



Everything Everywhere All at Once: DEI, Executive Orders and Legal Uncertainty

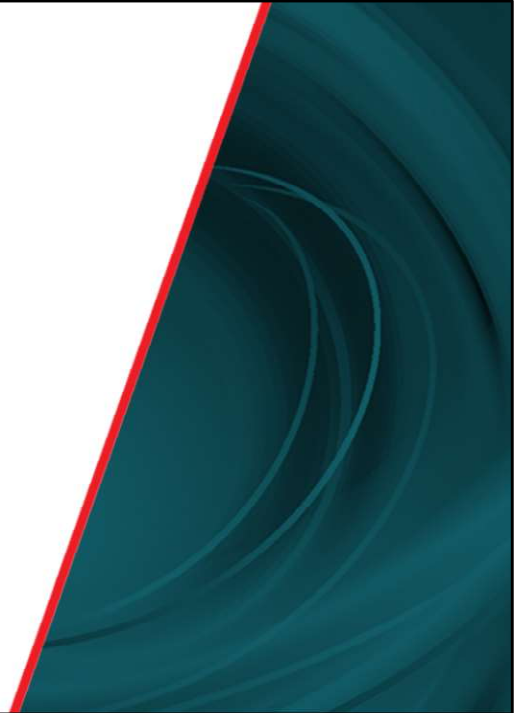


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Preliminary Executive Orders

- Following the inauguration, President Trump issued a series of Executive Orders (“EOs”) addressing Diversity, Equity and Inclusion (“DEI”) and Diversity, Equity, Inclusion and Accessibility (“DEIA”) in employment
 - These executive orders impact federal contractors, federal grant recipients, private sector employers and federal agencies
- Importantly, these EOs (and the subsequent federal agency activities they have spawned) do not target all DEI/DEIA activities and programs
 - Instead, they focus on eliminating “illegal” DEI/DEIA programs and activities as well as federal contractor affirmative action requirements for women and minorities

Preliminary Executive Orders Cont'd

- EO 14173 “Ending Illegal Discrimination and Restoring Merit-Based Opportunity”
 - Seeks to “encourage” private sector to end “illegal” discrimination/preferences
 - Revokes EO 11246 requiring covered federal contractors to establish and maintain affirmative action programs for women and minorities
 - Affirmative action for veterans and individuals with disabilities remains in place under the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA) and the Rehabilitation Act, respectively.
- EO 14151 “Ending Radical and Wasteful Government DEI Programs and Preferencing”
 - Directs the OMB, the Attorney General, and OPM to terminate:
 - All DEI, DEIA, and environmental justice “offices and positions”
 - All equity action plans, equity actions, initiatives, or programs, or “equity-related” grants or contracts

Initial Agency-Level Responses

- Following the initial set of EOs, several federal agencies put out statements, letters and other guidance materials addressing the Administration's directives
 - Following EO 14173, OPM issued a memorandum highlighting some practices it believes constitute unlawful discrimination such as mandatory "diverse slate" policies and employee resource groups that promote basing employment decisions on protected characteristics
 - Following the revocation of EO 11246, DOL announced it was halting various enforcement activities, reduced OFCCP's headcount by a reported 90%, and announced it would be updating the OFCCP website to reflect the new focus on statutory requirements surrounding affirmative action plans for veterans and individuals with disabilities.

EEOC and DOJ Preliminary Response

- On March 19, 2025, EEOC and DOJ released two technical assistance documents that were focused on “educating the public about unlawful discrimination related to ‘diversity, equity, and inclusion’ (DEI) in the workplace”
 - “What to Do If You Experience Discrimination Related to DEI at Work”
 - Provided guidance to employees who may have experienced discrimination “related” to DEI at work
 - “What You Should Know About DEI-Related Discrimination at Work”
 - Provides an overview of Title VII’s prohibition against workplace discrimination
- The press release for these documents acknowledged that:
 - “DEI is a broad term that is not defined in Title VII of the Civil Rights Act of 1964”
 - Adoption of DEI “does not change longstanding legal prohibitions against the use of race, sex, and other protected characteristics in employment”

EEOC Informal Guidance: What To Do If You Experience Discrimination Related to DEI at Work (https://www.eeoc.gov/what-do-if-you-experience-discrimination-related-dei-work?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=)

- Explains that DEI policies/programs may be unlawful if they involve an employer or covered entity taking an employment action motivated – in whole or in part – by an employee’s race, sex, or another protected characteristic
- Explains that DEI-related discrimination can take many forms, including:
 - Disparate Treatment
 - Limiting, Segregating, and Classifying (referencing closed membership ERGs & race-limited trainings)
 - Harassment (noting depending on the facts, DEI training may give rise to a colorable hostile work environment claim).
 - Retaliation (including opposition to DEI training)

EEOC also issued a more detailed Q&A about the same topics.

