



# Has the Dust Settled? Today's DEIB Landscape After the Students for Fair Admissions Decisions

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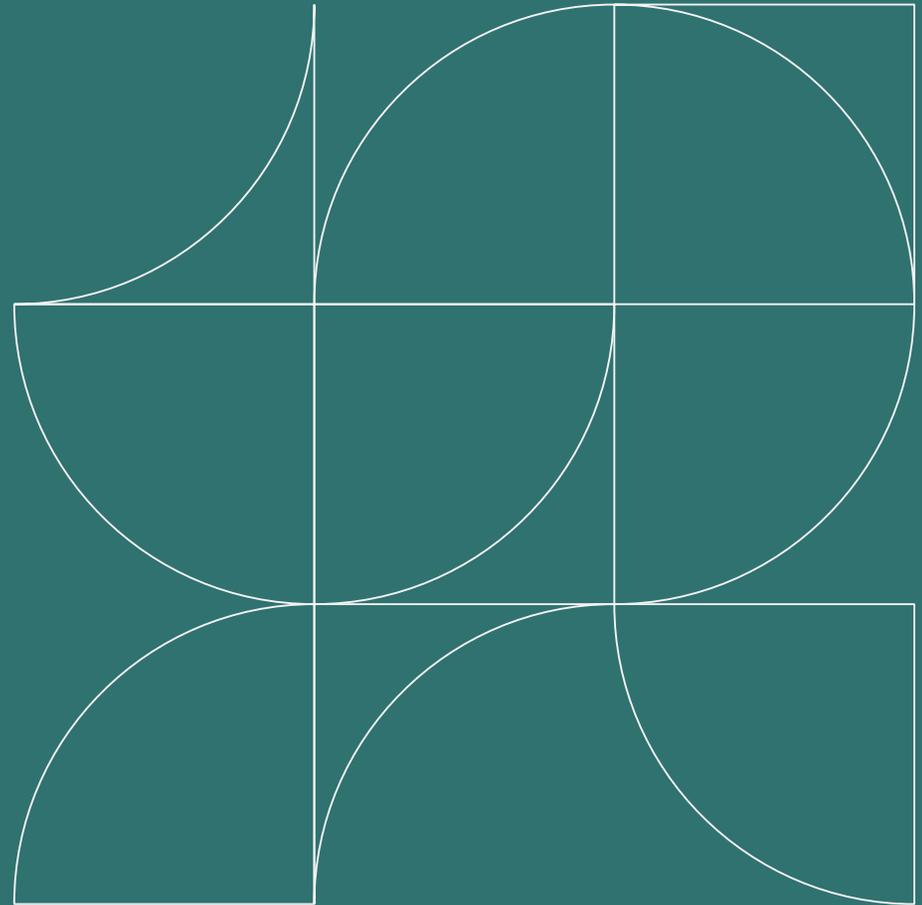


## Today's Agenda

- 01** Background and Responses to The Fair Admissions Cases
- 02** Common Employer Questions in the Wake of The Fair Admissions Ruling
- 03** Practical Responses for Employers' DEI Policies and Initiatives

# 1

## Background and Responses to The Fair Admissions Cases



## The Students for Fair Admissions Cases

- Alleged discrimination against Asians (Harvard and UNC) and Whites (UNC) under Title VI and the Equal Protection Clause
- Schools considered race/ethnicity as part of a candidate's application
- Admission policies were aimed at meeting the respective university's goals related to the racial makeup of their incoming classes.
- HELD: the policies failed "strict scrutiny" review; they violate Title VI and the Equal Protection Clause



***[T]he Harvard and UNC admissions programs... lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points."***

- Interests cannot be subjected to meaningful judicial review or measurement (too amorphous)
- The policies lack a meaningful connection between the means they employ and the goals they pursue (imprecise categories)
- Race may not be used as a **negative** or be based on **stereotypes** (especially in a "zero-sum" scenario)
- Lack of any logical end point
- **But** "nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."

