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Diversity, Equity, and Inclusion (DEI) Under the Microscope:

Reevaluating Your Programs in the Executive-Order Era

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Overview

- 2025 Executive Orders
- 2026 Executive Order
- Corporate Updates
- Reverse Discrimination Litigation and Cases
- Practical Takeaways

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SFFA – Background Context

- **Students for Fair Admissions (SFFA) (June 2023):** Supreme Court struck down race-conscious admissions; sparked broader DEI scrutiny
  - SFFA was expressly limited to race-conscious admissions at higher education institutions under the Equal Protection Clause
  - Executive Orders ("EOs") invoke SFFA as authority for the proposition that DEI programs may constitute illegal discrimination
    - EO 14173 directs AG and Education Secretary to issue guidance on SFFA compliance for educational institutions
    - The Trump Administration has consistently argued in litigation that SFFA supports a broad prohibition on race-based preferences in any context, not merely higher education admissions
  - Justice Barrett suggested at oral argument that affinity housing may reduce isolation—hinting she may view post-admission questions differently

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2025 Executive Orders

- Post-inauguration, President Trump issued a series of EOs addressing Diversity, Equity and Inclusion ("DEI") and Diversity, Equity, Inclusion and Accessibility ("DEIA") in employment
- These EOs (and resulting agency actions) do not target all DEI/DEIA programs
  - Focus is on eliminating "illegal" DEI/DEIA and federal contractor affirmative action requirements for women and minorities

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2025 Executive Orders

- **EO 14151 (Government DEI Order) — Ending Radical and Wasteful Government DEI Programs and Preferencing** (Jan. 20, 2025): Directed agencies to terminate federal DEI/DEIA offices, positions, equity action plans, and 'equity-related' grants and contracts
- **EO 14173 (Merit-Based Opportunity Order) — Ending Illegal Discrimination and Restoring Merit-Based Opportunity** (Jan. 21, 2025): Revoked EO 11246 (Affirmative Action Order), required anti-DEI certifications in federal contracts and grants, and directed enforcement against private-sector DEI practices
- **EO 14185 (Military DEI Order) — Restoring America's Fighting Force** (Jan. 27, 2025): Directed the abolishment of all DEI offices in the Department of Defense and Coast Guard and banned promotion of "divisive concepts" in military institutions
- **EO 14281 (Disparate Impact Order) — Restoring Equality of Opportunity and Meritocracy** (Apr. 23, 2025): Declared a policy to eliminate disparate-impact liability to the maximum extent possible
- **EO 14319 (Woke AI Order) — Preventing Woke AI in the Federal Government** (Jul. 23, 2025): Required agencies to procure only LLMs that are truth-seeking and ideologically neutral, with no intentionally encoded DEI or other partisan judgments

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2025 Executive Orders

- Following the initial set of EOs, several federal agencies put out statements, letters and other guidance materials addressing the Trump Administration’s directives

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2025 Executive Orders – Agency Action

- **Government DEI Order (EO 14151)**
  - **Feb. 5, 2025** – Office of Personnel Management ("OPM") issued a memo "Further Guidance Regarding Ending DEIA Offices, Programs, and Initiatives"
    - Diverse slate programs
    - Employment practices where protected class was considered

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2025 Executive Orders – Agency Action

- **Disparate Impact Order (EO 14281)**
  - Internal EEOC memorandum stated the EEOC would close almost all pending charges based solely on allegations of disparate impact by September 30, 2025
  - **June 4, 2026** – the EEOC approved a new National Enforcement Plan that prioritizes intentional discrimination over disparate impact claims
    - Includes the near elimination of disparate impact enforcement

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2025 Executive Orders – Agency Action

- **Disparate Impact Order (EO 14281)**
  - **June 9, 2026** – the Department of Justice's Office of Legal Counsel ("OLC") issued an opinion to the EEOC that its guidelines about disparate-impact under Title VII are unconstitutional
    - This was a response to a question from EEOC Chair Andrea Lucas asking whether Title VII's disparate impact provisions are constitutional as the EEOC interprets and applies them
    - The DOJ stated its opinion "helps implement Executive Order 14281"
    - Her response afterwards was thanking the DOJ for its thoughtful and insightful analysis

