

Navigating DEI: Legal Obligations and Best Practices in a Changing Landscape

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Agenda

1. Legal landscape

1. EO 14173 “Ending Illegal Discrimination and Restoring Merit-Based Opportunity”
2. EO 14168 “Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government”
3. Pending litigation

2. Conflicts with State Laws

3. Best Practices



Legal Landscape

EO 14173 “Ending Illegal Discrimination and Restoring Merit-Based Opportunity”



EO 14173- Ending Illegal Discrimination and Restoring Merit-Based Opportunity

- Revokes EO 11246 – Johnson-era EO that established the OFCCP and requires non-discrimination and affirmative action as to women and racial minorities by federal contractors and subcontractors
- Orders the OFCCP to immediately cease promoting “diversity”, enforcement of "affirmative action" and "allowing or encouraging Federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin.”
- Affirmative action programs for women and minorities no longer required
- OFCCP halted its enforcement activities related to affirmative action under EO 11246
- OFCCP retains its authority to enforce anti-discrimination under Section 503 of the Rehabilitation Act (disability) and VEVRAA (veterans)



EO 14173- New Certification Requirement

Mandates that “every contract or grant” award:

Include recipient’s agreement that “Its compliance in all respects with all applicable Federal anti-discrimination laws is material to the government’s payment decisions for purposes of” the federal False Claims Act (“FCA”)

Requires recipient to “certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws”



Certification Requests under EO 14173

No Uniform Certification Language Issued Yet by FAR Council – Up to Each Agency

CERTIFICATION REGARDING COMPLIANCE WITH APPLICABLE FEDERAL ANTI-DISCRIMINATION LAW

The Contractor or prospective offeror certifies that -

is in compliance in all respects with all applicable Federal anti-discrimination laws is material to the government's payment decisions for purposes of section 31 USC 3729(b)(4) (False Claims Act);

does not operate any programs promoting Diversity, Equity, and Inclusion that violate any applicable Federal anti-discrimination laws.

Contractor or Offeror Name:

.....
Authorized Representative Name and Title

.....
Authorized Representative
Signature

.....
Date



Certification Requests under EO 14173

GSA Class Deviation

“As of February 15, 2025, all uses of the term ‘gender identity’ are not to be recognized or used prospectively by Federal contractors. This notification does not affect . . . existing U.S. laws on civil rights, nondiscrimination or any laws that generally apply to a company regardless of whether it is a government contractor”



EO 14173-New Certification Requirement

False Claims Act Risk

- Any contractor who submits the certification or agrees to the anticipated contract provision and who then is determined to be operating illegal DEI policies or practices risks an FCA claim (including whistleblower claims) and related penalties
- FCA imposes civil and criminal liability for any person who knowingly submits a false or fraudulent claim to the government for payment
- Includes treble damages and penalties on a per invoice basis
- Scier requirement: a good faith belief in truth of certification is a strong defense
 - Will address undefined “illegal DEI” in EO and best practices for good faith certification later in program
- Extra-territorial application



EO 14173-Scrutinizing Private Sector

Gives AG and Agency Heads 120 days to create a strategic enforcement plan to “encourage the private sector to end illegal discrimination and preferences, including DEI,” including:

- Key sectors of concern within each agency’s jurisdiction;
- The most egregious and discriminatory DEI practitioners in each sector of concern
- A plan to deter illegal DEI programs, which includes identifying “up to nine potential civil compliance investigations of publicly traded corporations, large non-profit corporations or associations, foundations with assets of 500 million dollars or more, state and local bar and medical associations, and institutions of higher education with endowments over 1 billion dollars” for investigation and civil enforcement action

Lists expected y May 21, 2025



No Definition of DEI that Violates Applicable Federal Anti-discrimination laws

Look to:

Guidance from agencies

Statutes

Case law



Related Guidance From and Positions Taken By the Administration

OPM February 5, 2025 Memo – Directed at Federal Agencies

- Diverse slates and diverse hiring panels “illegal”
- Employee Resource Groups/Affinity Groups
 - Legal if open to all
 - Cannot permit formation of ERGs for certain protected groups but not others (e.g., women but not men; one race but not another)
- Social and Cultural Events (e.g., Pride Month, Asian Pacific American Heritage Month) legal if open to all



