



# Sustaining DEI momentum after the Supreme Court's decision on affirmative action

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# Introduction

In June 2023, the U.S. Supreme Court issued a ruling ending the use of race-based affirmative action in higher education, overturning more than four decades of precedents that allowed colleges and universities to consider applicants' race in admissions decisions (Exhibit 1).<sup>1</sup> Although this recent ruling was limited to higher education and no changes have been made to Title VII of the Civil Rights Act,<sup>2</sup> many companies are seeking to understand the potential ripple effects on corporate diversity, equity and inclusion (DEI) efforts in the near and long term.

## Exhibit 1

### Timeline of Affirmative Action in the United States



1. Matt Gonzales, "Supreme Court dismantles affirmative action in college admissions," SHRM, June 30, 2023. Note: precedents permitted affirmative action in federal law, but some states—such as California, Washington and Michigan—have passed laws limiting affirmative action for their own state universities. For more see Zachary Bleemer, "Affirmative action mismatch and economic mobility after California's Proposition 209," Quarterly Journal of Economics, 2021; Grace Deng, "What the Supreme Court's rejection of affirmative action programs means for WA colleges," Washington State Standard, June 29, 2023; and Steve Friess, "Ending affirmative action will be an 'earthquake' for colleges companies" Newsweek Nov. 16, 2022.)

2. Title VII of the Civil Rights Act prohibits employment discrimination based on race, color, religion, sex and national origin. For more information see "Title VII of the Civil Rights Act of 1964," US Equal Employment Opportunity Commission, accessed Sept. 12, 2023.

Companies are caught between competing pressures. On the one hand, they have a legitimate concern about becoming the target of litigation or backlash that could have a real impact on their bottom line.<sup>3</sup> On the other hand, companies are well aware of the benefits they stand to gain from continuing to advance DEI and racial equity—such as improvements in performance, talent attraction, retention and innovation<sup>4</sup>—often in response to shareholders,<sup>5</sup> employees,<sup>6</sup> customers and other stakeholders who expect continued progress.<sup>7</sup>

Along with navigating these opposing forces, companies are preparing for the potential direct impact of the Supreme Court's decision on their talent pipelines. Without affirmative action in higher education, talent pipelines will likely become less diverse.<sup>8</sup> Human resources and DEI leaders will need to work even harder to attract talent and build a workforce capable of meeting the demands of a business landscape shaped by rapidly evolving technological, environmental and economic trends.

Leaders can respond to these growing pressures on two fronts. First, they can reinforce to themselves and their colleagues why the company is investing in DEI in the first place, highlighting facts and figures that illustrate how DEI can enable the organization to deliver on its mission and business strategy. Second, companies can take a close look at their existing DEI initiatives to understand how they might need to adapt—all while holding true to their goals and aspirations and remaining steadfast in their efforts to build workplaces that are more diverse, equitable and inclusive.

### **To support corporate leaders as they navigate this moment and chart a path forward, this guide outlines a five-step process:**

- 1. Get up to speed:** Read up on the latest news about DEI.
- 2. Know your stakeholders:** Understand your organization's core stakeholders and how they feel about your DEI efforts.
- 3. Inventory your DEI strategy:** Assess your organization's portfolio of DEI efforts across two dimensions—positive impact and potential negative reactions—to build an action and mitigation plan.
- 4. Decide how you'll move forward:** Invest in communicating and socializing your path forward with the right stakeholders and decision-makers.
- 5. Stay informed:** Continuously keep a pulse on changes in the DEI landscape that might alter your perspective on how your organization proceeds with its strategy.

3. Multiple state attorneys general have threatened legal action against corporate DEI initiatives and some lawmakers have proposed bans or defunded DEI programs. See Michael Peregrine, "State attorney generals' warning to CEOs may chill DEI initiatives," *Forbes*, July 18, 2023; Alia Wong, "DEI came to colleges with a bang. Now, these red states are on a mission to snuff it out," *USA TODAY*, March 23, 2023. Regarding backlash, see Michelle Toh, "Bud Light controversy cost parent company about \$395 million in lost US sales," *CNN*, Aug. 3, 2023.

4. "What is diversity, equity, and inclusion?," McKinsey, Aug. 17, 2022.

5. For example, see "DEI and shareholder activism: Investor pressure for board diversity," Nixon Peabody, Oct. 18, 2022, for a description of recent pressures and lawsuits by shareholders demanding that companies (such as Starbucks, Facebook and Oracle) conduct racial-equity audits and follow through on public statements about diversity.

6. For more about the risk of failing to meet DEI commitments, including the potential negative impact on employee engagement, see Christina Brodzik, "Build trust in diversity, equity, and inclusion commitments," *Deloitte Insights*, Jan. 13, 2022.

7. See *Companies are committing to DEI initiatives, but more work is needed to increase accountability and action*, JUST Capital, Nov. 2, 2021, which notes that 79% of American respondents in March 2021 agreed that companies have a role to play in promoting equity both in the workplace and more broadly in society.

8. For examples of how ending affirmative action reduced representation of people of color in California and Michigan, see "Affirmative action, mismatch, and economic mobility," 2021, and "Ending affirmative action will be an 'earthquake,'" Nov. 16, 2022. Surveys and interviews conducted by the W.K. Kellogg Foundation of Expanding Equity participating organizations in 2023, n = 22.

# Get up to speed

The first step in developing an informed perspective on how to move forward with your DEI efforts is to build a working understanding of the potential impact of recent events such as legal rulings, legislation, lawsuits and pressure from stakeholders.

Given the extensive recent media coverage of DEI issues, you may already be well informed. If you need a refresher or would like additional articles, see page 19, “Additional resources,” to get up to speed quickly. For additional tips about staying abreast of the evolving DEI landscape, see page 17, “Stay informed.”