(https://www.eeoc.gov/wysk/what-you-should-know-about-dei-related-discrimination-work?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=)

EEOC issued a notice regarding a settlement with some of the law firms regarding its DEI-related investigations. (<https://www.eeoc.gov/newsroom/eeoc-settlement-four-biglaw-firms-disavow-dei-and-affirm-their-commitment-merit-based>)

Follow Up Executive Orders

- On April 23, 2025, President Trump issued an EO titled “Restoring Equality of Opportunity and Meritocracy.”
 - The EO states that “disparate-impact liability” creates a near insurmountable presumption that unlawful discrimination exists where there are any differences in outcomes in certain circumstances among different races, sexes, or similar groups, even if there is no facially discriminatory policy or practice or discriminatory intent involved, and even if everyone has an equal opportunity to succeed
 - The EO directs “all agencies” to “deprioritize enforcement of all statutes and regulations to the extent they include disparate-impact liability” and further directs the Attorney General to prepare a report identifying “all existing regulations, guidance, rules, or orders that impose disparate-impact liability or similar requirements,” and to “detail agency steps for their amendment or repeal, as appropriate under applicable law”

Follow up Agency-Level Responses

- On May 19, 2025, DOJ announced the establishment of the Civil Rights Fraud Initiative
 - The Initiative will utilize the False Claims Act to investigate and pursue claims against any recipient of federal funds that “knowingly violates civil rights” and “falsely certifies compliance with such laws”
 - DOJ noted that “the False Claims Act is also implicated whenever federal-funding recipients or contractors certify compliance with civil rights laws while knowingly engaging in racist preferences, mandates, policies, programs, and activities, including through diversity, equity, and inclusion (DEI) programs that assign benefits or burdens on race, ethnicity, or national origin”

Follow up Agency-Level Responses

- On May 25, 2025, the EEOC's Acting Chair sent out a "message" challenging disparate impact as a legal theory
- The letter advised employers that they may not use information about their employees' race/ethnicity or sex to facilitate unlawful employment discrimination based on race, sex, or other protected characteristics in violation of Title VII

Follow Up Executive Orders Cont'd

- EO 14319 “Preventing Woke AI In the Federal Government”
 - Focuses on providing guidance to agency heads responsible for procuring AI tools and resources
 - Labels “diversity, equity, and inclusion” as a “pervasive and destructive” ideology
 - Directs government agencies to only procure Large Language Models (“LLMs”) that “do not manipulate responses in favor of ideological dogmas such as DEI”

DOJ - Guidance for Recipients of Federal Funding

- On July 29, 2025, DOJ published its guidance for recipients of federal funding to clarify the application of federal anti-discrimination laws to programs or initiatives that involve discriminatory practices
 - The guidance focuses on the “significant legal risks of initiatives that involve discrimination based on protected characteristics”
- The guidance identifies “Best Practices” as non-binding suggestions to help entities to comply with federal anti-discrimination laws
 - Further recommends that all entities that “receive federal financial assistance or that are otherwise subject to federal anti-discrimination laws” should review the guidance as part of their compliance programs

DOJ Guidance - Cont'd

- In relevant part, the guidance identifies the following practices as potentially unlawful and discriminatory:
 - Preferential hiring/promotion based on protected characteristics
 - Providing opportunities/benefits/advantages to individuals/group based on protected characteristics in ways that disadvantage other individuals/groups
 - Use of “proxies” for protected characteristics
 - Using ostensibly neutral criteria that functions as a substitute for a protected characteristic
 - Segregation based on protected characteristics
 - Organizing programs, activities, or resources in a way that separates or restricts access based on a protected characteristic
 - Trainings that promote discrimination/hostile environments
 - Training programs that stereotype, exclude, or disadvantage individuals based on protected characteristics

