



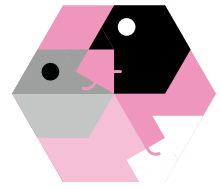
Diversity & Inclusion



# To Drive Diversity Efforts, Don't Tiptoe Around Your Legal Risk

by Edward Chang and Bonnie Levine

# To Drive Diversity Efforts...



DIVERSITY  
& INCLUSION



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Address it  
directly  
with your  
lawyers from  
the start.



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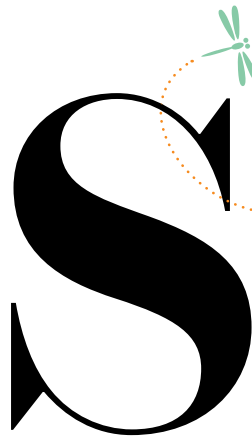
*...Don't  
Tiptoe  
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Legal Risk*







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**UPERFICIALLY**, a company's DEI leaders and legal counsel appear to be at odds. DEI leaders, passionate about their cause, think of legal experts as guardians of the status quo and resent them

for throwing up roadblocks to their reform-minded initiatives. Legal experts, trained to be methodical in anticipating the worst, resent DEI advocates for not reaching out early and often as they develop their initiatives. Entrenched in their perspectives, both groups engage only at the last minute, when they have to.

This serves nobody well because it can reinforce as "safe" outdated or performative DEI practices that have been shown to be ineffective. And ineffective DEI, particularly when perceived as noncommittal and inauthentic, can cause a host of problems: It can harm recruiting efforts, damage employee morale, drive employee concerns underground, and even invite lawsuits.

Consider how that dynamic plays out in the following hypothetical case: A CEO of a medium-size company sends an email to the new chief diversity officer, asking for some numerical goals for workforce demographics. In

consultation with a DEI council established three months before, the chief diversity officer decides to recommend a hiring goal of 45% women and 35% racial minority members in the coming year. Together they prepare a report and submit it to the CEO, who adds the topic to the agenda for a quarterly companywide briefing scheduled for the following week. The CEO plans to announce the goals there and put them on the company's website and social media accounts shortly thereafter. The chief diversity officer prepares talking points for the CEO that say the company is committed to holding itself accountable and may tie leader compensation to its hiring goals.

The day before the meeting, the CEO's office sends the talking points to the company's in-house attorney. Alarm bells immediately go off in the attorney's head. Are these goals actually quotas, which the law prohibits? Are the percentages meant to apply to new hires or the total workforce? Are they specific to the United States or global? Where would the data come from? Why didn't anybody tell me about these plans earlier?

While the attorney wrangles with these questions, the CEO sends a follow-up message to the chief diversity officer, the in-house attorney, and others on the leadership team, with the DEI council copied. The message reads, "Hey, everything good to go? I'm really excited about the work we're doing to cultivate a diverse, equitable, and inclusive workplace, and I want to thank our DEI council for their hard work putting this together!" Within minutes two of the council members reply all with positive reinforcement, thanking the CEO for the company's true commitment to this important initiative.

#### IDEA IN BRIEF

##### THE PROBLEM

Many DEI initiatives are scuttled because DEI leaders and legal teams feel themselves to be at odds over questions of acceptable risk. Working in a murky legal environment, both groups engage only at the last minute, when they have to.

##### WHAT EVERYBODY FORGETS

Businesses routinely choose to accept significant legal risk. In most situations they're confronted with a risk-reward calculus that's easy to quantify and conceptualize. But with DEI that's harder, because the only thing that appears on the balance sheet is the cost.

##### A BETTER WAY

When it comes to establishing a productive partnership between DEI leaders and legal counsel, the key is to collaborate early and often, using the framework this article lays out, so as to balance the nuances of legal risk with the need to implement effective initiatives.



DEI initiatives often focus on hiring from underserved groups, but lawyers tend to run away screaming from any suggestion that demographics are a factor in employment decisions.

Pressure mounting, the in-house attorney asks the outside corporate counsel to provide emergency advice via email. Outside counsel responds that these goals appear to be quotas, which are prohibited by law, and suggests that—in the absence of any more-specific information—the prudent thing to do is to remove all numbers and references to concrete actions from the talking points. So the in-house attorney revises them, marks the file “final/approved,” and returns it that evening to the CEO, with the outside counsel’s email attached. Stripped of all specifics, the new script says only that the company is “committed to equal employment opportunity” and “has set aspirational goals to increase diversity in hiring this year.”

