

Navigating a Shifting DEI Landscape in Venture Capital

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FOLEY & LARDNER LLP

Today's Presenters



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Von Bryant is passionate about working with clients to solve business problems and obtain optimal outcomes, focusing his practice on helping companies achieve success in business with a strategic and pragmatic approach. He is a partner in the firm's Transactions, Private Equity, Venture Capital and Fund Formation & Investment Management Practices, as well as the Sports & Entertainment Industry Team.

Von's practice is concentrated on the representation of investors, start-up companies, and mature businesses, and focuses on venture capital financings and private equity transactions, M&A and investment fund formation. His broad corporate practice also includes regularly counseling clients on technology licensing, commercial agreements, corporate governance matters and general business counseling.



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Patrick McMahon is a senior counsel and litigation attorney with Foley & Lardner LLP. Patrick focuses his practice on labor and employment matters and has significant experience in general commercial litigation. In Patrick's labor and employment practice, he has successfully defended employers in a number of forums, including federal and state courts, and federal, state, and local agency proceedings. He also provides consistent employment counseling to clients in various areas including disability accommodations under Titles I and III of the Americans with Disabilities Act, website and technology accessibility for people with disabilities, public accommodations, sexual harassment and safe workplace compliance, family and medical leave issues, wage and hour compliance, and other state and federal employment laws. In addition, Patrick's deep experiences in defending clients against the Illinois Biometric Information Protection Act (BIPA) claims has successfully resolved dozens of cases in both state and federal court, in addition to writing several articles on BIPA's latest developments.



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Katelynn Williams helps businesses navigate their relationships with — and legal obligations to — what's often called their most important asset: employees.

She is a senior counsel with Foley & Lardner LLP, where she is a member of the firm's Labor & Employment Practice. From proactive counseling to contentious litigation, Katelynn helps employers navigate their legal obligations and strategies in a wide variety of labor and employment-related issues.

Katelynn represents employers in discrimination and retaliation claims, wage & hour class actions, trade secret misappropriation litigation, labor arbitrations, and more. She also advises clients on the Occupational Safety & Health Act and its state law counterparts. In addition, Katelynn handles internal investigations and provides respectful workplace training for clients seeking a professional outside voice.

Agenda

- Defining DEI
 - In workplace settings
 - In venture capital context
- Political Landscape
 - The Trump Administration's actions
- Legal landscape
 - Litigation trends
 - State-led efforts
- Assessing Legal Risk & Recommendations



What Is Diversity, Equity, and Inclusion?

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What Is DEI?

- In a workplace setting, diversity, equity, and inclusion (DEI) is an umbrella term that can refer to a range of practices.

Improving
Diversity

Moving
Toward
Equity

Fostering
Inclusion

What Is DEI?

- **Improving diversity.**

Diversity refers to differences people bring to any setting (race, age, sex, etc.).

- Efforts may include practices such as broadening the places from which we solicit applicants.

- **Moving towards equity.**

Equity is an organizational outcome where people's demographics do not predict success.

- Efforts aim to achieve greater objectivity and fairness in policies and processes.

- **Fostering inclusion.**

An inclusive culture is one in which people feel supported and empowered.

- Efforts could include things as simple as acknowledging cultural heritage months and non-majority religious holidays.



What Is DEI?

- For investment firms, DEI considerations arise in:
 - Funding decisions
 - Grant programs
 - Committee/Board representation
 - Covenants in Investor Rights Agreements (IRA)
- Statistics show lack of diversity in VC funding recipients, but certain efforts to mitigate that trend face legal challenge



What Is DEI?

- In the venture capital world, investment firms are dealing with a shifting DEI landscape, much like employers.

Investment firms face growing and competing pressures around diversity, much like law firms, corporations, and universities making promotion, hiring, and admissions decisions. A 2023 US Supreme Court decision striking down affirmative action in higher education quickly spawned litigation challenges to DEI programs across sectors.

