



DEI & Affirmative Action - A Challenge with Consequences

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1



AGENDA

- **Recent Executive Orders and What They Mean for Private Companies**
- **Where We Find Ourselves Now**
- **How We Got Here**
- **Why Do We Need DEI Initiatives**
- **What Do We Do as Counsel? A Moderated Discussion**

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2

2

Is DEI Dead?

VOTE:

Strongly Agree ---- Strongly Disagree

3

Recent Executive Orders and What They Mean For Private Companies

DEFENDING WOMEN FROM GENDER IDEOLOGY EXTREMISM AND RESTORING BIOLOGICAL TRUTH TO THE FEDERAL GOVERNMENT

EXECUTIVE ORDER
January 20, 2025

INITIAL RESCISSIONS OF HARMFUL EXECUTIVE ORDERS AND ACTIONS

EXECUTIVE ORDER
January 20, 2025

HIRING FREEZE

January 20, 2025

ENDING ILLEGAL DISCRIMINATION AND RESTORING MERIT-BASED OPPORTUNITY

January 21, 2025

4



Where We Find Ourselves Now

Forbes

Target And Lululemon Hit With DEI Lawsuits From Opposing Sides Of The Controversy



Anti-DEI Proposal Rejected by 98% of Costco Investors

6 September, 2024

These large companies did a good thing by toning down their stupid DEI initiatives.

Uber and Citi Cut 'Anti-Racist' From Corporate Vocabulary Following DEI Backlash



Companies are running away from DEI. One of America's biggest beauty brands is standing firm


Ford becomes the latest company to walk back DE&I commitments

Misinformation is making companies afraid to continue with their initiatives, according to one expert.

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5

5



Where We Find Ourselves Now – Some Statistics

- “Republican lawmakers in more than **30 states** have introduced or passed more than **100 bills** to either restrict or regulate diversity, equity and inclusion initiatives in the current legislative sessions.”
- “Since the affirmative action ruling in June of 2023, the Meltzer Center has identified **68 new lawsuits** that target several types of policies of DEI.”
- “**16% of workers** say focusing on increasing diversity, equity and inclusion at work is a bad thing; **14% of workers** say that their company pays too much attention to increasing diversity, equity and inclusion.”
- “According to Boston Consulting Group, research of more than **27,000 employees in 16 countries** shows that DEI programs **increase** profits and inspire employee commitment.”

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6

6



How We Got Here (Prior to January 20, 2025)

- *Harvard Admissions* – U.S. Supreme Court (June 29, 2023)
- *Muldrow* – U.S. Supreme Court (April 17, 2024)
- *Alliance for Fair Board Recruitment* – 5th Circuit Court of Appeals (Dec. 11, 2024)
- Others:
 - Shareholder Derivative Litigation
 - Challenges to State / Federal Legislation, Programs, and Regulations
 - Project 2025
 - Stop WOKE Act (FL)
 - Dismantle DEI (U.S. Senate)
 - Forced Trainings
 - Challenges to Affirmative Action / Fellowship Programs

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7

7



Why Do We Need DEI Initiatives?

- The Law (still) prohibits discrimination.
- Businesses need workers (hiring, promotion, retention, succession).
 - U.S. Census Bureau: as of 2020, white/non-Hispanic was only 57.8% of the national population.
 - The Brookings Institution predicts that the white/non-Hispanic demographic will be the minority national population by 2045.
- Profitability / Productivity
- Employee Relations / Company Culture
- Customer Demands and Expectations
- Shareholder / Stakeholder Demands

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8

8



Scenario 1 – DEI Media Responses

Sick of reading about prominent Fortune 500 companies scaling back or eliminating their DEI programs, Fed Up Inc. (itself a publicly traded Fortune 500 company) decides to take a stand. Fed Up's Marketing team launches a social media campaign highlighting Fed Up's unwavering commitment to DEI and challenging other companies to do the same. Fed Up's social media campaign attracts the attention of investor-influencer Sobby Rawrbuck, who stirs up a frenzy against Fed Up on XY, a popular social media platform. While proud that their pro-diversity message has caused a stir, Fed Up's C-Suite worries Fed Up's social media campaign may have gone too far and is now attracting the wrong attention.

The C-Suite asks in-house counsel to answer these questions:

- (1) How should Fed Up respond to Rawrbuck's social media backlash?**
- (2) What advice can the legal department offer to mitigate these risks?**

9



Scenario 1: DEI Media Response

How should Fed Up respond to this social media backlash?

- A. Immediately post a letter of apology promising that it will re-evaluate its commitment to diversity and, potentially, retire current DEI goals (but not actually intending to do so).
- B. Launch a counteroffensive campaign blasting Rawrbuck for his abysmal record of stifling diversity efforts.
- C. Do nothing. Ignore social media and continue business as usual.
- D. Revise the social media campaign to emphasize the importance of serving a diverse customer base with a diverse group of employees to enhance company culture and the well-being of those who come into contact with Fed Up (whether as an employee, customer, vendor, or otherwise).
- E. Hire a media relations firm and let them figure it out.