Related Guidance From and Positions Taken By the Administration

EEOC March 19, 2025 Guidance – Discriminatory DEI

- Unlawful if motivated in whole or in part by an employee’s or applicant’s race, sex, or other protected characteristic
- Access to or exclusion from training, including leadership development
- Access to mentoring, sponsorship, or workplace networking/network
- Selection for interviews, including placement or exclusion from candidate “slate” or pool
- Employers “should ensure that ‘employees of all backgrounds . . . Have equal access to workplace networks’”
- “Pre-employment questions about race can suggest that race will be used as a basis for making selection decisions. . . . the inquiries can constitute evidence of discrimination.”
- DEI training can create hostile work environment



Related Guidance From and Positions Taken By the Administration

- EOs Targeting Law Firms and EEOC Letter to 20 Law Firms
 - Steve Bannon Quote: Goal is to Bankrupt Law Firms
 - Based on public statements and court filings
 - Focus on preferences in hiring, diversity-based scholarships and internships, and reporting of law firm diversity statistics
 - 35-40 separate requests in EEOC letters
 - Several law firms have reached settlements
- Dear Colleague Letter from Department of Education
 - Illegal to rely on non-racial information as a proxy for race (e.g., eliminating standardized testing to achieve diversity)
 - DEI programs that teach that “certain racial groups bear unique moral burdens that others do not” are discriminatory



Key Federal Anti-Discrimination Statutes

Title VII of the Civil Rights Act (“Title VII”)

- Prohibits discrimination in employment on the basis of **race, color, religion, sex, or national origin**

Title VI of the Civil Rights Act (“Title VI”)

- Prohibits discrimination in programs and activities receiving federal financial assistance on **the basis of race, color, and national origin**

Title IX of the Civil Rights Act (“Title IX”)

- Prohibits discrimination in education programs and activities that receive federal financial assistance on the basis of **sex**

42 U.S.C. § 1981

- Prohibits discrimination in making and enforcing contracts on the basis of **race**

Age Discrimination in Employment Act (“ADEA”)

- Prohibits discrimination in employment on the basis of **age** (40 or over)

Americans with Disabilities Act (“ADA”)

- Prohibits discrimination in employment and public accommodations on the basis of **disability**



Key Appellate and Supreme Court Cases

***Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023)**—held that race-conscious admissions policies are illegal

***American Alliance for Equal Rights v. Fearless Fund Mgmt., LLC*, 103 F.4th 765 (11th Cir. 2024)**—held that race-based contracts—there, funding to small businesses owned by Black women—likely violate Section 1981 of the Civil Rights Act)

***Muldrow v. City of St. Louis, Missouri*, 601 U.S.--, 144 S. Ct. 967 (2024)**—held that a plaintiff in a Title VII discrimination case need only show some “harm respecting an identifiable term or condition of employment.” The harm need not be significant or substantial.

***Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644 (2020)**—Held that an employer violates Title VII by firing an individual for being a transgender person because Title VII makes it unlawful to discriminate against an individual “because of” the individual's sex.



Still to come . . .

Ames v. Ohio Department of Youth Services

- Supreme Court granted certiorari October 4, 2024
- “Reverse” sexual orientation discrimination
- The Sixth Circuit affirmed summary judgment in favor of the employer-defendant, holding that—to establish a prima-facie case under Title VII as a member of the majority—in addition to the “usual” showing Plaintiff was required to make an additional showing of “background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority.”
- Circuit split
- Supreme Court will decide standard for “reverse discrimination” this year



Litigation Update-EO 14173

National Ass'n of Diversity Officers in Higher Education et al. v. Donald J. Trump, et al., No. 25-1189 (4th Cir. March 14, 2025)

- Maryland district court granted nationwide injunction on enforcement of the EO
- The court held that certain provisions of the EOs violated the First Amendment for content- and viewpoint- discrimination because the government (1) may not leverage funding to regulate speech outside of the contours of the program that is being funded; and (2) may not terminate government contracts because of speech on matters of public concern; and further, were void for vagueness under the Fifth Amendment (due process) because of the potential for arbitrary and discriminatory enforcement and lack of notice. The court then granted a nationwide injunction that also covers non-parties.
- Court of appeals granted the government's motion to stay the nationwide injunction, pending decision on the merits
- Some agencies now requiring certification