Enforcement Priorities

- DEI has been routinely identified as an enforcement priority for both EEOC and DOJ
 - EEOC has announced “rooting out unlawful DEI-motivated race and sex discrimination” as a key area of focus
 - DOJ has announced its commitment to “investigate, eliminate, and penalize illegal DEI and DEIA ... in the private sector”

Reverse Discrimination Case Law Review

Case Trends

- More reverse discrimination legal challenges or threatened challenges
 - Many of the claims are brought under Section 1981 or Title VII
 - Per Bloomberg search, there have been **~362** DEI-related cases filed since the last ELU (10/29/2024)

Bloomberg Search (searched on 10/21/2025): (("diverse" OR "diversity" OR "inclusion" OR "belonging" OR "DEI" OR "DEIA" OR "JEDI" OR "D&I" OR "Divisive concepts" OR "social justice" OR "social equity" OR "woke") NP/3 (program OR initiative OR fellowship OR Mentor! OR ERG OR policy OR training OR "affinity group")) AND (employ! OR hir! OR promot! OR dischar! OR terminat! OR demot! OR reassign!) AND ("§1981" OR "Title VII")

SCOTUS Developments Affecting Reverse Discrimination Cases

- **April 17, 2024** - *Muldrow v. City of St. Louis*, the Supreme Court held that employees need only show that a job transfer caused them “some harm” with respect to an identifiable term or condition of employment (resolving a circuit split on the issue)
- **June 5, 2025** - *Ames v. Ohio Department of Youth Services*, the Supreme Court unanimously held that majority-group plaintiffs are not required to meet a heightened evidentiary standard than minority groups in reverse discrimination cases (resolving a circuit split on the issue)

***Ames v. Ohio Dep't of Youth Servs.*, 605 U.S. 303(2025)**

- Plaintiff claimed she suffered discrimination because she was straight, and the employer favored LGBTQ+ employees
- The 6th Circuit required the plaintiff to show “background circumstances to support the suspicion that the defendant was that unusual employer who discriminates against the majority”
- The Court unanimously held that majority-group plaintiffs are not required to meet a higher evidentiary standard than minority groups in reverse discrimination cases (resolving a circuit split on the issue)
- The concurring opinion discussed issues with DEI policies

***Muldrow v. City of St. Louis, Missouri*, 601 U.S. 346 (2024)**

- Resolved a split among the federal circuit courts over whether an employee challenging a job transfer under Title VII must meet a heightened threshold of harm to bring suit
- Rejecting lower court decisions that required employees to show “material,” “serious,” “significant,” or “substantial” harm, the Court held that employees need only show that a job transfer caused them “some harm” with respect to an identifiable term or condition of employment
- Importantly, the Court explicitly underscored three consequences of its decision

- It changes the legal standard used in any circuit that previously required a showing of “material,” “serious,” “significant,” or “substantial” harm
- It lowers the bar that Title VII plaintiffs must meet
- As a result, the Court expects that “many cases” will be decided differently

(<https://www.smithlaw.com/newsroom/publications/Supreme-Court-Lowers-The-Bar-For-Title-VII-Claims>)

Preferential hiring/promotion based on protected characteristics

- *Raza v. Accenture LLP* (N.D. Ill. Apr 14, 2025)
 - Alleged that he was terminated because he was male and in retaliation for making complaints about discrimination
 - The CEO (female) hired in 2019, announced a goal to achieve gender parity in the workplace by 2025
 - His Senior Managing Director told him he should not expect to be promoted anytime soon because the Company's gender parity target required a certain number of female candidates to be promoted before him
 - He was terminated in a RIF and was not given a clear reason for termination

Raza v. Accenture LLP, 1:25-cv-03999 (N.D. Ill. Apr 14, 2025)

- Complaint Allegations
 - Raza brought claims under state and federal anti-discrimination laws
 - Senior Manager in the AI/Analytics role
 - Alleged that he was terminated because he was male and in retaliation for making complaints about discrimination
 - The CEO (female) hired in 2019, announced a goal to achieve gender parity in the workplace by 2025
 - Between 2023 and 2025, he was denied promotion opportunities to Managing Director
 - His Senior Managing Director told him he should not expect to be promoted anytime soon because the Company's gender parity target required a certain number of female candidates to be promoted before him
 - Managers and counselors informed him that the approach was discriminatory
 - He was terminated in a RIF and was not given a clear reason for termination

