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DEI Strategic Services Alert

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Minimizing legal risk in board diversity and organizational DEI initiatives

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Best practices for companies when diversifying their board and implementing organization-wide DEI programs.



What's the Impact?

- / Companies must be careful to not inadvertently create legal exposure when trying to solve DEI concerns
- / Understanding the risks involved will help determine the best way to achieve your organization's diversity, equity, and inclusion goals

As we discussed in our [first two alerts in this series](#), internal desires and external pushes have led to boards making significant changes to advance diversity—in the boardroom across organizations more generally. According to a [recent report](#), over 95% of directors surveyed said their board had done something regarding diversity within the last two years. However, it is

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crucial that organizations remember that while diversity, equity, and inclusion (DEI) programs and initiatives represent a tremendous opportunity, there is a sizeable risk as well.

This alert will focus on the best practices companies should keep in mind when diversifying their board and implementing organization-wide DEI programs.

Leadership's goals must positively impact all employees

From legislatures enacting new legal requirements for greater board diversity and transparency in disclosures to institutional investors calling for corporations to take DEI into account as they issue sustainability reports to shareholders pushing for third-party racial equity audits to independently assess the [impact of DEI programs](#), much of the [recent DEI conversation](#) has called for greater DEI investment, progress, and transparency.

But boards have to think about and navigate more than just their desire to increase diversity.

Some efforts have resulted in claims of discrimination against non-diverse employees. Recent shareholder proposals and litigation have called into question the legality of DEI initiatives and whether they have had a negative and illegal impact on non-diverse communities. Courts have looked to balance organizations' legal aspirational goals to increase diverse talent in the pipeline² versus initiatives where strategic DEI imperatives create pressure to reach unlawful targets based on race and gender.³

What this means for you

Organizations can create issues by trying to solve their DEI concerns without considering a myriad of complex legal issues. When companies do not take the time to assess what is and is not lawful, they leave themselves open to unforeseen risks. It is important to understand the risks involved when determining the best way to achieve your organization's DEI goals.

Questions your organization may want to consider include:

- / What are we required to do by law with respect to our DEI initiatives, and does that change from state to state?
- / What actions are prohibited by law with respect to our DEI program?
- / What does the organization want to do, and does that have any potential negative impact on non-diverse communities?

Looking ahead

Implementing an effective and lawful DEI program requires more than good intentions. It requires a comprehensive review and understanding of the intersection of the law, governance,

² *Mangold v. Peco Energy* (E.D. Pa. 2021)

³ *Duvall v. Novant Heath* (W.D. N.C. 2021)

and other areas that impact your business. It is always important to understand these issues and to assess risk and preparedness when implementing new DEI strategies.

Nixon Peabody's DEI Strategic Services team works with clients to develop inclusive cultures, drive business success, and elevate their brands. Learn more about our [three-phased approach](#) to help clients (1) assess current efforts, (2) address challenges, and (3) guide long-term success.

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