

The Employment Law Counselor

Episode 17

PLUS Staff: [00:00:00] Welcome to this PLUS Podcast, The Employment Law Counselor. Before we get started, we'd like to remind everyone that the information and opinions expressed by our speakers today are their own and do not necessarily represent the views of their employers or of PLUS. The contents of these materials may not be relied upon as legal advice.

Victoria Fuller: Hi everyone, welcome to The Employment Law Counselor Podcast. We're your hosts, Victoria Fuller

Laura Corvo: And Laura Corvo.

Victoria Fuller: Today we'll be discussing best practices for employers in an unsettled DEI climate. This podcast is a collaboration between White and Williams LLP and the Professional Liability Underwriting Society, commonly known as PLUS.

Laura Corvo: While our podcast is not legal advice, it is a practical discussion between attorneys that deals with the maze and minefield of labor and employment laws on a daily basis. If you like what you hear, please give us a five-star review and subscribe so you never have to miss an episode.

[00:01:00] Today, we are joined by one of our colleagues here at White Williams, Marlana Ellis, who is an employment lawyer practicing at our firm's Philadelphia office. How are you doing today, Marlana?

Marlana Ellis: I'm doing great, Laura. Thanks for asking. I'm really excited for today's subject.

Victoria Fuller: I am too. Why don't we just jump into it?

On January 20th and 21st, President Trump signed two executive orders, ending federal DEI programs and, amongst other things, encouraged private sector employers to end what it called “illegal DEI discrimination and preferences.” As we said earlier today, we'll be discussing the implications of those executive orders on employers and offer some best practices that employers should implement, right now, to manage these legal risks while still attracting and retaining high quality employees.

Laura Corvo: Vicky and Marlena, DEI is really a hot topic, right? It's a buzzword and a catchphrase that we've heard a lot about lately, and it's kind of been a topic [00:02:00] that's been the headlines around various news organizations and media platforms. Marlena, I think it probably makes sense for us to start off by just explaining what DEI is.

Marlena Ellis: Sure, Laura. First, DEI is not necessarily a legal term. As you mentioned, it is a buzzword and a catchphrase that has been in the media. It generally refers to frameworks designed to remove barriers to access and advancement opportunities for all employees. DEI stands for diversity, equity, and inclusion.

To break those down individually, diversity refers to the advancement of employees from a variety of underrepresented communities, including race, gender, culture, disability status, age, sexual orientation, and socioeconomic status, among others.

Equity, on the other hand, is the practice of ensuring that employment practices are fairly and objectively [00:03:00] implemented. Equity is in a way the exact opposite of desperate treatment. As we will talk about, equity is probably the most important of these three pillars for risk management.

Inclusion involves creating a work environment that is respectful and supportive, such that employees from every background can feel a sense of belonging. Fostering inclusion is important to employers because it is vital to employee retention.

Laura Corvo: That's a really great description for us, Marlena. Vicky, while DEI does not necessarily have a legal definition, don't we have a Supreme Court case that addressed DEI in the education context?

Victoria Fuller: Yes, Laura, you're right.

Last year, the Supreme Court issued its landmark decisions in *Students for Fair Admissions (SFFA)* in, it was actually two cases. One was brought against Harvard. The other one was brought against UNC.

The Supreme Court [00:04:00] held that race conscious admission policies failed the strict scrutiny test, which means that it violated the Equal Protection Clause of the 14th amendment, not constitutional. [It]also held that it violated Title VI of The Civil Rights Act of 1964, which applies to private institutions that receive federal funding. As a result of that ruling, these institutions of

higher education were no longer permitted to broadly consider race or other protected categories in an effort to diversify the school's student body.

Now, one thing that I want to emphasize here is that the SFFA Supreme Court decision was not the beginning of the anti DEI slash reverse discrimination movement that we're seeing now. In fact, this is something that has been building for a couple of years.

I just want to give a couple of examples to kind of set the table for our discussion today. This is one example. There's a case out of the Western District of North Carolina. It was called [00:05:00] *Duvall v. Novant Health, Inc.* There a white male senior vice president of marketing and communications had sued his former employer, alleging that the nonprofit medical network fired him and seven other white male executives as part of its diversity initiative. When the employee was terminated, he was then replaced by two women, one white, one black. The company defended its decision on the grounds that the employee was terminated for performance reasons and that the other males were not true comparators because they were from different departments and leadership levels.