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2025 Executive Orders – Agency Action

- **Woke AI Order (EO 14319)**
  - **December 11, 2025** – The Office of Management and Budget published memo guidance
    - Federal agencies must ensure that any solicitation or order for procurement of an LLM they issue includes contractual requirements addressing compliance with Unbiased AI Principles
    - Modify existing contracts for LLMs to include that requirement (to the extent possible)
    - By **March 11, 2026**, federal agencies must update their policies and procedures to ensure that contracts for procurement of LLMs include contractual requirements addressing compliance with the Unbiased AI Principles

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2025 Executive Orders – Agency Action

- **Merit-Based Opportunity Order (EO 14173)**
  - **March 19, 2025** – EEOC and DOJ released technical assistance documents on DEI-related workplace discrimination
    - "What to Do If You Experience Discrimination Related to DEI at Work" – employee guidance
    - "What You Should Know About DEI-Related Discrimination at Work" – overview of Title VII protections
  - **March 21, 2025** – Attorney General guidance about implementing both the Government DEI Order (EO 14151) and the Merit-Based Opportunity Order (EO 14173)
    - Direct or indirect/neutral preferences based on protected class are impermissible

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2025 Executive Orders – Agency Action

- **Merit-Based Opportunity Order (EO 14173)**
  - **May 19, 2025** – DOJ announced the Civil Rights Fraud Initiative
    - Uses the False Claims Act ("FCA") to pursue federal funding recipients that knowingly violate civil rights laws and falsely certify compliance
      - For example, a contractor may be liable under the FCA for knowingly and falsely certifying compliance with the law where the certification is material to the government's decision to pay
    - Implements the Merit-Based Opportunity Order, which requires contractors and grantees to certify compliance with federal antidiscrimination law and directed the AG to recommend civil rights enforcement measures

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2025 Executive Orders – Agency Action

- **Merit-Based Opportunity Order (EO 14173)**
  - **June 27, 2025** – OFCCP invited federal contractors to voluntarily submit information about their efforts to wind down affirmative action programs
  - **July 1, 2025** – DOL proposed rescinding the Affirmative Action Order (EO 11246) implementing regulations
  - **June 4, 2026** – the EEOC approved a new National Enforcement Plan that prioritizes challenging broad-based employment policies, programs or practices that result in intentional discrimination including DEI or similar euphemisms

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Merit-Based Opportunity Order (EO 14173) – Related Rulemaking

- **July 1, 2025 – DOL proposed rulemaking**
  - Rescind the Affirmative Action Order (EO 11246) implementing regulations
  - Removes Affirmative Action Order components from administrative enforcement procedures
  - Incorporates enforcement procedures directly into the Vietnam Era Veterans' Readjustment Assistance Act ("VEVRAA") and Section 503 of the Rehabilitation Act ("Section 503") regulations through separate rulemakings
  - **DOL's stated rationale:**
    - The Merit-Based Opportunity Order (EO 14173) revoked the Affirmative Action Order (EO 11246), so its regulations must go
    - Independently, DOL found the affirmative action rules legally vulnerable
    - Formal rescission avoids confusion over regulations DOL considers null and void

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Merit-Based Opportunity Order (EO 14173) – Related Rulemaking

- After a period of notice and comment, the DOL issued three final rules that take the following actions:
  1. Narrows Requirements for Section 503
  2. Provides Technical Updates to VEVRAA
  3. Rescinds the Affirmative Action Order's Implementing Regulations

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Merit-Based Opportunity Order (EO 14173) – Related Rulemaking

- **Narrows Requirements for Section 503** (eff. Sept. 21, 2026)
  - Eliminates the requirement to invite applicants and employees to self-identify as an individual with a disability, keep the related data, or measure their workforce against the required 7% utilization goal
    - DOL found the self-ID and utilization-goal requirements inconsistent with the ADA, and that the goal could push contractors toward quotas
    - Applicants and employees can still disclose their disability on their own initiative at any point in the hiring or employment process (for example, to request a reasonable accommodation)

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Merit-Based Opportunity Order (EO 14173) – Related Rulemaking

