

DEFENDING DIVERSITY, EQUITY, AND INCLUSION INITIATIVES

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- Diversity, Equity, and Inclusion (or DEI) has become a loaded term in recent years.
- This area of the law and culture is changing continually.
- But what does it actually mean?
And when and when isn't it legal?

What isn't DEI?

- Required hiring quotas.
- Illegal discrimination.
- Lowering standards.
- A one-time onboarding training session.
- “Marxism”
- Anti-majority.

What is DEI?

Examples:

- Implementing “blind” and inclusive hiring practices which reduce bias.
- Seeking out diverse hires through advertising, career, fairs, etc.
- Training to identify unconscious bias.
- Pay equity analysis.

This is not exhaustive

- New developments are emerging all the time.
- It goes well beyond Human Resources and Management: for example, prioritizing diverse suppliers or contractors.
- Can also be “bottom up” or employee driven: employee resource and affinity groups to provide support for example.

Affirmative Action

- There is a lot of mainstream confusion about what affirmative action actually is.
- It is meant to address and correct historic discrimination and imbalances.
- It is proactive: unlike measures designed merely to prohibit discrimination, affirmative action requires an organization to take positive steps toward diversity and inclusion.

What ISN'T affirmative action?

- Quotas. There is a long-standing myth that there are employers out there with assigned numbers of minority hires.
- Quotas have been illegal at least since the 1970s except for very specific situations.
- Hiring or promoting “less qualified” people or firing “more qualified” people.

The One Situation Where a Quota is OK

- Where “such relief may be appropriate where an employer or a labor union has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination.” Local 28 of Sheet Metal Workers’ Intern. Ass’n v. E.E.O.C., 478 U.S. 421, 445 (1986).
- This is exceedingly rare and requires a court finding that a quota is necessary to remedy past and pervasive discrimination.

And see also...

- United Steel Workers of America, AFL-CIO-CLC v Weber, 443 U.S. 193 (1979)
- “Title VII's prohibition . . . against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans.”
- Ultimately, SCOTUS approved provision reserving 50% of openings in training program for black employees.

Weber cont.

- However, the Court only allowed this because the plan “did not unnecessarily trammel the interests of the white employees” and did not actually bar them from advancing.
- Most notably, the Court approved this kind of quota as a temporary measure only: it was designed to terminate once black representation in the job classification was proportional.

Johnson v. Transportation Agency, Santa Clara County

- This is the other major SCOTUS case discussing voluntary affirmative action and similar initiatives. 480 U.S. 616 (1987)
- In that case, a female employee was promoted over a male employee with a higher exam score in a job position which was “traditionally segregated.”

Johnson cont.

- Johnson again approved such a measure provided it was aimed at a job where there was a history of segregation, the measure was temporary, and it did not “unnecessarily trammel” non-minority rights by forcing them to be dismissed or creating a bar to advancement.

Weber and Johnson

- Unless and until SCOTUS revisits Title VII in the employment context, the law remains that employers can voluntarily use race or gender to make tailored affirmative action policies that address discrimination in traditional segregated job categories.
- If you cannot make that showing, or else do not have court approval, any such policy will likely fail.

What IS proper and legal affirmative action?

- Targeted outreach and recruitment campaigns that seek qualified minority and disadvantaged candidates.
- Diverse hiring and promotion panels.
- The key, at least so far, is that while race or gender or protected status may be considered only as one factor. Any kind of quota requirement will almost certainly be illegal.

Students for Fair Admissions v. Harvard

- Does not (yet) apply to employment law.
- Ruled in 2023 that any race-based educational admission guidelines (even considering it as a factor) violate the Equal Protection clause of the Fourteenth Amendment.
- Does allow “personal statement” by applicants about how race has shaped their lives that can be considered as long as it shows “character or unique ability.”

Cont.

- This same reasoning may be coming soon to the Supreme Court in the employment setting as the Supreme Court and the administration both seem to want to test this.

