Shaping the Future:

How the Supreme Court Ruling on Affirmative Action in Education Impacts Workplace Diversity, Equity and Inclusion

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Agenda

- Introduction & Setting the Stage: The Allegations
- The Holding and Verdict
- Implications on Employment DEI Programs
- What to Anticipate and What May Be Coming
- Best Practices for Implementing DEI Initiatives and Programs

Setting the Stage: The Allegations

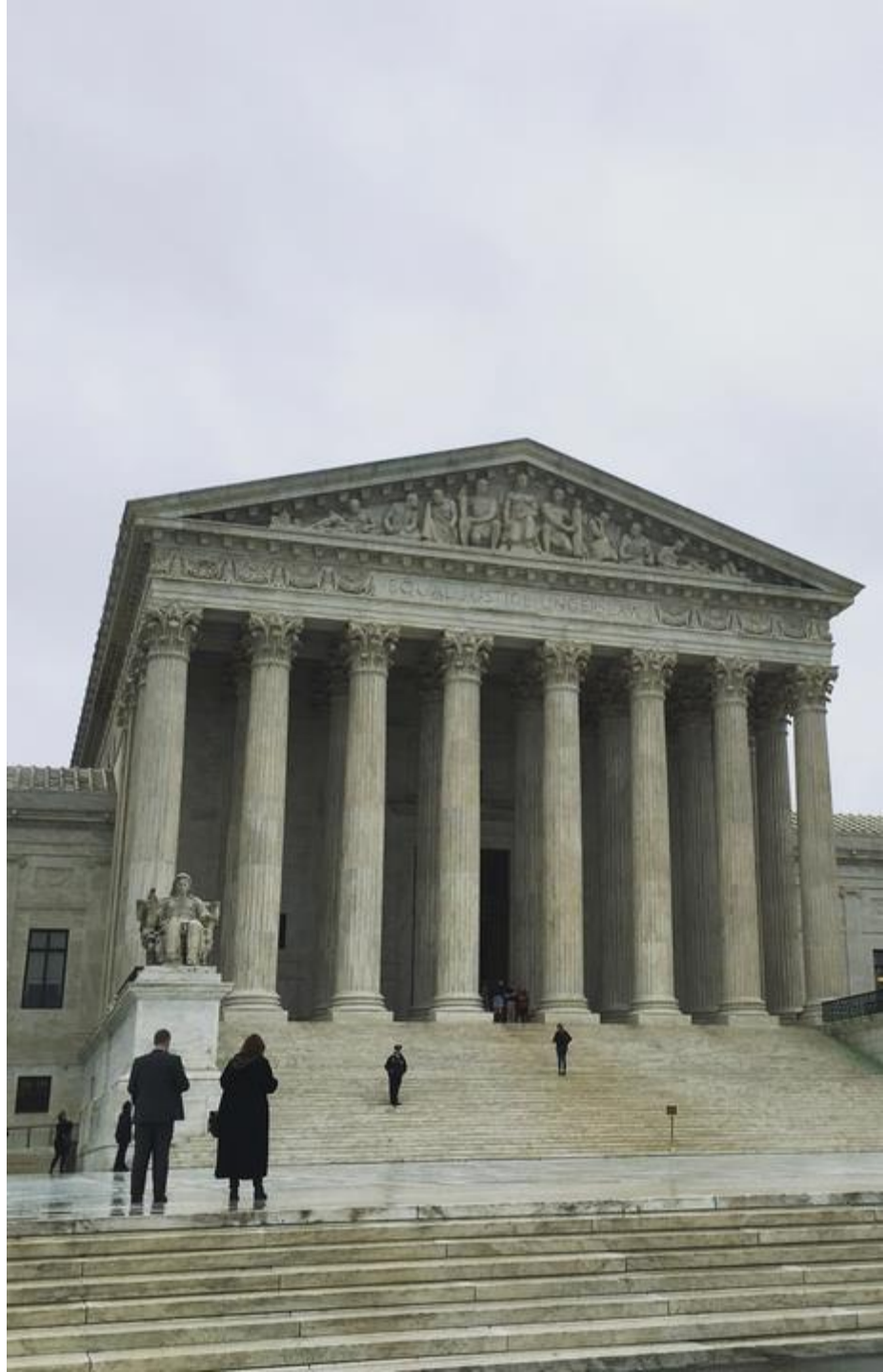
- In 2014, Students for Fair Admissions (SFFA) filed separate lawsuits against Harvard College and the University of North Carolina.
- SFFA alleged that the school's race-based admissions programs violated, respectively, Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.
  - SFFA alleged Harvard's admissions policy intentionally discriminated against Asian-American applicants
  - SFFA alleged that UNC's admissions process unfairly used race to prefer underrepresented minority applicants to the detriment of White/Caucasian and Asian American applicants
- Oral arguments were in October 2022; decision issued June 29, 2023

The Holding

- Using race in admissions violates the Equal Protection Clause
- Using race in admissions does not pass strict scrutiny standard
- Programs are not "'sufficiently measurable to permit judicial review' under the rubric of strict scrutiny"
- No compelling reason and not narrowly tailored because results cannot be measured
  - "'[c]lassifying and assigning' students based on their race 'requires more than . . . an amorphous end to justify it.'"

