

Introduction

“The ultimate measure of a person is not where one stands in moments of comfort and convenience, but where one stands in times of challenge and controversy.” — Martin Luther King, Jr.

It's the proverbial elephant in the room for companies that care about diversity, equity, inclusion, and belonging today: **What is the future of workplace DEIB?**

Finding the answer has become all the more urgent in light of the U.S. Supreme Court's recent bids to reverse progress. In June, SCOTUS' *Students for Fair Admissions v. Harvard* decision **banned affirmative action**, effectively ending race-conscious college admissions. A day later, the court doubled down on its anti-DEIB agenda when it **voted to restrict LGBTQIA+ protections**, siding with a Christian web designer who refused services to queer couples.

With rights and opportunities for many underrepresented groups on the line, now is the time for organizations to **strengthen** their DEIB efforts — not run from them. Unfortunately, rising fear and misinformation have left some employers at an internal crossroads. While the Harvard ruling focused specifically on removing affirmative action from college admissions, and not from workplaces, some have feared a cross-industry ripple effect on diversity hiring and recruitment for federal and private companies alike. And with concerns of legal risk in the air, it's enough to make many fear that **workplace DEIB efforts will stall**.

This, when we know that workers today want companies to take *stronger* stances on DEIB topics. Our **February 2023 survey** of PowerToFly's community of diverse professionals showed that 48% wanted their company to take a stronger stance against racial and ethnic discrimination this year, and 39% and 22% wanted stronger stances on gender discrimination and homophobia, respectively.

Underrepresented talent is paying attention, now more than ever, to see how far companies' commitment to DEIB will really go. And even in the face of initial uncertainty, many experts are making strong arguments that **SCOTUS' impact on workplace DEIB is, in reality, seriously limited**, with early attempts to overturn DEIB-related initiatives **appearing futile**. **So, what can companies actually expect to see as a result of SCOTUS' recent rulings?** And how can companies maintain their values and keep offering employees inclusive, equitable environments, all while mitigating the risk of lawsuits? That's what we'll explore in this timely guide.

Note: This guide will offer best practices and suggestions, but is not legal advice. Consult your organization's legal team for specific legal and compliance recommendations.



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SCOTUS and DEIB: An overview

Affirmative action and workplace DEIB: How did we get here?

The U.S. has wrestled with racism in its institutions for as long as it's been a nation, and progress has never been a straight line. Here's a quick historical and legal summary of how we ended up here:

The 14th Amendment (1866)

Granted citizenship to all formerly enslaved people and attempted to guarantee equal civil and political rights for all citizens, with emancipated Black people in mind.

***Brown v. Board of Education* (1955)**

Overruled *Plessy*, finding that segregated schools are inherently unequal. Desegregation of schools began immediately but required enforcement by the National Guard in some states.

***SFFA v. Harvard* (2023)**

Determines that race-based admission policies are unequal and unlawful, thus reversing the prior ruling supporting affirmative action.

***Plessy v. Ferguson* (1896)**

Provides the legal foundation for segregated facilities such as in schools, restaurants, restrooms, trains, etc. The Supreme Court rules that "equality of treatment" exists when races are given "separate but equal" quality facilities.

Supreme Court rulings reaffirm the use of affirmative, race-conscious college admissions

University of California v. Bakke (1978), *Grutter v. Bollinger* (2003), and *Fisher v. University of Texas at Austin* (2013).

***303 Creative LLC v. Elenis* (2023)**

Determines that an employee or business can refuse goods or services to a customer based on personal religious beliefs.



The end of affirmative action in higher education

Students for Fair Admissions v. Harvard (2023) ruled that a student's race cannot be among one of the many factors used during admissions considerations. It made affirmative action illegal in U.S. higher education (both public and private) and ended race-conscious admission programs across the country. Judge Clarence Thomas, in his concurrence with the majority opinion, referenced a "colorblind Constitution" as his guiding document; this, when the supposedly "colorblind" U.S. Constitution was written to include **four clauses** about slavery and the trafficking of enslaved people, even if it didn't use those terms directly.

