

DEI Push and Pull

Practical Strategies to Navigate Today's DEI Landscape

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Agenda

- Legal Landscape
- Strategies and Relative Risk
- Takeaways

A Recap on the Law:

Students for Fair Admissions

- Doesn't apply to private corporations
- “Right next door” to Title VI is Title VII
- Activist groups trying to push this reasoning into employment and supplier diversity
- Don't forget about organizational standing

Muldrow

- Lowered standard for adverse action
- Does not need to be tangible, financial
- Opened up litigation based on DEI programs without individualized harm
- Could theoretically also open up litigation from the other side in the case of divergence with labor data
- Other note worth cases: *Ames v. Ohio Dept of Youth Services*

Legal Authorities at Issue

Title VII

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate in hiring, firing, compensation, terms, conditions, or privileges of employment on the basis of race, color, religion, sex, or national origin.

Section 1981

Section 1981 of the Civil Rights Act of 1866 prohibits discrimination on the basis of race, color, and ethnicity when making and enforcing contracts. Section 1981 specifically grants all individuals within the US jurisdiction the same rights and benefits as "enjoyed by white citizens" regarding contractual relationships (42 U.S.C. § 1981(a)).

Executive Order 11246

The Executive Order prohibits federal contractors and federally-assisted construction contractors and subcontractors, who do over \$10,000 in Government business in one year from discriminating in employment decisions on the basis of race, color, religion, sex, sexual orientation, gender identity or national origin. The EO also requires Government contractors to take affirmative action to ensure that equal opportunity is provided in all aspects of their employment.

DEI Is Not Dead:

(Workplace DEI Breaks Down Barriers With Flexible Benchmarks: Bloomberg Law, June 2024)

Interview of EEOC Commissioner Kalpana Kotagal supporting lawful DEI efforts:

- “The university affirmative action programs at issue in SFFA involved using protected characteristics like race as explicit factors in individual higher education admissions decisions. Race or gender can sometimes be used in certain employment decisions, but only where they are part of a valid affirmative action plan. Lawful workplace DEIA practices are different. **These are forward-looking, proactive ways to remove barriers, reduce risk of discrimination, and create open and inclusive workplaces. They don’t involve using race or gender to make individual hiring or other employment decisions.**”
- “I’ve found that most employers understand these distinctions **and remain committed to dismantling barriers to equal opportunity**, even as they construct, review, and refine their own programs and practices.”

DEI Is Not Dead:

(Workplace DEI Breaks Down Barriers With Flexible Benchmarks: Bloomberg Law, June 2024)

- **“Any DEIA effort should begin with examining key decision points for possible bias and barriers. This includes evaluating recruiting, hiring and compensation practices, work assignments and evaluation procedures, employee retention, promotion to leadership, and termination.”**
- **“Data collection is an important part of analysis. For example, demographic data can provide useful insights about where an employer’s workforce might differ from the eligible labor pool, which can help identify existing practices that create barriers or opportunities for promising practices.”**
- **“This information can also help employers set aspirational goals—not fixed quotas, but flexible benchmarks that are separate from any specific employment decision.”**

