

# Client Alert: Threading the Needle: Navigating Potential Legal Threats to Supplier Diversity Initiatives

## Publications

May 25, 2023

By: Ishan K. Bhabha, Kelly M. Morrison, Katie Wynbrandt

As a core part of broader Diversity, Equity, and Inclusion (DEI) strategies, many companies have pledged to increase their spending or otherwise strengthen their relationships with diverse vendors and suppliers. With “[c]orporations spend[ing] 58 cents of every dollar in revenue on payments to suppliers,”<sup>[1]</sup> supplier diversity initiatives have enormous potential to address issues including systemic discrimination, the racial wealth gap, and implicit bias in the procurement process. At the same time, however, corporate supplier diversity initiatives now face a growing array of legal threats.

## About Supplier Diversity Programs

Whereas DEI hiring and workforce pipeline programs aim to diversify a company’s employee composition, supplier diversity efforts aim to leverage companies’ purchasing power in service of DEI objectives. Corporate supplier diversity goals often include a commitment to: (1) spend a certain amount of money annually on contracting with diverse suppliers; or (2) procure a certain percentage of goods and services from diverse vendors.<sup>[2]</sup>

For example, in 2019, Target set a goal of spending \$1.78 billion with diverse suppliers by the end of 2021.<sup>[3]</sup> The company also set a goal of investing five percent of its annual media budget with Black-owned media by the end of 2022.<sup>[4]</sup> Similarly, PwC announced plans to increase its spending with diverse suppliers to forty percent of its reportable spend by fiscal year 2026, up from 31 percent in 2021.<sup>[5]</sup> As of March 2022, Fortune 200 publicly traded companies had committed to spending more than \$50 billion with minority- and women-owned businesses over the next ten years.<sup>[6]</sup>

## Recent Litigation Challenging Supplier Diversity Initiatives

As they grow in popularity, not surprisingly, supplier diversity programs have become part of the next frontier for anti-DEI litigation. In August 2022, the National Center for Public Policy Research

sued Starbucks for a host of policies that the conservative think tank alleges “discriminate based on race.”<sup>[7]</sup> Among the policies being challenged is Starbucks’ commitment to “‘increase its spend with diverse suppliers’ from \$800 million ‘to \$1.5 billion by 2023.’”<sup>[8]</sup> The lawsuit, brought on behalf of shareholders, alleges that Starbucks’ DEI programs violate 42 U.S.C. § 1981 (discussed below), and as a result, the company’s board has breached its fiduciary duties by exposing the company to legal risk.<sup>[9]</sup> Amazon faces a lawsuit alleging that the company’s \$10,000 startup bonus offered to “Black, Latinx, and Native American” delivery service partners (independent businesses contracted to deliver Amazon packages to customers’ homes) violates “§ 1981 by excluding whites and Asian-Americans.”<sup>[10]</sup> The \$10,000 startup grants are part of Amazon’s \$1 million commitment to reduce barriers for diverse entrepreneurs interested in starting their own businesses.<sup>[11]</sup>

Anti-DEI groups have sent letters to several other companies, purportedly on behalf of shareholders, demanding that companies retract their DEI policies or face similar litigation. Targeted companies have included American Airlines,<sup>[12]</sup> J.P. Morgan,<sup>[13]</sup> and Novartis AG.<sup>[14]</sup> While some companies, such as Starbucks, have rebuffed similar demand letters,<sup>[15]</sup> others have seemingly adjusted certain DEI commitments in the wake of threats.<sup>[16]</sup>

## **Theories of Liability**

The recent and threatened legal challenges to supplier diversity programs rely on similar theories asserted in other “reverse-discrimination” suits, including a line of cases challenging supplier diversity efforts in the public sector.<sup>[17]</sup> However, these suits are generally asserted under Section 1981 of the Civil Rights Act of 1866, which prohibits race discrimination in the making and enforcing of contracts. Section 1981 is often considered the private sector analog to Section 1983, which authorizes individuals to sue state actors for alleged violations of their civil rights. Because it applies to racial discrimination in contracting, Section 1981 has been used by white litigants to challenge diversity initiatives on the ground that they have been adversely impacted by a company’s race-conscious contracting decision.<sup>[18]</sup>

In addition to federal Section 1981 claims, the demand letters and lawsuits described above also allege violations of various state civil rights statutes. For example, New Jersey’s Law Against Discrimination provides a cause of action against private companies for racially discriminatory contracting decisions.<sup>[19]</sup> Similarly, California’s Unruh Civil Rights Act prohibits any “business establishment” from discriminating against or “refus[ing] to . . . contract with” any person on account of race or other protected characteristics.<sup>[20]</sup> Both statutes have been used by white litigants in reverse-discrimination cases.<sup>[21]</sup>

## **Best Practices**

Despite the recent wave of legal threats, there are good reasons for companies to pursue supplier diversity. These programs not only further DEI objectives, but also “promote[] competition in the supply base, which can improve product quality and drive down costs”<sup>[22]</sup> as well as “make supply chains more resilient and agile.”<sup>[23]</sup> Like any DEI program, supplier diversity initiatives are not monolithic and some may face greater legal exposure than others. As companies strive to strike the right balance, the following can be useful steps to support diversity while not inviting litigation:

*Avoid a formulaic approach:* In the RFP process, some procurement offices use a point system or scorecard to evaluate bidders. A system that awards a certain number of points to diverse suppliers, for that reason alone, is more susceptible to legal scrutiny given the factual parallels to the Supreme Court’s decision in *Gratz v. Bollinger*.<sup>[24]</sup> In *Gratz*, an affirmative action case concerning undergraduate admissions at the University of Michigan, the Supreme Court held that the University’s policy, which “automatically distribute[d] 20 points, or one-fifth of the points needed to guarantee admission, to every single ‘underrepresented minority’ applicant solely because of race, [was] not narrowly tailored to achieve educational diversity”<sup>[25]</sup> and was therefore unconstitutional and a violation of Section 1981.<sup>[26]</sup> While *Gratz* is distinguishable from private sector supplier diversity initiatives given the education context and state action, the use of a scorecard that awards points to diverse suppliers is likely to be scrutinized and more vulnerable to legal challenges.

*Foster relationships with organizations that provide diverse business accreditations:* Organizations such as the National LGBT Chamber of Commerce, Disability:IN, the National Minority Supplier Development Council, and the Women’s Business Enterprise National Council award certificates to diverse businesses that identify these businesses as owned and operated by a member of a historically underrepresented community. Partnering with these organizations has the potential to facilitate connections with diverse suppliers outside traditional procurement processes. For example, a co-sponsored meet-and-greet event or RFP information session provides accredited diverse suppliers an opportunity to network with procurement officers and learn about your company’s supply needs. These partnerships can grow your supplier base and further an inclusive outreach strategy.

*Ask bidders about their DEI programs:* Asking vendors to describe their DEI initiatives as part of the RFP process provides your procurement office with insights into how suppliers think about DEI and whether they may be the right partner in promoting your diversity objectives. Rather than relying entirely on bidders’ diversity status, a more holistic approach that takes into account shared values has the benefit of reducing legal risk.

Jenner & Block has a deep commitment to diversity, equity, and inclusion as well as extensive experience supporting our clients’ DEI efforts through litigation, investigations, and strategic counseling. In light of this commitment and experience, the firm has launched a task force—composed of leading lawyers serving a wide variety of industries—to develop creative, strategic, and tailored solutions for clients across industries to accomplish their DEI goals while minimizing legal

risk. If you are interested in learning more about our work in this area, please contact Task Force Co-Chairs Ishan Bhabha (ibhabha@jenner.com), Lauren Hartz (lhartz@jenner.com), Marcus Childress (mchildress@jenner.com), Katie Wynbrandt (kwynbrandt@jenner.com), or Erica Turret (eturret@jenner.com).

## Footnotes

[1] Milan Prilepok, Shelley Stewart III, Ken Yearwood, Ammanuel Zegeye, *Expand Diversity Among Your Suppliers—and Add Value to Your Organization*, MCKINSEY & CO. (May 17, 2022), <https://www.mckinsey.com/capabilities/operations/our-insights/expand-diversity-among-your-suppliers-and-add-value-to-your-organization>.

[2] While definitions of a “diverse” supplier vary greatly, one common definition is a business that is at least 51 percent owned and operated by an individual or group that identifies as part of a historically underrepresented or underserved community.

[3] *We Are Never Done: Inside Target’s 2019-2021 Diversity, Equity & Inclusion Journey – and Where We’re Going Next*, TARGET (Mar. 7, 2022), <https://corporate.target.com/article/2022/03/diversity-and-inclusion-goals>.

[4] *One Year In, See Our Progress on Investing \$2 Billion in Black-Owned Businesses, Plus a \*New\* Fund to Uplift Diverse Voices*, TARGET (May 10, 2022), <https://corporate.target.com/article/2022/05/reach-guest-update>. Other examples include Coca-Cola’s goal to spend \$1 billion on diverse suppliers by the end of 2020, COCA-COLA COMPANY, 2019 BUSINESS & SUSTAINABILITY REPORT 15 (Sept. 16, 2020), [coca-cola-business-and-sustainability-report-2019.pdf](https://www.coca-colacompany.com/content/dam/coca-cola-business-and-sustainability-report-2019.pdf) (coca-colacompany.com), and DICK’S Sporting Goods’ commitment to spend \$300 million annually with diverse businesses by 2025, *Supplier Diversity*, DICK’S SPORTING GOODS, <https://www.dickssportinggoods.com/s/supplier-diversity>.

[5] Lisa Rabasca Roepe, *Supplier Diversity Is Getting More Attention in the C-Suite*, SHRM (Nov. 29, 2021), <https://www.shrm.org/executive/resources/articles/pages/supplier-diversity-gets-more-attention-in-c-suite.aspx>.

[6] Prilepok et al., *supra* note 1.

[7] Complaint ¶ 2, *Nat’l Ctr. for Pub. Pol’y Rsch. v. Schultz*, No. 22-2-02945-32 (Wash. Super. Ct., Spokane Cnty. Aug. 30, 2022) (hereinafter “Starbucks Complaint”).