## Know your stakeholders

Ensuring engagement and commitment from key stakeholders is essential to the success of DEI efforts—and even more crucial in the midst of DEI backlash. For example, surveys of **Expanding Equity** companies revealed that 91% of respondents cited senior leadership buy-in and support as a primary success factor in achieving organizational progress on DEI efforts.<sup>9</sup> To help determine next steps, a broad web of internal and external stakeholders should also be engaged.

Two important stakeholder groups to understand, especially given their role in the success of DEI initiatives at this moment, are employees (including leaders, managers and supervisors) and customers. In addition, as crucial as these other stakeholder groups are at this moment, many DEI professionals are now increasingly collaborating with their legal teams as they determine what to do next.

*Expanding Equity is a free transformational program that supports companies in advancing racial equity, diversity and inclusion. It provides access to a dynamic network of peers, publications such as this guide, live learning sessions with DEI experts, online learning courses and a broader community to support companies in attracting, developing, retaining and promoting diverse talent.*

*To join our mailing list and learn more about our special events, resources and opportunities, visit [ExpandingEquity.com](https://ExpandingEquity.com).*

9. Surveys and interviews conducted by the W.K. Kellogg Foundation of Expanding Equity participating organizations in 2023, n = 22.

# Employees (including leaders, managers and supervisors)






Companies can consider a vast web of additional stakeholders, from suppliers to investors to the board of directors to specific community groups. For more examples of potential stakeholders, see "From principle to practice: Making stakeholder capitalism work," by McKinsey.<sup>11</sup>

Understanding employee perceptions of DEI efforts is vital for two critical reasons: the success of ongoing initiatives and your company's broader ability to hire and retain top talent.

For example, 51% of employees who recently quit their jobs said one of the top three reasons they left was that they didn't feel a sense of belonging.<sup>10</sup> Critical moments such as the Supreme Court's recent ruling offer an opportunity to discuss how your company is responding and reiterate its commitment to DEI with employees.

As you engage with employees in an effort to understand their current sentiment toward DEI, find out how they may have reacted to recent company action (or inaction) related to the Supreme Court decision or DEI backlash. Also, explore if and how sentiment has changed for various demographic groups and levels across your organization.

Below are five ways you might gauge employee sentiment, including best practices. For all avenues, consider how you can use existing organizational structures and processes. For example, employee resource group (ERG) events and meetings provide an excellent opportunity to hold focus groups and other informal conversations. Additionally, if your company holds regular town halls, you might consider adding the company's commitment to a culture of belonging and inclusion to the agenda.

Avenues to engage employees	Best practices
 <b>Town hall</b>	<ul style="list-style-type: none"> <li>Reinforce the organization's commitment to ensuring a culture of belonging and inclusion, where everyone has equitable opportunities to thrive.</li> <li>Create space for open dialogue by reserving most of the time for comments and questions from the audience.</li> <li>Be prepared to share information about the organization's progress toward past commitments and the path forward.</li> </ul>
 <b>Survey</b>	<ul style="list-style-type: none"> <li>Consider conducting frequent pulse surveys to determine whether and how sentiments are changing over time.</li> <li>Anonymize surveys to receive honest feedback.</li> <li>Include a mix of both quantitative and qualitative questions to gather facts and context.</li> <li>Consider creating a mobile version of the survey or installing a digital kiosk at workplaces to allow employees without computer access to participate.</li> <li>Create a dashboard for results to track changes in feedback over time.</li> </ul>
 <b>Focus groups</b>	<ul style="list-style-type: none"> <li>Host focus groups with a cross-section of employees to get diverse perspectives.</li> <li>Use the same set of open-ended, unbiased questions across the groups to enable comparisons.</li> <li>Create a safe environment by setting norms—for instance, assuming others' best intentions and being vulnerable, honest and introspective.</li> </ul>
 <b>Question or suggestion box</b>	<ul style="list-style-type: none"> <li>Create a timely cadence to check for questions and suggestions.</li> <li>Answer questions and respond to suggestions as comprehensively and consistently as possible to build credibility and trust.</li> </ul>
 <b>Team huddles and one-on-one meetings</b>	<ul style="list-style-type: none"> <li>Train supervisors or managers by providing them with a toolkit to support them in asking and answering questions and holding conversations.</li> <li>Share thought-starter questions to guide conversations—for example, "What is your perception of our organization's DEI efforts? Has it changed recently? Do you think the way you feel about DEI is different from your peers in other parts of the organization?"</li> <li>Encourage supervisors or managers to seek additional guidance as needed and to report any concerns that may assist in identifying opportunities for further attention and communication.</li> </ul>

10. Aaron De Smet, Bonnie Dowling, Marino Mugayar-Baldocchi and Bill Schaninger, "Great Attrition' or 'Great Attraction'? The choice is yours," McKinsey Quarterly, Sept. 8, 2021.

11. Dame Vivian Hunt, Robin Nuttall and Yuito Yamada, "From principle to practice: Making stakeholder capitalism work," McKinsey, April 26, 2021.

## Leaders, managers and supervisors

Organizational leaders are employees—ranging from senior executives to middle managers to frontline supervisors. They have an outsized influence on DEI efforts given their role in shaping the day-to-day experiences of all employees, influencing hiring and promotions decisions and translating organizational vision into reality, including for DEI. These leaders may need to be considered separately in both evaluating employee sentiment and ensuring a coordinated, clear and comprehensive response.

You can engage these leaders in a similar way to other groups of employees to understand their perspectives and determine whether their thoughts and approaches may be shifting, even slightly, and how and why. You may also want to engage your organizational leaders by asking them to gauge the sentiments of the employees they supervise and interact with on a daily basis through pulse checks or guided discussions with their teams. These touchpoints provide an organic way to track how leaders and the whole company are reacting to changes in the DEI landscape.

