EEOC Issues Guidance on Unlawful Workplace DEI Programs: Top Takeaways for Employers

A Practical Guidance® Article by Regina A. Petty and Sheila M. Abron, Fisher & Phillips LLP

Regina A. Petty
Fisher & Phillips LLP

Shiela M. Abron
Fisher & Phillips LLP

Employers just received some clarity on what type of workplace DEI programs may be risky under President Trump's recent executive orders relating to illegal diversity, equity, and inclusion practices. The Equal Employment Opportunity Commission (EEOC) issued guidance on Wednesday specifically on what constitutes "unlawful discrimination" related to DEI in the workplace. While the guidance notes the type of conduct that has long been prohibited by existing federal law, it also provides a roadmap for employers to ensure their programs don't run afoul of new directives. Here's what you need to know about the EEOC's March 19 DEI guidance and how it may impact your workplace.

How We Got Here

First, let's briefly discuss the recent actions from the new administration leading up to this development.

Spotlight on DEI initiatives. As you are likely aware, the Trump administration has taken aim at DEI initiatives within both the federal government and the private sector and took a series of dramatic steps related to DEI programs in the first weeks after assuming office. Here are a few key examples:

- Trump issued an executive order directing federal agencies to combat "illegal" corporate DEI initiatives.
- Trump installed Andrea Lucas—an avowed opponent of illegal DEI—as Acting Chair of the Equal Employment Opportunity Commission (EEOC) and ousted two Democratic Commissioners. These two moves set the stage for the agency to focus on DEI programs at private organizations.
- For federal contractors, Trump revoked an executive order that mandated affirmative action requirements for federal contractors and subcontractors through the Office of Federal Contract Compliance Programs (OFCCP) and promoted DEI programs.

Uncertainty for employers. N otably, the executive orders did not provide a clear definition of "illegal DEI." Trump's January 21 executive order defines prohibited conduct as:

- Illegal discrimination and preferences –and–
- Workforce balancing based on race, color, sex, sexual preference, religion, or national origin

This type of conduct has long been prohibited by existing federal law (discrimination and quotas have always been unlawful under Title VII of the Civil Rights Act and other statutes.)

Courts review Trump's DEI orders. Although a federal judge in Maryland temporarily blocked parts of Trump's DEI order in February, an appeals court just lifted the ban on March 14, giving the administration the green light to proceed with its direction while the lawsuit plays out. The appeals court said Trump's orders "do not purport to establish the illegality of

all efforts to advance diversity, equity or inclusion, and they should not be so understood." One judge noted, however, that he would "reserve judgment on how the administration enforces these executive orders. "We will continue to monitor this lawsuit, as well as other related actions, and provide updates as warranted, so make sure you are subscribed to the Fisher Phillips Insight System.

Key Points in New Guidance

The EEOC—along with the Department of Justice—released two new technical assistance documents on March 19 providing some clarity for employers grappling with DEI compliance issues. Here are the key takeaways you should note from the guidance:

- **Reminder on the scope of Title VII protections.** The guidance reminds employers that Title VII prohibits employment discrimination based on protected characteristics, including race, color, national origin, sex, and religion. The agency explained that the law protects against such discrimination "no matter which employees are harmed," and noted that Title VII's protections "apply equally to all racial, ethnic, and national origin groups, as well as both sexes."
- **No 'reverse' discrimination.** "The EEOC's position is that there is no such thing as 'reverse' discrimination," according to the guidance, which also emphasized that Title VII's protections do not only apply to individuals who are part of a "minority group." Rather, they apply to "majority groups" as well. Title VII's protections apply equally to all workers, and the EEOC does not require a higher showing of proof for so-called "reverse" discrimination claims. You should note that this issue is also before the Supreme Court this term. We predict that the outcome will align with EEOC guidance, with the Justices ruling that majority-group plaintiffs must meet the same pre-trial evidentiary burden applicable to minority-group plaintiffs—and nothing more—under Title VII. You can read more about the case here.
- **No "business necessity" exception for DEI programs.** Title VII allows for a bona fide occupational qualification (BFOQ) in very limited circumstances to excuse hiring or classifying an individual based on religion, sex, or national origin—but this exception excludes race and color. The EEOC's new guidance highlights that Title VII does not provide any "diversity interest" exception to these rules. "No general business interests in diversity and equity (including perceived operational benefits or customer/client preference) have ever been found by the Supreme Court or the EEOC to be sufficient to allow race-motivated employment actions."
- **Covered workers.** The EEOC added that Title VII protects employees, potential and actual applicants, interns, and training program participants.