At trial, the employee introduced evidence that his race and sex were a partial motivating factor in the discharge decision. His evidence centered around an alleged pattern of white males being terminated from employment and the specifics of the employer's DEI program, including the fact that the employer's DEI council had determined that year that the employer was failing to meet its diversity targets, we'll talk [00:06:00] about that in a minute, specifically within leadership. The former employee was also able to present evidence of a pattern of termination of white males and the subsequent promotion of diverse leadership employees in their stead. After a seven day trial, the jury returned a verdict for that former employee and awarded 10 million in punitive damages.

That case actually predates the SFFA decision. I really like this case. Not that I like this case, but it really is a great example of the concerns driving the anti DEI movement. Instead of seeking to increase the proportion of diverse employees within leadership, the program ran afoul of preexisting state and federal discrimination laws because it ended up leading to reverse discrimination. It was out with white males in with diverse candidates without looking beyond that to the merits.

Now let's move forward in time. The court issues the SFFA decision. The media world explodes. It was widely anticipated [00:07:00] that the implications of

SSFA would be extended to the employment context. Everyone was talking about it.

Shortly after the SFFA comes down, we end up in this letter battle between different attorneys generals from different states. Mid July 2023, there are thirteen Republican Attorney Generals writing to Fortune 100 CEOs to, quote unquote, remind them of their obligation as employers under federal and state law to refrain from discriminating on the basis of race, whether under the label of DEI or otherwise. That letter also threatened serious legal consequences over race-based employment preferences and diversity policies. That letter then prompted a response a few days later from twenty-one Democratic Attorney Generals, reassuring corporate officers that efforts to recruit a divorced workforce and create inclusive work environments are in fact legal and reduce corporate risk for discrimination claims. The letter [00:08:00] battles continue through the summer of 2023.

On the heels of those letters, we start seeing the special interest lawsuits. One example is there were lawsuits against law firms over fellowship programs that had race-based eligibility requirements for inclusion. In other words, for black employees, you could participate in this fellowship program, but if you were white, you were excluded. Those lawsuits ended up resolving with the employers changing their eligibility requirements for their fellowship programs.

So, why am I talking about all of this? The point here is, this executive order that was handed down last month, it didn't just come out of the blue. This is the culmination of a movement that has started really over the last couple of years and kind of set the table for where we are today.

Now that we have dug into the history, why don't we now dig into the executive orders themselves? Laura, as I understand it, part [00:09:00] of this deals with ending affirmative action and other requirements for government contractors. Can you explain what that order means for those employers who have government contracts or subcontracts?

Laura Corvo: Sure. The new executive order that was issued by President Trump actually revokes an old order that was put in place way back in 1965 by President Lyndon Johnson. [This] required federal contractors and subcontractors, those are the businesses that have contracts and do business with the federal government, to develop affirmative action plans for women and minorities.

Generally, what this meant was that federal contractors had to take certain steps to examine demographic data about their workforce to see if women and minorities were somehow underrepresented. If the data showed that women and minorities were underrepresented in the workforce, the federal contractor had to create [00:10:00] goals that would help it kind of cast a wider net for candidates whenever it was looking to hire or promote people that could potentially address that underrepresentation.

It's important to know, though, it did not require employers or federal contractors to set quotas or to set aside specific jobs for women or minorities or to abandon a merit based system. It was just a matter of, "let's get some goals out to get that net a little bit bigger to potentially bring in more women or minorities into the workforce."

The Trump order, in addition to revoking that old order that was put in place by President Johnson also instructs the Office of Federal Contract Compliance Programs. That's a mouthful. That's the agency that oversees federal contracts. We commonly refer to it by the acronym OFCCP.

The Trump order [00:11:00] instructs the OFCCP to stop doing a number of things. It instructs it to stop promoting diversity, to stop holding federal contractors and subcontractors responsible for taking affirmative action, and to stop allowing or encouraging federal contractors and subcontractors to engage in workforce balancing based on race or sex or gender, religion, national origin, and the like. The new Trump order also instructs federal agencies to require that the companies that they contract with certify that they are not operating illegal DEI, right? Basically, the order says they must certify that they do not operate programs that promote DEI that violate any federal discrimination law. A White House fact sheet that came out right after the order was issued says that [what] this means is [00:12:00] that it requires simple and unmistakable affirmation that the contractor "will not engage in illegal discrimination, including illegal DEI." We'll get to the illegal DEI part in a second.