Governing Law - Federal

- **Title VII of the Civil Rights Act of 1964 (“Title VII”)**
- **42 U.S.C. § 1981**
- **Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution**

Title VII

- This is the basic anti-discrimination law enacted in 1964 that prohibits employment discrimination on the basis of race, color, religion, sex (including sexual orientation and gender), and national origin.
- Administered largely by the Equal Employment Opportunity Commission.
- They take complaints from employees, can sue on behalf of an employee, or give an employee a “right to sue” letter.

29 C.F.R. § 1608.1

- This is the Federal regulation that provides the statement of purpose for voluntary affirmative action under Title VII.
- Cites Executive Order 11246, which was repealed this year.
- From the regulation section discussing interpretation: “Affirmative action under these principles means those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity. Such voluntary affirmative action cannot be measured by the standard of whether it would have been required had there been litigation, for this standard would undermine the legislative purpose of first encouraging voluntary action without litigation. Rather, persons subject to title VII must be allowed flexibility in modifying employment systems and practices to comport with the purposes of title VII. Correspondingly, title VII must be construed to permit such voluntary action, and those taking such action should be afforded the protection against title VII liability which the Commission is authorized to provide under section 713(b)(1).”

42 U.S.C. § 1981

- This is part of a Reconstruction Era Federal civil rights statute passed in 1866.
- Protects the right to be free of racial discrimination in the making and enforcement of contracts.
- This has also been interpreted to mean employment contracts.

Section 1981 in the Eleventh Circuit

- The Eleventh Circuit has recently addressed section 1981 in the context of company DEI programs in American Alliance for Equal Rights v. Fearless Fund 103 F.4th 765 (11th Cir. 2024).
- Held that Section 1981 barred venture capital firm from opening a competitive grant contest to only black females. The contest was held to be a contract within the meaning of section 1981.
- Seems to be an outgrowth of the Harvard affirmative action case.

Fearless Fund cont.

- Case involved the “Fearless Strivers Grant Contest.” Four winners were to be chosen from at least “51% black woman owned” businesses.
- Contest rules specifically said “BY ENTERING THIS CONTEST, YOU AGREE TO THESE OFFICIAL RULES, WHICH ARE A CONTRACT.” This walked it straight in to section 1981.
- The Court also rejected arguments that this was sufficiently “remedial” in nature to fall outside section 1981, and that it constituted expressive conduct protected by the First Amendment.

Fearless Fund cont.

- Notably, the District Court initially found the contest to be protected by the First Amendment. Not only did the Eleventh Circuit disagree, it reversed the District Court's denial of a preliminary injunction against the contest, which means it has decided the legal issues involved are substantially likely to be decided in favor of the challenger. This makes it much likely that any such action can be challenged and immediately enjoined.

The Equal Protection Clause

- Part of the Fourteenth Amendment, which does many things.
- Specific language is: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”
- SCOTUS has recently used it to invalidate race-based admissions in the Harvard case.

But Wait! Executive Orders

- Executive Orders can also govern DEI initiatives, especially if we are not defining them well.
- They are not laws: they are instructions from the President to Executive Branch employees giving them orders or guidance on how to do their jobs.
- They still have to comply with the law, and (theoretically) they only touch Federal matters.

Relevant Federal Executive Orders

- Executive Order 11246 (repealed January 21, 2025)
- Executive Order 14151 (January 20, 2025)
- Executive Order 14168 (January 20, 2025)
- Executive Order 14173 (January 21, 2025)

Executive Order 11246

- No longer the law as of January 21, 2025, dated back to LBJ era. (September 24, 1965)
- Was previously implemented by Department of Labor regulations.
- Essentially mandated that any non-construction contractor (i.e., Supply and Service) must have a written affirmative action plan if 50 or more employees and at least \$50,000 in government contracts.
- It was amended many times over the years to add DEI requirements as well.

Executive Order 14151

- Enacted by Trump Administration on Day 1.
- It requires “the termination of all discriminatory programs, including illegal DEI and ‘diversity, equity, inclusion, and accessibility’ (DEIA) mandates, policies, programs, preferences, and activities in the Federal Government, under whatever name they appear.”
- Note that it says “illegal” DEI programs. What this means will certainly be litigated.