Litigation Update-EO 14173

Other pending challenges:

- **National Urban League et al. v. Trump et al.**, No. 1:25-cv-00471 (D.D.C. Feb. 19, 2025)—pending preliminary injunction motion (taken under advisement March 19, 2025)
- **San Francisco A.I.D.S. Foundation et al. v. Trump et al.**, No. 3:25-cv-01824 (N.D. Cal. Feb. 20, 2025)—pending preliminary injunction motion (briefing in progress; hearing set for May 22, 2025)
- **Chicago Women in Trades v. Trump et al.**, No. 1:25-cv-00587 (N.D. Ill. Feb. 26, 2025)—preliminary injunction motion granted April 15, 2025



Legal Landscape

EO 14168, Defending Women From Gender Ideology
Extremism and Restoring Biological Truth to the Federal
Government



EO 14168

Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government

“It is the policy of the United States to recognize two sexes, male and female. These sexes are not changeable and are grounded in fundamental and incontrovertible reality. Under my direction, the Executive Branch will enforce all sex-protective laws to promote this reality, and the following definitions shall govern all Executive interpretation of and application of Federal law and administration policy: . . .

‘Sex’ shall refer to an individual's immutable biological classification as either male or female. ‘Sex’ is not a synonym for and does not include the concept of "gender identity.”



EO 14168

Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government

- Directs federal agencies to issue Guidance to support this view
- Disagrees with prior administration’s view of *Bostock v. Clayton County* (2020) that case requires gender identity-based access to single-sex spaces
- Prohibits use of federal funds “to promote gender ideology”
- Directs the AG to issue guidance “to ensure the freedom to express the binary nature of sex and the right to single-sex spaces in workplaces and federal funded entities covered by the Civil Rights Act of 1964”
- Directs the AG, the Secretary of Labor, the EEOC, and agency heads to “prioritize investigations and litigation to enforce the rights and freedoms identified”
- Orders the Assistant to the President for Legislative Affairs to present to the President proposed bill text to codify in law the definitions that appear in the EO



EEOC Response

- Acting Chair Andrea Lucas announced that one of her priorities for compliance, investigations and litigation is to defend the biological and binary reality of sex and related rights, including women’s rights to single-sex spaces at work
- Removed the agency’s pronoun app, which allowed employees to display preferred pronouns
- Ended the use of the “X” gender marker during the intake process for filing a charge of discrimination
- Removed materials promoting gender identity on the Commission’s internal and external websites and documents



Case Law

Bostock specifically did not opine on the use of single-sex bathrooms: “Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind.”

Cruzan v. Special Sch. Dist., No.1, 294 F.3d 981 (8th Cir. 2002)—School's policy of allowing transgender women to use women's faculty restroom did not create a hostile work environment under Title VII for other employees.

Roberts v. Clark Cnty. Sch. Dist., 215 F. Supp. 3d 1001, 1017 (D. Nev. 2016)—Among other reasons, the employer's refusal to allow transgender police officer to use the restroom associated with his gender identity violated Title VII because the employer treated the officer differently than both male and female employees.



Legal Challenge to EO 14168

***Tirrell et al. v. Edelblut et al.*, No. 1:24:00251 (D.N.H. Feb. 12, 2025)**

Plaintiffs originally filed complaint in August 2024 seeking declaratory and injunctive relief regarding New Hampshire law that bars transgender girls from participating in school sports. Plaintiffs filed Second Amended Complaint, adding federal government defendants and seeking declaratory and injunctive relief regarding EO 14168.

Awaiting responsive pleadings from new federal defendants.



Potential Conflicts with State Law



State law protections re transgender status and gender identity

- More than a dozen states include gender identity/expression as a protected status under state law
- Include protections against discrimination based on gender identity/expression in employment and/or public accommodations
- Some states make it illegal under state law to prevent an employee from using the bathroom associated with their gender identity



State law protections re transgender status and gender identity

California law provides transgender employees the right to use the bathroom that corresponds with their gender identity (Cal. Code Regs. tit. 2, § 11034(e)(2)):

- (A) Employers shall permit employees to use facilities that correspond to the employee's gender identity or gender expression, regardless of the employee's assigned sex at birth.
- (B) Employers and other covered entities with single-occupancy facilities under their control shall use gender-neutral signage for those facilities, such as “Restroom,” “Unisex,” “Gender Neutral,” “All Gender Restroom,” etc.
- (C) To respect the privacy interests of all employees, employers shall provide feasible alternatives such as locking toilet stalls, staggered schedules for showering, shower curtains, or other feasible methods of ensuring privacy. However, an employer or other covered entity may not require an employee to use a particular facility.
- (D) Employees shall not be required to undergo, or provide proof of, any medical treatment or procedure, or provide any identity document, to use facilities designated for use by a particular gender.



