LEAD™ For Racial Justice

Race-Conscious Assessment Tool

UPDATED MAY 2025

Race-conscious activities, that is, activities designed to support people of a specific race, have long been accepted as powerful, legally valid weapons in the fight to combat the harmful effects of race-based discrimination and disenfranchisement. However, 501(c)(3) nonprofits – which we refer to here as "charities" – and their funders working to promote racial justice, eliminate race-based disparities, and build power in communities of color, may have concerns about evolving legal risks in the wake of anti-equity lawsuits, publicity of new challenges to race-conscious programs, as well as Executive Orders targeting diversity, equity, and inclusion efforts. Despite the perception of increasing risk, the vast majority of race-conscious programs remain legal. ***Even in this evolving legal landscape, charities and funders can continue to advance racial equity – directly, explicitly*, and effectively.** This Tool is designed to help organizations that conduct or fund race-conscious programs make informed decisions about whether, and if so how, to adjust their programs to align their programmatic goals with their risk tolerance.

The Tool is not designed to address whether an organization's existing programs are legal as currently conducted; for that, organizations should consult legal counsel with civil rights law expertise. As of this writing, no existing programs outside college admissions have become illegal yet. Our hope is that the Tool reinforces organizations' racial justice and equity efforts by helping them understand the underlying factors that may affect their risk of inviting a lawsuit, identify options for altering that risk, and continue their work with confidence. This Tool is generic; it does not offer, and cannot replace, specific legal advice tailored to each organization's particular facts and circumstances. Consult knowledgeable legal counsel for specific advice about how your organization can manage legal exposures associated with its programs.

The Tool has three parts:

- **Questions** identifying some of the factors that affect risk;
- **Explanations** of each factor; and
- **Further information** about the Tool and how to use it.

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BLACK FREEDOM FUND

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1. Does your program provide benefits only to individuals selected on the basis of race, or does it target a community where individuals of one race predominate?

You provide benefits to individuals selected based on race	You make benefits available to a community where individuals of one race predominate

2. Do you require beneficiaries to provide your organization with anything in return for receiving benefits, or are your benefits provided purely as gifts?

You require beneficiaries to sign a legally-enforceable agreement creating obligations to your organization	You provide benefits with no strings attached

3. Do you require an individual applicant (or an organizational applicant's leadership) to be of a specific race, or is the applicant's race one consideration among many in the selection process?

Specific race is an eligibility requirement	Open to anyone; race is a key factor	Open to anyone; race is one factor among many

4. Does your organization set selection criteria and select program beneficiaries itself, or are other organizations responsible for selection?

All selections made entirely in-house	Your organization participates in selection alongside others	All selections made by others

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5. Does your organization solicit or accept applications from the public, or does it develop candidates through an internal process?

Organization invites applications	Organization accepts but does not solicit applications	Organization does not accept applications

6. Does your race-conscious program address core First Amendment rights (freedom of speech, expressive association, freedom of the press, freedom of religion)?

Supported activities do not involve the expression of ideas	Output of supported activities is art, advocacy, journalism

7. Do you receive government funding for your race-conscious program(s)?

Your program receives public funding without any race-conscious mandate	You're part of a government-funded program to remedy past discrimination	Your funding sources are private, race-neutral, and non-controversial

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Explanation of Each Question/Factor

NOTE: *Having higher risk in one or more factors does* ***not*** *mean that an activity is illegal or should be discontinued, just that the activity may be more likely to be challenged by opponents, and/or that if opponents were to bring a legal challenge, the organization may be less likely to win on the merits. For most organizations, the overall risk profile is more important than any one factor. Higher-risk activities may be appropriate in light of an organization's specific mission and risk tolerance. For example, an organization whose mission specifically focuses on race-conscious strategies, may be comfortable accepting the risk inherent in such programs, but may want to reduce its overall risk by adjusting how it operates and implements its programs. A complete understanding of an organization's overall risk may require consideration of additional factors not addressed here.*

1. Does your program provide benefits only to individuals selected on the basis of race, or does it target a community where individuals of one race predominate?

