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Understanding the Potential Impacts of the New Administration on EPL Claims

April 10, 2025



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Questions

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Meet Your Presenters



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Agenda

- Developments Affecting Gender Identity
- Developments Impacting DEI Programs
- Recent Relevant Case Law Updates
- Executive Order 14173
- Changes at the EEOC
- EPL Best Practices
- Questions

Developments Affecting Gender Identity

- *Bostock v. Clayton County* (2020)
- Executive Order 14168: Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government
- Potential Long-Term Consequences

Developments Impacting DEI Programs

Background on DEI:

Diversity. Attracting and advancing employees from a variety of underrepresented communities, including race, gender, culture, disability status, age, sexual orientation, and socioeconomic status, among others.

Equity. Ensuring that employment policies and practices are fairly and objectively implemented, such that employment actions are grounded in merit and limit the opportunity for bias and favoritism.

Inclusion. The promotion of a work environment that is respectful and supportive such that employees from every background feel a sense of belonging.

Developments Impacting DEI Programs: Students for Fair Admissions

Plaintiff SFFA is a “nonprofit membership group of more than 20,000 students, parents, and “others who believe racial classifications and preferences in college admissions are unfair, unnecessary, and unconstitutional.”

- Studentsforfairadmissions.org



Developments Impacting DEI Programs: Students for Fair Admissions

“The ‘core purpose’ of the Equal Protection Clause: ‘do[ing] away with all governmentally imposed discrimination based on race.’”

“Eliminating racial discrimination means eliminating all of it.”

“.” For [these] reasons ... the Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. Both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful endpoints

SFFA v. President & Fellows of Harv. Coll., 143 S. Ct. 2141, 2161-62 (2023) (Roberts, C.J.).

Recent Relevant Case Law Updates:

Muldrow v. St. Louis

- Plaintiff only needs to show adverse employment action – it does not need to be significant.
- *Muldrow* opens the door to more discrimination claims based on DEI programs.
- *Agapov v. UBIF Franchising Co.*
 - Plaintiff asserted a reverse discrimination claim based on the allegation that the employer did not even consider a Black colleague for relocation.

Recent Relevant Case Law Updates:

Ames v. Ohio Department of Youth Services

- Issue Presented: Does a plaintiff who belongs to a majority group need to show a *heightened* “background circumstances” standard to make a prima facie case for discrimination?
 - Rationale: additional evidence against majority group members is less likely or unusual as held in certain circuits, but not others
 - Something more than what women and POC have to show?
- SCOTUS heard argument on February 26, 2025, was skeptical of heightened standard, creates imbalance between majority and minority groups under Title VII.
- Anticipated decision in Summer 2025.
- Impact: potentially same *McDonnell-Douglas* burden-shifting standard, which from *Muldrow*, requires a minimal showing of discrimination

Executive Order 14173

- Largely directed at government agencies and federal contractors by:
 - Removing affirmative action (changing a 60-year-old policy)
 - Requiring certification of federal contractors
 - Encouraging whistleblowers under False Claim Act
- Also directed at private employers:
 - Directs USAG and state AGs to launch investigations into “illegal DEI”
 - EO specifically targets publicly traded corporations, large non-profits, foundations with assets of >\$500MM, state/local bar and medical associations, higher education institutions with over \$1B in endowments
- Why is this important?

Executive Order 14173

- Largely directed at government agencies and federal contractors by:
 - Removing affirmative action (changing a 60-year-old policy)
 - Requiring certification of federal contractors
 - Encouraging whistleblowers under False Claim Act with monetary penalties
- Also directed at private employers:
 - Directs USAG and state AGs to launch investigations into “illegal DEI”
 - EO seeks to specifically target nine publicly traded corporations, large non-profits, foundations with assets of >\$500MM, state/local bar and medical associations, higher education institutions with over \$1B in endowments

Executive Order 14173

- Challenges to the EOs
 - *Nat. Assoc. of Diversity Officers in Higher Ed., et. al. v. Trump* (D. Md.)
 - Injunction initially granted, applied against all branches of government
 - EO was initially enjoined with respect to (1) terminating federal contracts; (2) requiring certification; and (3) encouraging investigation into “illegal DEI” (but not other investigations)
 - Rescinded by 4th Circuit on March 14, 2025, pending appeal
 - Briefing due in May 2025
 - *Chicago Women in Trades v. Trump, et. al.* (N.D. Ill.)
 - Temporary restraining order granted on March 27, 2025 preventing enforcement by DOL/OFCCP on the termination and certification provisions until preliminary injunction hearing on April 10, 2025
 - **Certification provision is enjoined nationwide**
 - Termination provision is enjoined as to CWIT only

Changes at the EEOC: March 17, 2025: EEOC Letters to Law Firms re DEI Employment Practices

- March 18, 2025: Response from Former EEOC Commissioners and GCs:

Because we deeply respect the Commission's statutory authorities and its institutional reputation, we write to express our grave concerns about the public letters you recently sent to 20 major law firms. These letters appear to exceed your authority under Title VII of the Civil Rights Act of 1964. We therefore believe it is important to share these concerns with you immediately.