Preferential hiring/promotion based on protected characteristics

- *Raza v. Accenture LLP* (N.D. Ill. Apr 14, 2025)
 - Company's defense was that he was terminated for performance reasons
 - October 7, 2025, the case was dismissed after the parties filed a joint stipulation of dismissal

***Raza v. Accenture LLP*, 1:25-cv-03999 (N.D. Ill. Apr 14, 2025)**

Preferential hiring/promotion based on protected characteristics

- *Robinson v. Walmart* (E.D. Pa. Oct 02, 2025)
 - A White male employee alleged reverse discrimination because Walmart implemented DEI programs that prioritized the retention and promotion of non-White employees
 - Claims he was subject to retaliation, including suspension and termination after reporting misconduct by two Black Senior Leaders (Unit VP and Regional VP)

Robinson v. Walmart, 5:25-cv-05699 (E.D. Pa. Oct 02, 2025)

- Robinson worked for Walmart since 2000 and was most recently a Market Manager
- Alleges that Walmart's DEI program "implicitly promoted racism and explicitly encouraged the hire, retention, and promotions of individuals based on illegal qualifications of race"
- Robinson made complaints about "misconduct" by two senior leaders (Black)
- Shortly after the complaint, he was suspended and terminated
- Robinson requested that the company be enjoined from maintaining its DEI program
- The complaint does not share specifics about how the DEI program affected the employment decision

Preferential hiring/promotion based on protected characteristics

- *Critelli et al v. Danaher Corporation et al* (M.D. Fla. Sep 15, 2025)
 - Class of White male employees arguing that the company's DEI policy discriminated against individuals over 40 and encouraged the "systematic discrimination" against White men
 - Argued that they were denied various opportunities to interview for promotions because those opportunities were provided to underrepresented individuals

***Critelli et al v. Danaher Corporation et al*, 6:25-cv-01780 (M.D. Fla. Sep 15, 2025)**

Notably, on September 3, 2025, the Eastern District of Virginia, dismissed a proposed class action against Gannett Co. Inc. alleging non-minority plaintiffs faced systemic discrimination due to race and gender parity commitment. *Bradley v. Gannett Co. Inc.*, 1:23-CV-1100, (E.D. Va. Sept. 3, 2025). The plaintiffs are currently appealing the decision.

Preferential hiring/promotion based on protected characteristics

- *Critelli et al v. Danaher Corporation et al* (M.D. Fla. Sep 15, 2025)
 - The company's goal was to have half the applicants for open positions come from underrepresented groups
 - "Women and POC comprised less than 50% of the qualified applicants for management positions"
 - "By artificially populating an interview pool with underrepresented candidates disproportionate to the applicant, Danaher discriminated against applicants who were not from an underrepresented group"

Critelli et al v. Danaher Corporation et al, 6:25-cv-01780 (M.D. Fla. Sep 15, 2025)

Preferential hiring/promotion based on protected characteristics

- *Critelli et al v. Danaher Corporation et al* (M.D. Fla. Sep 15, 2025)
 - The company modified its standards for diverse candidates only in order to open the roles to more diverse applicants, and would place them on a shortlist to move forward to the hiring manager
 - The company tethered manager performance evaluations and compensation to meeting DEI Policy objectives

Other Hiring Decision Cases

- *Duvall v. Novant Health, Inc.* (4th Cir. 2024)
- *Rhoden vs. CBS et al* (Cal. Super. Ct. Jan 22, 2025)
- *John Loeffler v. IBM et al* (C.D. Cal. Jun 25, 2025)
- *Romak et al v. Shell Inc. et al* (S.D. Tex. Aug 26, 2025)

Romak et al v. Inc et al, 4:25-cv-04042 (S.D. Tex. Aug 26, 2025)

- This matter is still ongoing
 - As of October 20, 2025, the complaint has been filed and amended, and the answer has been filed
- The named employees held various positions at Shell and were eliminated during a reorganization
- The processes for the reorganization were not fair to White individuals
- The plaintiffs had to re-apply for their positions and less qualified non-White applicants were selected
- The plaintiffs argue that the diversity hiring practices led to their termination
 - The company's "pillars and aspirations" were to hire and promote individuals based on immutable characteristics
 - The company sought to better reflect the communities in which it worked
 - There were allegedly corporate documents affirming that protected class was a motivating factor in hiring decisions
 - The company had a goal to achieve 15% ethnic minority group representation in its Senior Management

John Loeffler v. International Business Machines Corporation et al, 2:25-cv-05765 (C.D.

