

# Now & Next

DEI Alert

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## Diversity grants under legal scrutiny

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Eleventh Circuit strikes down diversity grant program, and other challenges loom over DEI initiatives.



### What's the impact?

- Courts across the country are placing limits on programs designed to provide opportunities to diverse populations.
- Organizations must assess not only their hiring and admittance processes, but also other aspects of DEI programs such as mentorship and community outreach.

Last week, the [Eleventh Circuit instructed](#) a federal trial court to enter a preliminary injunction against Fearless Fund, prohibiting it from awarding grants to companies where the eligibility was restricted to black-woman majority-owned businesses.

Fearless Fund is a venture capital fund that supplies grants to businesses that are at least 51% black woman owned, in an effort to “bridge the gap in venture capital funding for women of color founders building scalable, growth aggressive companies.” The appeals court held that the grant program does not qualify for an exception to 41 U.S.C. 1981 (Section 1981) as a “valid remedial program” because it created an absolute bar to non-black applicants and that the availability of funding from “other sources” did not have impact whether Fearless Fund’s

program was lawful. Section 1981 provides a federal cause of action protecting an individual's right to "make and enforce contracts" and "to the full and equal benefit of all laws...as is enjoyed by white citizens." The Eleventh Circuit also held that the Fearless Fund grant program was not entitled to First Amendment protection as a form of expressive conduct.

This lawsuit continues a growing trend of legal challenges to programs designed to provide specific benefits to address systemic differences in the opportunities available to diverse and non-diverse populations.

## DEI program challenges—a timeline

- / In **December 2023**, a State Bar was sued by one of its members, alleging that its diverse clerkship program for first year law students was discriminatory. Several statements about the program expressed a desire to address disparities in the racial balance in medium or large firms in the state, and to "help minority ... students get a first-hand look at private sector practice." Eligibility for the program calls for students "with backgrounds that have been historically excluded from the legal field." The lawsuit alleges that even with the change to race-neutral language, the original intent of the program and its current operation have led to discrimination against non-minority students. The lawsuit was partially settled, whereby the State Bar agreed to make clear that the diverse clerkship program is open to all first-year law students.<sup>1</sup>
- / In **January 2024**, nonprofit organization submitted another complaint with the US Department of Education Office for Civil Rights (the Department of Education) against a university that was sued by a nonprofit organization alleging that its fellows program was discriminatory because it requires applicants to be a "member of a historically underrepresented racial or ethnic group or community."
- / In **March 2024**, the same nonprofit organization submitted a similar complaint against another university alleging that its minority scholarship program, awarded to one undergraduate Black student, was discriminatory because it excluded non-black students from consideration.
- / In early **May 2024**, a law firm was sued by a first-year law student alleging that its summer associate program for students who "have an ethnically or culturally diverse background" or are "member[s] of the LGBT community" was discriminatory. The student filed a charge of discrimination with the EEOC, who found reasonable cause to believe that she was discriminated against.

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<sup>1</sup> *Suhr v. Dietrich*, No. 2:23-cv-01697-SCD (E.D. Wis. 2023).

## Next steps for DEI programs

Following the Supreme Court decision in [\*SFFA v. Harvard University\*](#), many businesses and educational institutions have reassessed their hiring and admittance processes. These recent legal challenges highlight the need for organizations to similarly assess other aspects of their DEI programs and initiatives, from mentorship and scholarship programs to community outreach and investment. The legal issues surrounding DEI initiatives continues to grow beyond the traditional employment arena, and organizations must be prepared to proactively address those issues.

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