## Customers

As companies work to maximize shareholder value, understanding customer sentiment is crucial. A growing number of consumers make choices about products or services based on their social values.<sup>12</sup> Social values are especially important to younger generations: 63% of millennials believe the purpose of business should be “improving society” instead of “generating profit.”<sup>13</sup> The current moment presents an opportunity for organizations to decide how they will respond to customer sentiment and use their DEI efforts to communicate who they are and what they value .

Companies can gauge consumer sentiment in several ways:

- **Talk to your marketing or sales teams** to understand priority customer segments, including any demographic segments that account for a large portion of the consumer base (whether individual consumers or other businesses).
- **Consider factors such as age, location, income and race/ethnicity of consumers** to think about how they might react to the company’s DEI efforts. To avoid making broad-based assumptions, consider using credible research, polls and other sources to build your perspective.
- **Investigate how sentiment may differ** for any of your core consumer segments compared with the general public while monitoring trends and staying updated on any recent shifts.



12. “The rise of the inclusive consumer,” McKinsey, Feb. 8, 2022.

13. Daniel Goleman, “Millennials: The purpose generation,” Korn Ferry, accessed Sept. 12, 2023.

14. Edward Chang and Bonnie Levine, “To drive diversity efforts, don’t tiptoe around your legal risk,” Harvard Business Review, July–Aug. 2022.

## Legal team

Understanding the perspectives of your legal team can help inform any potential actions to make your DEI strategy more resilient, gain buy-in with critical stakeholder groups and explore ways to effectively sustain your company's DEI efforts.

In some companies, DEI leaders and legal teams may have varying perspectives on how to respond, partly due to differences in risk tolerance. Legal teams are expected to ensure that a company's efforts follow relevant laws and regulations, and a protective versus a proactive stance may lead them to be more conservative and risk averse regarding initiatives and programs where laws are silent or lack precedent on what is legally permissible.

Your conversations with the legal team should be iterative and ongoing, but you can use your initial conversations as a starting point to understand how the team is thinking about protecting the company during this moment and emphasize the importance of sustaining DEI efforts and working together to achieve those goals. It is critical to ensure that all parties keep in mind both risks and opportunities to achieve your DEI aspirations. You might explore the following issues:

- What are the implications of the Supreme Court decision, other legal rulings and legislation from the legal team's perspective?
- What is the company's tolerance for legal risk?
- What are the changes, if any, in the company's assessment about the legal risks of certain types of DEI initiatives?
- How is the company balancing risk and impact while continuing to lean into its previous commitments and role as a champion for DEI?
- What types of guardrails have been set by senior leadership? Where is there still room to take action and shape the overall direction of the organization's DEI work?
- How can the company ensure the risks of changing or discontinuing certain DEI efforts are being given the same weight as any risks of continuing them?

You may want to meet with your legal team more frequently at first (for example, biweekly) and then set up ongoing, recurring check-ins to commit to further action steps and keep all members informed of any internal or external developments over time.

## Mapping stakeholders

One way to keep track of the sentiments and considerations of your various stakeholders is through mapping. This helpful exercise categorizes each group and its potential impact on the success of your DEI efforts. It also helps you understand the broader sentiments toward your work and evaluate potential risks with specific DEI-related initiatives (see page 10, "Inventory your DEI strategy"). If you have already conducted a stakeholder mapping exercise for your DEI efforts, now is a good time to update it in light of the current environment.

You can use this stakeholder mapping worksheet to map your stakeholders, including how you might categorize them based on their likelihood of supporting or opposing future efforts to improve DEI in your company. Exhibit 2 outlines the steps and presents a sample worksheet completed by a fictitious company, EE Corp, that focuses on several prioritized stakeholders.

*You might also consider engaging your communications team and other internal functions such as compliance, external affairs, ESG and government relations. While these teams perform different functions, they may have insightful perspectives or considerations during a time of uncertainty, so it may be helpful to bring these groups together to coordinate a response.*

*Government stakeholders can directly or indirectly affect your company through contracts, tax subsidies, policymaking or even potential litigation, so it's important to engage your government relations and external affairs team in this conversation. You may want to give government stakeholders added consideration if a significant portion of your organization's revenue or funding comes from the government, if your organization is required to have an affirmative action plan or if it operates in a city or state where government officials are actively attempting to curtail DEI efforts. In such cases, consider monitoring the sentiment of government stakeholders and having conversations with your legal team about any implications and responses.*



## Exhibit 2

Using the stakeholder mapping worksheet, spend time considering the stakeholders that are most important to your DEI efforts and how their sentiments influence your work going forward. To get started, utilize the following steps:

### 1 List your stakeholders

Create a consolidated list of the stakeholders you want to analyze. These can be broader groups such as customers and employees or can be made more granular to specific decision-makers in your organization

### 2 Note stakeholder sentiment

As you spend time interacting with stakeholders, try to understand any concerns they raise about your organization's DEI efforts, if they are generally supportive or opposed and how likely they are to act

### 3 Categorize your stakeholders

After understanding their sentiment, categorize your stakeholders into three groups to get a sense of where most groups land:

- **Advocates:** Strongly in favor and likely to take action to support DEI efforts in the future
- **Neutral actors:** Either slightly supportive or opposed, but unlikely to take specific actions at the moment
- **Detractors:** Strongly against and likely to take action to oppose DEI efforts in the future

