

Ensure Your Supplier Diversity Program Meets Legal Requirements and Thrives

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Supplier diversity programs are business initiatives designed to include businesses owned by traditionally underrepresented groups in companies' supply chains. Effective supplier diversity programs expand supplier bases, improve economic results, and promote high quality goods and services. These programs lawfully encourage contracting with businesses owned by women, racial and ethnic minorities, and members of other underrepresented groups.

Although critics of corporate diversity, equity, and inclusion initiatives are increasingly challenging supplier diversity programs as unlawful under 42 U.S.C. §1981 (which prohibits race discrimination in the making and enforcing of contracts), supplier diversity programs remain not only legal, but often statutorily required for government contractors.

Supplier Diversity in the Private Sector

No statute prohibits a private company from cultivating a diverse group of suppliers. Companies with diverse supplier initiatives are not establishing quotas or making contracting decisions on the basis of protected characteristics. Rather, they are diversifying the pool of qualified business partners from which they select the best candidate to perform a contract. Basically, supplier diversity programs provide a framework through which companies identify barriers in the contracting process and work to eliminate those barriers for all potential business partners.

Effective and lawful supplier diversity policies and programs focus on "good faith efforts" to engage diverse suppliers. Some examples of race- and gender-neutral actions that further supplier diversity goals are:

- Ensuring suppliers are aware of the company's procurement needs and processes
- Providing technical or other assistance, such as advice on improving financial controls
- Aiding in overcoming technical limitations, such as an inability to obtain bonding or financing
- Breaking procurements into multiple contracts, where smaller suppliers can provide some but not all of the required goals or services or serve only a limited part of the procuring company's geographic footprint
- Partnering with advocacy groups to provide resources to diverse suppliers seeking necessary certifications

Supplier Diversity and Government Contracts

Governments have a legitimate interest in ensuring equal opportunity for all vendors by removing barriers to contracting opportunities through race- and gender-neutral supplier diversity programs. The U.S. Supreme Court has recognized the legitimacy of race- and gender-conscious programs where the government can demonstrate a compelling interest for race- and gender-conscious efforts and show the efforts are “narrowly tailored” to achieve that compelling interest. In keeping with this legitimate interest, most state and federal government entities require government contractors to engage in good-faith, nondiscriminatory supplier diversity efforts.

Congress created multiple programs to facilitate inclusion of underrepresented vendors in the procurement process. These programs provide support through grants, training, or networking opportunities to businesses that are at least 51 percent owned and controlled by individuals who are both socially and economically disadvantaged. The programs determine “economic disadvantage” by criteria such as income and net worth. Socially disadvantaged individuals are those whose entry into or advancement in the business world have been negatively impacted by “prejudice or cultural bias within American society.” The social disadvantage must stem from circumstances beyond the individual’s control.

To qualify for these programs, an applicant need not meet any race or gender criteria. Prior to recent federal court decisions, applicants who belong to designated racial and ethnic minorities were presumed to meet the “socially disadvantaged” requirement without having to further demonstrate the impact of prejudice or cultural bias. Applicants not from the designated racial and ethnic minority groups had the additional requirement of describing incidents of bias that prevented entry into or advancement in the business world. District courts in Kentucky, Tennessee, and Texas, have found these race-based presumptions of social disadvantage to be unconstitutional and enjoined government agencies from using such a presumption in their selection decisions.

None of these court rulings diminished the government’s compelling interest to expand business opportunities for socially and economically disadvantaged individuals. The challenged programs remain active and lawful. All applicants to these federal programs, regardless of race or gender, now must provide the same social disadvantage narrative essay previously required of applicants who are not from designated racial and ethnic minority groups. Program officials then review the narratives to conduct the individualized assessment that Supreme Court Chief Justice John Roberts endorsed when writing for the majority in *Students for Fair Admission v. Harvard*: “[N]othing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.”

Rather than signaling the end of government supplier diversity efforts, these court decisions reinforce their validity.

Takeaways

Courts have routinely upheld the legality of programs designed to create fair opportunities for all businesses to compete for contracts with both private companies and government entities, including the underlying programs in the cases discussed above. Well-designed supplier diversity programs that apply the lessons of court cases are lawful and provide benefits such as improved quality, innovation, and lower costs.

Companies can strengthen their own supplier diversity initiatives by:

- Reviewing supplier diversity programs, processes, and practices to ensure legal compliance
- Implementing good faith efforts to ensure that qualified diverse suppliers have a fair opportunity to bid on, compete for, and perform procurement contracts
- Training procurement personnel on appropriate and legal supplier diversity efforts, as well as effective techniques for maximizing diverse supplier participation in procurements

Jackson Lewis attorneys in the Corporate Diversity Counseling practice group are available to discuss your supplier diversity programs.

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