

Post-EO DEI Assessments: What Are They and Why Should You Do Them?

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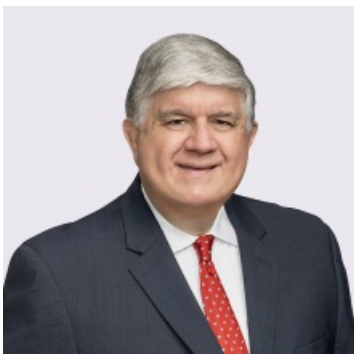
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Takeaways

- Challenges to DEI programs are at an all-time high, but it remains the law that employers are required to provide equal employment opportunity (EEO).
- That said, the use of shorthand and acronyms to describe DEI and EEO activities increases the risk of legal challenges to programs.
- A DEI assessment can help an employer define and refine its objectives; understand its employment practices to identify legal, business and reputational risks; and develop a strategy for ensuring EEO within the bounds of the law.

Related link

- [Trump Administration Revokes EO 11246, Prohibits 'Illegal' DEI: What the EO Ending Illegal Discrimination and Restoring Merit-Based Opportunity Means for Employers](#)

Article

Challenges to diversity, equity and inclusion (DEI) programs are at an all-time high and increasing. [Executive orders](#) (EOs) issued by President Donald Trump prohibit “illegal DEI” activities by federal agencies, contractors, and grantees, but they do not define “illegal DEI.” The EOs also direct agencies to investigate whether the DEI practices of private, non-federal contractor employers violate federal civil rights laws.

DEI is a catch-all phrase that can mean different things to different people. But, DEI done correctly is not per se illegal. Title VII of the Civil Rights Act and other anti-discrimination laws prohibit discrimination on the basis of race, gender, and other protected characteristics. Treating employees differently with respect to their employment because of race or sex or other protected characteristic may be unlawful, whether it is called DEI or not.

The EOs do not change existing law regarding discrimination in employment, contracting, or otherwise, but they do signal increased investigation and enforcement activities relating to DEI programs.

While there is still plenty of uncertainty, what is clear is that government agencies will be looking for unlawful DEI; employees and others will be raising more legal challenges; the government and individuals may be searching websites for easy targets; and the potential for litigation has gone up.

There is push and pull between those advancing DEI and those claiming DEI itself is unlawful. As a result, employers may be stuck in a hard place, because any action could be seen as not being supportive of one or more employee groups. Here are some practical steps to help employers stay out of the fray and minimize legal, brand, and

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reputational risk:

1. Conduct a privileged DEI assessment, which is an independent, objective appraisal of DEI and EEO policies, practices, and performance that helps an employer understand and assess its EEO strengths and weaknesses; identify areas of legal, business, and reputational risk; and develop initiatives to enhance equal employment opportunity in a legally compliant manner. The scope of a DEI assessment varies based on the employer's objectives, its current practices, and the culture of the organization, but an assessment typically covers the following areas:

- Metrics, such as demographic representation in the overall workforce and in senior management, turnover rates of different demographic groups, and pay equity
- DEI communications, internal and external
- DEI or EEO strategic plans, priorities, and infrastructure
- Recruitment and hiring practices
- Career development and promotion processes
- Performance management
- Succession planning
- Mentoring and sponsorship
- DEI committees
- Employee resource/affinity groups
- Employee engagement, including surveys
- Exit interview results and analyses
- DEI/EEO education and training
- Discrimination complaint systems
- History of DEI-related complaints, Equal Employment Opportunity Commission charges and litigation
- Customer demographics and multi-cultural marketing
- DEI-related philanthropy
- DEI-related government relations
- External collaborations and partnerships
- Supplier diversity

2. In the current environment, it is critical that employers review internal and external communications about DEI and EEO practices to ensure those practices are consistently and accurately described. The use of shorthand and acronyms for DEI and EEO activities increases the likelihood of allegations that the employer unlawfully discriminates. At the same time, employers should consider communications to their employees and prospective employees that the company is committed to equal opportunity for all employees and will support their development and success. Look for language that suggests the policy or practice is geared toward favoring one group over another. The word — or phrase — DEI is not unlawful (and many practices under its umbrella also are not unlawful), but the word is charged. Describe your programming with specificity.

3. Continue to emphasize the organization's commitment to equal employment opportunity, nondiscrimination, and treating everyone with respect, regardless of their race, gender, color, national origin, religion, gender identity, age, disability, veteran status, and any other characteristic protected by law. And, yes, organizations can and should continue to prohibit discrimination against individuals based on gender identity. Pronouns, allyship, and restrooms require nuanced analysis, and employers should

consult counsel about them. In the meantime, focus on treating everyone with respect. Everyone.

4. Rather than creating numeric “goals,” consider conducting regular, proactive, privileged analyses of the actions the organization takes (hires, promotions, terminations, compensation) to look for signs of favoritism to one group of individuals over another to understand how the organization is doing with respect to its EEO obligations.
5. Instead of talking just about diversity and DEI, put in the work to assess any potential barriers to equal employment opportunity, such as reviewing job qualifications to ensure that requirements are actually accurate and not unnecessarily limiting candidate pools. For example, a 50-pound lifting requirement that may no longer be necessary for the job due to new processes or equipment may negatively impact the ability to hire individuals of all genders, ages, and abilities.
6. Review any DEI training that is conducted or required.
7. Review employee resource group practices and missions, celebration days, workplace training distribution, leadership training, mentorship, internship, and fellowship opportunities, talent acquisition programs (such as diverse slates, interviewing panel processes), and other employment practices.
8. Assess with counsel any state or local requirements that may differ.
9. Conduct training of HR, DEI professionals, and leadership to ensure they understand the principles of equal employment opportunity and that they understand that the existence of a DEI initiative – whatever it is actually *called* – does not mean they can make decisions or apply preferences based on protected characteristics.
10. Focus on psychological safety and wellness for all employees.

Employer DEI programs are undergoing unprecedented scrutiny, but practices consistent with nondiscrimination laws are not only permitted but are critical to providing the equal employment opportunity mandated by law. Jackson Lewis attorneys will continue to monitor developments in the evolving DEI space. For questions and assistance, contact the Jackson Lewis attorney with whom you work or one in our Corporate Diversity Counseling and Affirmative Action, OFCCP and Government Contract Compliance practice groups.

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