## Responses in the Media

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Affirmative action ruling puts target on corporate diversity programs

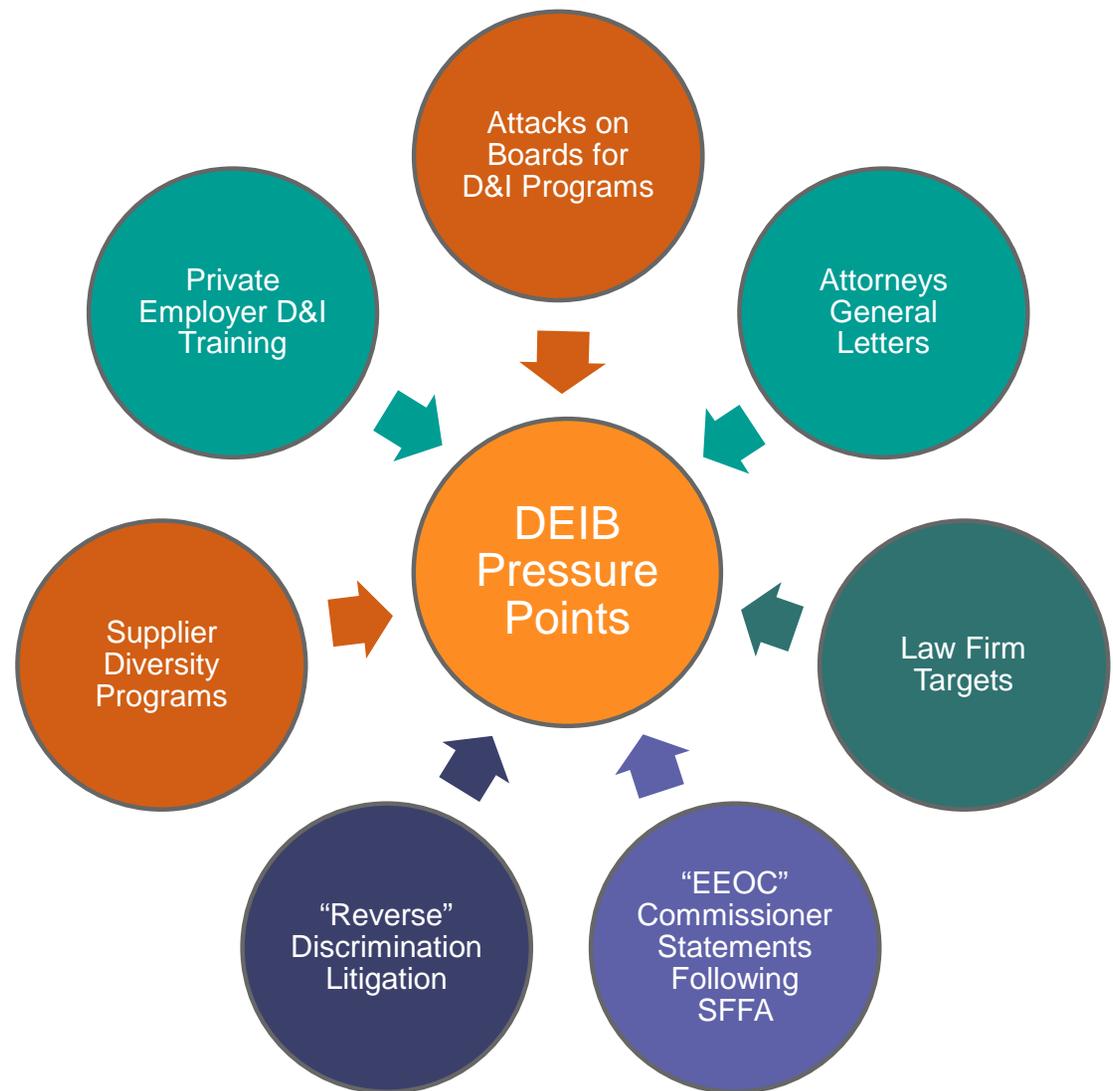
*Affirmative Action Ruling May Upend Hiring Policies, Too*

*Attorneys General Clash Over What SFFA Decisions Mean For Employer DEI Programs*