That said, *SFFA v. Harvard* does not prohibit universities from considering "an applicant's discussion of how race affected (their) life, be it through discrimination, inspiration, or otherwise" in something like a college admissions essay.

What's more, the Supreme Court specifically exempts military academies from the ruling, meaning they alone can continue to recruit from marginalized populations based on race. On this point, Justice Ketanji Brown Jackson said that Black Americans and other underrepresented groups are being prepared for "success in the bunker, not the boardroom."

A breakdown in public accommodation

In *303 Creative LLC v. Elenis* (2023), Lorie Smith, owner and sole employee of graphic design business 303 Creative, went up against the Colorado Anti-Discrimination Act (CADA). CADA prohibits all "public accommodations" from denying "the full and equal enjoyment" of goods and services to any customer based on race, creed, disability, sexual orientation, or another trait.

Smith had hoped to legally post an anti-gay message on her marketing website discouraging LGBTQIA+ individuals from contacting her as potential clients. The case is considered a “pre-enforcement challenge” because no LGBTQIA+ individuals had contacted the Christian designer nor asked for her services.

In their decision, the Supreme Court determined that an employee or business could refuse to design wedding websites for LGBTQIA+ couples if it’s contrary to their beliefs.

This ruling erodes public accommodation laws both in Colorado and at the federal level. **Title II of the Civil Rights Act** also states that all persons should have equal enjoyment of services and goods regardless of their identity.

What are the implications? The ruling opens the door to discrimination against any number of identities deemed to go against unspecified religious doctrines. It also presents a slippery slope by allowing individuals to claim a religious right to discriminatory action in a country that supposedly prizes the separation of church and state. Finally, it contributes a feeling of invincibility against consequences for people who seek to engage in bigoted speech — which we know **results in real-world violence**.

Other laws restricting diversity efforts

There are a number of recently introduced bills around the country that seek to ban or limit DEIB efforts, including bills that seek to prohibit the promotion, teaching, or use of race and other diversity factors in publicly funded institutions. Such bills have been signed into law in North Dakota, South Dakota, Tennessee, Texas, and Florida. At least **11 more** bills currently remain under consideration across the country.



Why do race and LGBTQIA+ status at work matter?

In light of these attacks on public accommodation and race-conscious policies, it's important to reiterate why the types of policies that have been struck down are helpful in addressing historical inequalities in the first place.

Gender and sexuality inequity in the workplace

As organizations implement LGBTQIA+ friendly policies, people feel more comfortable being authentic in the workplace. A [2022 survey](#) reported that 82% of queer employees said they believe allyship helps them be out at work. Belonging and representation go a long way towards inclusion.

In fact, according to [Gallup](#), the number of people who identify as LGBTQIA+ has doubled over the past decade. While it's great that people feel comfortable expressing their sexual or gender identity, coming out at work is still not always a safe option for queer people.

Closted at work

Nearly half of LGBTQIA+ folks ([46%](#)) in the U.S. are not out to coworkers.

Legal repercussions

As of 2021, 69 countries still had laws [criminalizing queerness](#).

Workplace bullying

[68%](#) of queer employees report hearing negative comments, slurs, or jokes about them at work.

Sexual harassment

[26%](#) of queer employees experience sexual harassment at work.

Physical harassment

[21%](#) of queer employees report physical harassment at work.

Lack of representation

Only [0.4%](#) of Fortune 500 board directors are openly queer. As of 2022, there are still just four openly queer Fortune 500 CEOs, all of whom are White.

Racial inequity in the United States

It bears repeating, again and again, that America is still divided along racial lines. Since the times of legal slavery, there have existed well-documented racial disparities in wealth, education, employment, housing, mobility, health, rates of incarceration, and more. These inequities are intergenerational, and progress has been slow. Currently:

Poverty

Black (18.8%) and Latino (15.7%) people experience higher rates of poverty than White people (7.3%).

Wealth disparity

The median family wealth for a Black household is \$24,100 compared to \$188,200 for a White household.

Income inequality

The median household income for Black families is \$46,400 compared to \$71,231 for White families.

Educational segregation

About half of all Latino and Black students attend a racially homogeneous school with at least 75% minority student enrollment.