State law protections re transgender status and gender identity

New York Division of Human Rights issued [Guidance on the Protections From Gender Identity Discrimination Under the New York Human Rights Law](#) that states that “It is unlawful to require a person to use a single-occupancy restroom because they are transgender, non-binary, or gender non-conforming. This is true even if other employees, tenants or customers object to sharing a facility with a transgender, non-binary or gender nonconforming person.”

The NYC Commission on Human Rights gender discrimination enforcement guidance states explicitly that an employer violates the NYC HRL where it fails to allow a transgender person to use the restroom associated with their gender identity. New York City, N.Y., Rules, Tit. 47, § 2-06(b).



State EEO/AA Obligations

- Also potential conflict between federal anti-DEI mandates and state/local affirmative action programs
 - Some require affirmative action, conducting utilization analyses, setting goals
- Uncertain future for MBE, WBE contracting requirements



Practical Impacts and Employer Responses



Comprehensive, Privileged Analyses of DEI Programs and Public-Facing Statements Relating to DEI

- Sourcing, recruiting and hiring
- Career development and inclusion programs
- Compensation programs
- Internal communications
- Titles and office names
- External communications
- Supplier diversity programs



Comprehensive, Privileged Analyses of DEI Programs and Public-Facing Statements Relating to DEI

Sourcing, Recruiting and Hiring

- Diversity Recruitment Initiatives
 - E.g., targeted hiring from HBCUs, Support for Racial Subgroups on Campus, Diversity-Focused Job Fairs
- Diverse Slate Requirements
- Diverse Interview Panel Programs
- Aspirational Goals
 - Representation of Women and Racial Minorities



Comprehensive, Privileged Analyses of DEI Programs and Public-Facing Statements Relating to DEI (cont.)

Career Development and Inclusion Programs

- Employee Resource Groups (ERGs) and Affinity Groups
- Sponsorship and Mentoring Programs
- Leadership Development Programs
- Training – Anti-Discrimination, Implicit Bias, Cultural Competency

Compensation Programs

- Tying Executive Pay to Diversity Efforts or Goal Attainment
- Pay Equity Programs



Comprehensive, Privileged Analyses of DEI Programs and Public-Facing Statements Relating to DEI (cont.)

Communications from Leadership to Employees and Other Stakeholders

- Corporate Values
- Clarify Meaning of “Diversity” and Emphasize Inclusion

Changing Titles and Office Names

Scouring of and Revision to Website Materials



Comprehensive, Privileged Analyses of DEI Programs and Public-Facing Statements Relating to DEI (cont.)

Section 1981 Considerations

- Assessment of Supplier Diversity Programs
- Key focus of litigation – *AAER v. American Airlines*, No. 25-125 (S.D. Tex. Feb. 11, 2025)
 - *American Alliance for Equal Rights Challenges supplier diversity program*
- Remaining supplier diversity requirements
- Assessment of Charitable Giving Programs and Investment Programs
 - First Amendment considerations



Practical Tips for Employers

- Document your processes
 - Be sure you can *demonstrate* compliance practices
 - Show *alignment* with your mission/ business purpose
 - Promote culture of integrity and compliance
- Highlight and focus on inclusivity
 - Expressly communicate all staff, vendors, are welcome and encouraged to participate
- Audit your assets
 - Be aware of vulnerabilities/gaps externally and internally
 - Work with internal stakeholders and leadership to develop a strategic plan
- Monitor the landscape
 - Don't rush to react
 - Keep a pulse on changes which *impact* your industry
 - Strategically engage Counsel on your specific facts/issues



Risk Continuum – Starting Points – Ultimate Assessment Based on Details