Generally, this order takes effect ninety days from when it was issued, which is April 21st. It does not impact obligations of federal contractors when it comes to other protected classes for veterans and individuals with disabilities. Those affirmative action plans for veterans and disabilities are statutory, so they can't be overturned by executive order. That's what it does in a nutshell, Vicky.

Victoria Fuller: That's a lot. Help me understand, what does this mean for federal contractors and the affirmative action plans they may have in place right now for women and minorities?

Laura Corvo: Well, first, it means that as of April 21st, they no longer have to have those affirmative action plans in place. It also [00:13:00] means that the OFCCP is not going to enforce that requirement. In fact, a couple of days after the order was issued the acting secretary of labor issued an order, directing OFCCP employees to actually stop their investigations and enforcement activities and essentially close out their files on review and enforcement.

Victoria Fuller: What about federal contractors? Even though it's no longer required, what about those contractors who choose to keep affirmative action plans in place?

Laura Corvo: At least until April 21st, when the order takes effect, those plans can stay in place. Over the next 90 days, we expect to get more guidance from the OFCCP, as well as have this sorted out through potential legal challenges. It's kind of a, “stay tuned, we're not sure yet.”

Victoria Fuller: As we're recording this, I mean it feels like the legal landscape is changing just by the minute.

What about the requirement that federal contractors must certify [00:14:00] that they don't engage in, quote unquote, “illegal DEI?”

Laura Corvo: Vicky, that's the most difficult question because one of the issues here is that the order does not define what illegal DEI is. We're going to have to wait and see how that term is interpreted by the OFCCP, federal agencies, and potentially courts. There's going to be a lot to sort out in the next days and months.

Victoria Fuller: Marlena, remind me, the executive order also addresses private sector employers who are not contractors. Is that right?

Marlena Ellis: That's correct, Vicky. The order also encourages the private sector to end illegal DEI discrimination and preferences. The order also requires that the attorney general seek to investigate and potentially prosecute employers who will continue to maintain illegal DEI programs.

Interestingly, the order also instructs that the [00:15:00] Attorney General and Secretary of Education issue guidance to educational institutions that receive federal funding regarding the measures and practices they need to implement to comply with SFFA. Importantly, the order repeatedly references illegal DEI programs, but it does not explain what an illegal DEI Program is.

Victoria Fuller: All right, guys. Are there any clues here as to what the OFCCP, the Attorney General, any federal agency, what is illegal DEI?

Laura Corvo: Vicky and Marlana, I think we have to go back and realize that as a threshold matter, Title VII, which is the federal law that bans discrimination in employment, that still exists. The Americans with Disabilities Act still exists. State anti-discrimination laws [and] local anti-discrimination laws, they're all still in play. Frankly, employers need to know that the fundamental law and [00:16:00] legal framework hasn't really changed here.

That said, I think the explicit references to the SFFA decision that you talked about earlier, Vicky, in the executive order indicates we should at least start to look there for guidance as to how to interpret what is an illegal DEI program. It's also worth noting that although the order targets DEI, generally it looks like the pillar that the order is actually trying to be aimed at is diversity. For example, the order refers to “dangerous, demeaning and immoral race and sex-based preferences.”

Marlena Ellis: It also says that illegal DEI and DEIA policies deny, discredit, and undermine the traditional American values of hard work, excellence, and individual achievement. The order also claims that [00:17:00] hardworking Americans who deserve a shot at the American dream should not be stigmatized, demeaned, or shot out of opportunities because of their race or sex.

Victoria Fuller: All right. Reading between the lines here, we're looking at reverse discrimination. That's the concern, that some employees are being given opportunities because of their race or because of their inclusion in some protected category and not on the merits.

Marlena Ellis: Yes, that's exactly right, Vicky.

Victoria Fuller: Have there been any legal challenges, Laura, to the new executive order on DEI?

Laura Corvo: Yes. Recently, a group of plaintiffs, which include a diversity officers organization, professors, a restaurant group and the city of Baltimore, filed a lawsuit in a federal court in Maryland, arguing that the executive orders are unconstitutional. The theory there is that they violate the First Amendment, separation of powers and due process. I suspect that there may be other legal challenges, [00:18:00] we are really operating in very uncertain times when it comes to DEI.

Victoria Fuller: Yeah, absolutely.

Laura Corvo: It's really, it's an uncertain time for employers as they navigate the shift in this paradigm, isn't it, Vicky?

Victoria Fuller: Yeah, I think this is going to be a very tricky year for employers. I think there are multiple stakeholders in this discussion. We've spent some time talking about the government, which is really just one of them. But there's the company itself, which wants to attract and retain the best workforce possible. There are current employees who want to feel comfortable that they're operating in an objective and fair system. There are candidates who employers want to attract who will have their own expectations about DEI programs and qualifications for a position.