- **Narrows Requirements for Section 503** (cont.)
  - Eliminates the utilization goals and analysis
  - Eliminates the disability applicant and hire data requirements (§ 60-741.44(k))
  - Eliminates Affirmative Action Order cross-references
    - The administrative hearing procedures now sit directly in the Section 503 rules instead of being borrowed from Part 60-30
    - Part 60-30 is removed effective Dec. 21, 2026, after the procedures move into the Section 503 and VEVRAA rules
  - Raises the basic coverage threshold from $15,000 to $20,000 to reflect inflation

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Merit-Based Opportunity Order (EO 14173) – Related Rulemaking

- **What hasn't changed about Section 503?**
  - Contractors with 50+ employees and a $50,000+ contract must maintain a written Section 503 AAP and continue outreach and positive recruitment efforts
  - Disability nondiscrimination, reasonable accommodation, and affirmative action duties to employ and advance qualified individuals with disabilities remain
  - Options that do not require disability-status data:
    - Skills-Based Barrier Analysis: remove nonessential requirements (e.g., lifting or driving)
    - Outreach: share vacancies and job fairs with disability employment groups
    - Accessible Hiring: support assistive technology in applications and assessments
    - Accommodations: share clear accommodation information and request procedures with all applicants and employees

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Merit-Based Opportunity Order (EO 14173) – Related Rulemaking

- **Technical Updates to VEVRAA (eff. Sept. 21, 2026)**
  - Mostly minor technical changes to VEVRAA (no new obligations)
  - Eliminates Affirmative Action Order cross-references
  - Relocates administrative enforcement (formerly contained in the Affirmative Action Order's regulations)
  - Removes the unnecessary Section 503 reference (29 U.S.C. 793) from the authority citation
  - Codifies an inflation adjustment raising the VEVRAA threshold (including the AAP trigger for 50+ employees) from $150,000 to $200,000
  - **Compare to 503 Changes:** unlike Section 503, contractors must still invite applicants and new hires to self-identify veteran status and keep the related applicant/hire data

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Merit-Based Opportunity Order (EO 14173) – Related Rulemaking

- **Rescinding the Affirmative Action Order's Regulations** (effective October 26, 2026)
  - Removes and reserves 41 CFR parts 60-1, 60-2, 60-3, 60-4, 60-20, 60-40, 60-50, and 60-999, and strips Affirmative Action Order components from part 60-30
  - Formally, at the regulatory level, ends ~60 years of government-mandated affirmative action for women and minorities
  - Functionally, makes sure that there are no implementing regulations for an EO that no longer exists
  - DOL concluded the race-based AA rules are unconstitutional, the sex-based rules likely are, and both conflict with Title VII

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Merit-Based Opportunity Order (EO 14173) – Related Rulemaking

- **Practical Takeaways**
  - Race-and-sex-based affirmative action is formally over
  - Stop using the disability self-ID process and remove the utilization goal and analysis from the plan
  - Keep the veteran self-ID process
  - Update your documents and keep an eye on the effective dates of the changes (some of which are already in place)
    - Key dates:
      - September 21, 2026: Section 503 and VEVRAA changes take effect
      - October 26, 2026: EO 11246 regulations rescinded
      - December 21, 2026: Part 60-30 removed

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2026 Executive Order

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Contractor DEI Order (EO 14398)

- On March 26, 2026, the President signed the Contractor DEI Order (EO 14398) about DEI in federal contracting
  - Builds upon the Merit-Based Opportunity Order's requirements (which required federal contractors to certify they do not operate programs promoting DEI in violation of the law)
  - Defines terms
  - Requires the inclusion of certain language in federal contracts and contract-like instruments
    - The required clause flows down to subcontractors at every tier
  - Discusses sanctions/penalties for non-compliance

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Contractor DEI Order (EO 14398)

- Defined terms:
  - **Racially discriminatory DEI activities** means "disparate treatment based on race or ethnicity in the recruitment, employment (e.g., hiring, promotions), contracting (e.g., vendor agreements), program participation, or allocation or deployment of an entity's resources"
  - **Program participation** means "membership or participation in, or access or admission to: training, mentoring, or leadership development programs; educational opportunities; clubs; associations; or similar opportunities that are sponsored or established by the contractor or subcontractor"