Your letters request extensive information and imply a duty to respond without any basis in the laws that the EEOC enforces. As you know, the EEOC has no authority to require information from employers under Title VII simply by the request of a Commissioner. If you had a sufficient basis in evidence to believe that any of the recipients of your letters had engaged in discrimination in violation of Title VII, you would have had the authority to file a Commissioner charge, signed under penalty of perjury, to begin an investigation. But Title VII does not authorize the sort of public demand for information encompassed in your letters to these law firms. Nor does Title VII require these firms to respond to your letter or permit EEOC to impose penalties on firms for declining to respond.

Changes at the EEOC: March 19, 2025 EEOC/DOJ Technical Assistance

What can DEI-related discrimination look like?

Diversity, Equity and Inclusion (DEI) is a broad term that is not defined in the statute. 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, DEI-related discrimination in your workplace might include the following:

Disparate Treatment

DEI-related discrimination can include an employer taking an employment action motivated (in whole or in part) by race, sex, or another protected characteristic. Title VII bars discrimination against applicants or employees in the terms, conditions, or privileges of employment, including

- Hiring
- Promotion
- Compensation
- Exclusion from training
- Exclusion from fellowships
- Firing
- Demotion
- Fringe benefits
- Exclusion from mentoring or sponsorship programs
- Selection for interviews (including placement on candidate slates)

Limiting, Segregating, and Classifying

Title VII also prohibits employers from limiting, segregating, or classifying employees based on race, sex, or other protected characteristics in a way that affects their status or deprives them of employment opportunities. Prohibited conduct may include:

- Limiting membership in workplace groups, such as Employee Resource Groups (ERG) or other employee affinity groups, to certain protected groups
- Separating employees into groups based on race, sex, or another protected characteristic when administering DEI or other trainings, or other privileges of employment, even if the separate groups receive the same programming content or amount of employer resources

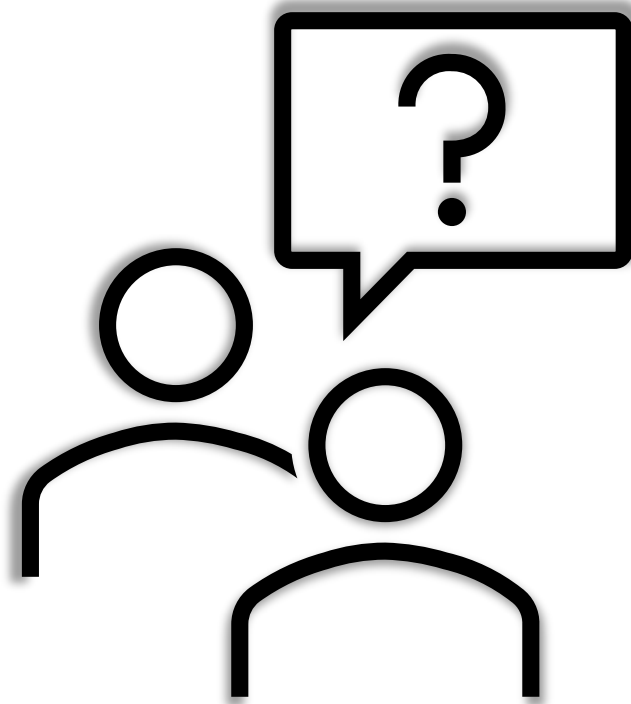
Changes at the EEOC: EEOC Technical Assistance Key Points

- Illegal DEI programs may include:
 - ERGs and affinity groups limited to protected categories
 - Access to training or other privileges of employment, even if other employees separately receive the same content or resources
- DEI training programs may create a hostile work environment, and opposition to attending one may constitute protected conduct.
- Consideration of protected category does not need to be but-for to be illegal
- Employees only need to show “some harm” (*Muldrow*)
- No heightened burden of proof

EPL Best Practices

- Employer Risk Management Best Practices
 - DEI Audits with Counsel
 - Train Managers
 - Update Policies and Procedures as Necessary
- Claims Handling Suggestions
 - Ames: confirm status of legal standard applicable to reverse discrimination case
 - Require thorough initial claims analysis report
 - Consider early resolution
 - Understand differences between state anti-discrimination statutes and new interpretation of Title VII
 - Be Prepared

Questions?



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Thank you!