Examples of Potentially Unlawful DEI Practices

The agency said DEI policies, programs, or practices may be unlawful under Title VII if they involve "an employment action motivated – in whole or in part—by an employee's race, sex, or another protected characteristic." Unlawful DEI-related discrimination might include:

- Quotas and other "balancing" practices based on race, sex, or other protected characteristics.
- Disparate treatment, which means taking an employment action that is motivated (in whole or in part) by a protected characteristic. Examples of employment actions include firing, promoting, demoting, and compensating employees; providing access to fringe benefits; excluding individuals from training, mentoring or sponsorship programs, or fellowships; and making selections for interviews.
- Limiting, segregating, and classifying employees based on protected characteristics in a way that affects their status or deprives them of employment opportunities. This includes limiting membership in workplace groups, such as affinity groups, and separating employees into groups based on protected characteristics for DEI or other workplace trainings, even if the content is the same.
- Harassment during DEI training, which may lead to a hostile work environment claim, depending on the facts. Harassment is illegal when it results in an adverse change to a term, condition or privilege of employment, or it is so frequent or severe that a reasonable person would consider it intimidating, hostile, or abusive.
- Retaliation for objecting to or opposing employment discrimination related to DEI, participating in employer or EEOC investigations, or filing an EEOC charge. "Reasonable opposition to a DEI training may constitute protected activity if the employee provides a fact-specific basis for his or her belief that the training violates Title VII," according to the guidance.

What Employers Should Do Now

- Assess your programs for DEI practices that are likely to come under scrutiny. While the following actions

have always been risky or straight-out illegal, they are especially likely to come under fire given recent events:

- Hiring or promotion policies that give explicit preference to certain demographic groups
- Internships or mentoring programs that give explicit preference to certain demographic groups
- Employee training that includes race- or gender-based stereotyping
- Affinity group policies that exclude employees based on protected characteristics
- Supplier diversity initiatives that mandate racial or gender-based quotas or are limited to certain demographic groups
- Policies that limit speech or expression in a manner perceived as restricting certain viewpoints
- AI-driven hiring or evaluation tools that unintentionally embed or reinforce bias

- Conduct an attorney-client privileged legal review of DEI programs and related training materials with your FP counsel.
- Ensure hiring, promotion, and compensation decisions are transparent and well-documented.
- Train hiring managers and HR personnel on legally compliant practices and the practices that support your business objectives. Communicate diversity initiatives to emphasize workplace culture, professional development, and inclusive merit-based access to opportunities as sustainable business practices.
- Read our detailed FAQs here, including best practices to deploy if you want to ensure you create a lawful diverse, equitable, and inclusive work environment.

Conclusion

We will continue to monitor developments that impact your workplace and provide updates when warranted. If you have any questions about these developments or how they may affect your business, please contact your Fisher Phillips attorney or the authors of this Insight. Visit our New Administration Resource Center for Employers to review all our thought leadership and practical resources, and make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information.

