DEI…R.I.P.?

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Today's Topics

- **Students for Fair Admissions v. Harvard**
- **Trump Administration Executive Orders On DEI**
- **EEOC, DOJ, OSHA Guidance**
- **State Attorneys General Actions**
- **Recent Litigation**
- **Takeaways**

Students for Fair Admissions v. Harvard

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The Supreme Court and Employer DEI Programs

- ***Students for Fair Admissions v. Harvard:*** **The Facts**
  - **SFFA filed separate lawsuits in 2014 against Harvard College and UNC, arguing that the schools' admissions programs violated Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.**
  - **Harvard and UNC both consider race as part of their process, including as a "plus factor" for students on the cusp (others include legacy and recruited athlete status).**
  - **In both cases, the district court upheld the school's approach as consistent with federal law and the Supreme Court's precedent on the consideration of race in admissions. The First Circuit affirmed the district court's ruling. The Supreme Court then granted certiorari in January 2022.**

The Supreme Court and Employer DEI Programs

- ***Students for Fair Admissions v. Harvard:*** **The Holding**
  - **On June 29, 2023, the U.S. Supreme Court held that both Harvard and University of North Carolina violated the Equal Protection Clause and Title VI of the Civil Rights Act of 1964 by impermissibly using race in their undergraduate admissions processes.**
  - **The Court explained that a race-conscious admissions program needs to satisfy three criteria in order to be consistent with the requirements of equal protection. The program must: (1) satisfy strict scrutiny; (2) not use race as a stereotype or negative; and (3) eventually end. The Court held that both programs failed to satisfy all three criteria.**

The Supreme Court and Employer DEI Programs

- ***The Aftermath: Race No Longer A Factor in Student Admissions?***
  - **Institutions of higher education can continue considering *race as a plus factor* in its admissions programs so long as those programs *satisfy strict scrutiny***
    - **Narrowly tailored to achieve a compelling interest.**
    - **For example, *remedying specific acts of an institution's past and present discrimination*, or**
    - **Potentially *addressing pervasive racial harassment* on campus caused in part by the reduced number of students of color on campus.**
  - **The Court emphasized these decisions do not prevent institutions of higher education from considering an applicant's racial experiences in the admissions process, so long as those *lived experiences* are linked to what a particular student can uniquely contribute to the institution.**

The Supreme Court and Employer DEI Programs

- ***The Aftermath: Implications Beyond Admissions***
  - **The Court's decision is limited to the consideration of race in college admissions for the pursuit of the educational benefits of diversity.**
  - **The Court's decision also has no direct impact on outreach; recruitment; affinity groups; *employment*; contracting; race-neutral policies governing K-12 selective admissions programs; and *diversity, equity, inclusion, and accessibility (DEI) programs*.**

The Supreme Court and Employer DEI Programs

- ***The Aftermath: The Impact on Employers***
  - ***Is there an impact on employers?***
  - **The Harvard decision did not interpret Title VII of the Civil Rights Act of 1964, which governs the employment practices of private employers.**
  - **The Equal Protection Clause applies only to federal and state actors, and the protections from discrimination under Title VI apply only to recipients of federal funding.**
  - **Bottom line:**
    - **Legal impact: Employers are already prohibited from using protected classes as a factor.**
    - **Practical impact: The Court's decision turns a spotlight on employer DEI programs.**

The Supreme Court and Employer DEI Programs

- **The Aftermath: Response from the EEOC**

The following is a statement from U.S. EEOC Chair Charlotte A. Burrows, in response to today's Supreme Court decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina*:

"Today's Supreme Court decision effectively turns away from decades of precedent and will undoubtedly hamper the efforts of some colleges and universities to ensure diverse student bodies. That's a problem for our economy because businesses often rely on colleges and universities to provide a diverse pipeline of talent for recruitment and hiring. Diversity helps companies attract top talent, sparks innovation, improves employee satisfaction, and enables companies to better serve their customers".

However, the decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina* does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background. It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace.

Voluntary Affirmative Action Plans?