Cal. Jun 25, 2025)

- This matter is ongoing
 - As of October 20, the company has filed a motion to dismiss the claim
- The plaintiff is a white male over 40 who held a senior role managing multimillion dollar government contracts
- The plaintiff argues that he was denied commission, reassigned to a less desirable sales area, and placed on a PIP with unattainable targets
- He alleges that his termination was part of IBM's strategy to meet internal DEI quotas and the quotas were tied to executive bonuses and job security.

***Rhoden vs. CBS et al*, 25STCV01775 (Cal. Super. Ct. Jan 22, 2025)**

- The plaintiff was a contract video editor and was allegedly promised a full-time position after months of praised work
- He was not considered for the position when it opened, and a Hispanic woman was selected with less experience
- A manager allegedly told him "We have too many straight, white men in our department"

Hiring Decision Cases

- Key Takeaways:
 - Clearly distinguish aspirational goals from quotas or any promotion metrics
 - Leader's language matters
 - Explain that approach to hiring managers
 - Do not tie diversity metrics to compensation
 - Be cautious about diverse slate commitments
 - Have clear documentation on the termination reasons

DEI Training Challenges

- *Chislett v. New York City Dep't of Educ.* (2d Cir. Sept. 25, 2025)
 - White educator claimed that she suffered a hostile work environment fostered by mandatory implicit bias trainings
 - Claims under Section 1983 because she was a public employee
 - Lower court granted summary judgment for the defendant

Chislett v. New York City Dep't of Educ., 24-972-CV(2d Cir. Sept. 25, 2025)

DEI Training Challenges

- *Chislett v. New York City Dep't of Educ.* (2d Cir. Sept. 25, 2025)
 - Argued that the already racially-charged work environment was further exacerbated by the implicit bias trainings
 - “interest in excellence was perfectionism and consistent with white supremacy”
 - “there is white toxicity in the air, and we all breathe it in”
 - Participants were lined up to reveal a “color line of privileges that favored whites”
 - Racially-charged conversations spilled over from the training

Here are more quotes from the case regarding the alleged hostile environment

“During the first bias training on May 4, 2018, the instructor told participants that “white colleagues must take a step back and yield to colleagues of color” and “recognize that values of [w]hite culture are supremacist.” *Id.* at *2.

“...Deputy Chancellor, told an employee, “We've all taken on whiteness.” *Id.*

“Dr. Ruby Ababio-Fernandez, who developed the implicit bias initiative and became the OEA's Senior Executive Director, declared: “There is white toxicity in the air, and we all breathe it in.” *Id.*

Chislett described the rules as explaining that “whites who wanted to withdraw or not participate in order to be safe were demonstrating white fragility, and it was no longer [the] right [of white people] to be safe in the workplace.” *Id.* at 3.

DEI Training Challenges

- *Chislett v. New York City Dep't of Educ.* (2d Cir. Sept. 25, 2025)
 - Held that a reasonable jury could find she was subjected to a hostile work environment claim
 - Racist comments were expressed during the trainings
 - Physical segregation of White employees
 - She was singled out for her race
 - Negative generalizations and stereotypes about White people were targeted at her during the trainings
 - Spillover from the trainings, “took a racialized tone”

DEI Training Challenges

- *Chislett v. New York City Dep't of Educ.*, 24-972-CV(2d Cir. Sept. 25, 2025)
 - Second Circuit clarified
 - Implicit bias trainings are not “per se racist”
 - “What matters here is the way the trainings were conducted. When employment trainings discuss any race ‘with a constant drumbeat of essentialist, deterministic, and negative language [about a particular race], they risk liability under federal law.’”