Stakeholder	Notes <sup>15</sup>	Advocates	Neutral actors	Detractors
<b>Internal</b>				
<b>Employees (general, including frontline)</b>	Most employees support DEI efforts, but a growing proportion expressed a degree of DEI fatigue with constant changes to initiatives		✓	
<b>Senior leaders (including DEI leaders)</b>	Leaders of DEI initiatives are still passionate but anxiously awaiting to hear how SCOTUS will affect go-forward plans	✓		
<b>Legal team</b>	Head legal counsel is supportive of DEI efforts but is also extremely cognizant of risk, especially about efforts focused on attracting diverse talent		✓	
<b>External</b>				
<b>Customers (general)</b>	Most customers care about company commitment to racial equity, which is a core reason they purchase the company's products and services	✓		
<b>Customers (near local HQ)</b>	A small but vocal group of customers in the headquarters geography has protested race-focused DEI efforts previously			✓
<b>State/local/tribal government officials</b>	Government officials have made positive public statements about DEI but seem unlikely to take any direct action in support of EE Corp		✓	
<b>Other (e.g., local community groups)</b>	Local community organizations that have previously supported EE Corp's DEI initiatives expect the company to uphold its previous commitments	✓		

## As you complete the steps on the worksheet, keep several questions in mind

### 1.

What are the stakeholder sentiment trends in your company? For example, are people generally in favor of DEI efforts but unlikely to act? Are they passionate and active but becoming burned-out?

### 2.

Would it be helpful to divide any stakeholder groups into smaller subgroups? For example, do some specific, more vocal customer segments have the potential to provide needed support or attract unwanted attention?

### 3.

How might each stakeholder group's perceptions about DEI efforts differ for specific initiative types? For example, is a given group more supportive of improving all employees' sense of inclusion and belonging but less supportive of initiatives focusing on the company's external political and social influence?

15. These initiatives are meant only to be examples. None is inherently more likely to cause negative or positive reactions from stakeholders than the others. Their potential depends on each company's unique context and stakeholder environment.

This mapping can reveal important themes and broadly shape how you communicate about DEI. It can also influence elements of your strategy, including:

**How you connect to your company values.**

If your company has made a strong commitment to DEI, it is essential to consider both how you can incorporate that value in your communications and how the way you communicate may have reputational repercussions. Depending on the values of your employees and customers, you may want to double down on certain values, even if they may be objectionable to certain groups. Remaining true to your beliefs about why DEI benefits your company's ability to achieve positive business outcomes can be critical in weathering the current volatile and unpredictable political and social climate and reinforcing your organization's core values—for the benefit of all your employees, customers and partners.

**The types of messages and themes that are used with specific audiences.**

If you discover that internal or external stakeholders are particularly concerned about certain words or concepts, you can ensure your communications focus on less-divisive and more-inclusive elements. With this approach, you can remain honest and transparent but avoid undue controversy and distraction from otherwise powerful work. If you have a customer base or shareholder group that is committed to specific DEI initiatives, you may choose to disclose additional information about that work.

# Inventory your DEI strategy

Now that you have an established baseline for stakeholder sentiment toward DEI, you can analyze the full portfolio of your company's DEI efforts. A holistic view of your company will enable you to determine how you can apply insights about your stakeholders to your portfolio of initiatives to further your overall DEI aspirations. You are not redoing your DEI strategy but simply taking an inventory to develop an optimal path forward. This planning can support the continued implementation of your data-backed DEI strategy while mitigating any potential challenges from external stakeholders.

A valuable tool to inventory your DEI efforts is a two-by-two negative reactions–positive impact matrix. It can help you examine the impact of DEI initiatives on your company's overarching business goals and the potential for each initiative to cause negative reactions among stakeholders—for example, bad press, frivolous lawsuits, customer boycotts or unwanted attention.\*

Before you conduct this exercise, list all the important DEI efforts within your company. These can include major internal initiatives (such as employee resource groups and changes to recruitment practices) as well as internal or external communications (for example, metrics reported in an annual DEI or ESG report). The following sections of this guide can help you understand how to use the two dimensions of the framework and address considerations once you have scored each of your DEI efforts.

**\* Scaling back on DEI initiatives can also spark negative reactions. Many companies have challenges with actual or perceived inequalities of opportunity and failing to act on those challenges can increase the potential for a negative reaction from key stakeholder groups. It is critical for companies to find a balance and weigh considerations on both sides.**

16. Linda S. Goldman, T. Scott Kelly and Zachary V. Zagger, "The Supreme Court's affirmative action ruling: A shift in how private employers approach DEI?," Ogletree Deakins, Aug. 9, 2023.

# Evaluating the potential for negative reactions to your DEI efforts

The first step is to assess your initiatives based on their potential to cause **negative reactions** from stakeholders, using a scale from one (very low chance of negative reactions) to four (very high chance of negative reactions).

As you assess your initiatives for their potential negative impact, consider the following questions in the context of your stakeholder analysis:

- How likely is your DEI initiative to receive significant public attention?
- How likely is your initiative to have a negative impact on stakeholder opinion?
- How likely are stakeholders to take action or cause additional unwanted attention as a result of your initiative (such as boycotting a product or initiating litigation)? What is their actual reach and potential influence?

For example, EE Corp's DEI manager rated four initiatives along with the rationale based on the factors above (Exhibit 3).<sup>17</sup>

*In this guide, our definition of **negative reactions** from stakeholders does not include the real risks of continuing certain DEI efforts. Some initiatives, policies or programs may be more likely to face higher legal risks. Examples may include tying compensation and promotion to hiring quotas, limiting opportunities to specific groups and setting specific goals or timelines for more diverse representation within specific roles.<sup>16</sup> For more information, speak with your legal counsel.*

## Exhibit 3

### Sample Negative Reactions scores for EE Corp

Score	Sample criteria
1	<b>Extremely unlikely</b> that the effort will cause negative reactions or action from stakeholders
2	<b>Somewhat unlikely</b> that the initiative will cause negative reactions or a shift in stakeholder sentiment for a limited number of stakeholders and <b>unlikely</b> that any stakeholder groups will take action
3	<b>Likely</b> that the effort will cause an unwanted shift in stakeholder sentiment for one or multiple stakeholder groups; <b>Somewhat likely</b> that certain detractor stakeholder groups will take action
4	<b>Extremely likely</b> that the effort will cause an unwanted shift in stakeholder sentiment for one or multiple stakeholder groups; <b>Likely</b> that multiple detractor groups will take action