- ***Steelworkers v. Weber*, 443 U.S. 193 (1979): Under Supreme Court precedent, a voluntary affirmative action plan is generally permissible only if:**
  - **Its purpose is remedial – corrects past discrimination.**
  - **It does not unnecessarily trammel the interests of non-diverse candidates.**
  - **It is a *temporary* measure intended to attain, not maintain, a balanced workforce.**
- **Has *Weber* and the cases that follow it been effectively overruled by *SFFA v. Harvard*?**
  - **Gorsuch concurrence in *SFFA* decision:**
    - **The reasoning of *SFFA* extends to the Civil Rights Act of 1964 (which includes Title VII)**
    - **Equal Protection Clause, Title VI and Title VII are identical in their prohibition against race-based preferences**
    - **"The words of the Civil Rights Act of 1964 are not like mood rings; they do not change their message from one moment to the next."**

The Trump Administration's Executive Orders

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Trump 2.0: Executive Orders Overview

Since January 20, 2025, the Trump administration has issued 152 executive orders.

- **DEI-Related Orders: Out of these, at least 10 address matters concerning Diversity, Equity, and Inclusion (DEI).**
- **Categories:**
  - **Higher Education: EO 14190, EO 14188, EO 14201**
  - **Private Employers: EO 14173**
  - **Federal Contractors: EO 14170, EO 14173**
  - **Federal Employees: EO 14183, EO 14151, EO 14168**

***Some executive orders impact multiple categories.**

Impact on Private Employers

- **On January 21, 2025, President Trump signed an EO targeting DEI programs in the private sector.**
  - **The EO encourages private employers to focus on "*individual merit, aptitude, hard work, and determination*" when selecting people for jobs.**
  - **The EO tasks the U.S. Attorney General and the heads of all agencies to "*enforce our longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities*."**

Impact on Private Employers

- **The law has not changed for private-sector employers.**
  - **Private employers must comply with ALL federal anti-discrimination laws.**
    - **Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employment discrimination based on race, color, religion, sex, or national origin.**
    - **Americans with Disabilities Act (ADA) prohibits discrimination against people with disabilities.**
    - **Age Discrimination in Employment Act (ADEA) prohibits employers from discriminating against employees who are 40 or older.**
    - **Equal Pay Act of 1963 (EPA) prohibits pay discrimination based on sex.**
    - **Genetic Information Nondiscrimination Act (GINA) prohibits employers from using genetic information to make employment decisions.**
    - **Pregnancy Discrimination Act (PDA) prohibits employment discrimination based on pregnancy, childbirth, or related medical conditions.**
  - **Private employers must comply with applicable state laws.**
    - **21 states (including Illinois, California, and New York) have passed state laws protecting individuals from discrimination based on their sexual orientation and gender identity.**
    - **21 states have passed the CROWN Act, prohibiting discrimination based on natural hairstyles and textures.**

Impact on Federal Contractors

- **On January 21, 2025, President Trump revoked EO 11246.**
  - **EO 11246, signed by President LBJ in 1965, prohibits federal contractors from discriminating based on race, color, religion, sex, sexual orientation, gender identity, or national origin and mandates affirmative action by covered federal contractors to ensure equal employment opportunities.**
  - **Now, all government contracts and grants must include a term requiring the contractor or grant recipient to "certify" that it does not operate any programs promoting DEI that violate any federal anti-discrimination laws.**

U.S. Attorney General Pam Bondi Memorandum

In addition to GSA potentially reducing that 90-day grace period, U.S. Attorney General Pam Bondi issued a memorandum on February 5, 2025, titled "Ending Illegal DEI and DEIA Discrimination and Preferences," which stated in relevant part, "To fulfill the Nation's promise of equality for all Americans, the Department of Justice's Civil Rights Division will investigate, eliminate, and penalize illegal DEI and DEIA preferences, mandates, policies, programs and activities in the private sector and in educational institutions that receive federal funds." The memorandum specifically set forth a date of March 1, 2025, as the date by which personnel at the U.S. Department of Justice would jointly submit a report containing recommendations for enforcement actions and other measures to encourage the private sector to end illegal discrimination and preferences. According to this memorandum,

Impact on Federal Contractors

- **What is a federal contractor?**
  - **A federal contractor is a non-federal entity that receives a contract to provide goods and services to the U.S. government.**
  - **A recipient is a non-federal entity that receives a federal award directly from a federal agency to carry out an activity under a federal program.**
  - **A subrecipient is a non-federal entity that receives a subaward for the purpose of carrying out part of a federal award.**

EEOC Guidance

Recent EEOC Developments Under Trump 2.0

- **Leadership Changes**
  - Andrea R. Lucas appointed as Acting EEOC Chair.
  - *"Consistent with the President's Executive Orders and priorities, my priorities will include rooting out unlawful DEI-motivated race and sex discrimination; protecting American workers from anti-American national origin discrimination; defending the biological and binary reality of sex and related rights, including women's rights to single-sex spaces at work; protecting workers from religious bias and harassment, including antisemitism; and remedying other areas of recent under-enforcement."*
- **Policy Reversals on Gender Identity**
  - EEOC dismissed gender identity discrimination cases.
  - Rescinded previous guidance protecting LGBTQ+ employees.
  - Emphasized "biological and binary reality of sex."