10

Scenario 1: DEI Media Response



What advice can Fed Up’s legal department offer to mitigate legal risk resulting from its social media campaign?

- A. Enlist outside legal counsel to draft an opinion memorandum in support of Fed Up’s social media campaign and broader goals of inclusivity.
- B. It’s too late. Fed Up is already on Rawrbuck’s radar.
- C. Re-incorporate in a state with favorable decisions relating to DEI efforts
- D. Ensure that Fed Up’s definition of “diversity” does not overemphasize one specific race, nationality, gender, religion or other protected characteristic.
- E. Rebrand Fed Up’s existing DEI department as the “Department of Equity and Inclusion.”

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11

11

Scenario 1: Best Practices



- ✓ Understand the risks and challenges of your business and identify weaknesses early on.
- ✓ Understand your mission and be ready to defend it.
- ✓ Understand your company’s risk tolerance, target customer, and corporate culture.
- ✓ Create a communication plan in case your company is unwillingly dragged into the media spotlight.

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12

12



Scenario 2 – Targeted Recruiting

SameOld/Same Old, Inc. (“SO”) has decided that its traditional means of recruiting have failed to produce a workforce that represents the community. The reasons for these failures are complex, and are related to historical discrimination, the difficulty for females (primarily) who have taken on most of child-bearing and child-rearing roles, and the tendency of SO executives and managers to hire through their fraternity networks and supper clubs, country club associations and, in some cases, limiting on-campus recruiting to certain institutions to Ivy or Ivy-adjacent institutions.

The SO HR Team comes to you with these questions:

- (1) What can SO do (if anything) to widen its applicant pool and create a more inclusive workforce in a legally compliant manner?**
- (2) What are the legal limits on diversifying its recruiting efforts?**

13



Scenario 2: Targeted Recruiting

How (if at all) should SO do to widen its applicant pool and create a more inclusive workforce?

- A. Actually, nothing needs to be done – eventually as people retire and leave the company, new hires will reflect the community at large – it will happen naturally.
- B. Direct recruiters to locate only people who identify with underrepresented communities by presenting a demographic sheet that allows them to self-identify (but it will be purely voluntary and if someone doesn't want to provide it, they won't be ruled out as a candidate).
- C. Create a scholarship in SO's name at a local university called Community Scholars and market the scholarship to individuals who come from disadvantaged backgrounds.
- D. Post job notices at community colleges of your fellowship/scholarship (to prove that you are really, really trying to expand your hiring horizons).
- E. Instead of conducting interviews (which could discourage applicants with limited access to technology like videoconferencing), rely solely on GPA and technical assessments to select candidates.

14



Scenario 2: Best Practices

- ✓ Understand the difference between recruiting goals and a hiring quota.
- ✓ Understand the requirements for EEO-1 reporting and developing federal contractor affirmative action plans.
- ✓ Understand the impact of *Harvard Admissions* on diversity scholarships.
- ✓ Understand that recruiting is only “half the battle.”

15



Scenario 3 – DEI Training

Best Intentions, Inc. (“BI”) announced to its employees that, once and for all, it is going to tackle (and maybe eradicate?) racial animus in the workplace. BI explained that the best way to address this problem is through training for its employees regarding racial animus, unconscious bias, white privilege, and other concepts relating to the evolution of race relations in the United States today. BI also notified employees that these programs will be mandatory. All of the programs will include a review of BI’s policies relating to the reporting of racial harassment and BI’s approach to investigating those complaints.

Your General Counsel wants your advice on:

- (1) the contents of the training and**
- (2) how to respond to employees who say they object to being “forced” to participate and who say that the training makes them feel uncomfortable and “blamed” for systemic racism.**

16

Scenario 3: DEI Training



What Should Training Include?

- A. Training on implicit bias (subconscious judgments by humans about humans).
- B. Legal components of discrimination and harassment with tangible examples.
- C. Testing on company policies (reading the policies and then answering questions about them).
- D. Data showing how diversity in the workforce, in management and the boardroom improves company performance.
- E. Require everyone to read a book about the role of white privilege in systemic racism.

17

Scenario 3: DEI Training



How should BI change its training?

- A. Inform employees that BI will withhold paychecks unless and until employees certify that they attended the training.
- B. Inform employees that trainers will hand out attendance “incentives” to those employees who not only attend but also actively participate in the training because the training also will cover topics that BI is legally required to present to employees.
- C. Require a member of the C-Suite to attend each training session in order to emphasize the importance of the training to BI’s culture.
- D. Ignore the comments.
- E. Conduct an informal survey of similar companies to see how other companies are addressing employee pushback.

18

Scenario 3: Best Practices



- ✓ Review legal requirements.
- ✓ Balance mandatory training against raising sensitivity.
- ✓ Consider the best way to present information given the employee population.
- ✓ Conduct an internal and external review of any proposed training.
- ✓ Tie the reason for the training to Company goals, missions and overall performance.

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19

19



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20