Example effort	Negative Reactions score	Rationale
Publicly share a commitment to attract at least 50% candidates of color for all positions by 2025	4	Legal counsel expressed their strongest concerns about this initiative and multiple detractor customer groups have advocated against similar initiatives in EE Corp's industry
Increase supplier and vendor diversity	3	Some detractor customer groups have advocated against similar initiatives, but the goals are not public, and the legal team has been supportive of this effort in the past because it does not use any form of race-based selection
Create a best practice sponsorship program with a focus on people of color	2	Employees are supportive of the program, and it does not exclude any individuals who want to participate, even though only employees of color have participated in the past
Institute and articulate objective hiring criteria	1	This is an initiative that all stakeholder groups are either supportive of or indifferent to and is a priority of senior leadership

17. These initiatives are meant only to be examples. None is inherently more likely to cause negative or positive reactions from stakeholders than the others. Their potential depends on each company's unique context and stakeholder environment.

# Evaluating the positive impact of your DEI efforts

After you have evaluated the potential for efforts to cause negative reactions from stakeholders, consider assessing their current and potential positive impact and their importance to achieving your overarching DEI goals and current DEI priorities.

In assessing the positive impact of your efforts, you could consider the following factors:

- How likely is the effort to support DEI and the company’s strategic business goals?
- How likely is it to have a positive impact on both internal employees and external community members?
- How well will the effort address an existing pain point related to your organization’s needs (such as racial equity, career advancement for people of color or inclusion for all employees)?
- How likely is the effort to lead stakeholders to take positive action on behalf of your company?

Again, EE Corp’s DEI manager used these considerations to rate the same four of its initiatives for positive impact (Exhibit 4).

*When you are evaluating the impact or measuring the progress of your DEI initiatives, it can be useful to examine the quantitative and qualitative baselines, including where you started, where you currently are and where you aspire to be. Collecting and analyzing aggregated data for demographic factors (for example, race and ethnicity, gender, sexuality or disability) can be helpful if there are major disparities or universal barriers. However, it is critical to ensure the data are not shaping individual employment decisions and are collected and used in accordance with privacy laws.<sup>18</sup>*

## Exhibit 4

### Sample Positive Impact scores for EE Corp

Score	Sample criteria
1	<b>Extremely unlikely</b> the effort will positively move your company towards its DEI aspirations, impact stakeholders or address a major pain point with limited reason to believe that it will change
2	<b>Somewhat unlikely</b> that the effort will positively move your company towards its DEI aspirations, impact stakeholders or address a major pain point at this moment, with some reason to believe that it could change in the future
3	<b>Likely</b> that the effort will positively move your company towards its DEI aspirations, impact stakeholders or address a major pain point, at especially with measurable progress
4	<b>Extremely likely</b> that the effort will positively move your company towards its DEI aspirations, impact stakeholders or address a major pain point and you have demonstrated progress with data to back it up

Example effort	Positive Impact score	Rationale
Publicly share a commitment to attract at least 50% candidates of color for all positions by 2025	1	EE Corp has already achieved the 50% marker internally for several years and can instead share its demographic representation number with the same influence on other companies in its industry
Increase supplier and vendor diversity	3	Contributing to local communities is a major aspect of EE Corp’s overarching DEI aspirations, and it has already made progress in increasing its pipeline of diverse vendor candidates by 18%, over halfway to their goal of 30% by 2025
Create a best practice sponsorship program with a focus on people of color	2	The program has been helpful to a small group employees, but participant surveys revealed that 72% of people of color in EE Corp report greater levels of sponsorship from informal avenues and over half rated the program as ineffective
Institute and articulate objective hiring criteria	4	EE Corp has struggled with over 30 reports of bias in its hiring process during the past two recruiting cycles, leading to a 20% increase in the gap between hiring of applicants of color and hiring of white applicants

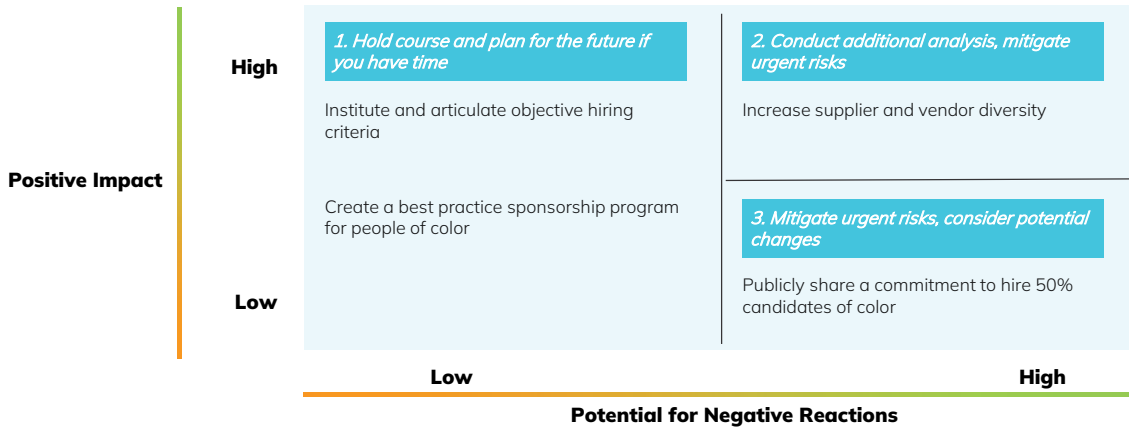
18. For more information on the use of racial data, see Lily Zheng, “How to effectively—and legally—use racial data for DEI,” Harvard Business Review, July 24, 2023.