Litigation: 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



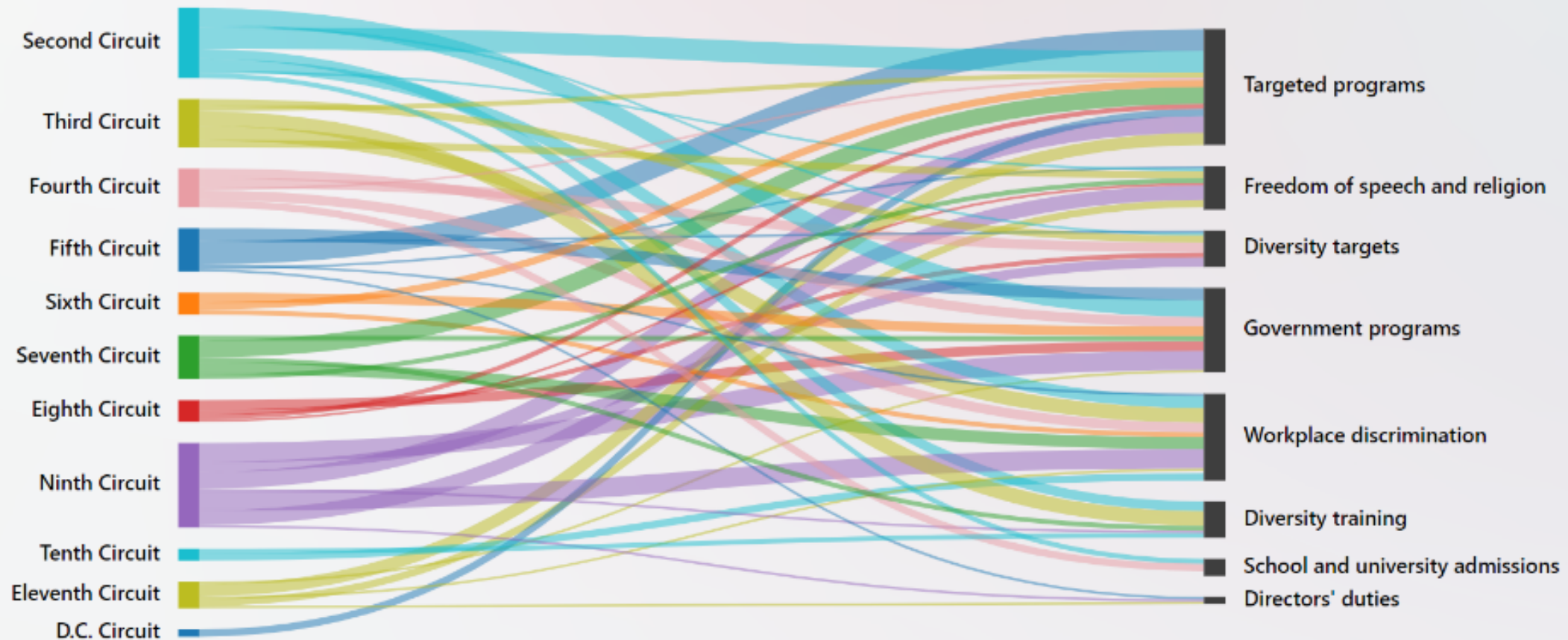
Other Litigation Trends

- LGBTQIA+ issues
- Increased Discrimination and Reverse Discrimination Litigation
- Use of *Muldrow* to bring anti-DEI litigation based on programs alone
- Standing: <https://www.jacksonlewis.com/insights/what-us-supreme-court-decision-standing-tells-us-about-challenges-corporate-dei-initiatives>
- Supplier Diversity: <https://www.jacksonlewis.com/insights/ensure-your-supplier-diversity-program-meets-legal-requirements-and-thrives>

What types of cases are occurring?

[Advancing DEI Initiative \(https://advancingdei.meltzercenter.org/\)](https://advancingdei.meltzercenter.org/)

This diagram captures the flow of anti-DEI cases arising in each geographic region of the United States, organized by circuit. Each case is categorized based on the DEI program challenged or the issues raised in the case. Since there may be multiple issues raised, some cases are categorized under multiple topics.



Push and Pull Beyond Litigation

- Organizations are pushing their agendas:
 - On 9/20/24, 19 civil rights organizations published an open letter encouraging Fortune 1000 companies to maintain their commitments to DEI initiatives.
 - Students for Fair Admissions sent open letters to Yale, Princeton and Duke, likely the precursor to litigation.
- Much of this is in the ESG space. Look for pushback from:
 - Shareholders and investors focusing on:
 - Labor unions
- Expect a continued or increased focus on ESG despite political push-back and demand for greater transparency on all ESG metrics.
 - Demand not just from the US, but abroad too, key for multinational companies.

Push and Pull Beyond Litigation

But see:

Anti DEI/DEI training legislation

- Florida Stop WOKE Act
- Alabama SB 129 (Eff. Oct 1)
- Dismantle DEI Act (bill)
- Trump Administration

Anti ESG legislation

- Roll back ESG To Increase Retirement Earnings (RETIRE) Act, H.R. 5339
- Prioritizing Economic Growth Over Woke Policies Act, J.R. 4790

Anti LGBTQ legislation

- Idaho Code

The election may change a lot!