Trying to balance all of those different stakeholders and what their needs are and what they're looking for, I think it's going to be, this is going to be a hard year.

Laura Corvo: Vicky, what do employers do with their existing DEI programs?

Victoria Fuller: [00:19:00] That's a really good question. If we look to the SFFA decision and we apply it in the employment setting, we'll want to just as a baseline eliminate anything that looks, feels, smells, has the practical effect of being a quota. We can't say, "the next hire here needs to be from this protected category." We can't condition a term or a benefit of employment on inclusion in a protected category. Like the law firms I talked about earlier that had the race-based fellowship programs, you're not going to do that anymore. You could still have fellowship programs, you would just want to remove any race based or similar protected category types of requirements for inclusion.

Marlena Ellis: Similarly, if you offer your employees mentorship opportunities, but only for employees of a certain race or another protected category, offer the mentorship program [00:20:00] to employees regardless of their inclusion in those particular categories.

Victoria Fuller: Yep, exactly.

Laura Corvo: Marlena and Vicky, it's probably a good idea for employers to have their existing DEI programs reviewed by counsel. You can help them revise it if they need to.

Marlena Ellis: That's exactly right. We don't want employers to totally scrap their DEI programs and policies, but they may need to adjust them a bit.

Victoria Fuller: Yeah. I would just add that this is such a complicated environment right now that you really should involve counsel helping you with this because there is just so much moving so quickly [in] understanding the law in this stage of development. Get your lawyer in the door and get some help.

I want to go back to something we talked about earlier. We talked about how the real focus seems to be on that D, diversity, not equity and inclusion, but this perception that some employees are getting ahead because of their inclusion in the protected category. This is a really good time, and it is [00:21:00] really an important time for employers to work with their counsel to shore up their handbooks and their management practices.

So, just a couple examples. You're hiring for a position. Look at the job description. Have you drafted a job description? Does it need to be updated? Is it clear as to what the requirements are for that position? When you're posting for it, make sure that the post aligns with the job description. Then you get your candidates in the door, you look at resumes, you're interviewing.

Keep records on your hiring decisions. Why was one candidate hired over the other final round candidates? Does that candidate satisfy the predetermined criteria for the position? If you ended up deviating from those criteria, why? Is the reasoning for doing so sound? Did you decide to do so because you like the person, but maybe they're not as qualified as somebody else?

Those are the kinds of things that can get you in trouble and that you really need to kind of catching yourself on. [00:22:00]

Laura Corvo: Vicky, those principles are also going to apply when employers are disciplining employees, right? As you said, the employers have to communicate clearly what they expect of their employees through the job descriptions and the handbook policies, et cetera. But once employees fall below those and don't meet those expectations that they've spelled out, they need to discipline the employees. Not only discipline employees, and this is where advice from counsel sometimes can be helpful, but make sure you're doing so in a consistent manner, right?

You can't discipline John for policy violation but let Mary slide or vice versa. We see this all the time. It's that inconsistency in discipline that gets employers in trouble because John can wonder if he's being punished for something that

Mary wasn't punished for because he's a man or because he's white or because of some other protected category. If John sues for discrimination, the burden is going to be back on the employer to [00:23:00] show that the reason they disciplined John and not Mary was not because of some discriminatory animus but because of some concrete business related reason.

Victoria Fuller: Yeah. I'm going to jump in on that for a second because this comes up all the time. Laura, I know you see this all the time. It is such a problem. Getting your managers trained is so important on this because I know it's hard. It's hard for any manager. Nobody wants to write somebody up. Nobody wants to engage in discipline. It's hard, but if we don't do it in a consistent manner. This is how we end up with these problems. Why did one person get disciplined versus another person? The manager didn't want to hurt somebody's feelings is not a good answer. We have to work on that. We have to get our managers to be consistent about it.

Marlena Ellis: Vicky and Laura, that's exactly correct.

Let's not forget the fundamentals. It's all about the documentation: documents, documents, documents. Employers can't afford for managers to be inconsistent [00:24:00] about this.

They need to document why they hired one employee over another. They need to document why they promoted one employee over another. They need to document why they disciplined one employee over another. They need to document why they terminated one employee over another. All managers need to be trained to consistently document employee decisions every single time.