For VCs and other business funding programs, the pressures are amplified by a June federal appeals court [ruling blocking Fearless Fund's](#) grant contest for Black women entrepreneurs. But on the other side, investigation demands the Southern Poverty Law Center sent to state attorney generals in early August and an upcoming [California diversity reporting law](#) have signaled to VCs that a heavy tilt in funding toward White and male targets could prompt claims of discrimination in investment choices.

Bloomberg Law
*Venture Capital
Firms Caught in the
Middle of DEI Legal
Fights*
Sept. 5, 2024

Evolution of Model IRA

- National Venture Capital Association (NVCA) Model IRA (October 2024)

5.9 [Anti-Harassment Policy]. The Company shall, within 60 days following the Closing (as defined in the Purchase Agreement), adopt and thereafter maintain in effect (i) a code of conduct governing appropriate workplace behavior; and (ii) an anti-harassment and discrimination policy prohibiting discrimination and harassment at the Company. Such code of conduct and policy shall be reviewed by the Board of Directors and its adoption shall require the approval of the Board of Directors.]⁵⁴

5.10 [Commitment to Diversity, Equity and Inclusion]. The Company shall [use commercially reasonable efforts to adopt within [90] days following the date hereof] and thereafter] maintain written policies, processes and procedures applicable to the Board of Directors and the Company to promote diversity, equity, inclusion and responsible governance. The Company shall use commercially reasonable efforts to interview at least one person who self-identifies as a member of a currently underrepresented population (e.g., race, gender, ethnicity, sexual orientation or disability) within the Company for each open executive-level employment position and each vacant independent director seat on the Board of Directors, if and when such a seat exists and to the extent permitted by the Voting Agreement.]

Evolution of Model IRA

- NVCA Model IRA (October 2025)

5.9 [Corporate Governance]⁵⁰ The Company shall prepare and submit each of the corporate governance policies and procedures set forth on Annex 2 attached hereto (the “**Required Governance Policies**”) to the Board of Directors for approval and adoption by the deadlines set forth therein, and following adoption, the Company shall thereafter maintain in effect such Required Governance Policies unless otherwise determined by the Board of Directors. On an annual basis, the Company shall review the list of Required Governance Policies with the Board of Directors to ensure the Company has in place appropriate corporate governance policies and procedures to promote responsible governance. Any amendments to such list or any material amendments or material waivers to any of the Required Governance Policies shall require approval of the Board of Directors, subject to any additional vote that may be specified in any such policy.⁵¹

Evolution of Model IRA

- NVCA Model IRA (October 2025)



[Annex 2

Required Governance Policies⁹²

Required Governance Policy	Deadline
[Investment and cash management policy	[60] days post-Closing]
[Code of conduct	[60] days post-Closing]
[Anti-harassment and discrimination policy	[60] days post-Closing]
[Policies and procedures to promote diversity, equity, Inclusion and responsible governance	[90] days post-Closing]
[Policies on executive hiring and independent director search	[90] days post-Closing]

⁹² ***New October 2025*** The listed policies are examples that are reflective of covenants included in the prior model Investor Rights Agreement. Parties should consider the appropriate number and types of policies and procedures that a company should adopt, and the appropriate deadlines, including considering such company's size, stage, operations, business lines, geographic footprint, business model and any other factors that the Board of Directors may deem relevant. NVCA has made available on its website a number of model HR and governance policies.



The Current Political Landscape Surrounding DEI

Actions of the New Administration

- Issued executive orders targeting DEI in the federal government and in the private sector.
 - January 20, 2025, Executive Order 14151 “Ending Radical and Wasteful Government DEI Programs and Preferences”
 - Terminated “discriminatory programs, including illegal DEI and ‘diversity, equity, inclusion, and accessibility’ (DEIA) mandates, policies, programs, preferences, and activities in the Federal Government. . . .”

Actions of the New Administration

- Issued executive orders targeting DEI in the federal government and in the private sector.
 - January 21, 2025, Executive Order 14173 “Ending Illegal Discrimination and Restoring Merit-Based Opportunity”
 - Ordered all agencies to “enforce our longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities.”
 - Commanded the OFCCP to, amongst other things, “immediately cease” promoting “diversity,” and “holding Federal contractors and subcontractors responsible for taking ‘affirmative action.’”
 - Asked federal agencies take action to encourage the private sector to “end illegal DEI discrimination and preferences.”