## **Corporate DEI Policies Face Scrutiny Following SCOTUS Affirmative Action Decision**

**Does the U.S. Supreme Court Ruling on College Admissions Have Implications for Corporate DEI Initiatives?**

# DEIB Landscape – Post SCOTUS SFFA Decision



# Attacks on Corporate DEI

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## Diversity Fellowships at Law Firms

- The American Alliance for Equal Rights (Ed Blum) brought lawsuits against law firms alleging diversity fellowships are unlawful
- Both firms eliminated the diversity requirement for the fellowships; lawsuits were then voluntarily dismissed
- Blum has since threatened lawsuits against other law firms
  - 10/30/2023: another law firm sued
  - Firm had responded to an earlier Blum letter by stating its fellowship was not based on race (“disadvantaged” and “historically underrepresented”)

## The Political Arena

- July 13: thirteen attorneys general sent warning letters to the CEOs of Fortune 100 companies reminding them of their legal obligation not to discriminate against employees/applicants.
- July 19: a separate group of twenty attorneys general sent the same Fortune 100 CEOs a letter seeking to “reassure [them] that corporate efforts to recruit diverse workforces and create inclusive work environments are legal and reduce corporate risk for claims of discrimination.”
- Also in July: Senator Tom Cotton sent a letter to the heads of 51 law firms threatening investigations and litigation if the firms continued to advise clients on their DEI and ESG programs, or if the firms operated a DEI program themselves.
- August 7: the House Financial Services Committee, led by ranking Member Maxine Waters (D-CA), sent a letter to those same CEOs urging them to push forward with their diversity and inclusion initiatives despite “Republican intimidation.”

# EEOC Commissioner Statements

## Chairperson Burrows

- *SFFA* “does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background.”
- “It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace.”

## Commissioner Lucas

- *SFFA* ruling does not alter current federal employment law, and that Title VII has always prohibited using race as a factor in employment decisions.
- Warned employers to “take a hard look” at DEI Programs
- “explicitly or implicitly taking race into decision-making for employment decisions” through initiatives, such as “race-restricted internships, race-restricted mentoring, [and] race-focused promotion decisions,” may already be “violating the law.”

## Commissioner Samuels

- *SFFA* “stands to severely undermine universities’ ability to realize the educational and civic benefits of diversity on campuses. While mourning the very real losses to the education of our nation’s youth, it’s important to recognize that workplace DEIA initiatives will survive.”
- Longstanding EEOC regulations make clear that employers are obligated to evaluate the impact of their selection procedures on protected groups at the front end and take steps to respond if those procedures have exclusionary effect.

# Additional Legal Theories of Challenge

- **Title VII Terms & Conditions**

- *Muldrow v. City of St. Louis, Mo.*, No. 22-193
- Does Title VII prohibit discrimination without a showing of “materially significant disadvantage”
- Case involves a transfer with no change in pay, benefits and only minor changes in working conditions



- **5<sup>th</sup> Amendment’s guarantee of due process / equal protection**

- *Ultima Servs. Corp. v. United States Dep’t. of Agriculture*, No. 2:20-CV-00041 (E.D. Tenn.)
  - SBA 8(a) program provides subcontracts “to socially and economically disadvantaged” entities
  - The court found the program unlawful, *quoting SFFA*

- **Section 1981 of the Civil Rights Act of 1866**

- *American Alliance for Equal Rights v. Fearless Fund Management, LLC, et al.* (N.D. Ga)
  - AAER filed suit to test the impact of *SFFA* on affirmative action in the context of private contracting
  - Fearless Fund provides grants and other perks to small businesses, allegedly only to black women
  - Section 1981 prohibits intentional race discrimination in the making and enforcement of contracts
  - Contends the program discriminates against non-black entrants to the program because of their race
  - Strivers Grant program temporarily blocked by 11<sup>th</sup> Circuit panel on October 3

# SEC Reporting Considerations

- **Alliance for Fair Board Recruitment v. SEC**
- Fifth Circuit rejected challenge to SEC NASDAQ Board diversity reporting requirements
- *En Banc* Petition outstanding
- Listed companies still need to report by year-end