# Using the negative reactions–positive impact matrix to prioritize next steps

Once you complete your ratings for each DEI effort, you can return to the matrix to plot your efforts and categorize them, similar to the example of EE Corp (Exhibit 5). Scores of one to two are considered low, and three to four are regarded as high.

## Exhibit 5

### EE Corp Sample Matrix



The Positive Impact and Potential for Negative Reactions scores are relative to the context of the company. An example of why a seemingly positive effort may be considered 'lower impact' is described in Exhibit 4

When plotting the initiatives onto the matrix, it can be helpful to consider potential actions you might take for initiatives in each category, with the goal of making your DEI strategy more resilient. This list of sample actions can help you consider your next steps while prioritizing the most urgent actions.

DEI effort category	Potential actions	Examples
<p><b>1. Low potential for negative reactions:</b> Efforts that can be continued as before and reevaluated only when it typically would be (for example, annual strategy review).</p>	<ul style="list-style-type: none"> <li>Continue monitoring the stakeholder landscape, any feedback from the initiative and legal landscape in case a shift moves the initiative into another category.</li> <li>Focus energy on initiatives in the other two categories.</li> </ul>	<ul style="list-style-type: none"> <li>An ERG initiative creates a space for all colleagues passionate about improving inclusion and belonging. The group is open to all employees and hosts events celebrating all identities.</li> </ul>
<p><b>2. High potential for negative reactions, high positive impact:</b> Efforts that support the company’s DEI aspirations and should be kept the same whenever possible; the company should have a plan to mitigate negative reactions.</p>	<ul style="list-style-type: none"> <li>Develop a mitigation plan that preserves the core of the initiative and articulates steps to decrease the likelihood of negative reactions, bad press or distracting lawsuits. Ensure you have a plan to address potential negative reactions, including specific action steps that you will take to build buy-in from your core stakeholders.</li> </ul>	<ul style="list-style-type: none"> <li>A diversity leadership program aims to provide leadership training to underrepresented leaders. The program was initially limited to certain racial/ethnic groups, but after recognizing the potential risks, the team decided to open it up to all races, with ample marketing efforts to ensure all employees are aware of and have access to this training.</li> </ul>
<p><b>3. High potential for negative reactions, low positive impact:</b> Efforts that have a high potential to cause negative reactions, should have a mitigation plan in place, and may be slightly adapted to increase impact.</p>	<ul style="list-style-type: none"> <li>As in the second category, DEI efforts in this category should have a mitigation plan outlining steps to avoid negative reactions and ways to respond if they do occur.</li> <li>However, also consider whether adjustments to these efforts could enable greater impact in service of your DEI goals</li> </ul>	<ul style="list-style-type: none"> <li>The company’s ESG report and website typically publicize the company’s commitment to attracting at least 50% candidates of color for management positions by 2025. Your team has expressed the potential unwanted attention caused by communicating this target as a recruitment commitment. Because the company has consistently achieved the goal with its de-biased hiring processes, it instead decided to share a simple employee demographic breakdown each year.</li> </ul>

# Decide how you'll move forward

Once you have inventoried your DEI efforts, sharing your initial assessment and action plans for the company's DEI efforts with key decision-makers is critical to gaining alignment and developing a path that sets up your DEI strategy for continued success. You can accomplish this by taking four actions: anticipate the considerations of key decision-makers, share initial inventory and proposed action plans, align on next steps and keep key decision-makers informed.

## 1. Anticipate the considerations of key decision-makers

First, understand key decision-makers' perspectives and top considerations regarding DEI. This process can be similar to conducting stakeholder sentiment analysis and involves conversations with each group. You may want to consider the following decision-makers and perspectives:

Key decision-makers	Potential considerations
<b>Senior sponsors</b> (such as the CEO, Chief Human Resources Officer or Chief Diversity Officer): Ultimate decision-makers about DEI efforts who use their bird's-eye view across the company to shape the broader direction and vision	<ul style="list-style-type: none"><li>• Reactions of key internal and external stakeholders (for example, customers, employees or the board of directors)</li><li>• Integration of DEI efforts with the broader organizational strategy and the organization's core values</li></ul>
<b>Specific DEI leaders:</b> Owners of specific initiatives who are responsible for implementation and tracking progress	<ul style="list-style-type: none"><li>• Effort required to implement or revamp DEI initiatives</li><li>• Maintenance of previously attained progress on DEI efforts</li><li>• Access to adequate resources (such as staffing and funding) to continue or adapt current DEI initiatives</li></ul>
<b>Internal functions teams</b> (such as legal and communications): Leaders with an understanding of current laws and potential legal and reputational ramifications	<ul style="list-style-type: none"><li>• Compliance of DEI efforts with existing national, state, local and tribal laws and regulations</li><li>• Impact on the brand and reputation of the company</li><li>• Possible legal challenges posed by DEI efforts</li></ul>
<b>Business unit leaders:</b> Employees who oversee business units or functions (for example, marketing, accounting and sales) and can assist with DEI implementation in their respective departments	<ul style="list-style-type: none"><li>• Access to adequate resources (such as capacity and budget) to implement or revamp DEI efforts</li><li>• Direct impact of specific DEI initiatives on their business unit and outcomes</li></ul>

## Training as a key enabler

Getting buy-in for potential future actions as part of your DEI efforts is critical and will require the engagement and active participation of people across your company, even beyond the senior leaders who may decide the ultimate direction. Training can help ensure that your approach for navigating the current moment sticks.

All employees, from senior leaders to middle managers to frontline workers, are critical to the day-to-day implementation of your DEI strategy, in part because they are likely to be responsible for implementing the DEI efforts you choose to pursue. Employees need to be aware of any new changes to your DEI efforts to avoid exposing the company to unnecessary risk by taking actions that are potentially illegal or inconsistent with new policies.