Other Considerations

- Universities may consider an applicant's discussion of how race affected an applicant's life, focused on the "student's unique ability to contribute to the university" and must be treated based on his/her "experiences as an individual – not on the basis of race."
- Court reiterated that race-based admissions programs eventually had to end. Harvard and UNC conceded their programs had no end point.



Standing:

- Court discussed organizational standing

- Member organization standing established by an organization with members who support its mission and whom the organization represents in good faith

Justice Gorsuch's Concurring Opinion: The Law Next Door

- Justice Gorsuch notes that Title VI prohibits a recipient of federal funds from "intentionally treating one person worse than another similarly situated person because of his race, color or national origin."
- And he wrote: ***"If this exposition sounds familiar, it should. Just next door, in Title VII, Congress made it 'unlawful . . . for an employer . . to discriminate against any individual . .. because of such individual's race, color, religion, sex or national origin.'"***
- This language is relied on in challenges to employer DEI programs.

So... What Does This Mean for Employers?

Implications on Employment and DEI Programs

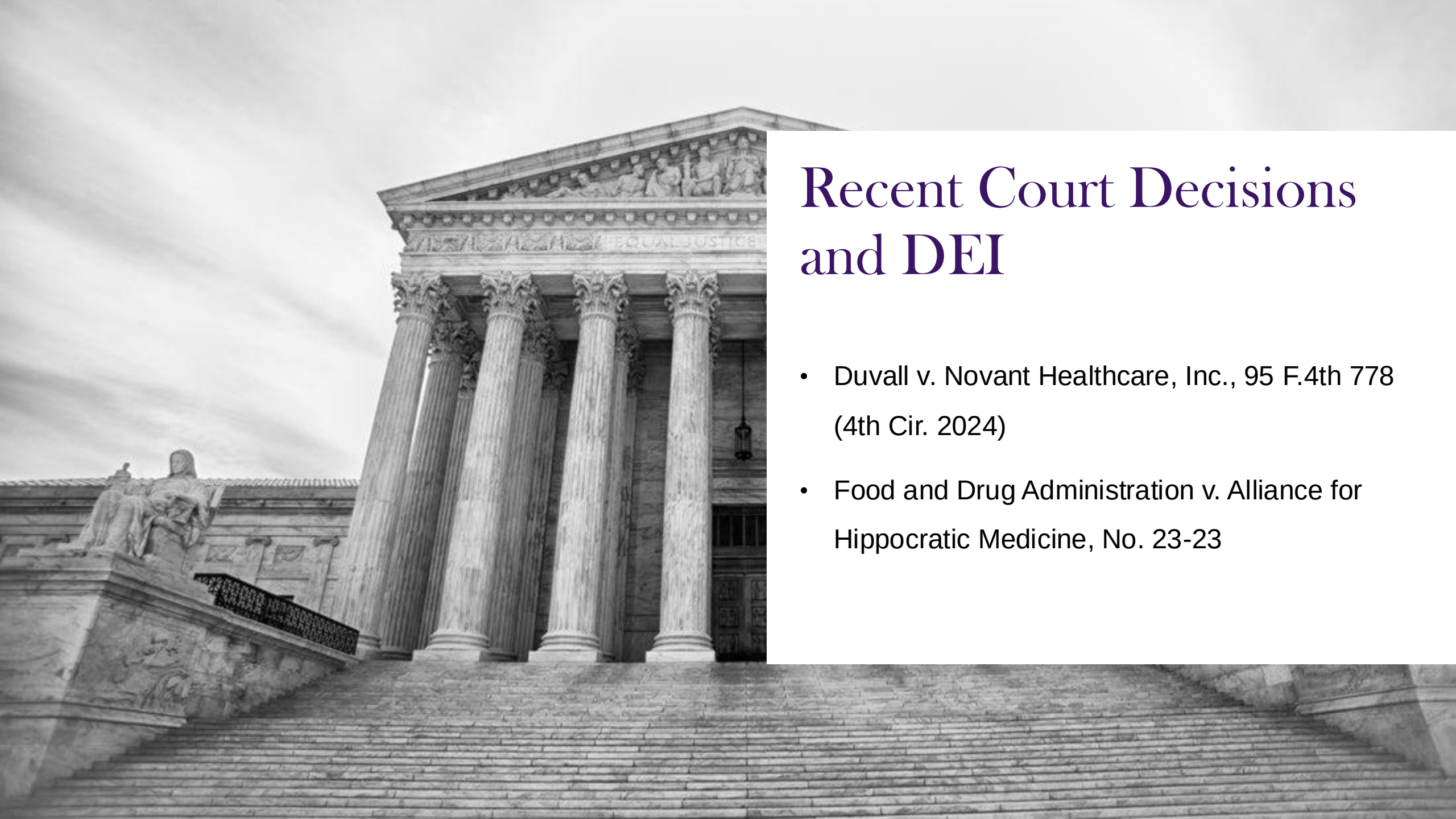
- Case does NOT apply to Title VII, Section 1981, or EO 11246

