# Legal Review of Corporate DEI Critical as Activists Quickly Pursue Litigation

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In a case that will impact DEI (Diversity, Equity & Inclusion) initiatives throughout the American workplace, the U.S. Court of Appeals for the 11th Circuit recently blocked a venture capital fund's effort to award $20,000 grants to Black female entrepreneurs.

The three-judge panel wrote in their decision that the funding initiative offered by Atlanta-based Fearless Fund was "racially exclusionary" and likely to violate a federal law which prohibits racial discrimination in the awarding of contracts.

The case was brought by the American Alliance for Equal Rights, a group led by activist Edward Blum. Blum is also the driving force behind the litigation which led to the landmark June 2023 U.S. Supreme Court decision that race-conscious student admissions policies at Harvard University and University of North Carolina were unconstitutional.

The appellate court decision affirmed Fearless Fund's First Amendment right to promote beliefs regarding racial equality. However, the judges said Fearless Fund did not have the right to exclude persons from a contractual arrangement based on their race.

**Impact of Fearless Fund Ruling on DEI Initiatives**

The Fearless Fund ruling is certain to have a chilling effect on DEI efforts in the business world, just as the June ruling declaring affirmative action to be unlawful in the college admission process has had.

Companies have long tried to eliminate inequality in their ranks, with DEI programs becoming much more prominent and popular in the remarkable wave of activism following George Floyd's death in 2020.

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Now, only a few years after Floyd's death, the uncertain winds of law, culture and politics are swirling around DEI issues in the form of lawsuits, shareholder letters, legislative inquiries and petitions to the EEOC (Equal Employment Opportunity Commission) -- all questioning the Constitutionality of certain diversity initiatives. Ironically, the activists opposed to DEI initiatives are employing many of the same tactics originally used to promote and establish them over the last several decades.

Except now the argument is that too many companies – under the banner of DEI -- are violating many of the long-established rules prohibiting race and sex discrimination in the workplace, including those originally designed to secure the workplace rights of African Americans and other minorities.

**Reconsidering the Value of DEI**

The current controversies regarding DEI notwithstanding, an overwhelming majority of companies are confident that their diversity initiatives all fall well within the law. Most of them will state that they remain fully committed to increasing the demographic diversity of their workforce and supplier base.

They will cite the many hurdles of corporate life still faced by minority groups and the significant business and competitive benefits it can yield as the top reasons for maintaining their DEI efforts.

Privately, though, the pushback has many of our top companies asking their attorneys if they should modify or de-emphasize their DEI programs and underlying philosophy.

Traditionally, corporations have relied on a rationale identical to the one supporting affirmative action in university admissions – that there are real and lasting benefits to diversity. By diminishing that rationale, the high court seems to have weakened the justification for any kind of DEI programs that promote it.

**Ensuring Your DEI Initiatives are Lawful**

To be sure, there is still much to be done from a diversity standpoint, but the targeted interest and concern of corporate activists and the courts call for a careful review of company DEI programs.

Involve an attorney with DEI expertise to ensure full compliance with all laws and regulations. They can help you with a review of your program that might include the following actions:

- Reviewing your DEI programs to ensure that the company is not using race or gender as sole factors in hiring, promotion of other employment decisions.
- Reviewing your DEI-related communications to avoid statements that could be characterized as unlawful.
- Creating and putting an evaluation system in place for objective reviewing and updating of your DEI initiatives and actions taken on a regular basis.

It's also important that organizations scrutinize their DEI policies to ensure they don't give the slightest indication that impermissible preferences are ever provided to any employee or candidate.

Employers who understand and value diversity shouldn't consider abandoning or diminishing their DEI initiatives. They're more important than ever, but the reality of the situation is that many diversity programs may be challenged.

By undertaking a careful review that ensures its DEI program is compliant with all laws and doesn't promote favorable treatment of one group over another, companies can feel safe in creating and promoting a culture of inclusion and respect.

*Foster Swift attorneys are monitoring the Fearless Fund case and other legal and compliance developments relating to corporate DEI programs. If you have specific questions or general concerns about your organization's DEI initiatives, please contact Cliff Hammond (chammond@fosterswift.com/248-538-6324) of our Employers Services Practice Group or Ray Littleton (rlittleton@fosterswift.com/248-539-9903) of our Litigation Practice Group.*

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## WANT TO LEARN MORE?

If you are interested in learning more about this case and its impact on your organization's DEI initiatives, be sure to join our next 2nd Wednesday session. Attorneys Cliff Hammond and Ray Littleton will be the guest speakers and will delve deeper into what companies need to address going forward in order to stay compliant and avoid costly litigation.

- **When:** November 8, 2023 from 12:00-12:30 pm
- **Registration:** https://bit.ly/2ndWeds2023