Graduation

High school graduation rates for Latino students (68%) are lower than rates for White students (90%).

Residential segregation

Black and Latino residents live in neighborhoods that are about half Black or Latino, respectively, while White Americans live in neighborhoods that are 71% White.

Unemployment

Native Americans have the highest unemployment rate of any racial group (6.6%).

Earning power

Hispanic women earn \$0.57 cents for every \$1 earned by White men, while Black women earn \$0.64 cents for every \$1 earned by White men.

Do race-conscious and diversity policies work?

The short answer is yes, including on the global scale. A **study** from India revealed that affirmative action policies were successful in increasing college enrollment of students from disadvantaged castes. A **study** in Ireland concluded that affirmative action policies increased employment from underrepresented groups.

We also know that when affirmative action was banned in the University of California, enrollment from Black and Latino students fell by **40%**.

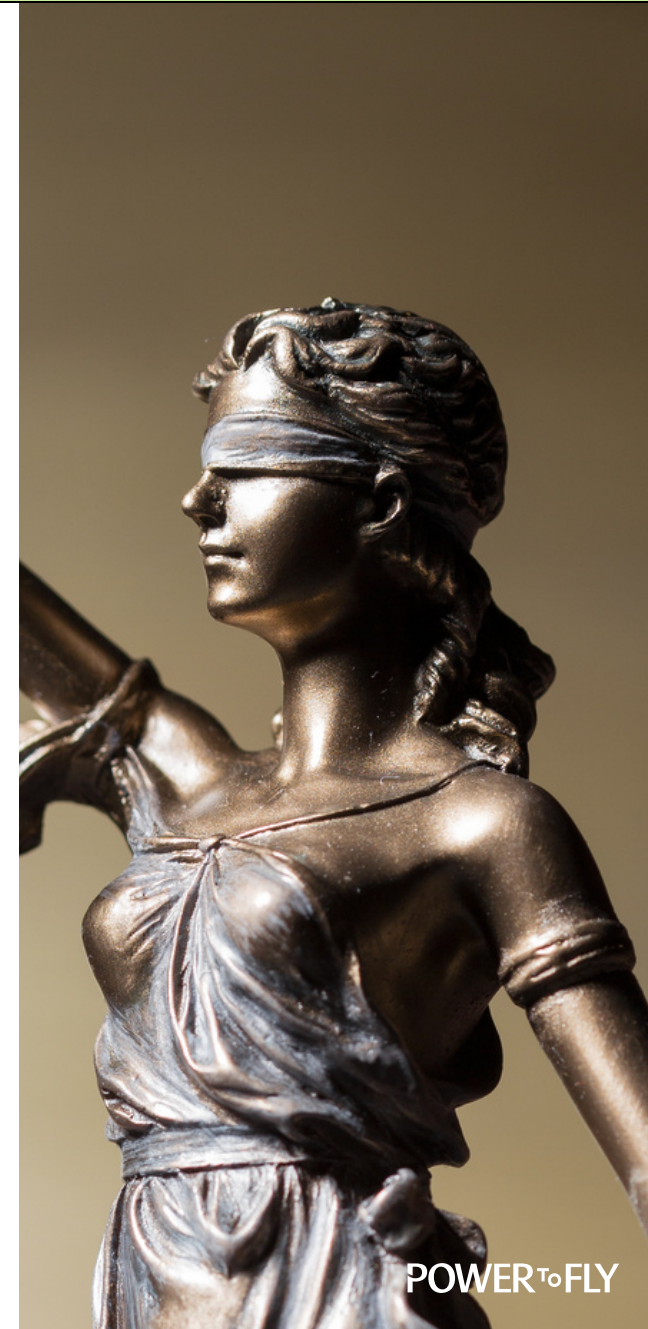
In the workplace, we have a long way to go in closing the racial wage gap as well as increasing diversity at the highest levels of company management.

The myth of colorblindness

A conceptual foundation for the Supreme Court's ruling is the idea that society, its people, and the law can be "colorblind."