The next morning, confused but not wanting to break the law, the CEO reads from the new talking points—which surprise and disappoint both the chief diversity officer and the DEI council. After the meeting, the CEO looks at them apologetically and says, “Our attorneys told us the previous version wasn’t legal.”

Nobody ends up happy in that scenario. Fortunately, there’s a better way: conscientious, proactive partnerships between DEI leaders and legal advisers. In making that claim, we speak from experience and different perspectives: One of us (Edward) is an academic who researches interventions to improve DEI in workplaces. The other (Bonnie) is an attorney who applies the principles of behavioral science in the workplace to compliance counseling, DEI, and investigations.

In this article we offer advice on how to develop a productive partnership between legal and DEI—one that advances DEI efforts by effectively balancing risk and reward.

## THE LEGAL LANDSCAPE

In the emerging DEI space, few statutes affirmatively regulate how companies conduct diversity, equity, and inclusion initiatives. Instead, most say what companies can’t do—without articulating specific applications. These laws concern topics such as:

### **The collection and processing of employee data.**

Sound DEI practices require thorough and accurate data about the workforce, including breakdowns by characteristics such as race and gender. But when it comes to self-identification campaigns, diversity analytics, and the

publishing of data, some laws (particularly privacy laws outside the United States) restrict what information may be gathered on job applicants and employees. Others require employers to collect and report information but are largely silent as to what else employers may do with it. The law in this area is changing and varies by location, so things can get complicated and confusing. Attorneys are also acutely aware that any visualizations and compilations of the data created by companies will be discoverable should litigation occur.

**The consideration of factors such as race and gender in employment decisions.** Corporate DEI initiatives frequently focus on recruiting and hiring from historically underserved groups, but lawyers tend to run away screaming from any suggestion that demographic factors have been or will be considered in employment decisions. Why? Because some laws appear to forbid that outright, suggesting that any such consideration would be “reverse” discrimination—a gender discrimination claim against male employees, for example. Fear of such claims should never drive your practices in this space, but you should be mindful of these laws when drafting job postings, conducting interviews, or rolling out new recruitment strategies.

**Targets versus quotas.** Antidiscrimination laws permit—and in some cases require—employers to take affirmative action to advance equal opportunity in the workplace. To hold themselves accountable, employers may set numerical diversity targets—aiming to have 30% of new hires be racial minority members by the end of the year, for example, or to have 40% of managers be women by 2025. *Goals* are permissible, but from a legal standpoint, even targets that are labeled “goals” may actually be *quotas*, which are impermissible under U.S. federal law. It’s up to the courts to determine whether something is a goal or a quota, and the process is often complicated and contingent on specific circumstances. (Did managers feel pressure to comply with it? Was anyone punished for not meeting it?) Even winning a case in this arena can be incredibly expensive.

## RISK AND TRUST

Given the evolving and often murky nature of this legal landscape, it’s easy to understand why lawyers consulted about proposed DEI initiatives, especially at the last minute, are



quick to worry about such matters as reverse discrimination and impermissible quotas—and why DEI professionals may not look forward to these conversations.

Part of the problem is that legal experts believe they are acting to protect the company from legal risk. That's understandable: It's their job. But by avoiding one risk, you often incur another. Consider an organization that touts its DEI accomplishments on social media but regularly dismisses the concerns of its employees (such as unfair pay, lack of representation, or fear of retaliation for speaking up). That contradiction itself can lead to lawsuits.

Further, businesses choose to ignore or accept significant legal risk all the time: They set up corporate entities to avail themselves of tax loopholes, knowing that they might be audited and fined; they research and integrate aspects of competitors' product strategies, knowing that they might be sued for intellectual-property infringement; they market-test new countries without registering to do business there. So what is different about DEI?

The answer, in part, is that when executives make decisions about products, customers, and routine operational matters, they're confronted with a risk-reward calculus that they can quantify and conceptualize comfortably. That's harder to do with DEI, because the only thing that makes it onto the balance sheet is the cost.

Absent a foundation of mutual trust and support, lawyers are skittish about signing off, and the businesses are more likely to end up wasting resources on performative exercises that, on their own, don't constitute sound DEI. They're likely, for example, to implement mandatory DEI training modules that haven't been shown to be effective. Unless accompanied by genuine efforts to encourage equity (through, say, the equitable distribution of decision-making power in an organization), these practices are more likely to foster resentment, damage credibility, disengage employees, fuel attrition, and ultimately increase the likelihood of a lawsuit. The lawyer-as-adversary fear, in other words, becomes a self-fulfilling prophecy.