Laura Corvo: Marlena, to that point, that documentation needs to reference neutral job related criteria that was used in each hiring, promotion, discipline, termination. That [way] a court, the EEOC, whoever's looking at this in the future can say, "this was made for a legitimate reason," not because the employee is male or white or a minority or a woman. It was made because the employee was doing a bad job and it's there and it's neutral and it's spelled [00:25:00] out clearly. We see this all the time as employment lawyers, that documentation and the way the documentation is done can make or break an employment case.

Victoria Fuller: That's exactly right, and that's what we're talking about here. This is the key to risk management, getting this documentation in and making it easy to get it in.

What can really facilitate your managers to doing their documentation is having a good HR program where they can easily input contemporaneous notes. I have found that to be just an absolute goldmine when defending a case. If they've been good about inputting their notes, it's got a timestamp on it, we know it was contemporaneously entered. [Consequently] you don't have to worry about memory issues. I love those programs because it just makes everything that much easier.

Marlena Ellis: All of these management practices that we're discussing actually strengthen equity because it provides the foundation for fairness throughout the entire [00:26:00] employment system.

Victoria Fuller: 100 percent agree. Actually, 1000 percent agree. We don't want to throw out. Equity. As we're talking about, “do we have to change our DEI?” We do not want to get rid of equity because that is your risk management. This feeling of fairness, the feeling that everybody's playing by the same rules.

Laura Corvo: Vicky and Marlena, we also should discuss the last pillar, which is inclusion. It goes without saying that most employers want their employees to feel like they belong to their company.

That sense of inclusion is often what motivates an employee to stay with the company and to do their best work for the company. Employers should think about how to structure these kinds of communities of belonging for their employees, right? Employers are going to have to find a balancing act to make sure that employees are not excluded from a community of belonging, but at the same time they're not compelled to join one, right?

Instead, you have [00:27:00] to have that option available to the employees and let the employees kind of become a source of strength for each other. That's really the great way to continue to build that foundation for inclusion.

Marlena Ellis: I totally agree. The other piece we should discuss when it comes to risk management is insurance. In this current environment, all employers should have employment practices liability insurance with adequate limits.

Victoria Fuller: Completely agree, Marlena. You should absolutely go talk to your broker. Make sure you've got adequate limits. You do not want to get caught in this environment without insurance.

Claims are expensive. It can easily get up into the several hundred thousand dollars to defend a claim. If you lose and you have a statute where you have to pay attorney's fees. Now you're looking at a couple hundred thousand dollars off the plaintiff's attorney's fees. Please make sure that you have coverage on that.

I also just want to mention many EPL policies now, [00:28:00] also will have a defense sublimit for wage and hour claims. Those types of claims typically are not covered for indemnification, but you want that defense sublimit for that reason. Otherwise, you could be paying hundreds of thousands of dollars out of pocket on defense.

The other issue is discrimination claims sometimes have a wage and hour claim paired with it. Sometimes it's in the form of a pay discrimination or pay equity claim. It's just a very good practice to get this coverage and make sure you have it in your policy.

Laura Corvo: Vicky and Marlana, I think as we've emphasized today, this is going to be a tough year for employers, right? Employers who find themselves in a position where they are sued need to think about how to handle that and whether they're going to be a test case in this kind of anti DEI movement that we find ourselves in.

In those circumstances, I think employers are going to have to critically evaluate if it makes the best business sense to kind of resolve this [00:29:00] case and resolve it early as opposed to being in a situation where you're expending legal fees in an area where the law's going to be very uncertain, at least for the time being.

When it comes to diversity, equity, and inclusions employers are going to have a lot to sort through in the coming months and days. I do think that good old fashioned best management practices, like what we've discussed here today, are really the starting point to balancing risk management while also attracting and retaining your workforce.

Victoria Fuller: Exactly. I think, Marlana had it right: document, document, document. Let's go back to fundamentals. Remember that the existing statutory framework is still there. When in doubt, call your lawyer. Call your lawyer prophylactically. Don't wait until you've got a claim to try to manage a situation.

With that, I think we're out of time. Marlana, thank you so much for joining us today. I think this was a really interesting topic for the Employment Law Counselor Podcast.[00:30:00]

Marlena Ellis: Thank you so much for having me.

Laura Corvo: We appreciate you joining us and we would like to thank all of our listeners for joining us here on the Employment Law Counselor Podcast, where we try to make sense of our ever-changing world of labor and employment law. If you enjoyed this episode, please give us a five-star review. Tell your friends and subscribe to the podcast.

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