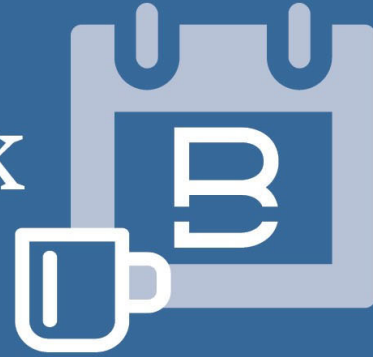


The Work Week

Bassford Remele Employment Practice Group



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Welcome to another edition of *The Work Week with Bassford Remele*. Each Monday morning, we will publish and send a new article to your inbox to hopefully assist you in jumpstarting your work week.

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Examining Employers' DEI Initiatives and the Increasing Challenges to the Same

[Gillian L. Gilbert](#)

Over the past several weeks many businesses have rolled out DEI initiatives in celebration of Black History Month and Women's History Month. DEI initiatives have appropriately become important keystones for employers. These initiatives communicate to employees the values of their employer, including engaging in thoughtful dialogues around how to make a workplace more inclusive.

However, many employers roll out DEI initiatives without considering best practices. No matter how well-intended an initiative might be, improper implementation can create unintentional consequences and can put employers in risky situations. On the heels of the United States Supreme Court's decision in [Students for Fair Admissions, Inc. v. President and Fellows of Harvard College](#) last summer, DEI initiatives have been increasingly challenged. But it's not just federal law that shapes DEI initiatives, states are increasingly creating new legislative landscapes for employers.

A multi-state business's DEI initiatives may also experience varying levels of scrutiny depending on the state in which they are operating. This makes it difficult for a business to have uniform DEI initiatives, or to implement an effective DEI program. Compare two states that have led the way for increased DEI legislation. Florida Governor Ron DeSantis created an alliance of states to combat what he calls "ESG financial fraud" and advanced a bill that prohibits ESG consideration by state or local governments in issuing bonds. This stand is in contrast to California, where Governor Gavin Newsom signed a bill requiring venture capital firms operating in the state to report annually the number of diverse founders in which they invest, and to disclose data about their race, sexual orientation, gender identity, disability, and veteran status of their employees.

In light of *Students for Fair Admissions*, a DEI initiative is most-susceptible to attack when three elements are present:

1. It confers a preference so that some individuals are treated more favorably than others;
2. The preference is given to members of a legally protected group, such as race, color, religion, national origin, and sex (including sexual orientation and gender identity); and
3. The preference relates to a tangible benefit, such as a job, promotion, pay raise, work assignment, or access to training and development opportunities.

Consider, for example, a women’s only lunch-and-learn where only female employees are invited to a lunchtime training event. Such an event would prevent non-binary and male employees from receiving or accessing training. While this example might seem obvious, employers should be sure to examine their DEI initiatives to ensure they are not indirectly limiting access to opportunities. In December, the Supreme Court heard [Muldrow v. City of St. Louis, Missouri](#), which could lower the standard for what counts as an “adverse employment action” and make it easier for employees to challenge some DEI initiatives. This could result in a continued increase in DEI litigation for businesses.

At [Bassford Remele](#), we regularly monitor changes to employment laws to keep our clients apprised and compliant, including the increasing presence of DEI initiatives and the case law affecting the same. Feel free to reach out with questions or for assistance in the meantime.

As a final reminder, the Department of Labor’s [final rule](#) regarding the classification of independent contractors goes into effect today. Please contact us with any questions you might have about this rule and how it may affect your employees and contractors.

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