EEOC Guidance – "DEI Discrimination"

- Diversity, Equity and Inclusion (DEI) is a broad term that is not defined in Title VII of the Civil Rights Act of 1964 (Title VII).
- Reminds employees they must file a charge of discrimination with the EEOC before they can file a lawsuit.
- Title VII protections apply equally to all workers.
- The EEOC does not require a higher showing of proof for so-called "reverse" discrimination claims.
- Cannot take employment action because of a client or customer preference.
- When is a DEI program or initiative unlawful?
  - Under Title VII, an employer initiative, policy, program, or practice may be unlawful if it involves an employer or other covered entity taking an employment action motivated—in whole or in part—by race, sex, or another protected characteristic
- What about employee affinity or resource groups?
- What about DEI training?

EEOC and DOJ Guidance - "DEI Discrimination"

- **EEOC and DOJ released guidance entitled:** What To Do If You Experience Discrimination Related to DEI at Work
- Under Title VII, DEI policies, programs, or practices may be unlawful if they involve an employer or other covered entity taking an employment action motivated—in whole or in part—by an employee's race, sex, or another protected characteristic. In addition to unlawfully using quotas or otherwise "balancing" a workforce by race, sex, or other protected traits.
- Reasonable opposition to a DEI training may constitute protected activity if the employee provides a fact-specific basis for his or her belief that the training violates Title VII.
- Encourages individuals who believe they have been subject to DEI-discrimination to contact the EEOC.

OSHA Updates on Sex-Based Workplace Policies

- **Removal of 2015 Restroom Guidance**
  - **OSHA has removed its 2015 guidance that allowed employees to use restrooms aligning with their gender identity.**
- **New Sex-Based Definitions**
  - **OSHA has posted updated definitions of "sex" on its website, emphasizing biological distinctions.**
  - ***"Recognizing the immutable and biological nature of sex is essential to ensure the protection of women's health, safety, private spaces, sports, and opportunities. Restoring biological truth to the Federal government is critical to scientific inquiry, public safety, morale, and trust in government itself."***

Definitions

- ***Sex*** is a person's immutable biological classification as either male or female.
- ***Female*** is a person of the sex characterized by a reproductive system with the biological function of producing eggs (ova).
- ***Male*** is a person of the sex characterized by a reproductive system with the biological function of producing sperm.
- ***Woman*** is an adult human female.
- ***Girl*** is a minor human female.
- ***Man*** is an adult human male.
- ***Boy*** is a minor human male.
- ***Mother*** is a female parent.
- ***Father*** is a male parent.

OASH Office on Women's Health, https://womenshealth.gov/article/sex-based-definitions

State Attorneys General & DEI Efforts

The Role of State Attorneys General in DEI Enforcement – 2025 Political Landscape & AG Roles