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Contractor DEI Order (EO 14398)

"In connection with the performance of work under this contract, [the contractor/appropriate party (contractor)] agrees as follows:

1. *The contractor will not engage in any racially discriminatory DEI activities, as defined in section 2 of the Executive Order of March 26, 2026 (Addressing DEI Discrimination by Federal Contractors);*
2. *The contractor will furnish all information and reports, including providing access to books, records, and accounts, as required by the contracting agency pursuant to the Executive Order of March 26, 2026 (Addressing DEI Discrimination by Federal Contractors), for purposes of ascertaining compliance with this clause;*

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Contractor DEI Order (EO 14398)

Provisions 1 and 2 in Practical Terms:

1. Turns the definition into a binding contract term (the definition could address practices not already clearly prohibited by existing anti-discrimination laws)
2. Creates a broad duty to share records that may not already be required under existing law

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Contractor DEI Order (EO 14398)

3. In the event of the contractor's or a subcontractor's noncompliance with this clause, this contract may be canceled, terminated, or suspended in whole or in part, and the contractor or subcontractor may be declared ineligible for further Government contracts;
4. The contractor will report any subcontractor's known or reasonably knowable conduct that may violate this clause to the contracting department or agency and take any appropriate remedial actions directed by the contracting department or agency;

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Contractor DEI Order (EO 14398)

Provisions 3 and 4 in Practical Terms:

3. Failure to comply may lead to termination and debarment from future contracts
4. Requires the contractor to conduct some level of due diligence that their subs are also in compliance with the requirements

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Contractor DEI Order (EO 14398)

5. The contractor will inform the contracting department or agency if a subcontractor sues the contractor and the suit puts at issue, in any way, the validity of this clause; and
6. The contractor recognizes that compliance with the requirements of this clause are material to the Government's payment decisions for purposes of section 3729(b)(4) of title 31, United States Code (False Claims Act)."

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Contractor DEI Order (EO 14398)

Provisions 5 and 6 in Practical Terms:

5. Must notify the agency if a subcontractor sues the contractor and challenges the clause's validity
6. Acknowledges that failure to comply creates potential False Claims Act Liability

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Corporate Updates

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Failure to Accommodate Religious beliefs:

- Pre-litigation settlement regarding Generac Power Systems. EEOC accused the Wisconsin company of failing to accommodate the religious beliefs of an employee who asked to be exempt from using a transgender worker's pronouns
- Employee's request was denied without first engaging in an accommodation process. EE said by using pronouns aligned with gender identity went against his religious beliefs
- EEOC has rolled back transgender bias enforcement, and the Commission has rescinded anti-harassment guidance that said misgendering workers or denying them access to workplace facilities matching their gender identity is a form of discrimination. **Remember some states and local laws still treat intentional misgendering as harassment**
- As part of settlement agreement, company agreed to update its religious accommodation policies and provide related training. There was also an undisclosed monetary payment to the EE who had resigned when his accommodation was denied
- Impact: The key lesson is about process, not outcome. Generac's exposure came from denying the request without any dialogue. Employers should keep enforcing respectful-workplace standards, and they should also explore reasonable alternatives with employees who raise religious objections, such as using names instead of pronouns. They should also document that process

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EEOC Rescinds Guidance and Shifts Enforcement Priorities: What It Means for Employers

- Rescinded old guidance on affirmative action plans
- *Enforcement plan rejects disparate impact liability as an enforcement theory*
- *Increased scrutiny of job ads and recruiting practices that target or encourage specific groups to apply*
- Moves to end the annual EEO-1 report, which requires large employers to submit workforce data by race, ethnicity, sex, and job category
- Impact: Title VII protects workers exactly as it did before. What has changed is the EEOC's own guidance and enforcement priorities. Employers should make sure no policy or practice uses a protected characteristic as a selection criterion, and review any program with diversity-related criteria

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English-Only Rules Still Carry Legal Risk