Related Content

Resource Kits

- Workplace Diversity, LGBTQ, and Racial and Social Justice Resource Kit
- Trump Transition Resource Kit

Practice Notes

- Affirmative Action Programs and Diversity Initiatives: Key Considerations

State Law Surveys & Regulatory Trackers

- Legal Challenges to 2025 Presidential Executive Orders and Actions Tracker
- Presidential Executive Actions Tracker

Regina A. Petty, Partner and Chief Diversity Officer, Fisher & Phillips LLP

Regina Petty is the firm's Chief Diversity Officer and partner in the San Diego and Los Angeles offices. She practices in state and federal courts at the trial and appellate levels and is experienced in multi-district and class action litigation. Regina is a Cornell Certified Diversity Professional.

Regina advises employers and public agency boards and handles litigation for private and public employers. She successfully argued *Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158 before the California Supreme Court, a case noted on Bender's *California Labor & Employment Bulletin's* top ten list of most significant cases and trends for the Fair Employment and Housing Act's fiftieth anniversary.

Regina is a past president of the San Diego County Bar Association and a former member of the board of directors of the Minority Corporate Counsel Association.

She is "AV" Peer Review Rated by Martindale-Hubbell and has been listed in *San Diego Super Lawyers* every year since its inaugural issue. She has been named one of the *Los Angeles Daily Journal's* Top 75 Women Litigators in California and one of the *San Diego Daily Transcript's* Top Ten attorneys in both the labor and employment and business litigation categories.

Regina is also a recipient of the *San Diego Business Journal's* Women Who Mean Business Award and she was honored by the Stanford University Black Community Services Center with its Legacy Award.

Sheila M. Abron, Partner, Fisher & Phillips LLP

Sheila Abron is a Partner in the Columbia office and Co-Chair of the Firm's Affirmative Action and Federal Contract Compliance Practice Group. She is committed to finding practical, real world solutions to her clients' employment law needs. She represents companies—large and small—as they navigate employment issues related to hiring, discipline, investigations, employment discrimination, unemployment, and other related issues. Sheila provides guidance to higher education institutions on Title IX Compliance and investigations She has extensive experience providing compliance advice to federal contractors on affirmative action and OFCCP regulations and audits. Sheila also has extensive experience working on collective actions under the Fair Labor Standards Act (FLSA) and class actions under wage and hour state laws. Sheila also provides training for supervisors and managers on harassment, Equal Employment Opportunity (EEO) compliance, the Family Medical Leave Act, diversity and inclusion, and many other areas.

Sheila is involved in various professional and community activities. She is a past president of both the South Carolina Women Lawyers' Association (SCWLA) and the South Carolina Bar Young Lawyers (SCYLD) Division. She also serves on the Board of Directors for Columbia – Society for Human Resource Management (SHRM) and the board of the National Conference of Women's' Bar Associations. Sheila is active in the Richland County Bar, American Bar Association, and is a member of the Junior League of Columbia.

Prior to attending law school, Sheila was a member of store leadership for a Fortune 500 retail company, providing employee supervision and managing a variety of employee issues related to wage and hour, workers' compensation, discrimination issues, performance management, and other personnel issues.

Sheila is a 2019 recipient of the Silver Compleat lawyer Award from the University of South Carolina School of Law Alumni Association. This award recognizes alumni who have made significant contributions to the legal profession and who exemplify the highest standard of professional competence, ethics, and integrity.

She has also been named to the *Columbia Regional Business Report's* list of 2018 Women of Influence, *Columbia Business Monthly's* 2018 Best and Brightest 35 and Under, *Columbia Business Monthly's* Legal Elite of the Midlands in 2017 and the American Bar Association's On the Rise – Top 40 under 40 in 2018. She is also a 2018 South Carolina Super Lawyers – Rising Star and a 2019 recipient of the Leadership in the Law award. She was awarded the Johnathon Jasper Wright Award by The Honorable Matthew J. Perry Chapter of the Black Law Students Association at the University of South Carolina School of Law, is a three-time recipient of the President's Award a and a four-time recipient of the Start of the Quarter award from the South Carolina Bar Young Lawyers' Division.