

# DEI: Framing the Concepts Through a Legal Lens

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Diversity, Equity, and Inclusion (DEI) initiatives are no longer aspirational, but the norm. It is critically important for practitioners to follow the regulatory guidance on issues of protected class and to review DEI policies through a legal lens to help place clients in the best position to succeed.

Most corporate strategies now include DEI initiatives. Diversity is defined as: “the inclusion of people of different races, cultures, etc. in a group or organization,” according to Merriam Webster. Equity focuses on eliminating differences between groups, when those differences can be addressed and on providing access to resources for both individual and organizational success. Inclusion focuses on bringing all diverse perspectives to the table, creating a sense of belonging, and improving corporate culture.

DEI initiatives don't just aim to close the gap of success for underrepresented groups, like Black, Indigenous, and People of Color (BIPOC), but they also help keep businesses innovative. In order to make DEI initiatives successful corporate policy, companies often create strategic goals and plan for success. While lawyer intervention in this process may seem stifling at times, it is critical to maintaining legal compliance in pursuit of a more diverse business.

## **Trending Issues in the Legal Landscape**

The DEI movement has empowered people to identify themselves, potentially placing employers on notice of disabilities requiring accommodation, or co-worker behaviors that may amount to harassment in response to those self-identifications. Both the federal and California landscape prohibit harassment and discrimination based on protected class status. Below are some categorical updates that attorneys should familiarize themselves with:

- Sexual Orientation and Gender Identity Protections
- Remote Work Accommodations for Self-Identified Mental Disabilities
- Increasing Transparency in Pay Practices

Title IV of the Civil Rights Action now prohibits termination on the basis of sexual orientation and gender identity. See *Bostock v. Clayton Cty., Georgia* (2020) 140 S. Ct. 1731. California regulations spell out these protections for employers, and protect employees from recruitment, through internal promotion. While employers cannot ask for gender-affirming documentation, they must honor the self-identification request of an employee, including allowing the employee to conform to the dress code of his or her identified gender and to use the pronouns requested.

Remote work often is labeled as being DEI-friendly. While in-person office culture may foster collaboration, remote work options are an inclusive practice for

employees with disabilities. Note that, under California's Fair Employment and Housing Act (FEHA), mental and physical disability are protected so long as they limit a "major life activity." Limitations can include "physical, mental, and social activities and working." Remote work can benefit not only physically disabled employees, but also those who identify as neurodivergent—a term commonly used to explain that a person's brain function, behaviors, and interactions with the world differ from a neurotypical experience. While neurodivergence may not always amount to a mental disability under FEHA, an overzealous supervisor asking an employee to come to the office to "get back to normal" or to "act normal," may rise to the level of disability harassment.

California law also is trending toward a model of transparency, another DEI-friendly practice. The Labor Code was recently amended to include transparency in job postings, pay transparency for current employees, and required pay data reporting. Now, employers with 15 or more employees must include in any job posting or announcement the pay scale (hourly rate or salary range) for a position and must provide a pay scale for a current employee's position at the employee's request. Pay transparency helps underrepresented groups navigate new job opportunities and assess room for growth.

## **DEI Initiatives**

Many DEI initiatives are centered on mentorship of underrepresented employees, eliminating bias and offering greater transparency around career goals and advancement. Employers can make a conscious effort to eliminate bias during the hiring phase with anonymous screening processes, removing names and personal information from resumes.

Employers also can implement mentorship programs to help underrepresented employees navigate a pathway toward advancement. Marginalized groups are frequently less recognized and serve in less visible roles than their counterparts, so the additional mentorship provides another avenue toward success.

Increasing and advertising benefits also can attract and retain a diverse workforce. Some inclusive benefits include travel and childcare reimbursements for working parents, flexible work schedules like remote or hybrid schedules, fertility benefits, and mental healthcare.

With all these rich ideals in fostering DEI, it's important to note that DEI initiatives may not always align with state and federal requirements. For instance, affinity resource groups can be a great way to help diverse employees feel safe at work, but they cannot exclude other employees. For example, a women's group should remain open to "allies" and not exclusive to women.

Measuring progress on DEI programs through data collection can create more problems than solutions. While general data collection about person identifiers is permissible, asking employees questions about success on DEI policies can invite negative responses, resulting in necessary investigations for compliance with the FEHA. Surveys should be drafted with the help of legal professionals to ensure that areas of unlawful conduct are not implicated.

In conclusion, it is critically important to keep up to date on the legal landscape effecting DEI Initiatives, placing clients in the best position to succeed.

*For more on this topic, see CEB's CLE course "[DEI: Framing the Concepts Through a Legal Lens](#)", presented by the authors of this article.*

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