- The EEOC announced plans to rescind its 1980 national origin guidelines, which warned employers that English-only policies and citizenship requirements can violate Title VII.
- Despite shifting priorities for EEOC, the exceptions for English-only and citizenship policies remain narrow
- The 1980 guidelines treated English-at-all-times rules as presumptively discriminatory. Courts are still likely to find these rules unlawful if there is no business justification
- The priority shift and announced rescission do not change Title VII or existing case law
- **Impact:** Employers should not read the rescission as permission to adopt broad English-only or citizenship rules. Any English-only rule should be limited to specific situations, such as safety, customer communication, or supervision, and supported by a documented business reason. Private plaintiffs and state agencies can still challenge these policies, so employers should review existing rules now

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Anti-DEI Litigation & Training Challenges

- DEI Training Case Law:
  - **Chislett v. NYC DOE** (2d Cir. 2025): Second Circuit held a reasonable jury could find implicit bias training created hostile work environment based on how the training was conducted – but clarified trainings are not "per se racist"
  - **Young v. Colo. DOC** (10th Cir. 2026): Court held a single training with disclaimers was not sufficient for a hostile work environment claim
  - **Key Takeaway:** Not all DEI training constitutes unlawful hostile work environment, but outcomes depend heavily on the facts, circumstances, and impact of the training

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EEOC Subpoena Enforcement Actions

- **EEOC v. NIKE, Inc. (E.D. Mo., filed Feb. 4, 2026): Subpoena Enforcement**
- **No employee complaint:** The investigation started with a Commissioner's charge that Chair Lucas filed herself in May 2024, alleging discrimination against white employees
- **Built from Nike's own words:** The charge relied on information Nike had made public:
  - Its mentorship and diversity programs
  - Data showing more minorities in leadership roles
  - Its stated goal of 35% racial and ethnic minority representation in the corporate workforce by 2025
- **What the EEOC subpoenaed:** Data going back to 2018 on:
  - Hiring, promotion, demotion, and layoff criteria
  - Use of race and ethnicity data in executive compensation
  - 16 programs that allegedly offered race-restricted opportunities, including participant names and eligibility criteria
- **Nike pushed back:** It called the charge "impermissibly vague and overbroad" and called the court filing "a surprising and unusual escalation"
- **Outcome:** Nike produced the documents between March and August 2026. The EEOC then moved to dismiss, saying "no remaining controversy" was left
  - The EEOC said it was "pleased the company complied without a court order"

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From Guidance to Litigation: The EEOC's 2026 Playbook

The EEOC's National Enforcement Plan makes DEI-related discrimination its #1 priority. It may investigate without a charge, and rebranded programs are still covered

- **What it does:** The new plan replaces the agency's prior strategic plan and names "remedying DEI-related race and sex discrimination" as the EEOC's top enforcement priority
- **No complaint needed:** The EEOC says it may investigate DEI programs proactively, even when no individual has filed a charge
- **Practices it flags:** job ads seeking "diverse candidates"; "aspirational goals" treated as stand-ins for quotas; diverse slate policies; required diversity statements; executive pay tied to diversity goals; and sharing demographic data with managers outside HR

***EEOC v. Washington Univ.*:** A race-segregated DEI training session leads to discrimination and retaliation claims.

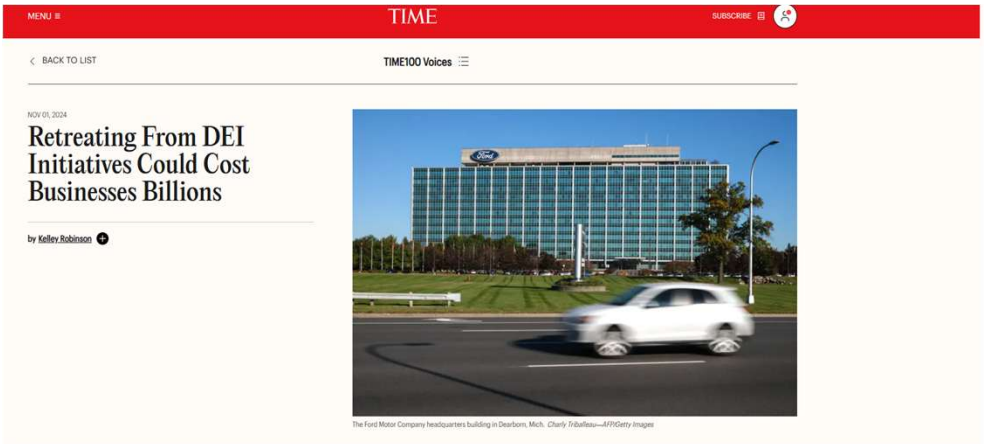
- The charging party is a Black employee. She alleges a mandatory anti-racism training put staff into Zoom breakout rooms separated by race, leaving her as the only BIPOC participant. She says she was later terminated after complaining to the EEOC
- **Takeaway:** Segregated DEI programming creates risk no matter which group is affected. The EEOC's guidance treats separating employees by race in training as prohibited even when every group gets the same content