Here is the full quote regarding the training

“We do not suggest that the conduct of implicit bias trainings is per se racist. See [Vavra v. Honeywell Int'l Inc.](#), 688 F. Supp. 3d 758, 770 (N.D. Ill. 2023) (holding that an employer's requirement that employees attend implicit bias training does not, by itself, violate Title VII) (collecting cases), *aff'd*, [106 F.4th 702 \(7th Cir. 2024\)](#). What matters here is the way the trainings were conducted. When employment trainings discuss any race “with a constant drumbeat of essentialist, deterministic, and negative language [about a particular race], they risk liability under federal law.” [De Piero v. Pa. State Univ.](#), 711 F. Supp. 3d 410, 424 (E.D. Pa. 2024). And when a municipal agency consistently ignores the racial harassment of employees in both trainings and workplace interactions, it can be held liable.”

Id. at *12.

DEI Training Challenges

- Challenges regarding DEI training have had mixed results
 - *Chislett* - a win for the plaintiff and perhaps providing supporting reasoning for other challenges to DEI training
 - *Vavra v. Honeywell Int'l, Inc. (2024)* - a win for the employer on different facts
 - The employee had not watched the training to understand its content or application
 - Assumed it would vilify white people and treat people differently based on their race

Here are the notes from last year's presentation on the *Honeywell case*

Vavra v. Honeywell Int'l, Inc., 106 F.4th 702, 703 (7th Cir. 2024)

- Filed December 23, 2021
- White engineering employee refused requests from management to participate in mandatory diversity, equity, and inclusion training
- Employee alleged he had a reasonable belief that training was an unlawful employment practice in violation of state law and Title VII
 - Never watched the video to understand its content or application
 - Assumed it would vilify white people and treat people differently based on their race
- The court held that there was no evidence that Honeywell retaliated against the employee because he did not have a reasonable belief that the training was an unlawful employment practice
- The only information he had about the training contradicted his assumptions
- Notably, the EEOC filed an amicus brief in this case stating: "anti-discrimination trainings, including unconscious bias trainings, are not per se discriminatory and may serve as vital measures to prevent or remediate workplace discrimination"
- While also noting that opposition to DEI training "may constitute protected activity"

under Title VII if the plaintiff “provides ‘a fact-specific basis’ for his belief that the training” violates Title VII

DEI Training Challenges

- Key Takeaways
 - Carefully review training language
 - Take complaints about the training seriously
 - General “discomfort” with the training likely won’t equal discrimination
 - Issues occur when it is repeated/targeted conduct
 - DEI training is not per se harassment

What is Illegal D&I in the Workplace

- The Administration has challenged or forecasted increased scrutiny for a variety of existing practices including (but not limited to):
 - Mandatory Diverse Slate Policies
 - Use of proxies for protected characteristics
 - Programs that promote “equity” rather than “equality”
 - Efforts to “rebalance” workforces
 - Diversity “goals” or “targets”
 - Diversity-based compensation incentives
 - Recruitment efforts aimed at “underrepresented groups”
 - Trainings that create a hostile work environment

Practical Impact

- There has been a clear shift in focus with the change in Administration.
 - For example, EO14281 explicitly directs enforcement activities and priorities.
- As a result, there are a variety of programs and practices that were typically not subject to regulatory scrutiny that are now forming the basis for discrimination claims:
 - Mentorship/training opportunities
 - Employee affinity groups (Employee Resource Groups, Business Resource Groups)
 - DEI training/workplace training materials

Recommendations for Compliance

- Review existing D&I-related Programs for compliance with federal, state, and local laws with a particular focus on:
 - Quotas, preferences, plus factors, and set asides for any group (e.g., race, sex, protected characteristic)
 - Compensation and incentives tied to achieving diversity hiring metrics or "penalties" for failing to achieve D&I goals
 - Diverse candidate slate or diverse hiring panel requirements
 - Closed groups/programs (e.g., mentorship or leadership development programs, employee affinity or resource groups) where participants need to identify with/be a member of a protected class or where activities are segregated by a particular characteristic
 - D&I training materials (including third-party training materials) with attention to content that could be viewed as equity ideology or otherwise discriminatory

Recommendations for Compliance Cont'd.