A "colorblind" racial perspective embodies the idea that the color of one's skin has no bearing on how one is treated in society. This ideology involves both the denial of someone's skin color and/or the denial of institutional racism entirely. Denying race as a factor perpetuates the myth that all people have equal access to resources and opportunity. Colorblindness also serves to place the blame on marginalized people for their situation, rather than acknowledging systemic inequities.

The above statistics of inequality along racial lines is evidence enough that race is a significant factor in people's day-to-day lives, both in the U.S. and worldwide.





Discussion at the highest levels

In July, a **letter** was sent by 13 Attorneys General to Fortune 100 CEOs demanding a halt to DEI programs. In response to this letter, 21 other Attorneys General sent a **second letter** to Fortune 100 CEOs. In it they state unequivocally:

- “*SFFA v. Harvard* does not prohibit, or even impose new limits on, the ability of private employers to pursue diversity, equity, and inclusion initiatives.”
- “Private employers retain many tools to continue the important work of diversifying their workforces.”

Hiring decisions based on race have, since 1964, been prohibited under Title VII. The Attorneys General go on to say:

- “Of course, consistent with Title VII, private employers can, should — and in some circumstances, must — identify arbitrary and unnecessary barriers to diversity, equity, and inclusion in the workplace and develop solutions to address those issues. Removing barriers does not constitute an act of racial discrimination.”

Potential repercussions of the SCOTUS rulings

You may be wondering: **Did SCOTUS just make my company's DEIB programs illegal?** The answer is **no**.

There is already a precedent of **lawsuits** against DEIB programs, so the political movement to further marginalize people based on race, gender, or sexuality is not entirely new. A call to shutdown well-intentioned DEIB efforts in response would be completely overblown — as well as legally and financially risky (more on that below). Don't allow the SCOTUS rulings to scuttle your progress.

Both the *SFFA v. Harvard* and *303 Creative LLC v. Elenis* rulings may have different effects on workplace policies. It's too early to make exact predictions, but let's consider a few repercussions that seem likely:

Weaker hiring pipelines. In *SFFA v. Harvard*, The Supreme Court interpreted the U.S. Constitution, a document that does not dictate how private employers must behave. With that in mind, the ruling will likely have an **indirect** effect on companies. With colleges reevaluating admissions policies, it's likely that there may be drops in enrollment from marginalized groups. This pattern was already seen in the University of California in the '90s. In the longterm, this may affect future hiring pipelines. Less diverse college populations will mean less diverse graduate pools, and thus fewer candidates from underrepresented groups.

New hardships for LGBTQIA+ talent. The *303 Creative LLC v. Elenis* ruling opens up possible religious objections to LGBTQIA+ individuals in many areas such as wedding services and beyond. Be prepared to have difficult conversations and make accommodations for your talent if they come up against discrimination. Consult your legal counsel on **Title II**. Shore up your **LGBTQIA+ employee benefits** and consider flexibility policies for individuals with major life events where new hardships may present themselves.

More choice for private employers: At first glance, *303 Creative LLC v. Elenis* is all about discriminatory practices. If read correctly, though, it can *also* be used to the advantage of DEIB efforts. It gives private businesses (unlike public institutions) the right to more choices based on personal beliefs. If those beliefs place value on diversity and inclusion, all the better. Understand that it was a blow to the LGBTQIA+ community and public accommodation, but consider that private employers are given more freedom to make values-based decisions as well.



Increased lawsuits from anti-DEIB groups: Know that striking down anti-discrimination policies at the federal level only encourages those who seek to discriminate against marginalized individuals. There are already attempts at prohibiting DEIB language and considerations from public institutions. Private companies may be on the horizon. Right-wing advocacy group Wild Hill has confirmed their agenda, **saying** the ruling “will put the wind in the sails of groups like ours, who want to get the woke, racially-based hiring and promotion schemes out of corporate America.” Individuals who think like this may be emboldened to bring lawsuits against companies that value DEIB.