DOJ Civil Rights Fraud Initiative

- **What it is:** The DOJ is using the False Claims Act against federal contractors who "falsely" certify compliance with civil rights laws. It has said DEI policies may be treated as violations
- **Why it matters:** False Claims Act exposure adds the risk of treble damages on top of ordinary Title VII liability

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The Cost of Full Retreat



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Costs of retreat: Target's experience

An Overview of Target's DEI Rollback:

- In January 2025, Target ended several of its most visible DEI initiatives, including its REACH (Racial Equity Action and Change) strategy and participation in the Human Rights Campaign's Corporate Equality Index (Stern, 2025)
- The company also rebranded its Supplier Diversity program to "Supplier Engagement" and removed many DEI-focused goals from its website (Davis, 2025)
- Target stated that the move was a response to "an evolving external landscape"—a phrase interpreted by many as pressure from political actors and conservative shareholder groups

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Costs of retreat: Target's experience

What Target said	What headlines said
Target said it remains focused on "creating a sense of belonging for our team, guests and communities through a commitment to inclusion."	CNBC: "Target rolls back DEI initiatives, the latest big company to retreat."
Target said it was "concluding our three-year diversity, equity and inclusion goals."	AP/MPR: "Target is ending its diversity goals as a strong DEI opponent occupies the White House."
Target said it was "concluding our Racial Equity Action and Change (REACH) initiatives in 2025 as planned." It later said it fulfilled its $2 billion Black-owned business commitment in early 2026.	One advocacy report said Target "terminated its $2 billion" REACH initiative, "effectively dismantling" support for minority-owned suppliers.
Target said it was renaming "Supplier Diversity" to "Supplier Engagement" to "better reflect our inclusive global procurement process."	A law review article said the Supplier Diversity division "was rebranded" as part of a "sunset of its DEI infrastructure."
Target said it was "stopping all external diversity-focused surveys, including HRC's Corporate Equality Index". It said its employee resource groups would "continue to be open to all."	CNN reported that Target was "eliminating hiring goals for minority employees" and "ending an executive committee focused on racial justice."
Target gave its reason as "staying in step with the evolving external landscape."	Coverage tied the timing to the new administration: "days into the Trump presidency."

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Costs of retreat: Target's experience

- **Consumer Boycotts:** The January 2025 rollback led to a national boycott, protesters gathered outside Target's Minneapolis headquarters. Twin Cities Pride Festival cut ties with Target
- Shareholder Lawsuit: City of Riviera Beach Police Pension Fund filed a class action lawsuit alleging that Target misled investors by failing to disclose the potential risks of scaling back its DEI programs
- **Market Value:** Investopedia reports that Target's stock fell 33% after the DEI rollback, wiping out more than $20 billion in shareholder value by mid-September 2025
- Reputational Harm: Store traffic fell by nearly 10% in Q1, and Target experienced increased employee turnover
- Target reportedly cut about 1,800 corporate jobs in late 2025, citing market pressures and reputational damage from the boycott. Organizers said in March 2026 that the boycott, which began in February 2025, was still going
- **Target's own acknowledgment:** In May 2025, coverage reported that Target admitted the DEI rollback and the boycotts contributed to its sales decline

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Pulling Back Didn't End the Legal Risk. It Added Consumer and Reputational Costs