A program that distributes benefits only to specific individuals selected with reference to their race, is riskier than one that targets its benefits to a community with reference to the racial demographic of the community members, while making its benefits available to anyone in the community. Individuals have an attribute we call "race," but communities, issues, or topics have no race, so choosing a community, issue, or topic based on the demographics of its members or people interested in an issue or topic, is fundamentally different from discriminating between individuals using their race. Furthermore, if individuals can benefit from a program or activity regardless of their race, that program's risk is extremely low. Several lawsuits have challenged the distribution of cash benefits to people of a specific race, but none to date has challenged the selective delivery of services into a community chosen because most of its members are people of a specific race. Examples include a program that offers services addressing the particular needs of a specific race, offers culturally competent services, or selects locations to deliver programs based on the racial composition of the surrounding community, without excluding any member of the public from participating or attending. Establishing a health clinic in a predominantly Black area in order to address proven health disparities, or building a playground in a predominantly Latino area that lacks playgrounds, is unlikely to present an appealing target for litigation.

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2. Do you require beneficiaries to provide your organization with anything in return for receiving benefits, or are your benefits provided purely as gifts?

Requiring something in return for receiving benefits, as opposed to providing benefits without any strings attached, may be higher risk. Because one of the primary civil rights statutes underlying some litigation (Section 1981 of the Civil Rights Act of 1866) focuses on the presence of a "contract," and may be interpreted to prohibit any use of race in contract decisions, the nature of the relationship between your organization and the beneficiaries of your race-conscious program is a potentially significant component of your organization's risk profile. As a legal matter, a "contract" exists when there is an exchange of value between the parties, which might include money, services, goods, and/or a promise to do (or not do) something. Put another way, a contract exists when each party to the arrangement has some legally-enforceable obligation to the other. For example, if, in order to receive the benefits that your program offers, prospective beneficiaries are required to complete some work or deliver some outcome, the arrangement may constitute a contract. Work or deliverables could include a requirement to grant your organization a license to use their image or the results of their work, or to release any claims they may have against your organization.

In the *Fearless Fund* case, opponents claimed that the Fearless Fund's Fearless Strivers grant contest, which provided $20,000 grants to Black women running small businesses, violated Section 1981 because beneficiaries of the grant program were required to agree to specific contractual provisions in exchange for receiving the award. The 11th Circuit agreed, ruling that Section 1981 applied to the specific facts of the Fearless Strivers program. That ruling now guides other judicial decisions in the lower federal courts within the 11th Circuit, which includes Georgia, Alabama, and Florida, but federal courts in other circuits, as well as all state courts, remain free to decide the question differently. Moreover, even in the 11th Circuit, different facts about different programs may well lead to a different outcome.

Where a contract does or may exist (even if called something else, such as a "memorandum of understanding," "letter of intent," or "award letter"), the arrangement could be subject to Section 1981, which could preclude considering race when choosing the other party to the contract. On the other hand, if your organization provides benefits without requiring anything in return, then the arrangement is unlikely to be subject to Section 1981's prohibition on considering race. Organizations that provide financial benefits may be able to design their programs without legally obligating beneficiaries to provide anything in return. Requiring compliance with the law, or requesting reports without requiring them, are less likely to be considered the sort of obligations that create a contract.

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3. Do you require an individual applicant (or an organizational applicant's leadership) to be of a specific race, or is the applicant's race one consideration among many in the selection process?

A program that screens potential participants based on their racial identity is riskier than a program that considers race among other relevant factors. For example, a grant program that only allows people of a given race, or organizations led by people of a given race, to be eligible to apply, is riskier than a grant program that is open to all applicants, but still weighs the applicant's race as one factor among many. A program that does not consider race specifically, but rather considers applicants' lived experience (e.g., a history of specific discriminatory treatment based on their race) or relevant experience (e.g., leaders who have credibility in the target community) poses even less risk. A program that seeks to invest in power-building within a community can be designed and implemented without incurring high risk on this factor. Racial qualifications may be framed as requirements ("this program is open to Black- led organizations"), aspirations ("the ideal candidate will be a Black-led organization" or "... a community-led organization"), or preferences ("Black-led organizations are encouraged to apply"). Requirements are riskier than aspirations, which are in turn riskier than preferences.

4. Does your organization set selection criteria and select program beneficiaries itself, or are other organizations responsible for selection?