- Review all public/internal materials and messaging:
 - Many challenges to D&I programs rely on publicly available information such as company websites, SEC filings, tweets, internal reports, etc.
 - Internal and external messaging surrounding D&I have been cited as evidence of allegedly discriminatory hiring and other employment practices.
- Commence training for HR, D&I professionals, and leadership focusing on distinguishing legal and illegal D&I activities:
 - Many D&I activities are neither clearly legal/illegal. It is important that relevant stakeholders are aware of the margins to make informed decisions based on the company's risk tolerance.
 - Consider designating one or more employees who are responsible for tracking updates related to the enforcement of federal anti-discrimination laws.

Recommendations for Compliance Cont'd.

- Take employee complaints or objections related to D&I activities, programs, and trainings seriously.
 - Consideration should be given to allowing employees to opt out, where appropriate.
- Emphasize the company's commitment to EEO and non-discrimination:
 - By way of example, references to "equity" have been construed as running afoul of *equal* opportunity.
 - Companies should also continue to ensure that all employment decisions are based on hiring, promoting, and retaining the best, most qualified person for the role without regard to protected characteristics.

Special Considerations for Government Contractors

- Review all existing state and federal contracts to determine what, if any, obligations the company has related to D&I:
 - This review should identify areas where their contractual obligations (such as those imposed by Federal Acquisition Regulation ("FAR") clauses, collective bargaining agreements, or state or local affirmative action laws) contradict the terms of the Executive Order or stated positions of the Administration.
- Establish ongoing contact with the company's contracting officers:
 - Employers should stay in regular contact with their contracting officers to understand their evolving FAR and compliance obligations under any existing contracts.

Special Considerations for Government Contractors Cont'd.

- Review all affirmative action activities, related policies, and forms to ensure compliance with EO 14173:
 - Ideally, this review is conducted by legal counsel under privilege. As part of this review, federal contractors should review EEO/AA policy statements and tag-lines, invitations to self-identify, and contracts with EO clause provisions and remove all references to federal affirmative action.
- Modify non-compliant activities, programs, policies, and contracts:
 - Federal contractors are clear targets for future investigations and litigation related to their D&I programs and activities. Where possible, modifications to any existing activities, programs, policies, contracts, and grants should be done in coordination with legal counsel.

Risk Mitigation for D&I Programs

- Ideal D&I programs in the employment context are policies and practices aimed at ensuring equal opportunities and outreach to certain underrepresented groups in the workforce, such as women, people of color, LGBTQ+ individuals, and people with disabilities.
 - It is NOT “affirmative action.”
 - It is NOT making decisions based on protected class status.
- Can still have diversity, inclusion, belonging, and accessibility policies and a culture grounded in these values.

Risk Mitigation for D&I Programs Cont'd.

- D&I programs might include:
 - Outreach to diversity-focused recruitment sources to identify a strong pipeline of diverse talent.
 - Non-exclusive mentoring programs aimed at supporting diverse talent within a company (beware of exclusive accelerated development programs).
 - Unconscious bias training, bystander intervention training, and ally training (carefully vetted by legal and HR).
 - Skills based training to develop employee skills to be better qualified to move into other roles.
 - Having other policies and practices to champion and promote diversity within the workforce, such as affinity groups and awareness events (open to all).

Risk Mitigation for D&I Programs Cont'd.

- D&I programs cannot include:
 - Using protected categories, such as race, to decide who to hire or promote.
 - Setting aside positions to be filled by a woman or racial/ethnic minority.
 - Setting a quota for a specific number of individuals to be hired based on a protected class characteristic.
- Other high-risk activities include:
 - Allowing employees with hiring decision-making power to have access to demographic information.
 - Tying in compensation with certain diversity hiring targets.
 - Publishing or creating aspirational goals for workforce diversity.

Key Takeaways

- This is a rapidly developing area of law. We expect continued guidance and clarification in the coming months.
- Employers may still provide and support legal D&I programs and activities within their organization. Employers need to be mindful of how they develop, operate and maintain these programs to avoid unwanted regulatory scrutiny.
- Federal contractors must discontinue federal affirmative action programs for women and minorities and coordinate with their federal contracting officers regarding FAR compliance.
- All employers should continue to ensure that all employment decisions and opportunities are merit-based and not based on protected characteristics.



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