- "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."
  - *EEOC Chair Charlotte Burrows, June 2023*

- Title VII, Section 1981, and EO 11246 remain unchanged, but employers should anticipate more challenges to DEI measures and initiatives

Common DEI Issues Under Attack and Mitigation Strategies

- Aspirational Goals
- Internship & fellowship programs
- Scholarship programs
- Leadership or skill development programs
- Recruitment, retention, and promotion programs
- Target 3rd party programs-diverse supplier initiatives
- Compensation tied to D&I results
- Tracking/dashboards and DEI demographic data
- ERGs/Affinity Groups/BRGs
- Board Diversity
- Public Data Disclosure
- Retention Programs
- Supplier Diversity



Recent Court Decisions and DEI

- Duvall v. Novant Healthcare, Inc., 95 F.4th 778 (4th Cir. 2024)
- Food and Drug Administration v. Alliance for Hippocratic Medicine, No. 23-23

Does Section 1981 apply to grants, scholarships, fellowship programs?

- Section 1981 prohibits race discrimination in contracting
- 11th Circuit's Decision in *Am. Alliance for Equal Rights v. Fearless Fund Mgmt., LLC*, 103 F.4th 765 (11th Cir. 2024).
  - AAER's challenge to a grant program available only to Black women-owned businesses after the district court found the program lawful
  - 11th Circuit Court found that the Fearless Fund's contest likely violated Section 1981
  - Dissenting opinion from Judge Rosenbaum – Standing
  - Circuit split – 2nd Circuit
- Progressive Insurance – defending AFL's challenge to a grant program that helps Black-owned businesses buy business vehicles

LAW FIRM INTERNSHIP/HARLEY DAVIDSON SOCIAL STUFF SLIDE

- PLACE HOLDER
- JENNA / PJT
- American Bar Association denounces 'attack' on law firm diversity initiatives | Reuters
- Harley-Davidson is dropping diversity initiatives after right-wing anti-DEI campaign | CNN Business
- Ex-Teacher Asks 7th Circ. To Revive Bias Fight Over Pronouns - Law360

Litigation Challenging Practices that in the Implementation Benefit White Applicants

- On July 3, 2023, the Chica Project, the African Community Economic Development of New England, and the Greater Boston Latino Network filed a federal civil rights complaint against Harvard College, alleging that its practice of giving preferential treatment in the admissions process to applicants with familial ties to wealthy donors and alumni results in systemic preferential treatment of White applicants in violation of Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d).
- The Complaint further alleges that qualified applicants of color are harmed as a result, as admissions slots are given instead to the overwhelmingly white, wealthy applicants who benefit from Harvard's legacy and donor preferences.

Other Trends Impacting DEI: What is an Adverse Employment Action Under Title VII?

- *Muldrow v. City of St. Louis*
- *Hamilton v. Dallas County*
- *Justice James C. Ho's Concurrence in Hamilton*

Muldrow v. City of St. Louis

- A case involving a police sergeant's transfer from one division to another, allegedly due to her gender. The sergeant claimed that her transfer led to altered scheduling and responsibilities, amounting to discrimination in her "terms, conditions, or privileges of employment." The district court granted summary judgment in the City's favor, and the Eighth Circuit Court of Appeals affirmed, reasoning that the sergeant had not shown any "tangible change in working conditions that produce[d] a material employment disadvantage" because her rank, pay, and responsibilities remained the same.
- The Supreme Court answered the question: **"Does Title VII prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage?"**

Muldrow v. City of St. Louis (cont.)