Increased lawsuits from marginalized workers: Despite the eagerness of anti-DEIB groups, we know that many of their early lawsuits filed on the heels of SCOTUS’ rulings **appear thin at best**. As we’ve reviewed, SCOTUS did **not** hold that affirmative action violates Title VII, the main statute governing employment. SCOTUS would need to overrule two other longstanding precedents that authorize affirmative action under Title VII to have a direct impact on workplace DEIB. Meanwhile, **companies that react to the potential for anti-DEIB lawsuits by throwing out DEIB altogether pose a huge risk to their business in the long-run.**

Employment law has not changed — even if some companies have begun to act as though it has. Title VII, ADA, and other federal legislation is still alive and well. Divestment in DEIB thus creates great risk and sends a green light to bad actors. Companies will see a surge in litigation from underrepresented talent if they stop things like **DEIB training** and education and halt improvements to their hiring processes. Boards, the C-Suite, and managers are still being held to the same standards they were before June, and courts won’t care that the media, with its “DEIB is dead” takes, believe otherwise.

In other words, companies will have *greater* legal and financial risk by divesting in DEIB than they would by staying the course, understanding what is and what is not legal, and continuing to do their part.

Mitigating risk for companies wisely committed to DEIB

There are plenty of ways employers can mitigate the risks posed by the *SFFA v. Harvard* and *303 Creative LLC v. Elenis* rulings. Most companies are worried about three major factors: first, the reactive slowing or stoppage of successful DEIB efforts; second, the weakening of a diverse talent pipeline; and third, the potential for new lawsuits, necessitating better risk-management efforts industry-wide. Below, here are a few key ways to navigate these issues.

Ensure compliance

Ensure your hiring practices comply with Title VII and the **ADA** by reviewing the **text** of these **existing, quite-real laws**. Do that rather than prioritize imagined compliance with future SCOTUS scenarios. We sometimes talk about regulation as the bare minimum, so start there. Consult your legal counsel to ensure you're in compliance.

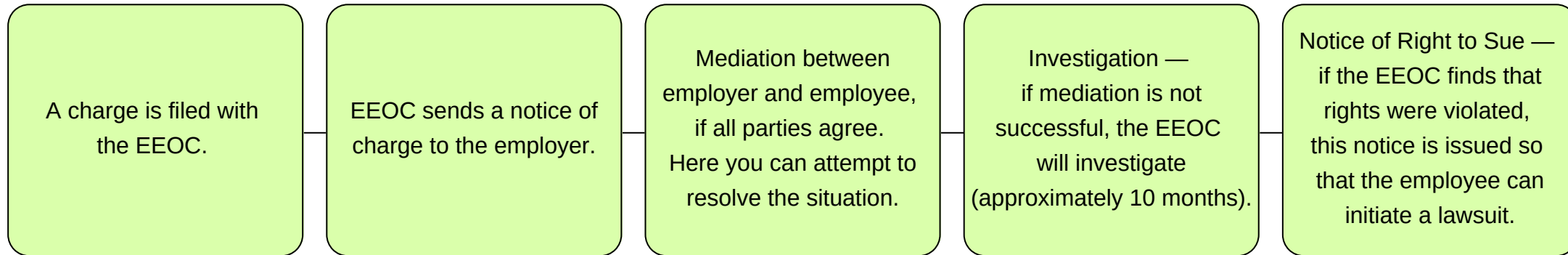
Continue to protect underrepresented individuals at your company

Companies reactively throwing out DEIB altogether at the first opportunity — including ones masking DEIB fatigue or budget gripes with wobbly legal concerns — are taking on a huge business risk. Be alert. Faced with the market environment surrounding the recent SCOTUS rulings, we see very high risk in doing nothing. The EEOC **made it clear** that DEIB programs are still legal. If a company stops protecting underrepresented talent pools, it's sending a thumbs-up to bad actors within your organization to harass, bully, or discriminate in the name of your company. This not only opens you up to lawsuits, but damages your brand and seriously harms your employees' wellbeing.



Understand how an employment discrimination charge works

As mentioned above, individuals who are against DEIB efforts may be emboldened to take legal action against companies that are vocal about diversity as a value. Be proactive by educating your team about the process of an employment discrimination charge and your procedure to address it. Here is the typical timeline:



Ensure you have internal systems to report discrimination

This is part of protecting your employees and, though obvious, is worth calling out. Make your internal **discrimination reporting systems** accessible and easy to understand. Hold a workshop on the process and be sure to include long-term employees who may be multiple years out of orientation. Communicate clearly about your internal investigation system as well as company roles, responsibilities, and expected outcomes. This will ensure that your values are clear to your talent and that your employees feel comfortable reporting bad actors.