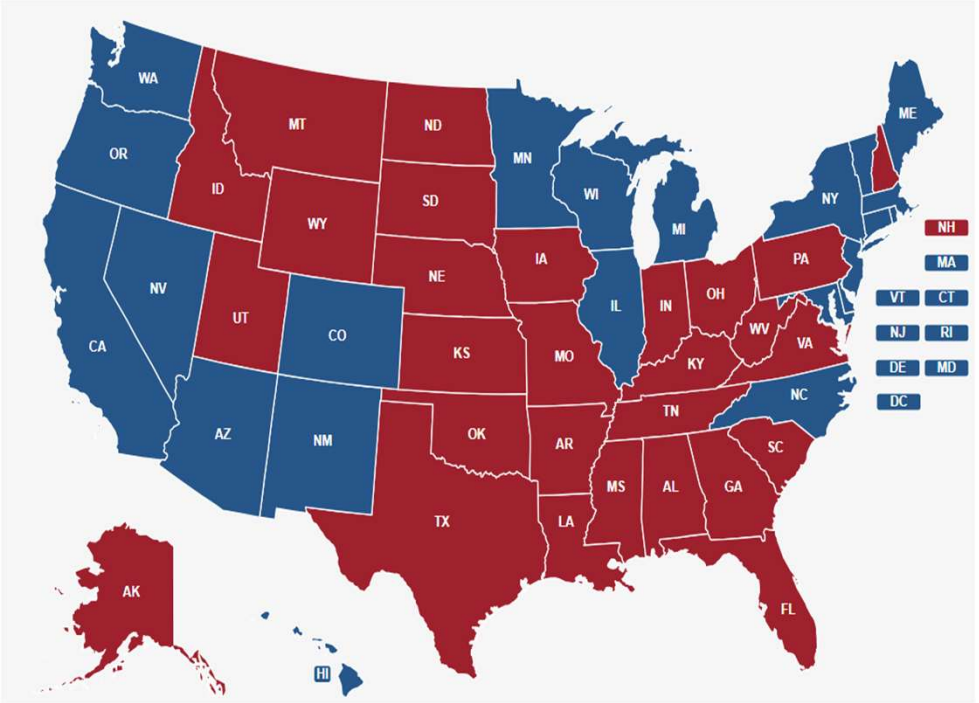
Who

- Elected in 43 states & DC
- Appointed by Governor in AK, HI, NH, NJ & WY; appointed by Supreme Ct. in TN; elected by state legislature in ME
- 28 Republican AGs
- 23 Democratic AGs
- 6 New AGs: (NC, OR, PA, UT, WA & WV)
- 2025 races: VA AG re-election; NJ re-appointment

Roles

- State's chief legal officer and independent constitutional officer
- Provides legal advice to the governor, legislature, and state agencies (labor enforcement agencies) and defends state laws and agency actions and orders
- Proposes legislation, submits comments and provides testimony on proposed state and federal legislation (e.g., 2021 Multistate comment letter in support of DOL proposed rulemaking to rescind religious exemption from anti-discrimination laws)
- Provides formal legal opinions on questions of state law (e.g., 2023 CO AG Opinion re: DEI programs *post-Students for Fair Admissions*)
- Submits amicus briefs (e.g., 17 AGs amicus brief in *Alliance for Fair Board Recruitment v. SEC*, in support of a challenge to the SEC's approval of a Nasdaq board diversity rule)

2025 State AG Political Landscape



State AG Enforcement on DEI – Republican AG DEI Activity

Enforcement Activity Trends

2/25: MO AG sued Starbucks in E.D. Mo. for violation of Title VII and MO Human Rights Act, alleging:

- **Starbucks unlawfully tied compensation to DEI goals, engaged in discriminatory training and mentorship programs, used Partner Networks to segregate on race & sex, and maintained quotas for corporate board membership.**

1/25: 19 Republican AGs Warn Costco its DEI Policies May Violate State and Federal Civil Rights Laws, stating:

- **Maintenance of DEI policies constitutes unlawful discrimination and "[f]or the good of its employees, investors, and customers, Costco should "do the right thing" by following the law and repealing its DEI policies."**
- **"Following the Harvard decision, State Attorneys General have diligently worked to stop unlawful discriminatory practices."**

1/25: 11 Republican AGs Warn Financial Institutions that DEI and ESG Policies May Violate State and Federal Law

- **State contracts with asset managers require contractors to comply with federal, state and local laws and fiduciaries must act solely in the interests of the asset owners and beneficiaries.**
- **The use of board and supplier quotas and the managing of client assets to advance race- and sex-based quotas and to satisfy climate commitments may violate fiduciary duties and duty of loyalty and prudence. Such decisions are not based on maximizing shareholder value, but instead may be based on the furtherance of political agendas in violation of state and federal law.**

3/24: TX AG Investigates Boeing Supplier Spirit AeroSystems Regarding Manufacturing Defects and DEI Policies

- **"[T]he company must release documents related to its diversity, equity, and inclusion ("DEI") commitments, and whether those commitments are unlawful or are compromising the company's manufacturing processes."**

6/24: MO AG sued IBM for violation of the MO Human Rights Act, alleging:

- **The use of unlawful racial and gender quotas.**
- **Unlawfully tying compensation and employment status on participation in discriminatory practices.**

State AG Enforcement on DEI – Democratic AG Activity

2/25: 16 AGs Issue Guidance Regarding DEI Initiatives:

- **"…diversity, equity, inclusion, and accessibility best practices are not illegal, and the federal government does not have the legal authority to issue an executive order that prohibits otherwise lawful activities in the private sector…"**
- **"…[DEI efforts] are not the same as preferences in individual hiring and promotion decisions that have been found to be unlawful."**
- **"…[DEI efforts] help to reduce litigation risk by affirmatively protecting against discriminatory conduct that violates the law."**
- **"[T]he absence of policies and procedures may be a factor considered by enforcement authorities and courts…[and] …may be used by our offices or courts to assess culpability and liability for discriminatory conduct."**
- **"…employment discrimination laws generally require employers to pay attention to the impact their practices have on different groups based on protected characteristics in order to avoid and limit liability for unlawful conduct."**

State AG Enforcement on DEI – Democratic AG Activity

Blue State Actions

- **Illinois and 12 other state AGs threatened legal action against companies that have pulled back on their DEI initiatives.**
  - **In a letter to Walmart, the AGs criticize Walmart's decision to close down its Center for Racial Equality, end equity trainings, and remove all references to DEI and diversity from company documents.**

As chief legal officers of our jurisdictions, we want to make one thing clear: Walmart's decision to jettison DEI initiatives is *not* required by law. If anything, civil rights laws support—and often necessitate—efforts to make corporations more inclusive for all employees, including employees from minority groups and other protected classes. State and federal laws prohibit discrimination in employment based on a wide variety of protected classes.[3] These laws require that employers take necessary steps to address practices that are purposefully designed to discriminate as well as those that have a discriminatory effect.[4] Initiatives and programs designed to prevent discrimination and to remedy the impact of past discrimination, including those designated as DEI, are not just good policy, but in many cases, are necessary to comply with the law.[5]

- **21 Democratic AGs write letter defending corporate DEI programs to Fortune 100 Companies (2023):**

Irrespective of *SFFA*, hiring decisions made on the basis of race are prohibited under Title VII and have been for decades. Of course, consistent with Title VII, private employers can, should — and in some circumstances, *must* — identify arbitrary and unnecessary barriers to diversity, equity, and inclusion in the workplace and develop solutions to address those issues. Removing barriers does not constitute an act of racial discrimination. Companies remain free to remedy historic inequities by: (a) adjusting recruiting practices, (b) developing better retention and promotion strategies, and/or (c) furthering leadership development and accountability. Companies need not don a veil of ignorance and pretend that racial inequities do not exist.

Legal Challenges

Legal Challenges To Date

Changes to Diversity Program Eligibility Criteria

Organizations have altered DEI language after facing suits

Company/Firm	Program	Old Criteria	Revised Criteria
Pfizer	Breakthrough Fellowship Program	Applicants "must meet the program's goals of increasing the pipeline for Black/African American, Latino/Hispanic, and Native Americans."	You can apply "regardless of whether you are of Black/African American, Latino/Hispanic, or Native American descent."
Gibson, Dunn & Crutcher	2L Diversity & Inclusion Scholarships	Gibson Dunn offers scholarships to "students who identify with an underrepresented group in the legal profession and who have demonstrated resilience and excellence on their path toward a career in law."	Gibson Dunn offers scholarships to "students who have demonstrated resilience and excellence on their path toward a career in law."
Morrison Foerster	Keith Wetmore Fellowship	Program "recognizes and supports the career advancement of highly motivated first-year law students who are members of historically underrepresented groups in the legal industry."	Program "has recognized and provided exceptional first and second-year law students with a demonstrated commitment to diversity and inclusion in the legal profession, with the training, mentorship, and exposure" for development.

Source: Bloomberg Law, law firms, and company websites.

Bloomberg Law

Legal Challenges to Date

- **Reverse Discrimination Cases Are On The Rise**
  - **Duvall v. Novant Health, Inc. 95 (F. 4th 778 (4th Cir. 2024)**
    - **A jury awarded $10 million in punitive damages to a white male employee who raised reverse discrimination claims.**
    - **David Duvall was terminated from his position as Senior Vice President of Marketing and Communications. Duvall filed a lawsuit claiming he was an exceptional employee, but he was fired due to a diversity and inclusion initiative and replaced by two women (one of whom was a racial minority).**
    - **The district court upheld the jury's verdict of liability but reduced punitive damages to the statutory maximum of $300,000. The district court awarded Duvall back pay and front pay totaling $3.4 million plus interest.**
    - **The Fourth Circuit upheld the $3.4 million in lost wages, but vacated the $300,000 in punitive damages.**

Reuters

4th Circuit backs $3.4 mln award in white ex-hospital exec's bias case

March 12 (Reuters) - A U.S. appeals court on Tuesday upheld a $3.4 million award for a white male former healthcare executive who claimed he...

