



Navigating the Federal Landscape: The Challenges of Meeting Current DEI Standards

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CUPA-HR Webinar

Presenters



Carolyn Pellegrini
Partner, Vice Chair Labor &
Employment Practice Group
Saul Ewing LLP



Jesse Krohn
Associate
Saul Ewing LLP

Agenda

- Background
- Executive Orders
- Agency guidance
- Major themes
- Action items for your institution
- Questions?





Background

What are the Administration's Enforcement Priorities?

- Low Priorities:
 - Discrimination against immigrants
 - Discrimination based on gender identity, and possibly sexual orientation
- High Priorities:
 - Ending protections based on gender, and possibly sexual orientation
 - Antisemitism and other “shared ancestry”
 - Discrimination against white individuals and Christians; preferences for women over men

Who is Left to Enforce?

- Mass layoffs at the Department of Education Office for Civil Rights
- An estimated 50% or more of attorneys and investigators at the DOJ Civil Rights Division have taken buy-outs or been forced out
- The EEOC has seen significant decreases in staffing
- Commitment to compliance with all Executive Orders and interpretations is required of the remaining employees

Example: DOJ Individual Employee Rights

- IER group enforces the non-discrimination provision of the Immigration and Nationality Act (INA)
- Traditionally, unit had 25-30 attorneys and investigators dealing with complaints about “U.S. Citizen only” advertisements or policies and other forms of discrimination
- There are now only two employees
 - Director issued a press release soliciting complaints from U.S. citizens who believe they were passed over for jobs in favor of an immigrant

Trends in Litigation: Challenging Training

- *King v. Johnson & Johnson* (E.D. Pa., filed Mar. 6, 2024; settled July 2024): White male plaintiff alleged discrimination against him in the pursuit of DEI, which allegedly aimed to “eliminate” older, White males, asserting violations of § 1981, Title VII, and ADEA
- *Arsenault v. HP Inc.* (D. Conn., filed May 29, 2024): White male plaintiff alleged that he was subject to a “shaming session” after expressing his negative opinions on DEI, which led to retaliation, termination of his employment, and refusal to rehire him, asserting violations of § 1981 and Title VII

Trends in Litigation: Majority Group Plaintiffs

- Increasingly common claims brought by majority group plaintiffs, often supported by advocacy organizations
- Claims bolstered by recent development in the Supreme Court
- *Ames v. Ohio Dep't of Youth Servs.*, No. 23-1039, 2025 WL 1583264 (U.S. June 5, 2025):
 - Addressed whether a majority-group plaintiff must, beyond proving the other elements of Title VII, show “background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority”
 - Involved a heterosexual woman alleging her former employer discriminated against her by denying her a promotion and demoting her “because she is straight”
 - The Supreme Court: No. Title VII “draws no distinctions between majority-group plaintiffs and minority-group plaintiffs”
 - Ruling eliminates the “background circumstances” rule in the Sixth, Seventh, Eighth, Tenth, and District of Columbia Circuits

IHEs Stay in the Hot Seat

- Key leverage is threats to cut off/cutting off federal funding, but also:
 - Enforcement via Title IV FSA program (e.g., HCM)
 - This and other actions sparking accreditor inquiries
 - International student enrollment issues
 - Undocumented student issues (e.g., PRWORA)
 - Investigations/enforcement actions (from ED, DOJ, EEOC, HHS, Congress)
 - Press/Reputational
 - Contract requirements addressing “illegal DEI,” cooperation with ICE, and other Administration priorities
 - Federally-sponsored research issues
 - Previously-mandated DEI-related grant provisions unwound
 - Grants designed for DEI activities a target

Executive Orders

What is an Executive Order?

- Official documents executed by the President
- Not laws, but similar to agency-level / subregulatory guidance
- Used to direct and manage the Executive Branch
 - Enforcement via Title IV FSA program (e.g., HCM)
 - Not state agencies or private entities
 - BUT reach many businesses as federal contractors and recipients of federal grants
 - Agency implementation affects future guidance, regulations, and enforcement
- Can be challenged in court

Revoked—EO 11246

- “Equal Employment Opportunity”
- Had been in effect since September 1965
- Prohibited discrimination by federal contractors and subcontractors, and required them to take affirmative action to prevent discrimination
- All federal contractors ordered to stop their affirmative action programs for employees by April 21, 2025
 - No more goals, timetables, or reporting for race, gender, and national origin
 - Veterans and qualified individuals with disabilities remain intact