Lawsuits opposing race-conscious activities generally target the entities that make the specific decisions about who can receive the benefits of the program. The more distant your organization is from these selection decisions, the lower your organization's risk. Conversely, the more directly or closely involved your organization is in the selection of beneficiaries of a race-conscious program, the greater the risk to your organization. As a general matter, funders of race-conscious programs that are conducted by the funders' grantees will be more removed from the grantee's selection process, and therefore have a lower risk than the grantees conducting the program and making the selections.

To our knowledge, private funders that merely support race-conscious programs conducted by others have not been sued as a result of funding those programs. However, a funder's risk may increase if the funder also establishes the criteria that the grantee must use to select beneficiaries. Similarly, for charities that implement government-funded programs, if the government funding comes with a requirement or objective to select beneficiaries of a certain race, the charity is at less risk of being directly challenged, but may risk loss of funding if the government entity funding the program faces a legal challenge.

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5. Does your organization solicit or accept applications from the public, or does it develop candidates through an internal process?

The less public information there is about racial qualifications, the lower the risk. The more transparent the role of race is in considering applications, the higher the risk. The process of soliciting applications inherently involves publicizing information about who is eligible. While eligibility requirements may legally include racial characteristics, publicizing them means opponents might see them and argue they are racially discriminatory. At the other end of the spectrum, programs may identify beneficiaries via a non-public, internal process, without a process for accepting applications from potential beneficiaries or publishing any information about qualifications, racial or otherwise.

Application-driven programs create the opportunity for a person or entity that believes they were excluded on the basis of race to claim that their failure to be selected constitutes impermissible discrimination. A program that has no publicized requirements or rubrics and that selects beneficiaries via an internal process is much more difficult (though not necessarily impossible) to challenge, because no one can easily demonstrate that they should have been eligible, let alone should have been selected. If your organization accepts but does not solicit applications, or accepts applications from invited candidates without publishing eligibility requirements, the risk is lower than with an open invitation with published race-conscious criteria.

6. Does your race-conscious program address core First Amendment rights (freedom of speech, expressive association, freedom of the press, freedom of religion)?

Charitable programs that support activities involving expressive content or association may be less appealing targets for suit because such content is protected speech under the First Amendment. Accordingly, race-conscious programs that support the work of artists, authors, journalists, political activists, or religious leaders selected with reference to race should be significantly more difficult for opponents to challenge than race-conscious programs that support activities that are not protected speech.

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7. Do you receive government funding for your race-conscious program(s)?

Receipt of government funds triggers the application of certain laws (e.g., Title VI of the Civil Rights Act of 1964) that prohibit race-based discrimination, potentially putting a recipient of such funds who uses them in race-specific ways at higher risk of a challenge. If an organization has adopted a race- conscious element without a government mandate to implement the program in a race-conscious manner, then the organization is more likely to be a direct target of a challenge. If the government has dictated that a program be race-conscious, the government is more likely to be a target.

If your organization receives government funding, it is a good idea to ensure the organization is in compliance with the contract. It may be useful to work with an attorney with expertise in federal government contracts, especially if your contract is cancelled.

When possible, replacing government funding with private funding is another way to prepare for a potential challenge. While private funding sources would generally present a lower risk of attracting a suit, a grantee's risk may increase if the grantee's specific private funders have been in the news for their support of race-conscious work, have high profile board members or founders, or have come under investigation or been required to testify before Congress.

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Further Information

This Tool focuses on the risk of being sued, not the risk of losing if you are sued. These factors (and others not included here) were developed in the context of lawsuits that **do not** directly change the law for most nonprofit organizations, but that do signal the **possibility** of significant future shifts in the boundaries of race-conscious activity. This Tool does not address the risk of loss of tax-exemption under Section 501(c)(3) of the Internal Revenue Code from operating race-conscious activities. Based on our analysis, we have concluded that the risk of loss of exemption as a result of engaging in race-conscious charitable activities is essentially zero at this time, and any such risk would take some time to develop. The Tool is designed to help organizations face the uncertainties of that future with greater confidence.