Position your company as a DEIB safe haven

We know that in one study, **39%** of employees said they would leave their organization for a more inclusive one. Consider the talented individuals who may be uncomfortable with their employer's sudden dismissal of DEIB efforts. Perhaps your company is well-positioned to attract that talent and engage them around the values of diversity and inclusion. We've talked about **sensitive recruiting strategies** before. This is a case where stepping lightly will serve you well. Be tactful about your approach and don't presume a candidate's point of view. Let your branding, public statements, and DEIB actions as a company do the talking.

These recommendations are one way to avoid wading into murky water created by the *SFFA v. Harvard* and *303 Creative LLC v. Elenis* rulings and their repercussions in the workplace. Race and gender identity inform the daily reality for many of your employees. If you put your DEIB values front-and-center, you will reap the benefits with your talent pool and your brand alike.

5 practical ways to protect DEIB efforts

In the spirit of allowing your brand to do the talking, here are four more practical ways you can shore up your branding as a company that takes DEIB seriously.

1. Take a stand

Now isn't the time to quietly withdraw support of DEIB initiatives and programming. Instead, you can:

- **Find out how your employees are feeling.**
 - Survey or speak with your employees to find out their opinions about DEIB efforts and working with LGBTQIA+ clients.
- **Take stock of your diversity achievements.**
 - Gather data on what progress has been made towards DEIB goals.
- **Communicate your support for diversity.**
 - Develop an unambiguous statement of support from the CEO.
 - Use the survey of your employees and your diversity data in the statement.
 - Tie DEIB into company values, culture, and business plans.
 - Set and stick to a *long-term* DEIB budget; even before the SCOTUS rulings, in 2022, **1 in 3 DEI professionals** lost their jobs, up from 21% of non-DEI workers. Ensure that your company's DEIB team has the runway secured they need to do the work they were hired to do.
- **Say it loud.**
 - Now is the best time to project your company values louder than ever.
 - Broadcast your **DEIB statement** in all external and internal communication material, from emails to website copy.
 - The values that make your organization unique will attract like-minded people.



2. Review company processes

Protect yourself from legal action by prioritizing DEIB as a **tool for bias interference** and not a reflection of racial preferences.

- **Language.** Review the language in external and internal documents for explicit references to race.
 - Embody **inclusive language best practices** and ensure there is no favoritism projected in the language based on race or other factors.
- **Hiring.** Ensure your **job descriptions** and hiring processes are inviting to all, free of bias.
 - Demonstrate the types of candidates you seek through images and video on your website.
 - Add a statement to job descriptions such as “applications who don’t meet 100% of the criteria are still encouraged to apply.”
 - Pursue new ways to remove bias from screening processes. Consider: Decades ago, women composed just 5% of musicians in the top five U.S. orchestras. After orchestras obscured the gender of musicians by requiring them to audition behind a screen, the number jumped to over 35%, as **the Harvard Business Review** pointed out.
- **Performance reviews.**
 - Audit performance reviews for bias; for example, do in-office workers receive more favorable performance reviews and clearer advancement opportunities **compared to remote workers**?
- **Pay gaps.**
 - Conduct a **pay-gap audit**.
 - Take action to address any unjustified pay differences.

3. Rethink recruitment

With new-grad talent pipelines almost certain to be more homogeneous in a post-affirmative action world, it’s imperative that hiring teams get more creative. You can:

- **Reconsider diversity quotas in hiring.** DEIB metrics matter, and so does having a workforce that’s representative of the community you serve. That said, diversity quotas in hiring have long been a recipe for tokenization. Focus more on changing the inclusiveness of your *systems* versus hitting numerical *quotas*.
- **Strengthen your connections to the community.** Knowing organizations within the community you operate within builds informal recruitment sources. Get to know and support youth centers, churches, small businesses, and other entities in the community.
- **Recruit from community colleges and boot camps.** These institutions have fewer barriers to entry, and there’s a high likelihood of finding diverse candidates.
- **Rethink the requirements of the job.** Is a college degree *actually* necessary for this job? Removing the barrier of a degree requirement entirely may open up possibilities for candidates from marginalized communities who now face new obstacles in higher education.