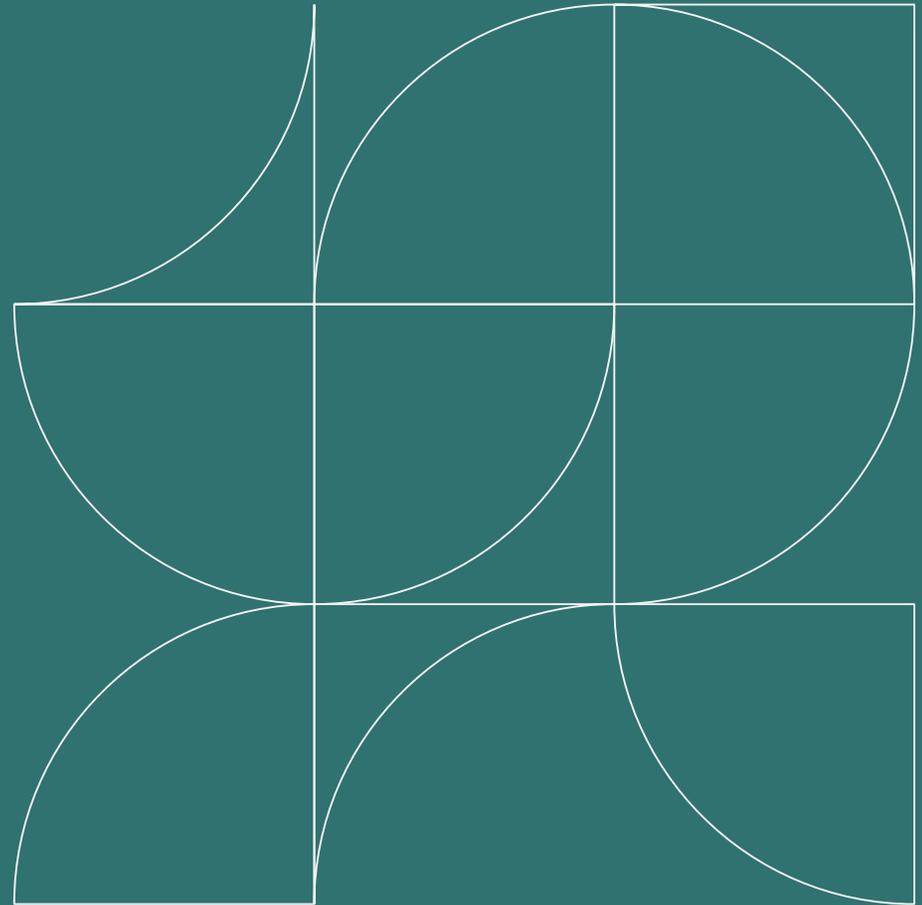
## **SEC Proposal to Enhance HCM Disclosures**

Investor Advisory Committee (IAC) voted to support recommendation to require:

- Employee headcount, broken down by full-time, part-time and contingent workers
- Turnover or comparable workforce stability metrics
- The total cost of people spend broken into major components of compensation
- Workforce demographic data sufficient to allow investors to understand the company's efforts to access and develop new sources of talent and evaluate the effectiveness of those efforts
- Provide a narrative disclosure in the Management Discussion & Analysis of the 10-K. This recommendation includes "how the firm's labor practices, compensation incentives, and staffing fit within the broader firm strategy."