- **Holding - Employee challenging a job transfer must show that the transfer caused some harm with respect to an identifiable term or condition of employment, but the harm need not be significant**
- **Implication of broadening the definition of an "adverse employment action:"**
  - Enable traditionally underrepresented employees to more easily bring meritorious employment-discrimination claims.
  - It could allow opponents of DEI to more easily bring "reverse-discrimination" claims against employers, without ever alleging that DEI initiatives have caused any employee to suffer a materially significant disadvantage.

Hamilton v. Dallas County

- In April 2019, the Dallas County Sheriff's Department transitioned from a seniority-based scheduling policy to a gender-based scheduling policy pursuant to which only male detention offers were given full weekends off from work. In contrast, the female detention officers were limited to either two weekdays off or one weekday and one weekend day off. A sergeant with the sheriff's department admitted that the new scheduling policy was based on gender and explained it would be unsafe for all the men to be off during the week and that it was safer for the men to be off on the weekends.
- Nine female detention officers filed suit against Dallas County for violations of Title VII and the Texas Commission on Human Rights Act claiming the county "engaged in the practice of discrimination with respect to the terms and conditions of Plaintiffs' employment."

Hamilton v. Dallas County (cont.)

- On August 18, 2023, the full Fifth Circuit Court of Appeals significantly broadened the types of adverse employment actions that could give rise to an actionable claim. Prior to this decision, Plaintiff had to show an "ultimate employment decision" to state a cognizable discrimination claim.
- The Fifth Circuit reasoned that to limit disparate treatment claims to those involving ultimate employment decisions ignored the "terms, conditions, or privileges of employment" language of the anti-discrimination provision.
- The Fifth Circuit held that "[t]he days and hours one works are quintessential 'terms or conditions' of one's employment."

Hamilton v. Dallas County (cont.)

Judge James C. Ho's Concurring Opinion:

- "Today's decision is just the latest in a series of recent rulings designed to restore the full meaning of the Civil Rights Act for the benefit of all Americans. *Groff* restores Title VII for people of faith. *Students for Fair Admissions* restores Title VI for Asian American students. And our decision today will help restore federal civil rights protections for anyone harmed by divisive workplace policies that allocate professional opportunities to employees based on their sex or skin color, under the guise of furthering diversity, equity, and inclusion."
- "As the Civil Rights Division of the Justice Department noted during en banc oral argument in this case, if 'a law firm is having a lunch to do CLEs and you have a policy that says we're only going to invite women but not men to this CLE lunch, that's of course actionable, and that's of course a term, condition, or privilege of employment' under Title VII. Audio of Oral Arg. 23:00–23:29."

What to Anticipate?

- Title VII, EO 11246 remain unchanged, but employers should anticipate more challenges to DEI measures and initiatives
- Under Court's ruling, "member" organizations may argue standing to sue private employers even if members were not employed
- More challenges by organizations saying DEI measures are evidence of discrimination against White employees, males, CIS-gender, etc.

What to Anticipate?

- Expect challenges by organizations saying DEI measures don't go far enough or that absent DEI initiatives employers maintain recruitment, hiring and promotion practices that benefit white applicants.
- Expect Litigation under Section 1981
- Be mindful of legislative mandates
  - Stop WOKE Act in Florida
  - Florida Board of Education adopted rule barring public colleges from using state and federal funds for diversity, equity and inclusion programs, activities and policies.
  - Legislation introduced in more than 30 states to either restrict or regulate DEI programs.
  - Governor Abbott of Texas signed a law to require all state-funded colleges and universities to close their DEI offices
  - Governor Cox of Utah signed a law banning all government and universities from having offices dedicated to promoting diversity

What Do We Do About DEI?

- Review your DEI Initiatives and Assess Risk
  - What are your values and risk profiles?
  - Where do you want to be?
- Expand Outreach
- Conduct diagnostics to evaluate policies, practices, communications
- Review barriers to entry and advancement in job descriptions, policies, benefits, practices

What Do We Do About DEI?

- Focus on Inclusion and Wellness
- Train on Bias and implement structural changes to interrupt it
- Become active in situation management… so it does not require crisis management
- Ensure all involved in hiring, promotion understand that any employment decisions are based on legitimate, nondiscriminatory reasons
- Ensure process for handling complaints, concerns are in place.
- Listen to Employees

What Do We NOT Do About DEI?

- No hasty changes!
- Do not let HR, DEI offices, Managers think that a DEI measure means they are to make decisions based on protected characteristics
- Ensure that race is not: “in the mix,” a “tipping point,” a “plus factor” or used as a preference in meeting affirmative action goals when making employment decisions
- ***No quotas – that’s not new***

Takeaways

- DEI is not dead
- EO 11246 “Affirmative Action” is not dead either
- Focus on Inclusion and Wellness
- Understand organizational risk
- Smart training on the legal guardrails, communication and implementation

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Thank you.