It is likely that your company already has numerous trainings related to DEI. As you evaluate your initiatives and brainstorm potential changes, consider whether any of these sessions need to be revised to help employees act in a way that incorporates and operationalizes guidance that is consistent with a legally sound approach to DEI.

Training topics that you could integrate include the following:

- Selecting DEI metrics and mitigating common data collection risks
- Implementing equitable hiring practices and ensuring race/ethnicity is not taken into account in employment decisions
- Incorporating inclusive language in writing position announcements or job descriptions
- Reviewing DEI programs to emphasize that they are inclusive and do not limit participation based on demographic factors
- Setting DEI goals and communicating about them in a way that is both legal and consistent with company values

## 2. Share initial inventory and proposed action plans

Once you have articulated the considerations of key decision-makers, it is essential to hold meetings with the relevant groups to share your initial findings and ideas for the path forward. At this point, organizations should reinforce to leaders why DEI is a priority, including how it affects the bottom line. These meetings are an opportunity not only to reiterate your commitment to your goals but also articulate why they are important—which can help make your efforts more resilient.

Once you have defined the why, you can then treat the initial inventory of DEI efforts as a hypothesis that leaders will help you test, all while building consensus for the ultimate direction. When sharing this initial assessment, you might have the following goals:

- Test your assumptions about the current impact and potential for negative reactions of DEI efforts.
- Ask questions to uncover knowledge gaps (for example, other litigation concerns or broader business strategy shifts).
- Brainstorm additional actions that may help to mitigate potential negative reactions or protect high-impact initiatives.



### 3. Align on next steps

After sharing the initial inventory and proposed action plans, coordinate with leaders on next steps to further evaluate DEI initiatives or begin implementing your mitigation plans. Additionally, these discussions can help align leaders on the urgency of necessary changes. For example, a recruitment initiative that was deemed to have a higher potential to cause negative reactions from stakeholders and is expected to be implemented in the next recruiting cycle may need to be prioritized for review by senior leaders to ensure it is ready on time.

### 4. Keep key decision-makers informed moving forward

To drive DEI efforts, it is critical to establish a continuous communication loop that keeps key decision-makers informed of changes to the assessment and progress toward the defined next steps.

The following actions are good ways to keep these decision-makers informed:

- Send end-of-week or end-of-month emails outlining progress and priorities.
- Set a weekly or monthly cadence for meetings with core decision-makers.
- Create a simple tracker to monitor progress toward next steps.

These actions can support buy-in, especially given that leaders' involvement is necessary to motivate employees in the future.

*Sharing the assessment can be done in different ways. If internal decision-makers share similar perspectives, discussions could involve multiple groups. However, if these groups have potentially divergent perspectives, it may be helpful to hold separate discussions with different leaders first before getting buy-in from the ultimate decision-maker (for example, the CEO or Chief Human Resources Officer).*

*Helpful tip: aim to secure a commitment to take clearly defined next steps. An acronym to remember is EWBEWBWEW: exactly what, by exactly when, by exactly who. Considering these questions during discussions can help spur action and accountability.*

# Stay informed

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As you further refine your initiatives and build buy-in among stakeholders, continue to strengthen your working knowledge of how new DEI-related events may affect your work in corporate DEI. Staying informed about legal rulings, major lawsuits and pressure from stakeholders can help you continue to execute your DEI strategy.

As you learn about new developments, you can consider how they apply to your specific context based on factors such as the industry your company operates in, how many employees your company has, geography where your company operates and the types of DEI efforts that make up your strategy.

Two actions will help you keep your finger on the pulse of DEI trends: keep track of recent DEI news and connect with your peers.

## Keep track of DEI news and developments

Monitoring the latest changes in the broader corporate DEI ecosystem should be an ongoing activity.

Several tactics will help you keep up:

### **Set up a news alert for “affirmative action” and other keywords (for example, “corporate DEI”).**

Many news sites and internet browsers allow you to follow specific topics or set email alerts. This can help you ensure you are getting the latest information about affirmative action and other issues affecting corporate DEI policies and practices.

### **Read the latest thinking about the legal ramifications.**

Articles can be helpful by providing context to the broader change (for example, the [Department of Labor’s FAQ about affirmative action for federal contractors and subcontractors](#)) or detail about specific topics relevant to your company (for example, a focus on DEI in your state). You can also work with your legal counsel to stay abreast of case law within your state or local jurisdiction.

### **Join relevant webinars.**

Several law firms, law schools and organizations—such as the [Corporate Racial Equity Alliance](#), [Catalyst](#) and [Business for Social Responsibility](#)—have held information sessions about the Supreme Court ruling. Follow local and partner companies to learn about additional opportunities.

### **Monitor consumer sentiment.**

Follow recent events and assess consumer sentiment. This can include monitoring social media posts or keeping up with online polls from sources such as Gallup or Pew Research Center.

See page 19, “Additional resources,” for other helpful articles related to the Supreme Court decision.

## Connect with your peers

Another way to continue strengthening your understanding of shifts in the external environment is to check in with your peers at other organizations and monitor activity in your industry. Making these connections can support your learning as you navigate this specific moment in DEI, but you don't have to make the check-ins a one-time event. Engaging with your peers on an ongoing basis can help you stay up to date on the latest ways companies are reacting to the latest news like the SCOTUS decision, including ways that they have overcome challenges to carrying out their DEI strategy.<sup>19</sup>

You may also receive invitations to complete surveys about how companies' DEI efforts are evolving. Participating in these surveys can help you further benchmark your efforts against others within your industry.

You can connect with colleagues at other companies through the following activities:

- Attending conferences
- Joining industry-specific networking groups
- Reaching out directly to peers in similar roles
- Participating in **Expanding Equity** or similar programs

As a reminder, to join **Expanding Equity's** mailing list and learn more about our special events, resources and opportunities, visit [ExpandingEquity.com](https://ExpandingEquity.com).