# 2

## Common Employer Questions in the Wake of The Fair Admissions Rulings

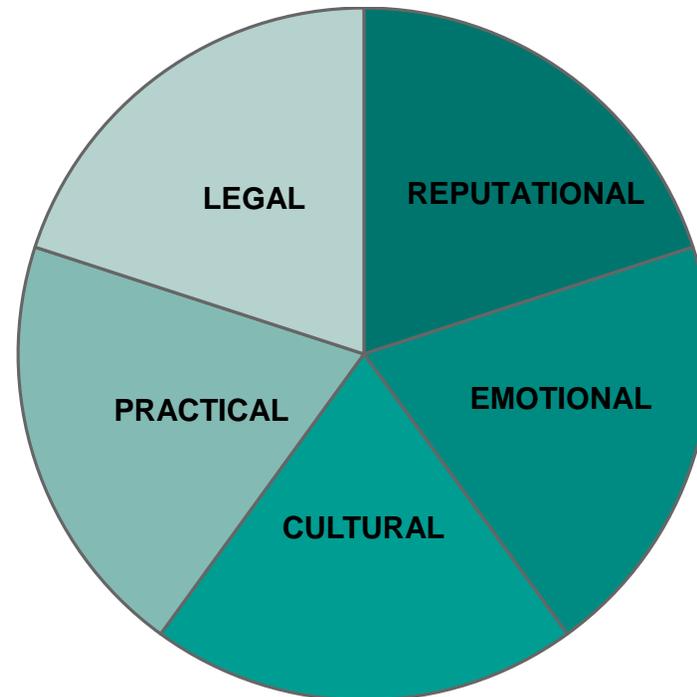


## Are my programs still legal?

- May not have been “legal” prior to *SFFA*
- While all DEI programs could bear some relation to protected characteristics such as race or gender, there is (and always has been) a spectrum of legal risks associated with such programs depending on:
  - the type of initiative;
  - how an employer implements that initiative; and
  - how the employer communicates about it.
- The closer the specific DEI strategy is to race, gender and other protected characteristics in relation to the specific employment action at issue, the greater the risk—*particularly in the current environment.*

## Which programs present the most risk?

- It is important to remember that DEI programs, initiatives and strategies are not created equally.
- Risk takes many different forms
- Legal risk has not necessarily increased *as a result of* SFFA, but . . .



## Not All Programs are Created Equally: An Example

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- *Young v. Colorado Department of Corrections et al.* (D. Colo.)
  - Filed in June 2023
  - Plaintiff alleges that the Department's DEI training materials created a hostile work environment for white employees
  - He claims the materials' references to white supremacy, “white fragility,” white privilege, the history of white oppression in the country, implied that white achievements were not merit-based
  - He therefore contends he suffered a hostile work environment and was forced to resign as a result
- DEI training is generally **low risk**, but challenges are still possible in the current environment.

## What do I tell my employees?



- Businesses are still navigating the communications aspects.
- “Stuck between a rock and a hard place”
  - Walking back public DEI championing can come with reputational risk
  - Some public statements related to DEI may create additional reputational and legal risk
- Messaging to Consider:
  - An internal statement(s) regarding DEI commitment
  - Messaging to DEI function, ERGs, and other internal stakeholders about the importance of their roles

## Some of these considerations are in tension with each other....

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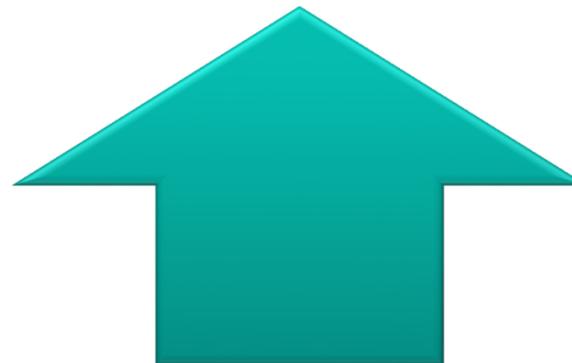


If DEI efforts become more conservative, legal risk goes down.

But....



That could lead to practical issues, such as disappointed stakeholders and disheartened DEI proponents.



*In the world of DEI, both acting and doing nothing (or doing less) have their own risks....*

## What are other companies doing?



- Each employer's DEI journey is unique
- Numerous factors to consider
  - Internal and external pressures
  - Past public statements/reports
  - Risk appetite
  - Size of business
  - Industry
  - Geography
- Companies should consider a review or audit of their DEI programs at a minimum
- *NOTE: Despite speculation, we are NOT seeing employers walk away from their DEI programs.*

## **Demands / Requests**

### **Advisory Votes / Shareholder Proposals:**

- Executive Compensation
- Audits
  - Program / policy merits
  - Racial equity
  - Pay equity
- Improve disclosures
- Prohibit political speech
- Revised reports
- Assess litigation risk

