related implications as any other part of the organization. This risk might be borne by not only the organization, but also any individual charged with oversight of the DEI function.

The Delaware Court of Chancery recently clarified that the fiduciary duty of oversight applies to officers, a decision that came down in the context of sexual harassment claims. It is hardly a leap to expect that the same could be true in the context of DEI-related claims. *In re McDonald’s Corporation Stockholders Derivative Litigation*, March 1, 2023.

For this reason, it is critical that DEI officers understand the scope of their responsibility, including potential legal implications associated with their duties, and have access to the board. This access can help support the position that the organization has a robust compliance function with respect to DEI if DEI-related issues arise down the

road. Companies also are wise to consider any indemnification and officer insurance implications for individuals charged with oversight of DEI matters.

Of equal importance is DEI officers' access to outside legal counsel, who can advise on both best practices and legal risks with respect to establishing DEI goals, actions that companies should and should not take to achieve those goals, and appropriate and necessary remedial action to consider upon discovering any issues.

Legal counsel can help provide context for legal risks and also explain the relationship between discoverability and privilege. If it seems like discoverability has come up a few times in this article, it's because it is one of the core themes of DEI-related legal risks. The company that provides its DEI officers with access to outside DEI counsel will not only protect itself, but also arguably its DEI officers as they navigate a "high risk, high reward" center of the organization.

About the authors



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