Mar 12, 2024

Legal Challenges to Date

- **Reverse Discrimination Cases Are On The Rise**
  - **Ames v. Ohio Dep't of Youth Servs., ___, U.S. _____ (2025)**
    - **Supreme Court issued a unanimous decision holding that Title VII's protections against discrimination do not require majority group individuals to present additional evidence showing they were treated differently because of their majority group status.**
    - **Marlean Ames, a heterosexual woman, alleges she was demoted and replaced by a gay man. A few months later, she claims the company selected a gay woman for another leadership role.**
    - **Ames sued based on sex and sexual orientation. The district court ruled against Ames and granted the company's motion for summary judgment because Ames failed to meet the extra "background circumstances" requirement for majority group claims under *McDonnell Douglas*. The district court noted that two heterosexual individuals made the decision to demote Ames.**
    - **The Sixth Circuit affirmed the district court. Notably, Judge Kethledge's concurrence noted that "*our court and others have lost their bearings in adopting [the 'background circumstances'] rule*" and asked the Supreme Court to address the issue.**
    - **U.S. Supreme Court held that Title VII's plain text does not require different evidentiary burdens.**
    - **This eliminates the background circumstances test.**

Legal Challenges to Date

- **EO Legal Challenges**
  - ***National Association of Diversity Officers in Higher Education et al. v. Trump et al.*, No. 1:25-cv-00333, U.S. District Court for The District of Maryland**
    - **The City of Baltimore and a group of academic and restaurant workers' groups are challenging President Trump's DEI EOs as unconstitutionally vague and in violation of the First Amendment.**
    - **On February 21, the District Court of Maryland issued a nationwide injunction preventing the enforcement of the DEI EOs.**
    - **On March 14, a unanimous Fourth Circuit panel issued an order staying the injunction and requested further briefing.**

The Washington Post

Diversity officers and professors sue to block Trump's DEI orders

The federal lawsuit contends the executive orders — which request potential investigations against large universities and corporations — are...

Civil Rights Groups Sue Trump Administration Over D.E.I. Orders

The organizations claimed that the president had exceeded his authority in issuing the orders, and that they intentionally discriminated against Black and transgender people.

Time Magazine

Civil and Human Rights Organizations Sue Trump Administration Over DEI, Gender Orders

Various organizations filed a lawsuit against the Trump Administration on Wednesday in response to Executive Orders targeting DEI.

LAW360 · Cozen O'Connor

Judge Probes Vagueness In Suit Over Trump's Anti-DEI Orders

By Ali Sullivan ·

Law360 (February 19, 2025, 10:05 PM EST) -- A Baltimore federal judge on Wednesday pressed a U.S. Department of Justice attorney to spell out what would constitute so-called illegal DEI under Trump administration executive orders that aim to root out diversity, equity and inclusion programs in the public and private sectors.

Shareholder and Customer Push Back?

- **In recent months, we have seen shareholders pushing back against corporate initiatives to move away from DEI initiatives.**
  - **Apple, Coca-Cola, Costco, John Deere, Goldman Sachs, Visa, Disney, and Levi Strauss have voted overwhelmingly against proposals aimed at modifying/dismantling corporate DEI efforts.**
- **Customer Push Back**
  - **In January, Target announced it would scale back its "Belonging at the Bullseye" strategy, which focused on hiring and supplier diversity goals.**
  - **Target faced a 40-day consumer boycott as a result, resulting in decrease in sales and foot traffic.**
  - **Target's CEO recently acknowledged in a recent earnings call that part of lowered earnings was consumer reaction to change in DEI policies.**

Key Takeaways

- **Do Not use race or gender and other protected characteristics as a plus factor to improve workplace diversity.**
- **Do use race, gender and other protected characteristics to enhance pipeline of diverse candidates (sourcing and recruiting).**
- **May use life experiences as plus factor.**
- **Review DEI communications and programs for red flags.**
- **Assess goals for the DEI programs.**
- **Monitor legal developments in this area.**

Thank You

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