### **Assurances:**

- Third-Party consultants
- Vendor/Supply chain

# 2022 Human Capital Management (HCM) Industry At-A-Glance

	Agriculture & Food	Construction & Real Estate	Energy & Natural Resources (Incl Utilities)	Financial & Insurance	Healthcare & Pharma	Industrial & Manufacturing	Retail	Services	Technology & Telecom	Transportation
COVID-19	 75%	 60%	 80%	 60%	 80%	 75%	 70%	 60%	 65%	 55%
Culture	 95%	 70%	 75%	 55%	 90%	 75%	 80%	 100%	 85%	 55%
Demographics	 70%	 40%	 65%	 75%	 80%	 50%	 30%	 50%	 60%	 70%
Diversity and Inclusion	 100%	 85%	 100%	 95%	 100%	 95%	 95%	 95%	 95%	 85%
Employee Health and Safety	 95%	 80%	 100%	 65%	 100%	 75%	 80%	 85%	 75%	 85%
Initiatives	 90%	 95%	 65%	 80%	 100%	 90%	 70%	 90%	 80%	 75%
Pay Equity	 30%	 25%	 25%	 40%	 50%	 25%	 25%	 25%	 40%	 10%
Recruiting and Retention	 60%	 75%	 90%	 90%	 95%	 90%	 65%	 100%	 75%	 85%
Talent Development and Management	 90%	 85%	 90%	 90%	 100%	 90%	 85%	 100%	 95%	 95%
Did it mention the Board or a Board committee as having oversight of human capital?	 65%	 35%	 60%	 60%	 40%	 40%	 40%	 35%	 40%	 35%

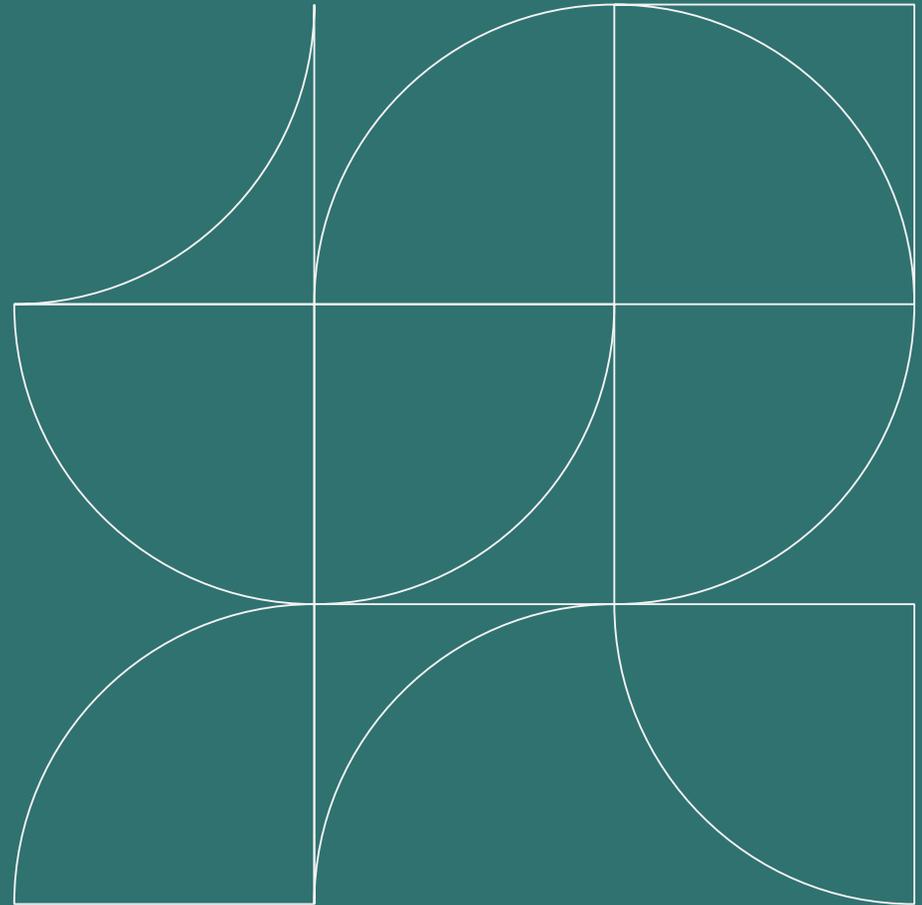
# 2023 HCM Industry Trends

Statistics show certain industries still focused on certain metrics:

- *Agriculture and Food* - emphasis on statistics, with many disclosures setting forth aspirations to have certain percentages of female or diverse employees by certain dates, especially in leadership or management roles
- *Construction and Real Estate* – largest area of focus; almost half of these disclosures included specific descriptions of ongoing or future goals/initiatives
- *Manufacturing and Industrial* – main focus; 85% of the statements for this industry group provided specific examples of ongoing efforts, with 50% of the statements providing some sort of breakdown of the demographics of their workforce and 35% of the statements referencing specific diversity goals for the future

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## Practical Advice for Responding to Increased Scrutiny



# Audits

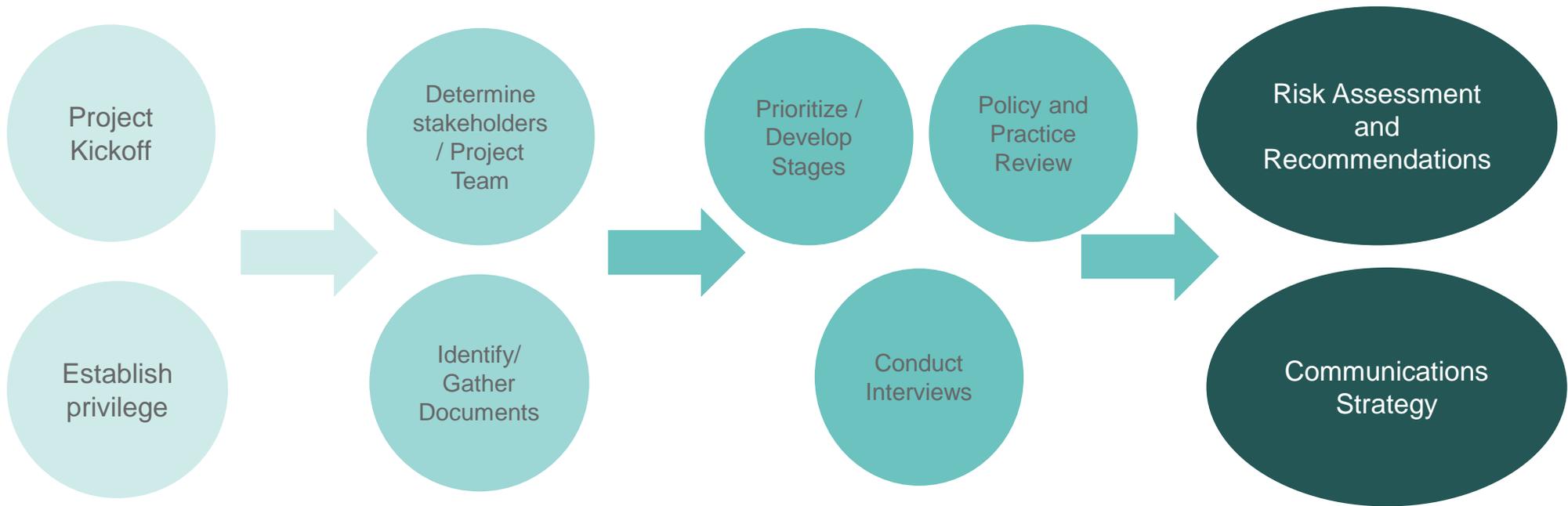


## Responding to the Increased Scrutiny

- A privileged DEI audit is one method
- DEI policies and practices may have become lax with lack of threatened legal enforcement and spotlight
  - Misconceptions about what is “legal”
- Presents a good opportunity to look under the hood and kick the tires of company’s DEI programming
- Highlights potential vulnerabilities in current litigation environment and allows for discussion to shore those up going forward
- Provides an opportunity to “reset”
  - Update policies
  - Update communications (internal and external)
  - Define stakeholders and their respective roles (e.g., HR, DEI, legal)—who should have a “seat at the table?”
  - Streamline policies and practices
  - Promotes discussion about risk appetite and strategy

# DEI Audit Process

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## Potential Challenges in DEI Audits