## THE PATH TO PARTNERSHIP

It is possible—and indeed necessary—to ensure that DEI initiatives are both legally informed and effective. When

it comes to establishing a productive partnership between DEI leaders and legal counsel, the key is to balance the nuances of legal risk with the need to craft and implement initiatives that are more than just performative. Here's a framework for doing that.

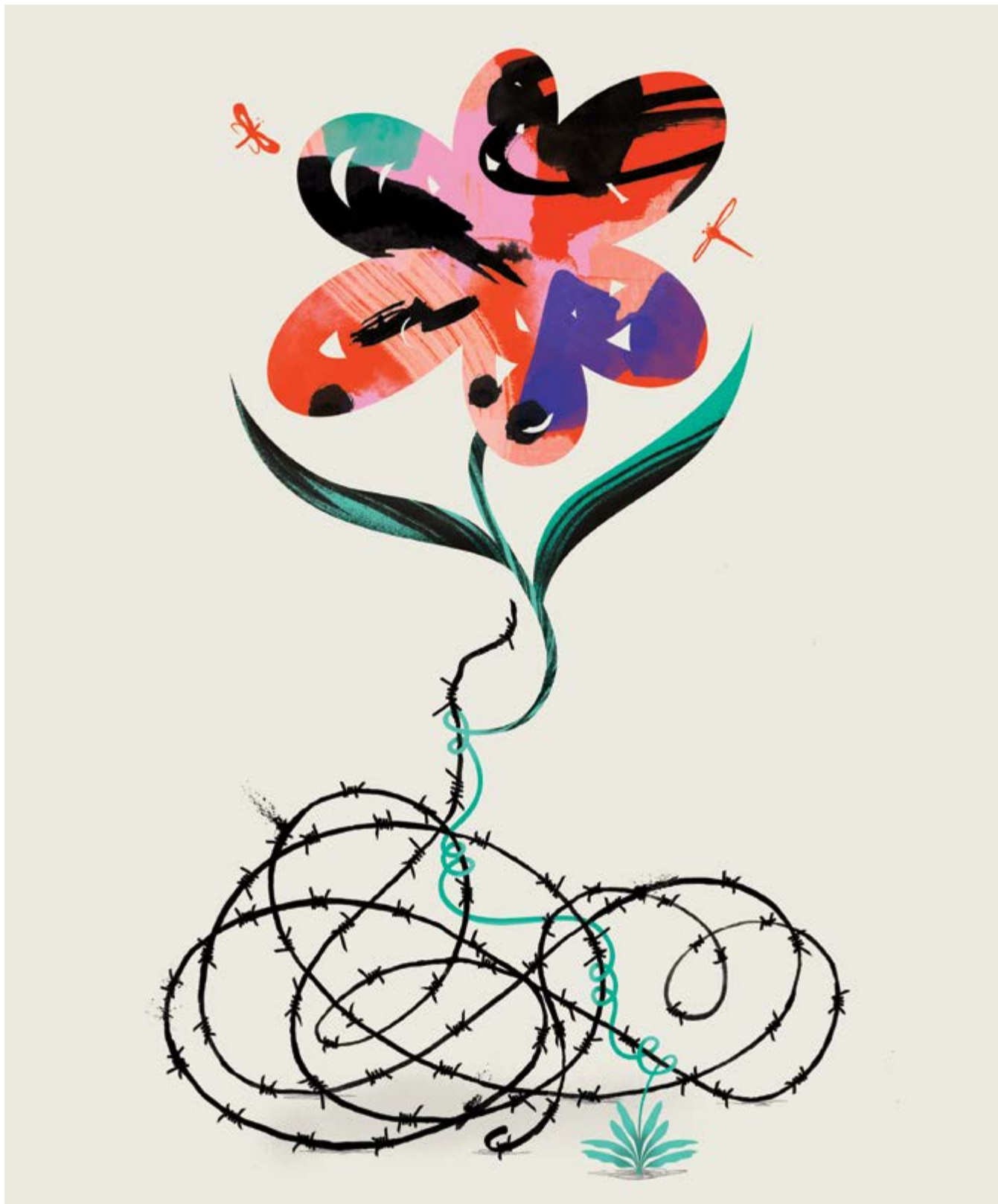
**Learn the lay of the land.** To begin, consider the structural and procedural foundation. If your organization has an in-house legal department, what are the existing relationships between that department and your DEI leaders? Is there a lawyer on your DEI committee or directly involved in your DEI efforts? What other departments overlap with DEI? The number of departments or teams with necessary involvement in a DEI initiative can be staggering. In larger legal departments, stakeholders include those involved with employment, people management, and privacy. Then there are questions of diversity and equity: Legal departments, like most other departments, still tend to skew older, white, and male at the top. How might that affect the work you're hoping to do? If you want your organization to adopt a proactive rather than reactive approach, you need to establish a baseline. One way to do that is by developing a nuanced understanding of your institutional structure.