Beyond these conversations, you can also do a quick scan of companies in your industry to understand their current position on DEI and determine how—and whether—that position is changing over time. To do this, choose three to five peer companies to track. Consider companies that are in your industry, have similar DEI aspirations or have similar employee demographics. Your colleagues running the day-to-day business may also have a good idea of your company's key competitors. Once you have identified your peer set, monitor social media, blogs, newsletters or other publications to learn more about their actions related to DEI.

## Conclusion

Developing an awareness of the external environment, assessing the sentiment of stakeholders, evaluating your DEI efforts and securing buy-in from senior leaders will put you in a strong position to address potential challenges raised by the Supreme Court decision. With this guide, you can refine your DEI strategy, initiatives and communications within the current ecosystem to ensure they are resilient and sustain your momentum in creating a diverse, equitable and inclusive workplace.

19. Affirmative action in employment officially applies only to federal contractors and subcontractors, categories that do not include all employers. However, being aware of these changes can be helpful when trying to understand the broader shift and how the Supreme Court ruling could have implications for corporate DEI more broadly.

20. Some antitrust considerations restrict employers from having certain discussions or agreements with other peers seeking to hire the same employees. For more information, see "Antitrust guidance for human resource professionals," US Department of Justice Antitrust Division, Federal Trade Commission, Oct. 2016, or consult with your legal team.

# Additional resources

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## Potential pushback on corporate DEI initiatives

- 1) Gartner (May 2022): [“How to navigate pushback to diversity, equity and inclusion efforts”](#)  
*Anticipates pushback that companies may face from internal and external stakeholders (such as employees and customers) and how to tackle them.*
- 2) Harvard Business Review (July 2023): [“What SCOTUS’s affirmative action decision means for corporate DEI”](#)  
*Provides an overview of types of diversity programs and practices that are likely to withstand potential challenges to corporate DEI initiatives.*
- 3) Vox (July 2023): [“The future of affirmative action in the workplace”](#)  
*Describes the connections and differences between affirmative action for higher education and for the workplace, drawing from an interview with Pauline Kim, an employment law expert from Washington University in St. Louis.*
- 4) NPR (Aug. 2023): [“Corporate DEI initiatives are facing cutbacks and legal attacks”](#)  
*Describes recent changes in the DEI landscape including recent cuts and predictions for what is to come for corporate DEI.*
- 5) Wall Street Journal (Aug. 2023): [“The legal assault on corporate diversity efforts has begun”](#)  
*Describes recent efforts by conservative groups to challenge corporate DEI efforts, including pending legal actions against companies such as Amazon, Starbucks and Coca-Cola.*

## Sustaining momentum of DEI efforts

- 1) Chief (June 2023): [“Affirmative action has been banned in college admissions. Here’s how corporate leaders can respond”](#)  
*Describes innovative methods for companies to continue developing and recruiting diverse talent.*
- 2) BSR (June 2023): [“The US Supreme Court ruling on affirmative action: A business response”](#)  
*This blog highlights seven key actions that companies can do now to help demystify the affirmative action ruling’s impact amongst stakeholders and promote an inclusive economy in the long run.*
- 3) Catalyst (June 2023): [“Does the US Supreme Court decision on affirmative action affect your company’s diversity initiatives?”](#)  
*Discusses potential implications of the Supreme Court ruling and what US-based companies can do to continue advancing racial equity.*
- 4) Fortune (July 2023): [“The importance of communication in wake of Supreme Court affirmative action ruling”](#)  
*Outlines key actions companies can take to maintain momentum of DEI initiatives: proactively consult legal counsel, ensure the company is communicating DEI efforts and double down on data.*
- 5) MIT Sloan Management (Aug. 2023): [“How outlawing collegiate affirmative action will impact corporate America”](#)  
*Details how previous state-level bans on affirmative action in college admissions had an impact on corporate pipelines and the need for businesses to change their practices to continue hiring diverse candidates.*
- 6) Forbes (Sept. 2023): [“Dialing back your company’s DEI efforts? Not so fast”](#)  
*Describes the importance of articulating the business case for DEI with one way of doing that being to integrate DEI efforts into an organization’s environmental, social and governance (ESG) strategy.*

# Legal risks companies may face and ways to address them

1) Bloomberg Law (March 2023): ["Corporate diversity pledges fizzle amid layoffs, GOP backlash"](#)

*Describes how laying off DEI specialists can undermine company racial-justice pledges and cause an increase in behavior or biases that can result in legal risk.*

2) Jenner & Block (May 2023): ["Client alert: threading the needle: Navigating potential legal threats to supplier diversity initiatives"](#)

*Provides an overview of the recent challenges to supplier diversity programs, sharing emerging best practices for sourcing diversity information from corporate vendors and other stakeholders.*

3) Harvard Business Review (July 2022): ["To drive diversity efforts, don't tiptoe around your legal risk"](#)

*Encourages effective collaboration and engagement with legal teams to minimize the litigation risk of DEI initiatives.*

4) Reuters (June 2023): ["Diversity matters: The four scary legal risks hiding in your DEI program"](#)

*Examines potential legal risks companies face and considerations such as compliance with employment law and engaging legal teams to mitigate litigation risks.*

5) Harvard Business Review (July 2023): ["How to effectively—and legally—use racial data for DEI"](#)

*Provides steps to balance DEI initiatives amid legal uncertainty by navigating racial-data usage after the Supreme Court ruling.*

6) New York Bar Association (Sept. 2023): ["Report and recommendations of the New York State Bar Association Task Force on Advancing Diversity"](#)

*Covers the federal anti-discrimination laws that apply to corporations, recommendations for corporates to ensure they continue to invest in DEI efforts while mitigating potential legal risks and strategies that can help organizations ensure a diverse talent pipeline.*



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