- Identifying all programs and policies
  - For example, certain business units or locations may have their own programming or processes
- Generating buy-in
  - Some groups may be skeptical of an internal legal department or outside firm reviewing their policies
  - May view audit process as seeking to undermine DEI or undo progress
  - Audits can be time consuming—takes away from other important HR/DEI work
- Defining scope of review
  - How far back should the audit process go?
  - Relevant custodians?
  - ESI/Emails Included?
- Implementing suggested changes

## Responding to Increased Scrutiny: Training

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- Another way to respond is training
  - Relevant groups (e.g., DEI, HR, Managers)
  - Broader employee population
- Training may derive from lessons learned from an audit; or be completely independent
- Internal or external trainers can discuss:
  - Supreme Court cases and what they do/do not mean for employer DEI programs
  - Provide a refresher on contours of a legally compliant DEI program
  - Highlight the company's DEI programming and continued commitment to DEI



## Practical Considerations: In General

- Evaluate legal risk of programs
  - Programs that are in close proximity to tangible employment decisions (e.g., hiring, promotion, compensation) are more likely to be challenged and thus create more legal risk
  - Consider whether altering the timing of these programs or orienting away from decisionmakers would be effective
- Evaluate program effectiveness
  - Important to understand whether programs are having the desired impact and are effective in areas the business needs
  - This may help identify programs to change based on the results (or lack of results)
    - Do you need a diverse slate program for every position?
    - Are targeted recruiting programs for women or particular minority groups necessary in all geographies?
  - Generally, the more tailored the programming, the less legal risk.

## Practical Considerations: Language Matters

- Review documents and edit language to mitigate risk
  - Describing “gaps” in minority employee representation could be harmful both in a lawsuit by a minority employee or in a “reverse” discrimination lawsuit
  - Avoiding language that indicates that only certain groups will get benefits (e.g., “The leadership development program’s goal is to *accelerate* the promotion of women to our highest ranks.”)
- This is important for external and internal-facing documents
  - Assume any document may be discoverable
- Consider whether to publish certain DEI policies (employee-facing vs. HR-only versions)
- Ensure policy and any related practical guidance is consistent

## Practical Considerations: Language Matters

### Practical Consideration: Language Matters

- Focus communications on the DEI journey or progress the employer has made over time
- It is typically better to highlight the progress for a particular sector or level within the organization, as compared to simply providing raw data percentages along with prospective promises to “do better”
  - What is “better?” – leaves room for challenge by both minority and majority employee populations
- Be mindful of how information will be received by all audiences
  - For example, anti-harassment or implicit bias training that is unnecessarily critical of certain populations may result in backlash that turns into legal challenge

## Practical Considerations: Data and Analytics

- It is often advisable to use workforce and benchmark data to analyze your workforce and establish the quantitative predicate necessary to support specific programs and help the organization determine how to best focus resources and efforts
- Not every program requires specific analyses, but it may be useful to leverage data analytics to support the most important and riskiest programs

*But, such data may be required to show a “manifest imbalance” sufficient to support a business’s voluntary affirmative action program*

- Workforce analytics should be prepared under the attorney-client privilege framework – allows for robust and in-depth discussions regarding the findings

## Other Practical Considerations

- Pay close attention to the news
  - Groups challenging DEI programs like American First Legal are open about their goals and strategies
  - For example, scholarships and fellowships, as well as [supplier diversity programs](#) are currently in their sights.
  - This may help prioritize for review programs during an audit/legal review
- Coordinate Legal, HR, Talent, Recruiting, and Diversity Teams as relates to DEI

## High-Level Take-Aways

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- Define Success for Your Organization
  - Ensure Consistency with Values / Purpose / Charters
- Understand the Current State (policies, statements, reports, metrics)
- Modify Language Where Needed
- Define Responsibilities
  - Consider Adding Oversight to Special Committees
- Pay Attention to Short, Medium, Long-Term Targets
- Assess Data Collection and Validation Processes
- Evaluate Existing Programs
- Update & Enhance Training
- *Most importantly: Move Forward with Diversity & Inclusion Strategies*

**thank  
you**

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