[8] *Id.* ¶ 53.

[9] *Id.* ¶¶ 75–89, 108–141.

[10] Second Amended Complaint ¶ 57, *Bolduc v. Amazon.com Inc.*, No. 4:22-cv-615-ALM (E.D. Tex. Feb. 21, 2023), ECF. 15.

[11] *Id.* ¶ 8.

[12] *Open Letter to Officers and Directors of American Airlines Group, Inc.*, AM. C.R. PROJECT (Feb. 28, 2023), <https://www.americancivilrightsproject.org/blog/submissions/open-letter-to-officers-and-directors-of-american-airlines-group-inc>.

[13] *Open Letter on Behalf of Shareholders to Officers and Directors of JPMorgan Chase & Co.*, AM. C.R. PROJECT (May 16, 2022), <https://www.americancivilrightsproject.org/blog/open-letter-on-behalf-of-shareholders-to-officers-and-directors-of-jpmorgan-chase-co/>.

[14] *Open Letter on behalf of Shareholders to Officers and Directors of Novartis AG*, AM. C.R. PROJECT (March 25, 2022), <https://www.americancivilrightsproject.org/blog/open-letter-on-behalf-of-shareholders-to-officers-and-directors-of-novartis-ag/>.

[15] Starbucks Complaint ¶¶ 66–68.

[16] *See, e.g.*, Debra Cassens Weiss, *Coca-Cola Never Adopted Diversity Plan for Law Firms; Group that Threatened Suit Targets Other Companies*, ABA J. (Mar. 30, 2022, 8:39 AM), <https://www.abajournal.com/news/article/coca-cola-never-adopted-diversity-plan-for-law-firms-group-that-threatened-suit-targets-other-companies>.

[17] *See, e.g.*, *City of Richmond v. Croson*, 488 U.S. 469 (1989) (invalidating Richmond’s Minority Business Utilization Plan, which required prime contractors to subcontract 30 percent of city-awarded construction contracts to minority business enterprises, under 42 U.S.C. § 1983).

[18] *See* examples above; *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 286–87 (1976) (holding that Section 1981 applies to “racial discrimination . . . against white persons”).

[19] *Perlowski v. Elson T. Killam Assocs., Inc.*, 384 N.J. Super. 467, 478 (Law. Div. 2005) (holding that N.J.S.A. 10:5–12(l) allows contractor, in this case a law firm, to sue a company for discrimination on the bases articulated in New Jersey’s Law Against Discrimination, which include race and gender).

[20] Cal. Civ. Code § 51(b).

[21] *Flizack v. Good News Home for Women, Inc.*, 346 N.J. Super. 150, (App. Div. 2001) (holding that New Jersey’s Law Against Discrimination applies to discrimination against white persons on the basis of race); *Correll v. Amazon.com, Inc.*, No. 21-1833, 2022 WL 5264496, at \*5 (S.D. Cal. Oct. 6, 2022) (alleging that Amazon’s policies to “promote, encourage, and incentivize minority certified sellers” violate the Unruh Civil Rights Act).

[22] Alexis Bateman, Ashley Barrington, Katie Date, *Why You Need a Supplier-Diversity Program*, HARV. BUS. REV. (Aug. 17, 2020) <https://hbr.org/2020/08/why-you-need-a-supplier-diversity-program>.

[23] *Id.*

[24] 539 U.S. 244 (2003).

[25] *Id.* at 270.

[26] *Id.* at 276 n. 23 (“[W]ith respect to § 1981, we have explained that the provision was ‘meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race’ [and] . . . a contract for educational services is a ‘contract’ for purposes of § 1981.”).

## Related Attorneys



**Ishan K. Bhabha**

Co-Managing Partner  
+1 202 639 6000



**Kelly M. Morrison**

Special Counsel  
kmorrison@jenner.com  
+1 213 239 5156



**Katie Wynbrandt**

Partner  
kwynbrandt@jenner.com  
+1 202 637 6389

## **Related Capabilities**

Organizational Values and Strategy Task Force

© 2026 Jenner & Block LLP. Attorney Advertising. Jenner & Block LLP is an Illinois Limited Liability Partnership including professional corporations. This publication, presentation, or event is not intended to provide legal advice but to provide information on legal matters and/or firm news of interest to our clients and colleagues. Readers or attendees should seek specific legal advice before taking any action with respect to matters mentioned in this publication or at this event. The attorney responsible for this communication is Brent E. Kidwell, Jenner & Block LLP, 353 N. Clark Street, Chicago, IL 60654-3456. Prior results do not guarantee a

similar outcome. Jenner & Block London LLP, an affiliate of Jenner & Block LLP, is a limited liability partnership established under the laws of the State of Delaware, USA and is authorised and regulated by the Solicitors Regulation Authority with SRA number 615729. Information regarding the data we collect and the rights you have over your data can be found in our Privacy Notice. For further inquiries, please contact [dataprotection@jenner.com](mailto:dataprotection@jenner.com).

**Stay Informed**

