

Vital Briefing

How are companies responding to DEI uncertainty and legal challenges?

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Companies are facing an uneasy shift related to diversity, equity and inclusion (DEI) programs.

DEI uncertainty

It is not yet clear how [Students for Fair Admissions](#), the Supreme Court's decision limiting affirmative action in college admissions, may apply to corporate DEI.

State attorneys general have given conflicting opinions, both [warning](#) and [assuring](#) companies about the effect of the *SFFA* ruling on private employers.

Legal challenges

Even before *SFFA*, companies were [targeted with EEOC complaints](#) by

America First Legal (AFL), a group that has challenged affirmative action in various settings.

Companies are also facing investor litigation around DEI, including a [shareholder derivative action](#) alleging that Starbucks' leadership enabled illegally discriminatory DEI policies.

Changes in DEI language

In this fraught environment, some companies are changing public messaging around DEI.

This review looks at changes in DEI websites of companies that have experienced EEOC complaints and DEI-related litigation.

Several targeted companies have watered down references to gender and racial minorities.

Starbucks Corp.

AFL sent letters to the [Starbucks board](#) and [EEOC](#) objecting to mentorship programs for Black, Indigenous, and People of Color (BIPOC) employees.

Changes in the Starbucks [website](#) relating to diversity include:

- Change from "BIPOC representation" to "racial and ethnic diversity" for numerical diversity targets (goal of at least 30% at all corporate levels and at

least 40% of all retail and manufacturing levels by 2025);

- Change from "investing in small business growth in BIPOC communities" to "investing in small business growth in historically marginalized communities" (Community Resilience Fund).

DEI litigation: Starbucks defeated a [shareholder derivative action](#) that alleged Starbucks officers and directors breached fiduciary duties by adopting illegally discriminatory DEI policies.

Activision Blizzard

AFL sent letters to the [Activision board](#) and [EEOC](#) objecting to the use of diversity considerations in products, training, hiring and contracting practices, and employee network groups.

Changes in the Activision [website](#) relating to diversity include:

- Deleted reference to specific educational funding programs for girls and women in technology.

DEI litigation: Activision entered into an [\\$18 million EEOC settlement](#) finding it violated federal law by subjecting female employees to sexual harassment, pregnancy discrimination, and related retaliation. Activision also defeated a [securities fraud lawsuit](#) that alleged it misled investors about its "frat boy" culture and discrimination against women and minority employees.

Key takeaways

- Corporate DEI programs are encountering significant legal challenges and uncertainty.
- Some targeted companies have changed their website language about DEI.
- Others are maintaining existing language.
- Companies should evaluate public messaging for alignment with DEI approach.

NASCAR

AFL sent a letter to the [EEOC](#) objecting to NASCAR development programs for female and minority drivers, pit crew members, and interns.

Changes in the NASCAR [website](#) relating to diversity include:

- Change from seeking “top minority and female drivers” and “aspiring minority and female pit crew members” to seeking applicants “from diverse backgrounds and experiences” for “Drive for Diversity” programs;
- Deleted requirement for minority membership for Diversity Internship Program.

DEI litigation: A lawsuit that alleged NASCAR discriminated against Black drivers was dismissed in [2016](#).

Some firms maintain existing language

Not all companies hit with anti-DEI EEOC complaints have changed their DEI websites. No changes were observed on the websites of the following companies that were also targeted by AFL.

Salesforce

AFL sent letters to the [Salesforce board](#) and [EEOC](#) objecting to numerical hiring goals for woman-identifying, non-binary, Black, Indigenous, Latinx, and Multiracial employees and leadership. AFL also objected to tying executive compensation to those goals.

The Salesforce [website](#) still lists numerical goals for increasing representation by end of 2023 (woman-identifying and

non-binary—40%; Black, Indigenous, Latinx, and Multiracial employees and leadership—50%).

Morgan Stanley

AFL sent a letter to the [EEOC](#) objecting to a Morgan Stanley internship program for Black, Hispanic, Native American, and/or LGBTQ+ college students.

The Morgan Stanley [website](#) still lists demographic qualifiers for the Freshman Enhancement Program, although it is not clear if the program has been renewed for 2023.

DEI litigation: A white male former managing director and head of Executive Services sued Morgan Stanley for [employment discrimination](#) in connection with his alleged termination and replacement by a Black woman.

The Hershey Company

AFL sent a letter to the [EEOC](#) objecting to Hershey’s numerical diversity goals of 50% gender representation across its workforce and 42% of its leadership by 2025 and a 30–40% representation of people of color across U.S. employees.

Hershey announced the above diversity goals in a [2023 press release](#) and [2021 ESG report](#), which are still available on its website. Hershey’s main diversity [website](#) does not appear to reference these specific diversity goals.

DEI litigation: Hershey defeated an [employment discrimination](#) suit by a white male attorney over his alleged termination and replacement with a younger African-American woman.

Bottom line

- ➔ An increasing quagmire around corporate DEI practices features legal uncertainty and potential liability in the form of EEOC complaints, employment discrimination actions, and investor lawsuits.
- ➔ Public communications should be in alignment with DEI policies, programs, and practices.
- ➔ Companies may consider consulting legal counsel and reviewing website content such as descriptions of company initiatives around diversity, code of conduct, and ESG and sustainability reports.

To view a chart summarizing findings, click here - [Company DEI websites](#)