Size matters too. How big is your organization, and in how many legal jurisdictions (states or countries) does it operate? Smaller companies need to think hard about when and how to seek external legal advice, which can be difficult to justify when DEI is viewed as a cost center. Large multinationals are better able to afford in-house or external advice, but they need it in all sorts of jurisdictions and subject-matter areas, which can mean multiple lawyers—each of whom has a different specialization or bar license, and some of whom will inevitably disagree.

What about the general climate among employees? Are there “revolving door” indicators or obvious issues that the company is desperate to correct? Past lawsuits or threats? Are you aware of any situations that might make certain conversations particularly sensitive? Knowing your organization's pain points can help you sidestep land mines.

Finally, does your company have policies on how and when to seek legal advice? Who decides whether to call the lawyers? Is there a defined workflow between legal and other departments? If guidance is unclear or absent, there may be inconsistencies in how legal gets involved. Either way, DEI may fall through the cracks, particularly when companies have only recently created a DEI officer position or a DEI committee. If you can ask these questions proactively and decide on a workflow outside the context of a particular initiative, you'll be better equipped to handle time-sensitive and unexpected situations.







**2** **Provide goal-oriented framing.** Legal counsel's role is to help you and protect you from legal risk, and they can't do that without context. You want to negotiate interests, not positions. So don't just fill your lawyers in on the facts about an initiative. Make them understand why you're launching it and what your goals are. In the back-and-forth that ensues, they may end up steering you toward something a bit different from what you originally had in mind, but if they understand your goals and motivations properly, they can help you mitigate legal risk while maintaining the essence of your objectives.

To ensure that you're providing goal-oriented framing, ask yourself: Are the general solutions we're contemplating appropriate for our organization? Are they likely to accomplish anything? Research suggests, for example, that the kinds of diversity training most organizations have now adopted may not do what people expect, in part because they aren't tailored to the specific problems the companies are facing. It's normal to want to emulate the practices of large public companies, but a medium-size company will have a much different workforce profile and risk calculus than, say, Starbucks or Microsoft does. Mismatched comparisons won't sway lawyers. But thoughtful benchmarking with similarly situated companies can be extremely compelling.

Think, too, about how to express the purpose of your initiatives as concretely as possible. Doing so will require you to take an honest look at what is motivating them. Data-driven initiatives and data transparency are critical components of sound DEI efforts. But they're also what tends to make lawyers the most nervous, because it's easy to imagine problematic data being used against the organization—in, say, an exhibit in opposition to a summary-judgment motion.

The benefits of transparency may seem obvious, but lawyers are accustomed to communicating in a closed vault protected by attorney-client privilege. You can make them more comfortable by making it clear why the data in any given presentation is important for the end goals of DEI, where the data comes from, who has access to it, whether someone's identity can be inferred from it, and whether the data subjects consented to its use for this specific purpose. At a minimum, know which answers you lack so that you can build trust by asking legal to help develop them. (For

more on this topic, see "Data-Driven Diversity," by Joan C. Williams and Jamie Dolkas, HBR, March–April 2022).

Unfortunately, the end goals of diversity, equity, and inclusion rarely guide legal discussions. Indeed, lawyers are often discouraged from thinking about DEI goals and are instead instructed to focus on narrow legal concerns. ("Please only change things that are *against the law*.") But staying true to your motivations is key, as is making sure that your lawyers understand them, because bad DEI poses greater legal risk than good DEI does. Most lawyers would agree, after all, that when a party acts or speaks in a way that misrepresents reality—as is often the case with DEI conducted in bad faith—that party is creating legally damaging evidence, no matter what the context. Lawyers also know that when it's serious enough, a misrepresentation alone can create liability and make people mad enough to sue.

**3** **Invite attorneys in early.** The best way to get attorneys invested in the goal is to bring them to the table as partners from the get-go. When actively engaged, lawyers can add real value to DEI. Attorneys track the latest court rulings and legal developments, anticipate avoidable scenarios, and help the business mitigate risks. Moreover, DEI requires discussion about difficult, sensitive topics, and attorney-client privilege can afford a degree of safety and privacy in conversations, which in turn can facilitate the candor necessary to improve the quality of DEI efforts. When they see themselves as partners rather than adversaries, attorneys can also be creative problem solvers.