- **Talent Attraction:**
  - 77% of Gen Z and 63% of Millennial workers say DEI plays a major role in where they decide to work
- **Retention:**
  - Retreating from DEI puts current employees at risk.
  - 76% of employees say they are more likely to stay long-term if their employer keeps supporting DEI
  - 43% say they would quit if their employer stopped supporting it
- **Credibility in Recruitment:**
  - Candidates check whether employers act on their stated values
  - Most Gen Z and Millennial workers will turn down assignments or employers that conflict with their ethics
  - Their loyalty is much higher when employers act on that feedback
  - Quiet rollbacks, or DEI that is only for show, risk mistrust and disengagement

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The Costco Contrast: Holding Steady

- **The Decision (January 2025)**
  - Costco's board recommended rejecting an anti-DEI shareholder proposal, saying its efforts "enhance our capacity to attract and retain employees who will help our business succeed"
  - More than 98% of shareholders voted against the proposal
- **The Framing**
  - The board said: "We believe that our diversity, equity and inclusion efforts are legally appropriate, and nothing in the proposal demonstrates otherwise"
  - Board chair Tony E. Curtis said its inclusion commitment "does not and has never included quotas or systematic preferences, nor does it mean compromising merit"
- **The Consumer Response**
  - **Numerator data:** Costco had nearly 7.7 million more visits year over year in the four weeks ending February 9, 2025. Target had nearly 5 million fewer
  - **Placer.ai data:** Costco's traffic rose 2.2% in February and 7.5% in March
  - **Who shifted:** Shoppers who said DEI was important to them drove most of the shift. Hispanic/Latino households accounted for more than one-third of Costco's gains
- **The Legal Pressure**
  - On January 27, 2025, 19 state attorneys general sent Costco a letter demanding that it either repeal its DEI policies or explain itself within 30 days

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Reverse Discrimination



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Ames v. Ohio Dep't of Youth Servs. (June 2025)

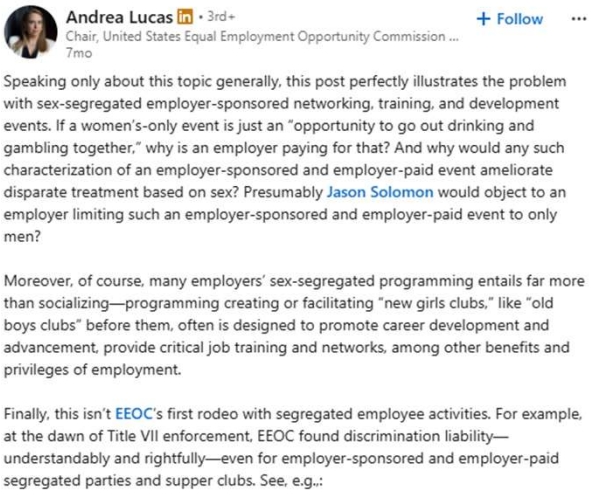
- Supreme Court struck down Sixth Circuit's "background circumstances" rules which required a plaintiff who is a member of a majority group to show background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority
- The Court rejected heightened evidentiary standard for members of majority group to satisfy a prima facie case of discrimination
- 4th Circuit never required a heightened evidentiary standard for majority groups
- EEOC filed an amicus brief noting to Court that there is no such thing as reverse discrimination-only discrimination and "background circumstances" test has no basis in Title VII text
- Likely courts will no longer apply inference that no discrimination occurred were plaintiff and alleged discriminator belong to same protected class. *See, e.g.,Elrod v. Sears, Roebuck and Co.*,939 F.2d 1466, 1471 (11th Cir. 1991)(stating that "it is difficult for a plaintiff to establish discrimination when allegedly discriminatory **decision-makers** are within the **same protected class** as the plaintiff"); *see also Orgain v. Salisbury,* 305 Fed. App'x 90, 103 (4th Cir. 2008)

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What about the Men?