Stanley Black & Decker Confronts Boycott Over DEI Initiatives

Right-wing nonprofit Consumers' Research targets tool manufacturer for its pro-LGBTQ workplace policies and embrace of DEI initiatives.

Jul 22 - Written by Erik Kasperczyk

Merit, Excellence and Intelligence: an Anti-DEI Approach Catches On

Tractor Supply Co. eliminates DEI roles and goals following conservative criticism
The home improvement and agriculture chain released a statement Thursday addressing the criticism and announcing the change.

BUSINESS

As DEI gets more divisive, companies are ditching their teams

Zoom and Snap are among companies that have cut roles in recent weeks

SHRM drops 'equity' from diversity and inclusion strategy

Bloomberg News | July 16, 2024

Major HR Trade Group Drops The 'E' For Equity From DEI— Prompting Online Firestorm
In this week's Future of Work newsletter, Forbes speaks with SHRM's CEO about the online firestorm over its diversity and inclusion rebrand—plus more of the latest policy, AI and workplace headlines.

BUSINESS

2024 might be do-or-die for corporate diversity efforts. Here's why.

As lawsuits rise and opponents like Elon Musk declare that "DEI must die," companies are pulling back from some initiatives

MONEYWATCH
John Deere & Co. backs off diversity policies, following Tractor Supply
By Kate Gibson
Cited by Alissa Picchi
July 18, 2024 / 1:57 PM EDT / CBS News

DEI efforts may be under attack, but companies aren't retreating from commitments
By Jessica Guynn
USA TODAY
Published 9:01 a.m. ET July 17, 2024 | Updated 8:22 p.m. ET July 17, 2024

Robby Starbuck: the activist pushing US companies to ditch their DEI vows

What does this mean for managing risk?

- Risk is not a hypothetical concept
 - Lawsuits are filed regularly, on individual and organization basis
- Litigation means cost and distraction
 - Can take years
 - Can cost in the 6 or 7 figures
 - Negative press can affect recruitment and retention
 - The reality is resources are limited – where do you want to spend them?
- Negative PR and litigation together can undermine DEI efforts, affect stock price, reduce trust among customers
- *Every company we work with* is grappling with this.

A Shift In How We Talk About It

- Shifting terminology
 - SHRM shift from IE&D to I&D – but is it just semantic?
 - Also reaffirmation of commitments – JP Morgan Chase
 - Compare – elimination of DEI at Tractor Supply, Harley Davidson, John Deere
 - Compare – elimination of high-risk activities only at Ford
- It's not just SHRM
- Many mixed reactions
- What is the real impact
- Are we moving towards our goals?



Goals For Everyone

Fostering a Culture of Inclusion

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What Can We Do: Low Risk Practices

1. Expand outreach
2. Conduct diagnostics to evaluate policies, practices, programs
3. Review barriers to entry and advancement in job descriptions, policies, practices
4. Focus on inclusion and wellness
5. Listen to employees and address concerns
6. Train on bias and implement structural changes to interrupt it
7. Become active in situation management . . . So it does not require crisis management

Get the Easy (Easier?) Stuff Right

1. Ensure all involved in hiring and promotion decisions understand that any employment decisions are based on legitimate, nondiscriminatory reasons
2. Ensure process for handling complaints/concerns are in place
3. Train the various constituents on what they need to know
4. Survey employees on inclusion
5. Analyze recruitment, hiring, retention and promotion practices to eliminate barriers or bias
6. Focus on inclusion and wellness
7. Train on legal guardrails and inclusion
8. Communicate clearly verbally and in what you publish
9. Listen to your employees!

Risk Assessment

High Risk Employment Decisions to Avoid

1. Race/gender conscious employment decisions
2. Quotas, set asides, preferences, plus-factors
3. Exclusive practices
4. Aggressive targets
5. Short timelines to accomplish goals

This does not mean DEI is Dead.

This does mean you have to be honest with yourself:

- What does DEI mean to your organization?
- How does DEI make your organization better?

This also means legal compliance must be a greater part of DEI discussions.

Let's discuss!

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Thank You.

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