All too often, however, companies loop lawyers in on a final product with an imminent deadline, hoping that short deadlines and high pressure will limit their comments to must-flag matters or, better yet, a rubber stamp. Many leaders are also simply afraid of the cost. If you're posting a job announcement tomorrow and you show it to your lawyers tonight, there are only so many hours they can bill on it before it goes online, right?

But when lawyers sense that there is no time or appetite for them to do their jobs properly, they tend to focus on one thing: not committing malpractice. This is a natural instinct, and it often leads them either to put initiatives on the back burner or to give them an outright "no." DEI proponents, for their part, are left with a reinforced belief that lawyers are obstructionist. It's a vicious cycle.

A wiser course of action is to bring in lawyers early and align them with your goals. Engage them in dialogue. At the outset of a new initiative, for example, you might say, "The business is willing to take some level of risk in this initiative, but can you help us identify arenas where, legally, risk is unnecessary or problematic?" Focusing the lawyers on preventing unnecessary legal risk and on promoting the





## When they see themselves as partners rather than adversaries, attorneys can be creative problem solvers.

organization's DEI goals frames the inquiry in a mutually beneficial way.

It's also important to look for ways in which your legal advisers can add value rather than just flag risk. Highlight language that has been a challenge to draft, or raise a specific legal question that you need help thinking through before you get started. Try to find ways to integrate legal review into DEI organizational processes, too—perhaps first in mapping out the initiative and then again in a final review. In larger organizations, think about the many jurisdictions and stakeholders involved, and consider bringing in multiple attorneys to help flag risk, anticipate problems, and generate alignment. In smaller organizations, where costs are a big concern, consider budgeting for an hour-long call with counsel at the idea stage. Additionally, commit with your lawyers to a few strategies for handling employee complaints and concerns and other factors out of your direct control. Getting your lawyers involved in these ways early in the process will help them feel invested in the result.

**4 Don't oversimplify risk.** The term "risk-averse" is slippery, because lawyers (and the rest of us) tend to account for certain risks but overlook others. Nuances abound. In that vein, when lawyers say something is "not legal" or "can't be done here," you have every right to adopt a posture of curiosity and press for more information. Ask "Would you mind sending me the name of the law or the case?" or "Do you have some examples of where that law was enforced in a DEI setting?" If your lawyers are worried about the risk of a reverse-discrimination suit and cite a high-profile verdict as evidence, ensure that they aren't falling prey to the "availability heuristic"—the natural urge to make decisions about the future using the first information that comes to mind. "How common is that kind of verdict?" you might ask. "And how do we balance that risk against the ongoing risk of discrimination against Black women?"

The need to avoid oversimplifying risk can be critical for global companies, which often speak of DEI as if it is a global concept. Consider the case of a multinational organization that wants to create an LGBTQ+ resource group but isn't sure what to do about countries where laws seem to ban same-sex relationships. Excluding those countries from the initiative might seem like the easiest option, but is that consistent

with the global values the company espouses? In cases like that, lawyers and DEI leaders have to dig deep together. What do those laws actually say? (Usually they target individuals and not employers.) Are they ever enforced? (In many countries, they are not.) What actions actually lead to negative consequences, and what are those consequences? (Often the alarmist consequences are far-fetched.)

There are no easy answers, and one company's solution to a problem may not work for another. But consider the possibility that legally speaking, a sound DEI initiative, properly vetted for quality across multiple environments, may be easier to defend than one composed of piecemeal, inconsistent decisions that cannot be reconciled through legal comparison. For example, if you exclude most African countries from a DEI survey because you're told the questions are not legal there, would you be able to defend asking those same questions in France, where cultural norms might be different but the laws on data collection are even stricter?

Lawyers are primed to focus on what can go wrong if something is done, but companies need to go deeper and explore what can go wrong if something is not done. After all, shareholders have sued companies that were failing to prioritize DEI. That's what happened at Pinterest after former employees, including a former COO, alleged gender and racial discrimination at the company. You need to understand the risks not only of action but also of inaction, and lawyers can help you do that.

**IN OUR YEARS OF** working in this arena, we've seen many DEI initiatives scuttled because of miscommunication, a lack of communication, or conflict between DEI leaders and legal teams. When that happens, everybody loses. But it doesn't have to be that way. By entering into a partnership with your legal advisers and collaborating with them early and often, in ways that allow you and them to see both the forest and the trees, you can make your DEI efforts work better for everyone. ☺

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