Issued—EO 14173

- “Ending Illegal Discrimination and Restoring Merit-Based Opportunity”
- Directs federal agencies to require contractors/grantees to certify that they do not “operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws”
- Expressly states that compliance is “material to the government’s payment decisions for purposes of [the False Claims Act]”

Issued—EO 14168

- “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”
 - Bars use of federal funds to promote “gender ideology”

Issued—EO 14321

- “Restoring Equality of Opportunity and Meritocracy”
 - “It is the policy of the United States to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, Federal civil rights laws, and basic American ideals”
 - Directs the Attorney General to “review with all agencies existing regulations, guidance, rules, or orders that impose disparate-impact liability or similar requirements, and detail agency steps for their amendment or repeal, as appropriate under applicable law”
 - Also review of existing settlements and investigations based upon disparate impact regulations, and take action to end them
- But, “disparate impact” is written into ADA, Title VII, and other laws
 - Clear conflict – more on this in part four of this presentation

Issued—EO 14168

- “Defending Women From Gender Ideology Extremism And Restoring Biological Truth To The Federal Government”
- Declares it “is the policy of the United States to recognize two sexes” which “are not changeable,” and orders federal agencies to “take all necessary steps” to “end the Federal funding of gender ideology”
- What is “gender ideology?” Per the EO: “[T]he false claim that males can identify as and thus become women and vice versa, and requiring all institutions of society to regard this false claim as true”
- Institutions have been asked to certify, in connection with the receipt of grants and contracts, compliance with Title IX, “including the requirements set forth in [EO] 14168”
 - **What does it mean to use federal funds to promote gender ideology?**

Agency Guidance

Feb. 14, 2025 ED Dear Colleague Letter: More than Admissions

- Sets forth OCR statement of the law governing admissions post-*Students for Fair Admissions*
- “Nebulous concepts like racial balancing, diversity, social justice and equity” are not compelling interests which can satisfy strict scrutiny, regardless of tailoring
- Ruling itself limited to admissions; interpretation in Dear Colleague Letter more significant

Feb. 14, 2025 ED Dear Colleague Letter: More than Admissions (cont.)

- Federal law prohibits institutions from using race in decisions “pertaining to admissions, hiring, promotion, compensation, financial aid, scholarships, prizes, administrative support, discipline, housing, graduation ceremonies, **and all other aspects of student, academic, and campus life**”
- An educational institution may not “treat[] a person of one race differently than it treats another person because of that person’s race,” “separate or segregate students based on race,” or “distribute benefits or burdens based on race”

March 1, 2025 Q&A: Reinforcing Broader Scope

- “[I]ntended to anticipate and answer questions that may be raised in response to the [Feb. 14, 2025 DCL]”
- Reinforces interpretation of SFFA that
 - “race cannot be a “stereotype or negative” and
 - “schools may not grant preferential benefits to members of certain races for the purpose of achieving a student-body composition that mirrors the racial makeup of the country, remedying general societal discrimination, or otherwise rectifying societal injustice”
- Clarifies that this is not limited to admissions

March 19, 2025 EEOC Guidance

- “What You Should Know About DEI-Related Discrimination at Work”
- DEI practices may be unlawful if they involve employment action motivated – in whole or part – by race, sex, or other protected class
 - Using quotas or “balancing” a workforce
 - Different treatment in hiring, promotion, compensation, fringes, training, mentoring, fellowships, and/or interviews – including placement or exclusion from a ‘slate’ or ‘pool’
 - Limiting membership in groups based on protected class (e.g., affinity groups)
 - Separating employees into groups based on protected class, even if receiving the same programming or resources
 - Offering training which subjects employees to a hostile environment
- Encourages individuals “experience[ing] DEI-related discrimination” to file charges

May 19, 2025 DOJ Memorandum: False Claims Act Enforcement

- Announced “Civil Rights Fraud Initiative,” designed to address those who “defraud the United States by taking its money while knowingly violating civil rights law”
- Cites certain behavior that the DOJ believes violates civil rights laws and the FCA:
 - Encouraging antisemitism and refusing to protect Jewish students;
 - Allowing “men” into “women’s” restrooms; and
 - Requiring “women” to compete with “men” in athletic competitions
- Initiative solicits whistleblowers to bring private lawsuits to enforce the FCA

July 29, 2025 DOJ Guidance: Attorney General “Best Practices”