4. Consider socioeconomic status

In the '90s, the University of California shifted to considering “socioeconomic status” in lieu of race-conscious policies. **Socioeconomic status** can tell a lot about the context in which a person has developed and the barriers they’ve overcome. Now that affirmative action has been banned, universities are asking applicants for information such as whether they received free school lunch or their guardian’s income level.

How does that translate to the workforce and to recruiting? Here are some legal ways to consider socioeconomic background as a means of promoting diversity:

- Ensure representation of socioeconomic backgrounds among the **hiring committee**.
- Provide **socioeconomic-minded training** for recruiters and hiring professionals.
- Re-think your referral hiring programs.

With the latter of these, what do we mean by “re-think”? On one hand, we often specifically *advise* leveraging referral programs as a way to increase diversity. It’s one way of tapping into underrepresented employees’ networks of like-identifying professionals. Referrals can be especially successful in community outreach scenarios when looking to connect with local talent, too.

On the other hand, referral programs can reinforce power dynamics. They often have a “good-old-boys club” effect where the people in power tend to hire people just like themselves (namely, other **White men**). So take a hard look at how your referral program has worked in the past. Consider surveying for the demographics of your referral hires. Use data-driven decision-making to evaluate your real outcomes. Be honest about if it’s helping or hurting your DEIB goals — and make the necessary changes by re-reading the first three points above.

5. Dig into your DEIB data.

Data is more important now than ever. Consider that collecting DEIB data will help you:

1. **Identify existing DEIB gaps** in pay, promotions, and more.
2. **Document your evidence** for investing in DEIB initiatives accordingly.

The more you know in the form of concrete **metrics**, the more you can link your company's DEIB efforts to specific, demonstrated gaps (and act to close those gaps). This can help prevent justified litigation from underrepresented professionals who've been on the receiving end of gaps *as well as* protect you from litigation from anti-DEIB third parties who claim you're practicing favoritism versus working to address a real problem.

And on the hiring side: With **PowerPro**, you can use DEIB data and insights to identify and manage your talent pipeline, from start to end. Our just-released **Candidate Search** feature lets you search for and select candidates using a number of identity parameters, like gender and ethnicity, thanks to proprietary, self-reported data from our community of 3.7 million diverse professionals. Compared to traditional recruiting tools, it's a more robust, streamlined, and accurate way of seeing and tracking the diversity of your complete talent funnel. **Get a free demo** to see how unlocking this new level of data can complement your DEIB goals.



Recommended Resources

For further learning and exploration, check out these:

- » **Response Letter from Attorneys General to Fortune 100 CEOs**, by Aaron Ford Attorney General of Nevada. It outlines how private companies may continue to conduct DEI programs after *SSFA vs Harvard*.
- » **Dissenting opinion on *SSFA vs Harvard***, by Justice Sonya Sotomayor. It begins on page 140 and explains why race-conscious policies for college admissions are appropriate.
- » Read: **No, SCOTUS Did Not Make Your Company's DEI Programs Illegal.**
- » Read: **Fearless Fund's 914-Page Response Makes a Strong Case That Discrimination Lawsuit is Baseless.**

For additional discussions and conversations on global DEIB, you can watch recordings from PowerToFly's August 2023 Diversity Reboot Summit [here](#).



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PowerToFly was founded by Milena Berry and Katharine Zaleski in 2014 to fast-track economic equity by upskilling and connecting underrepresented talent to roles in highly visible sectors. As an end-to-end diversity, equity, inclusion, and belonging (DEIB) recruiting and retention platform, PowerToFly is focused on empowering underrepresented talent across all races, ages, ethnicities, sexual orientations, abilities, veteran statuses, and gender identities. Read more about our [origin story](#) and [see which companies](#) are partnering with us to reach their DEIB goals.