- EEOC v. Coca-Cola Beverages Northeast, D.N.H. No. 1:26-cv-00115
- EEOC alleges that a women's retreat discriminated against men
- EEOC claims that Coca-Cola's bottler discriminated against male workers by only inviting women to an "employer-sponsored trip and networking event
- This test the "some harm" standard articulated by the Supreme Court in Muldrow v. City of St. Louis in 2024
- Justice Kavanaugh in a concurrence in Muldrow suggested that any worker transferred based on a protected category should "easily be able to show some additional harm," including through "perks" and "networking opportunities"
- EEOC argues this women's only retreat gave women an opportunity to network with the C-Suite
- The action is part of Chair Lucas' announced efforts to stop the threat of discrimination against white men posed by race and gender focused programs

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Speaking only about this topic generally, this post perfectly illustrates the problem with sex-segregated employer-sponsored networking, training, and development events. If a women's-only event is just an "opportunity to go out drinking and gambling together," why is an employer paying for that? And why would any such characterization of an employer-sponsored and employer-paid event ameliorate disparate treatment based on sex? Presumably Jason Solomon would object to an employer limiting such an employer-sponsored and employer-paid event to only men?

Moreover, of course, many employers' sex-segregated programming entails far more than socializing—programming creating or facilitating "new girls clubs," like "old boys clubs" before them, often is designed to promote career development and advancement, provide critical job training and networks, among other benefits and privileges of employment.

Finally, this isn't EEOC's first rodeo with segregated employee activities. For example, at the dawn of Title VII enforcement, EEOC found discrimination liability—understandably and rightfully—even for employer-sponsored and employer-paid segregated parties and supper clubs. See, e.g.,:

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EEOC Outreach and Warning

- **December 2025:** EEOC Chair Lucas posted a video asking, "Are you a white male who has experienced discrimination at work based on your race or sex? You may have a claim to recover money under federal civil rights laws"
- **February 2026:** The EEOC sent warning letters to the 500 largest U.S. companies

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EEOC v. The New York Times Co., S.D.N.Y No. 1:26-cv-03704 (May 2026)

- **The claim:** The EEOC alleges the Times passed over a white male editor for a Deputy Real Estate Editor promotion because of his race and/or sex
- **The theory:** The EEOC contends the Times's "race and sex-based representation goals influenced the decision"
  - The complaint cites the Times's 2021 "Call to Action" diversity goals, its tracking of those goals by department, and internal Slack messages about diversity hiring
- **Why it matters:** EEOC leadership says this is the agency's first lawsuit in a decade brought on behalf of a white male complainant

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Practical Takeaways

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Remember:

1. **Diversity and inclusion are not illegal**
   - Title VII prohibits employment actions motivated, in whole or in part, by race, sex, or another protected characteristic. It does not prohibit inclusion itself
   - Employers can still support D&I lawfully through programs that are open to all, such as mentoring, outreach, and broad recruiting
2. **Programs limited by protected class carry the most risk**
   - The risk is highest where a program affects terms and conditions of employment: hiring, promotion, compensation, training, mentoring, sponsorship, or candidate slates
   - Groups and trainings restricted to, or separated by, protected class are a target, even when every group receives identical content
   - *Ames* and the EEOC's Coca-Cola retreat case show that majority-group plaintiffs face no higher bar, and that "perks" and networking access can count as harm

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Remember:

3. **The government is watching**
   - The EEOC and DOJ are actively collecting publicly available information about diversity practices. Increase in subpoena enforcement actions
   - In February 2026, the EEOC sent letters directly to CEOs, general counsels, and board chairs reminding them of their Title VII obligations related to DEI
4. **Review training for both content and delivery**
   - Training is not unlawful per se, but outcomes turn on how it is conducted and the impact it has
5. **Language matters, both internally and externally**
   - How you describe your efforts affects your legal exposure, as with diversity "targets" or metrics tied to compensation
   - It also affects trust. Quiet rollbacks, or DEI that is only for show, can lead to mistrust and disengagement
6. **Don't swap one risk for another**
   - Fully retreating doesn't eliminate legal risk, and it can add talent, consumer, and reputational costs
   - The goal is to revise programs to make them lawful, not to abandon them

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Diversity, Equity, and Inclusion (DEI) Under the Microscope:

Reevaluating Your Programs in the Executive-Order Era

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