Actions of the New Administration

- Appointed anti-DEI leaders to key agencies such as the DOJ and EEOC
- Signaled investigations of companies and firms engaged in “unlawful” DEI
- EEOC and DOJ released guidance on “unlawful DEI-related discrimination,” warning of risks associated with:
 - Hiring, firing, or promotion motivated by race, sex, or other protected characteristics
 - Exclusion from training, mentorship programs, and fellowships based on race, sex, or other protected characteristics
 - Limiting affinity group membership based on race, sex, or other protected characteristics
 - DEI training that creates a “hostile work environment” (very rare)

Actions of the New Administration

- Revoked Executive Order 11246
 - Executive Order 11246 required federal contractors and subcontractors to take affirmative action to ensure the workforce resembles the races/gender of the employees' community.
 - Did NOT permit violation of non-discrimination law
 - Did require identification of job groups and goals where the race/gender attributes of the job group is not consistent with the available pool of persons for the position(s).
 - Goals are NOT quotas
 - Efforts are the “key” to meeting goals



The Current Legal Landscape Surrounding DEI

What Is “Illegal Private-Sector DEI”?

- EO 14173 & 14151 do not define “illegal private-sector DEI.”
- The definition of “illegal private-sector DEI” will be determined by courts interpreting current federal laws.
- While the EO do not define what is illegal, a February 5th, 2025, memo from the Office of the Attorney General, interpreting the EO, states:
 - “This memorandum is intended to encompass programs, initiatives, or policies that discriminate, exclude, or divide individuals based on race or sex. It does not prohibit educational, cultural, or historical observances-such as Black History Month, International Holocaust Remembrance Day, or similar events-that celebrate diversity, recognize historical contributions, and promote awareness without engaging in exclusion or discrimination.”

Key Federal Laws

- Title VII (1964)
 - Impacts private and public sector employers
 - Makes it illegal to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to [the individual’s] compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin[.]”
 - Bottom Line: The “message” of Title VII is that protected traits are “not relevant to the selection, evaluation, or compensation of employees.” *Bostock v. Clayton Cty.* (2020)



Key Federal Laws

- Title VII case: *Ames v. Ohio Department of Youth Services* (2025)
 - Marlean Ames argues she missed out on a promotion, and was demoted, because she is heterosexual, in violation of Title VII.
 - The Sixth Circuit Court of Appeals rejected Ames's claim, noting she lacked "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority."
 - On June 5, the Supreme Court unanimously held that traditional discrimination plaintiffs and reverse discrimination plaintiffs must meet the same standard under Title VII.
 - Justice Thomas wrote a concurrence (joined by Justice Gorsuch) criticizing American employers for being "obsessed" with DEI initiatives that "often" discriminate against majority groups.



Key Federal Laws

- Section 1981 (Civil War-Era Legislation)
 - Requires equal treatment of all citizens
 - *All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.*

Key Federal Laws

- Section 1981 Case: *AAER v. Fearless Fund* (2023-2025)
- Fearless Fund
 - Atlanta-based venture capital fund founded by women of color
 - “Established to address the gap that exists in venture capital funding for WOC-led businesses....”
 - Black women-led companies receive less than 1% of all venture capital funding
 - Nonprofit arm, Fearless Foundation, annually gave four \$20,000 grants to women-owned businesses (in addition to providing other business advisory and consulting benefits)



AAER v. Fearless Fund

- Complaint filed in 2023 by the American Alliance for Equal Rights (AAER)
- AAER claimed race discrimination in violation of Section 1981 against Fearless Fund and its affiliates
- Eleventh Circuit Court of Appeals found:
 - Plaintiffs have standing
 - Fearless' grant contest does create an actual contract
 - Injunctive relief appropriate because grant program likely violated Section 1981

