

Diversity, Equity, and Inclusion in Nonprofit Bylaws

Nonprofits should be at the forefront of encompassing diversity, equity, and inclusion (“DEI”) into their governance and operations. While discussions regarding DEI are increasingly prevalent in the nonprofit sector, the next, more difficult, step forward is to turn the discussions into action. How do we, as part of the nonprofit community dedicated to the benefit of the public, effectuate our commitment to DEI? What steps can we take to make our organizations more diverse, equitable, and inclusive?

Commitment to DEI may be demonstrated through leadership, governance policies, recruitment, power-sharing, and importantly, accountability. From a corporate law perspective, one way to lock DEI in as a core value of an organization is to include DEI principles and language into an organization’s Bylaws. As a manual for the Directors and officers in governing the organization, Bylaws that include DEI provisions function as a sign that the organization will devote meaningful resources to those values.

In considering where and how DEI principles might be incorporated into the Bylaws, a Board might review the document section by section, focusing on how each may impact, or be modified to impact, DEI favorably or adversely. For an organization whose mission is racial justice-oriented, it may be especially important to set forth specific DEI-related goals (rather than just aspirational language), that if not met, will cause the organization to be out of compliance with its Bylaws.

The following list is intended to help a Board generate its own discussion on how it might incorporate DEI in the Bylaws:

- **Purpose Statement** – Practitioners differ in their opinion about whether an organization should include a specific purpose statement in their Bylaws. Generally speaking, including a specific purpose statement can create more legal risk if the organization diverts from that specific purpose. However, if DEI is part of an organization’s mission, locking a purpose statement in the Bylaws will evidence that the organization is committed to operating within that mission. A Board might begin by considering whether its mission and purpose statement (if any) accurately reflect the values of the organization and discuss how it might be improved.
- **Selection of Directors** – If the Board is serious about DEI, it must set the tone at the top. When a nonprofit’s Board reflects the diversity of the community it serves, the organization will be better suited to serve that community and attract a diverse staff to implement its programs. Changing the composition of a Board can be very difficult; however, setting a goal through a provision in the Bylaws, whether aspirational or a specific, can tie the organization to said goal. Each organization should determine for itself what its Board diversity target is, how it plans to achieve it, when it plans to achieve it (e.g., 3 years? 5 years?), and by what method (e.g., set numbers, percentages). Admittedly, the following is an over-simplistic example, but if an organization’s goal is to increase representation of a certain group of individuals, they might include a provision in the Bylaws that states that Board must be made up of at least X% of that group within a stated time frame. Among the many challenges to discuss, carefully consider, and thoughtfully address are avoiding tokenism and ensuring any new directors have ample opportunities for meaningful contribution.
- **Qualifications of Directors** – The organization should be sensitive to who it may be excluding through its qualifications for the position of a Director. Does the organization have Get or Give requirement or a qualification regarding the individual’s educational background? Such requirements may be important for many reasons, but the Board should also consider how those requirements exclude individuals from an array of backgrounds, which could ultimately harm the organization.
- **Principal Office** – An organization might consider how the location of its office may have some DEI consequences and whether it is important to include specific considerations in determining where the

office location is. For example, the Bylaws might include language such as, “We aspire to locate this corporation’s principal office in an area that is consistent with the mission of this corporation” or “We will consider the following factors in determining the principal office of this corporation: [e.g., beneficiaries, staff, mission].”

- **Compensation** – The Board might consider including in the Bylaws certain provisions regarding compensation, such as a statement that the corporation must pay all employees a fair and reasonable wage, as to both the corporation and the employees. Additional external and internal compensation equity principles might also be added.
- **Meetings** – In most states, including California, Board meetings are permitted to be held by “conference telephone, electronic video screen communication or electronic transmission” so long as each Director can hear one another or can communicate concurrently, depending on the medium. In consideration of the organization’s DEI values, a Director’s ability to participate in meetings remotely (in accordance with state law) should not necessarily be discouraged. Such form of participation may improve the Board’s geographical diversity and also might help in the recruitment and retention of a Director who might otherwise have an access barrier in serving as a Director.
- **Conduct of Meetings** – Traditionally, a Chair of the Board presides over Board meetings and is responsible for setting the tone and guiding discussions and Board actions. One way to encourage diversity in thought and possibly deliberate through a different lens is to consider a provision in the Bylaws permitting other Directors to chair meetings. In addition, from time to time, allowing different Directors to prepare agendas and/or preside over certain Board meetings can also advance the organization’s DEI values.
- **Committees** – While Bylaws may not include detailed committee descriptions to provide for greater flexibility, they may provide general descriptions of certain standing committees the Board is committed to maintaining. A DEI Committee may be one such committee. By making it an advisory committee instead of a Board committee (which must be composed of only Directors), the DEI Committee itself can maintain a diverse composition and be better positioned to have big picture discussions about the organization’s DEI priorities. A DEI Committee might also be charged with performing a DEI audit of the organization, as further discussed below.
- **Officers** – Commonly, the corporate officers listed in the Bylaws include the Chair of the Board or President (or both), the Secretary, and the Treasurer. An organization might also consider requiring a Diversity Officer, which may be filled by a Director or possibly an employee. Alternatively, the organization might require a Vice President to assume DEI oversight responsibilities. Additionally, co-leadership models are becoming more common and may offer an opportunity for an organization to benefit from diverse perspectives in the management of the organization.
- **DEI Audit** — The organization may commit to tracking how it is doing on DEI-related goals by requiring a DEI audit. The Bylaws may require that an annual DEI audit report be provided to the Board to hold itself accountable to its values. The report might examine the organization’s employees, beneficiaries, goods, Directors, officers, and vendors to see if there has been improvement and determine the areas needing more work. The Board might also consider whether to require that the DEI audit report be made public on the organization’s website.
- **Amendments** — To protect the DEI provisions in the Bylaws, consider increasing the required number or percentage of Directors necessary to approve an amendment to those provisions.

By reviewing the Bylaws and considering where DEI principles can be included, the Board will be forced to think through what level of commitment to DEI is desired for the organization. Of course, the Board shouldn’t include requirements that it cannot meet; however, the Board can show its commitment and readiness to be held accountable when the goals it sets out in the Bylaws are not met.

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