INVESTING IN RACIAL EQUITY THROUGH CHARITABLE GRANTS AND SERVICES

Lawyers' Committee for Civil Rights Under Law | 2025

EFFORTS TO ADVANCE RACIAL EQUITY ARE UNDER ATTACK. Recent federal actions (including executive orders and federal agency memoranda) have sought to limit diversity, equity and inclusion, or "DEI", initiatives in the public and private sectors. These actions, however, do not reshape the legal landscape, especially for organizations that only receive private funds. These federal actions do not change long-standing civil rights law and as such, cannot categorically deem all DEI as unlawful. Whether or not any particular program violates the law is a determination made by the courts, as outlined in this document. Moreover, these federal actions apply only to the federal government and federally-funded organizations, and it is important to note that many of these executive actions are being challenged in courts.

Grantmakers, nonprofits, and others who seek to advance racial equity for communities of color are wondering if they need to adjust their approach to equity-focused grants and programs in this moment to minimize legal risk. At the same time, many charitable organizations are looking for ways to double down on maximizing impact for affected communities in an increasingly hostile landscape. This resource provides an overview of the most prominent legal development in this space—the *Fearless Fund* case—as well as a non-exhaustive list of lawful ways to continue the critical work of fostering fairness and economic opportunity for communities of color.

Putting *Fearless Fund* in Context

Legal challenges to grant programs designed to provide access to economic opportunities for Black communities and other communities of color are on the rise. To date, most of these lawsuits have been dismissed because courts found the individuals or groups bringing the cases could not show "standing," i.e., that they were harmed by the programs they sought to eliminate. Other cases have settled after the defendants agreed to change the program.

One recent lawsuit was *American Alliance for Equal Rights ("AAER") v. Fearless Fund Management LLC* (*"Fearless Fund"*), which sought to stop a venture capital fund from providing $20,000 grants to businesses that are majority-owned by Black women entrepreneurs. The case is informative for grantmakers, nonprofits, and others that provide grants or services on the basis of race or ethnicity.

The group that sued brought their claim under our nation's oldest civil rights law, section 1981 of the Civil Rights Act of 1866. That law, which was passed after the Civil War, provides that all people have the same right to enter into and enforce contracts "as is enjoyed by white citizens." The lawsuit claimed that Fearless Fund's grant program violated section 1981 by discriminating against non-Black individuals entering into a contract, as it was restricted to Black women.

In June 2024, the U.S. Court of Appeals for the 11th Circuit ordered an immediate temporary pause to the grant program, finding it likely violated the law. In September 2024, the parties settled the case, with Fearless Fund agreeing to voluntarily end the grant program. Because the case settled before the court was able to decide the legality of the grant program on the full evidentiary record, the decision of the appeals court has limited impact. However, the ruling suggests that federal courts, particularly those in the 11th Circuit (Georgia, Alabama, and Florida) could determine that grants or other programs with contractual obligations violate section 1981 if decisions about who receives funds or services are made on the basis of the race or ethnicity of the applicant, regardless of the reparative or other beneficial goals of the programs.

Does the Grant or Program Create a Contract?

In order to sue under section 1981, there must be a contract. Whether any specific agreement or relationship creates a legal contract does not depend on labels alone. Instead, it depends on the facts of the situation.

In *Fearless Fund*, the appeals court pointed to several facts that it said supported a finding of a contract. In exchange for entering the contest for the $20,000 grant, the applicant:

- gave Fearless Fund publicity and intellectual property rights to use the applicant's name, image, and likeness as well disclose their business plan/idea,
- agreed to arbitration for any disputes, and
- promised to indemnify Fearless Fund for any related liability costs arising from the grant.

In addition, the grant application originally stated in all caps that applicants were agreeing to the "OFFICIAL RULES, WHICH ARE A CONTRACT."

Finding that applicants were entering into a contract with Fearless Fund, the appeals court found that the plaintiff's section 1981 claim was likely to succeed because the contract was expressly limited to Black women.

The appeals court finding was the first decision in the over 150-year-history of the post-Civil War civil rights law that has halted private charitable support for any racial or ethnic group. Anti-racial equity groups have filed a number of similar cases. One of their goals is to cause grantmakers and others to open their grant programs and services to all groups, even if the program is designed to level the playing field and advance economic freedom for groups that have been historically denied the same opportunities.

The Fearless Fund and others engaged in similar work seek to address discrimination that is long-standing and irrefutable. We urge philanthropies and nonprofits to not withdraw from their critical work to advance racial equity. Maintaining a focus on achieving racial equity is foundational and even more critical in this moment when racial progress is under attack. Remedying racial inequality benefits impacted communities and has substantial benefits to the economy and nation as a whole. There are many ways to continue this essential work within the confines of the law.

What Does This Decision Mean for Philanthropic Grantmaking and Nonprofit Work Focused on Racial Equity?

The *Fearless Fund* decision does not mean an end to racially-informed grantmaking or nonprofit work. To the contrary, it is still lawful for organizations to have missions designed to advance racial equity. It is also fully lawful to explicitly discuss racism and discrimination. Specifically, charitable organizations can continue to discuss the effects of discrimination and justification for their racial equity programs on their organization websites and public-facing materials.

The decision has, however, created a landscape where using race as an explicit eligibility criterion for grants and services that could be interpreted as contracts is riskier. That said, there are many lawful ways to engage in grantmaking and programs to advance racial equity within this new landscape.

Trust-based Philanthropy May Lower Section 1981 Liability Risk

Under federal law, in many cases, organizations that receive only private (nongovernmental) funds can engage in charitable grantmaking and services specifically for members of certain racial or ethnic groups, provided that the funds or services do not create a contract by imposing conditions or obligations on the recipients to receive the charitable support. Trust-based philanthropy may offer a way forward. Under this approach, foundations seek to simplify unnecessary burdens on grantees to help ensure they have the flexibility and resources to succeed. Depending on the legal needs of the funder, grants may be distributed with either no grant agreement (in the case of giving to 501(c)(3) organizations), or with an agreement that is limited to the minimal legal requirements. Whether a grant or service creates a contract depends on the facts of the specific situation and likely requires legal review. For more information about trust-based philanthropy, including sample agreements, you can visit: https://www.trustbasedphilanthropy.org/.

Additional Examples of Lower-Risk Measures to Advance Racial Equity

Whether or not a contract is formed, there are additional ways organizations can advance their racial equity goals through measures that are not race exclusive and treat applicants of all races and ethnicities the same. For example, organizations can:

- consider applicants' demonstrated commitment to advocacy on behalf of Black communities or communities of color;
- consider applicants' lived experiences with race, racism, and discrimination;
- voluntarily solicit demographic data from applicants and beneficiaries for analytical purposes to better measure program impacts and results;
- develop aspirational goals if certain groups are underrepresented in your application process;
- use targeted recruitment and advertising to increase racial and ethnic demographic representation of underrepresented groups in applicant pools, including partnering with Historically Black Colleges and Universities, Hispanic-Serving Institutions, and other Black, Indigenous, and People of Color-serving organizations.

Note: this is not an exhaustive list.

Conclusion

We all must reaffirm our commitment to advancing racial equity within this new landscape. The Lawyers' Committee is committed to working with allied stakeholders, including philanthropies, nonprofits, and others to ensure that we can continue the critical work to create the future we all deserve.

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

January 2025