AAER v. Fearless Fund

- Considerations from Fearless' argument
 - *To the Foundation's knowledge, this action by AAER represents the first attempt to extend § 1981 to a charitable endeavor.*
 - Threat to First Amendment right to make donations to individuals of one's choice
- The Dissent: Judge Rosenbaum
 - AAER lacks standing
 - No actual injury has occurred, and plaintiff's complaint is similar to soccer players flopping on the field

AAER v. Fearless Fund

- Settled in September 2024
 - Settlement terms are confidential
 - Similar to other organizations that have settled with AAER, Fearless Fund has removed race considerations from its grant program description
- Lessons from *Fearless Fund* litigation?
 - Practical application: organizations more broadly define requirements for future DEI efforts
 - Settlement avoided creating potentially problematic precedent



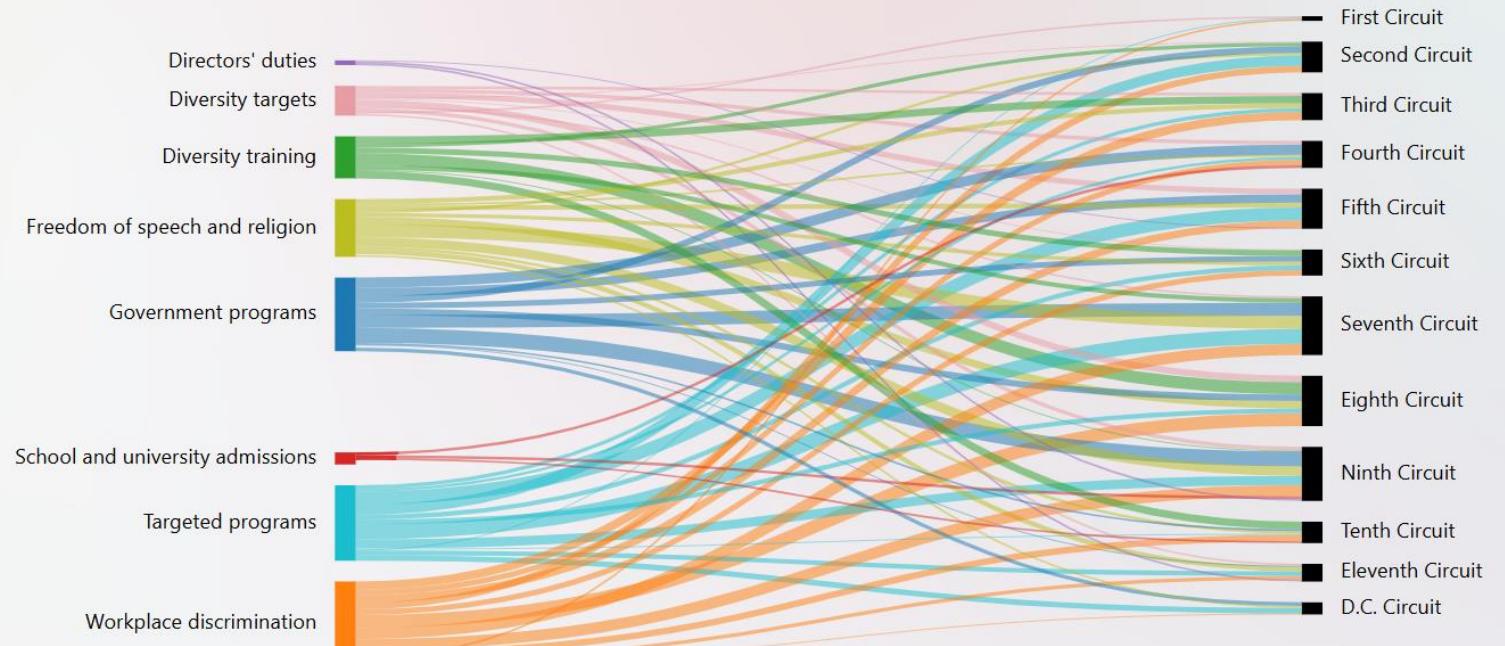
Litigation Trends

- Cases challenging DEI targets
 - Claim that setting internal diversity goals and/or tying incentive compensation to achieving them is illegal
- Cases challenging DEI training
 - Claim that DEI training creates or contributes to a race-based hostile work environment
- Cases challenging DEI programs
 - Claim that programs which limit eligibility to certain races is discriminatory

Litigation Trends

What types of cases are occurring?