- “Guidance for Recipients of Federal Financial Assistance Regarding Unlawful Discrimination”
- Targets “DEI” and other programs and practices DOJ views as discriminatory
- Identifies “Best Practices” as (purportedly) non-binding recommendations
 - “Focus on Skills and Qualifications: Base selection decisions on specific, measurable skills and qualifications directly related to job performance or program participation”
 - “Prohibit Demographic-Driven Criteria: Discontinue any program or policy designed to achieve discriminatory outcomes, even those using facially neutral means”
 - “Document Legitimate Rationales: If using criteria . . . that might correlate with protected characteristics, document clear, legitimate rationales unrelated to [protected characteristics]”
 - “Scrutinize Neutral Criteria for Proxy Effects: Before implementing facially neutral criteria, rigorously evaluate and document whether they are proxies for race, sex, or other protected characteristics”

Major Themes

Major Theme: Conflict with Existing Laws and Regulations

Conflict with State Law

- Most federal discrimination laws include provisions that they do not preempt state laws that provide equal or greater protection
- Administration is taking the position that state laws cannot:
 - Designate certain protected classes (e.g., gender identity)
 - Permit certain conduct it believes unlawful based on its own interpretation of the law (e.g., athletics participation; use of restrooms based upon gender identity)

Disparate Impact

- Still a recognized theory of liability; agencies may no longer bring those claims, but private plaintiffs can, and so can state and local agencies
 - Unless the Supreme Court changes its longstanding position and finds that such theories violate the Constitution under an expansive interpretation of *SFFA v. Harvard*

Major Theme: Proxies

- “[O]stensibly neutral criteria that function as substitutes for explicit consideration of race, sex, or other protected characteristics”
 - “selected because” they correlate with race;
 - “implemented with the intent” to advantage or disadvantage individuals based on race
- Requiring applicants to demonstrate “cultural competence,” “lived experience,” or “cross-cultural skills” in ways that effectively evaluate race
- Targeting “specific geographic areas, institutions, or organizations chosen primarily because of their racial or ethnic composition”
- Requiring applicants to describe “obstacles overcome” or submit a “diversity statement” in a manner that advantages experiences “intrinsically tied to protected characteristics...”

Major Theme: Third-Party Partners

- DCL: “[Institutions must] cease all reliance on third-party contractors, clearinghouses, or aggregators being used...to circumvent prohibited uses of race”
- FAQs: “[A] school’s responsibility not to discriminate...applies to conduct of everyone over whom the school exercises some control, whether through a contract or other arrangement...A school may not engage in racial preferences by laundering those preferences through third parties”
- In action: OCR investigation into 45 universities partnering with The PhD Project
 - For many, the “partnership” was limited to attending an annual conference
 - Per OCR, this violated Title VI because participation was “limited to individuals who identify as Black/African American, Latinx/Hispanic American, or Native American/Canadian Indigenous”
 - Explanations that White and Asian individuals attended the conference were unavailing
 - Consider: implications for hiring/recruiting

Major Theme: Gender Identity

- EEOC rescinds guidance requiring employees be permitted to use the bathroom which accords with gender identity (Jan. 28, 2025)
- EEOC announces prioritization of cases involving ciswomen alleging deprivation of privacy at work; cases alleging discrimination based on transgender identity given lowest priority (despite vitality of *Bostock*)
- “Federally funded institutions that allow males, including those self-identifying as ‘women,’ to access single-sex spaces designed for females—such as bathrooms, showers, locker rooms, or dormitories—undermine the privacy, safety, and equal opportunity of women and girls”

Action Items for Your Institution

Ongoing Evaluation

1. What does law and regulation say? Controlling case law?
2. What do Executive Orders and subregulatory guidance say?
3. What affirmative obligations do we have? (e.g., certification)
4. Where we have choices, what are our priorities?
5. Are we prepared for the unpredictable?

Know What You Have

- If you haven't already, review your existing DEI-related apparatus
- Check websites, policies, written practices
- Then, probe further into programs and activities
- Focus on highest-risk activities (hiring, admissions) and common pitfalls (diversity as a “tie-breaker,” group-specific programs)
- Classify red, yellow, green – and be prepared to:
 - adjust/re-classify, based on factors on previous slide
 - activate partners for ongoing assessment

Activating Partners to Make Critical Choices

Compact for Academic Excellence in Higher Education

1. Equality in Admissions
2. Marketplace of Ideas & Civil Discourse
3. Nondiscrimination in Faculty and Administrative Hiring
4. Institutional Neutrality
5. Student Learning
6. Student Equality
7. Financial Responsibility
8. Foreign Entanglements

- Implicates admissions, human resources, financial aid, board, provost/deans, fundraising

Have a Question?



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