Risk tolerance. Some organizations may welcome becoming the defendant in litigation to protect race-conscious efforts and to end racial inequity and injustice, but others will not. Every organization has a different level of tolerance for different types of risk, and we encourage any organization using this Tool to conduct an internal assessment of its tolerance for suit in this area. For example, some organizations may be more concerned with reputational risks, while others may be prepared to weather challenges in the court of public opinion, but find the potential financial impact of litigation of greatest concern. Or risk tolerance may be affected by how predominant race-conscious activities are relative to your entire organization; if you have only one program and that program is race-conscious, you may be less comfortable with the associated risks than if your race-conscious activities are a small part of your overall operations. Note that risk tolerance may differ across the organization's Board of Directors, its senior leadership, and its staff. Proactively surfacing and resolving any internal disparate points of view can promote confidence in a unified approach to a changing environment. There is no "right" amount of risk an organization should be willing to accept, but the Tool may help an organization realize that actual risks are lower than what they perceived.

How do the factors interact? Which factors are most important?

Application of each factor is more art than science, and we have not attempted to quantify absolute probabilities associated with specific activities, nor to address how different factors may interact with each other. Generally, we see these factors, as operating cumulatively, in the sense that higher risk levels on more factors will raise overall risk, but ultimately, each individual factor can provide an organization with useful information about the potential of being targeted by opponents.

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Breaking down overall risk allows organizations to choose which factors to focus on. Those choices may be driven by what an organization can most easily control, or weighing factors differently based on varying tolerance for different types of risk. The ultimate goal of using the Tool is to reduce overall risk with minimal impact on effectiveness. The list of factors is not exhaustive. Other factors not included in this document affect potential risk, and it may be necessary to add, remove, or modify factors as the legal landscape changes with future court decisions or other developments.

Probabilities versus consequences. This Tool is designed to help organizations assess their risks of being sued. In other words, the Tool addresses probability. It does not address the consequences of losing a case to the organization or to its mission. A full discussion of potential consequences is beyond the scope of this Tool, and of course it will differ depending on the particular race-conscious program, the nature of the legal claims made against the organization, and the clarity of the law when the suit is brought, but there are some important general points to bear in mind.

- The civil rights laws under which plaintiffs have challenged race-conscious activities are not criminal statutes. This means no one is going to jail or prison, even in the unlikely event that a race-conscious program is successfully challenged in court.

- To date, there have been no monetary damages awarded in such litigation, and for now at least, none are likely. (In some cases, plaintiffs have sought to recover attorneys' fees.) This is for a number of reasons: plaintiffs generally have sought only to stop activities by having them declared illegal; to be awarded monetary damages, individual plaintiffs would have to prove that they were personally harmed by the behavior (e.g., that they would have been awarded funds or other benefits if not for their race), which is often impossible; and where the plaintiffs' claims seek a new application of the law to establish a new legal precedent, which is the nature of this type of civil rights case, an award of punitive damages would not be granted since the law was not knowingly broken, since it did not exist prior to the lawsuit.

- While fighting a lawsuit may be costly and disruptive, forfeiting your endowment is not a risk in these suits. If your organization is sued, you always have the option to settle. Agreeing to change your race-conscious program can rapidly end the suit, minimizing legal fees. This means an organization could reasonably decide to wait to be sued before modifying or stopping its race-conscious program, even if it has no appetite or capacity for drawn-out litigation.

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Planning in uncertainty. As existing and new lawsuits make their way through the judicial system, the legal environment will continue to evolve. A race-conscious program that is safe today may eventually become riskier, or even illegal. Here are steps organizations can take to ensure their resilience if the legal context becomes more challenging.

1. Decide how much, and what types of risk, your organization can tolerate.
2. Assess the risk of your current race-conscious activities using this Tool and other resources.
3. Compare your risk tolerance to your assessed risk, and, if needed, make adjustments. The Tool may highlight a range of ways you can reduce your risk, and in our experience, risk can often be reduced without reducing the effectiveness of your program. Consider consulting legal counsel for specific guidance about your organization's risk profile and management options.
4. Monitor the shifting legal landscape.
5. Have a back-up plan. Know exactly what your organization would change and how it would make those changes, if the law evolves in a way that undermines your ability to continue to use the approach you have been using.
6. If the law changes and the risk becomes unacceptably high for your organization's risk tolerance, pivot to your Plan B.

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