CLIENT ALERT

The Shifting Landscape for Race Conscious Programs Under Section 1981

A series of recent lawsuits and decisions in federal courts demonstrate that the landscape for race conscious programs under 42 U.S.C. § 1981 is shifting with significant implications for a broad range of organizations.

BY EDWARD WILLIAMS, PRINCIPAL · JULY 20, 2026

KEY TAKEAWAYS

- Recent federal lawsuits filed since December 2025 challenging race-conscious programs signal the widening scope for plaintiff organizations seeking to end these types of programs. The suits covered four entirely different sectors: scholarships, arts/entertainment, employment, and healthcare.
- Each of the lawsuits advances the theory that relying on race as an eligibility criteria necessarily violates 42 U.S.C. § 1981's ("Section 1981") ban on discrimination in contracting.
- The suits rely on untested theories of what constitutes a contract or ask courts to find that diversity-promoting programs are discriminatory.
- Although the law remains unsettled, there are likely ways for organizations to continue their race-conscious work without running afoul of Section 1981's prohibition.
- This is a quickly developing area of the law. Join our webinar on August 5, 2026 to learn more about how to protect your organization's work.

Since December 2025, several federal lawsuits have targeted race-conscious programs in sectors that, on the surface, have little in common. What connects them is not the industry — it's the legal architecture of the challenge itself.

In December, the American Alliance for Equal Rights sued the Hispanic Scholarship Fund, arguing that restricting scholarship eligibility to people with Hispanic ancestry violates Section 1981 — the same month a separate plaintiff sued the Off-Broadway theater Playwrights Horizons over a "BIPOC

Night" discount, alleging that patrons who didn't identify as Black, Indigenous, or people of color were charged $90 for tickets that cost $39 for those who did. In May, Do No Harm and a Colorado dermatologist sued the directory Find A Black Doctor, and in June, the same plaintiff behind the theater case sued Broadway's Wicked along with two nonprofit music-employment directories, alleging he was excluded from a paid apprenticeship because the eligible applicant pool was limited to directories restricted by race and sex. With the exception of the case against Playwrights Horizons, which recently settled out of court, these cases remain pending and the new theories have not been endorsed by a court.

WHY THIS MATTERS NOW

This matters for two reasons. First, the theory is portable. It has now been applied to a national scholarship program, a single ticketed event, a professional employment pipeline, and a healthcare referral service — meaning virtually any organization running a fellowship, grant, discount, membership, or directory with a demographic eligibility criterion should assume it fits the same pattern, regardless of how established or well-regarded the program is. Second, the exposure predates the lawsuit. In each of these cases, the language creating legal risk — eligibility criteria, marketing copy, application gates — was written long before anyone anticipated a challenge. The vulnerability isn't new; it's just now being tested.

The organizations best positioned going forward aren't the ones hoping they're too small or too well-intentioned to be named. They're the ones who've already had counsel review their programs' actual documents and language, under privilege, before a claim ever arrives — and made the changes needed to hold up if one does.

WHAT WE'RE WATCHING

The most recent decisions in this area, including one concerning a scholarship from the American Bar Association, continue to apply a straightforward framework: (1) Is the thing that the plaintiff claims he was denied access to a contract as opposed to a gift or noncontractual benefit? (2) Is the defendant organization in fact using race to limit access to the program or benefit as opposed to mere promotion? Not every benefit conferred by an organization is a contract and not every invitation to racial communities to engage with an organization serves a gatekeeping function. As the law continues to develop in this area, we're watching how courts draw the lines between these important distinctions.

WANT TO LEARN MORE?

Join us for a webinar on *Navigating the Shifting Landscape for Race Conscious Programs* on August 5, 2026 at 1pm ET. The webinar will expand on the topics discussed in this client alert, provide some immediate to dos for organizations seeking to maintain race conscious programs, and answer participant's questions.

Register here: https://zoom.us/meeting/register/ddI5hhUwQLWROOEIrzKJ_g

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