This diagram shows the distribution of DEI cases across the United States, organized by federal circuit (a geographic area of the country defined by the federal court system). Each case is categorized according to the DEI program implicated or the specific issues raised. Since some cases involve multiple issues, those cases may be categorized under several topics.



It's Not Just Litigation...

- Dueling letters
 - Southern Poverty Law Center sent letters to AGs in Florida, Louisiana, and Georgia, urging them to investigate investment firms whose portfolios consist of predominantly white-founded businesses for potential discrimination
 - Republican AGs sent letters to major financial institutions warning that their DEI policies may risk enforcement action



California VC Diversity Reporting Law

- California SB 164 takes effect January 1, 2026
- Requires certain VC companies to annually report diversity data about the founding members of their portfolio companies
 - Law outlines covered entities with some specificity, including that the company:
 - Is a venture capital company under CCR Section 260.204.9;
 - Is primarily engaged in the business of investing in, or providing financing to, startup, early-stage or emerging growth companies.
 - Has a nexus to California (headquartered, “significant presence” or operational office in California, invests in portfolio companies based in or primarily operating in California, or solicits or receive capital from California residents or entities).



California VC Diversity Reporting Law

- Covered entities must distribute a survey to founders to collect data about founding team members' gender identity, race, ethnicity, disability status, LFBTQ+, veteran, and California residency
 - California Department of Financial Protection & Innovation (DFPI) will issue the survey form to be used
 - It will include a "decline to state" option
- Covered entities must include a written disclosure before or with the survey, noting that responses are voluntary, will not lead to adverse action, and are submitted to DFPI on an aggregated basis
- Covered entities must report total amount of venture capital investments to businesses with primarily diverse founders, as a % of venture capital investments made; in the aggregate and broken down by categories of demographic information collected in the survey.

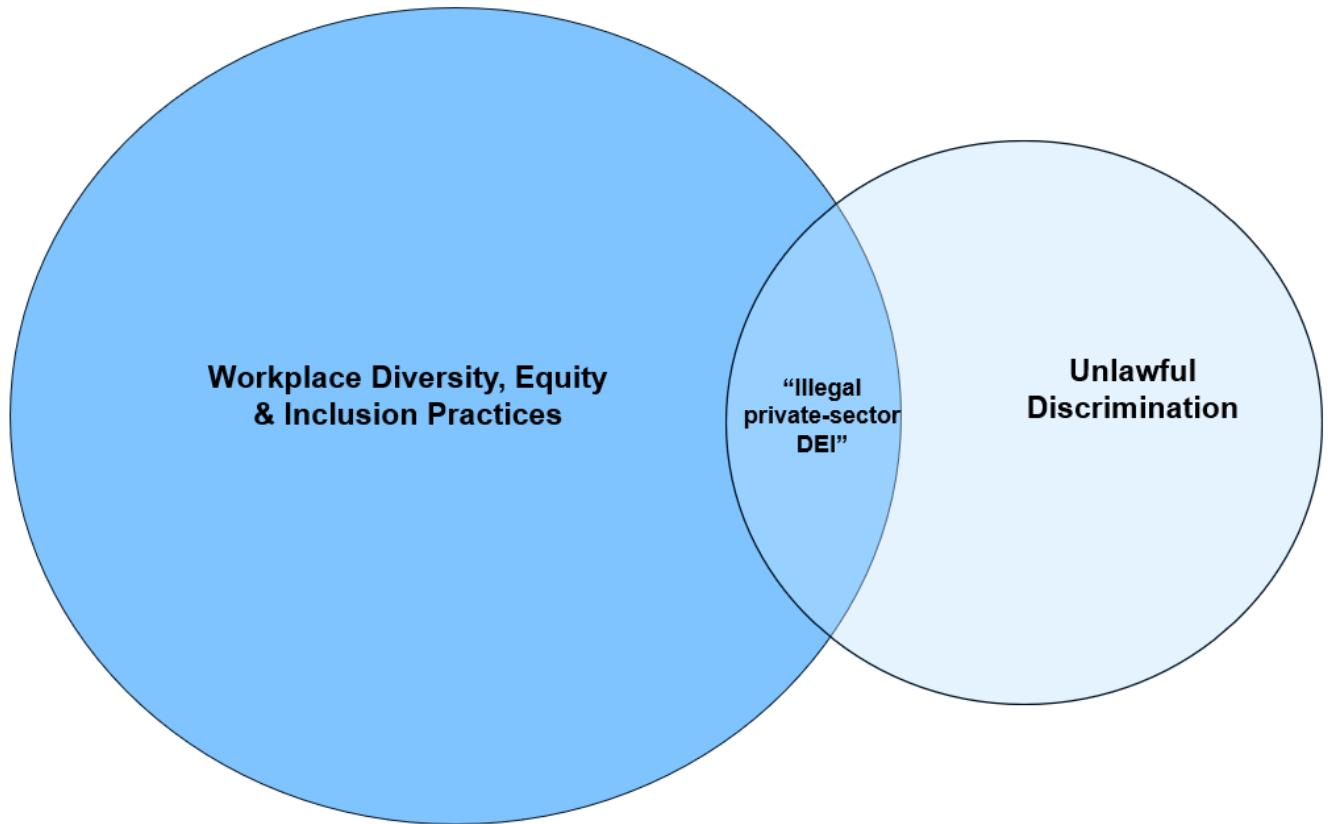
California VC Diversity Reporting Law

- What can covered entities do now?
 - Assess recordkeeping hygiene — are you in the position to execute the survey, once released by DFPI?
 - Designate someone to monitor guidance and ensure compliance with process
- What must covered entities do soon?
 - Distribute survey once released by DFPI
 - Gather data and generate report (and look for further guidance on format from DFPI)
 - Register with DFPI in March 2026
 - Submit report by April 1, 2026 (and thereafter annually on April 1)



Assessing Legal Risk and Recommendations

So, Is DEI Still Legal?



Lifting DEI = (Arguably) Illegal DEI

- Lifting DEI (which is usually in the form of a targeted program) is legally risky when it contains the following three elements:
 - confers **preference**
 - on (a) **protected** group(s)
 - with respect to **palpable** benefit
- Avoid the three-Ps!



Lifting DEI = (Arguably) Illegal DEI

- Anti-DEI advocates are primarily focused on lifting DEI
- The vast majority of anti-DEI lawsuits are challenging programs that:
 - limit eligibility to members of underrepresented groups
 - Are government initiatives that explicitly consider race, and other alleged “preferences,” like quotas/hiring set-asides
 - use a protected characteristic as a tiebreaker
 - tie manager compensation to meeting diversity goals
- Organizations that adopt or continue these type of practices risk being targeted by the Trump administration as well as other litigation risks

Leveling DEI = Legal DEI

- Leveling DEI is all inclusive, focused on eliminating bias, and has been a best practice approach in DEI for many years
- Universal Work
 - Addressing systems or policies that make the workplace demonstrably better for everyone
 - A rising tide lifts all boats approach. (Some boats will lift more than others.)
 - Examples: updates to review and feedback systems, uniform interview questions, work allocation tools.
- Debiasing Work
 - Especially forms that are facially neutral (ex: interview training, implicit bias training, inclusive leadership education, heritage month education, etc.)



Minimizing Risk

- Rhetorical shifts are a key part of leveling DEI, emphasizing process and inclusion for all.
 - Language matters. There's a difference between:
 - Old recruiting language: "We are committed to hiring diverse talent."
 - Updated: "We are committed to conducting a fair, intentional, recruitment process that minimizes bias and results in a diverse array of hires."
 - Precision is important in communicating about organizational DEI efforts. (And can help protect your organization if those efforts are challenged.)

Questions?



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