14151 cont.

- Specifically requires all Federal agencies and departments to “terminate, to the maximum extent allowed by law, all DEI, DEIA, and ‘environmental justice’ offices and positions (including but not limited to ‘Chief Diversity Officer’ positions); all ‘equity action plans,’ ‘equity’ actions, initiatives, or programs, ‘equity-related’ grants or contracts; and all DEI or DEIA performance requirements for employees, contractors, or grantees.”

14151 cont.

- As an immediate matter, this resulted in the immediate dissolution of most Federal agencies' diversity offices, the elimination or disfavor of the use of many terms, especially so-called "gender ideology."
- The US Service Academies shut down affinity groups.
- Closer to home, NASA employees were allegedly instructed to drop everything and scrub its websites of anything related to diversity.

Executive Order 14168

- Also issued on Day 1.
- Titled “Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government.”
- Largely directed to trans-gender persons, requires Federal departments to only recognize two sexes (and replace term “gender”), ceases funding for “gender ideology.”

14168 cont.

- Policy statement: “It is the policy of the United States to recognize two sexes, male and female. These sexes are not changeable and are grounded in fundamental and incontrovertible reality. Under my direction, the Executive Branch will enforce all sex-protective laws to promote this reality[.]”
- Also mandates “Privacy in Intimate Spaces” including no men in women’s prisons, no funding for gender affirming care, and “appropriate action to ensure that intimate spaces designated for women, girls, or females (or for men, boys, or males) are designated by sex and not identity.”

Executive Order 14173

- Enacted on Day 2.
- Repealed Executive Order 11246 (and all orders amending it to add DEI requirements) as noted above.
- Also consolidated all enforcement of anti-discrimination requirements to the DoL's Assistant Secretary for Policy, taking authority away from the Office of Federal Contract Compliance Programs, the EPA, and all other federal agencies' civil rights offices.

14173 cont.

- Policy statement: “It is the policy of the United States to protect the civil rights of all Americans and to promote individual initiative, excellence, and hard work. I therefore order all executive departments and agencies (agencies) to terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements. I further order all agencies to enforce our longstanding civil-rights laws and to **combat illegal private-sector DEI preferences, mandates, policies, programs, and activities.**” (emphasis added)

14173 cont.

- This order therefore also directs the EEOC and other Federal enforcement to not only eliminate DEI practices in the Federal government or with Federal contractors, but potentially also any private employer as well.
- Also explicitly terminated Executive Orders 12898 (Environmental Justice in Minority and Low Income Populations), 13583 (Coordinated Government-wide Initiatives to Promote Diversity and Inclusion), and 13672 (equal employment opportunity in the Federal government and related matters).

Other Sources of Federal Authority

- There are various other Federal statutes and regulations that provide for some form of affirmative action.
- As noted above, this landscape is rapidly changing.
- Anything based on regulations (as opposed to straight statutory text) could change potentially any time.

Section 503, Rehabilitation Act of 1973

- Requires any governmental contractor with 50 or more employees and at least \$50,000 in contracts to develop a written affirmative action program for persons with disabilities.
- Contract is defined in the regulations as “any agreement or modification thereof between any contracting agency and any person for the purchase, sale or use of personal property or nonpersonal services.”

Vietnam Era Veterans Readjustment Assistance Act

- Codified at 38 U.S.C. § 4212.
- Protects qualified Vietnam era veterans, disabled veterans, recently separated veterans, and veterans who served in active duty during a war or qualifying campaign.
- DoL regulations interpret it as requiring any government contractor with 50 or more employees and a contract worth at least \$100,000 (after December 1, 2003) to have a written affirmative action plan.

Recent DOJ Guidance

- On July 29, 2025 the Department of Justice issued a formal guidance opinion regarding unlawful discrimination by recipients of Federal funding.
- The guidance is aimed squarely at existing DEI programs.
- Gives examples of what the DOJ considers to be unlawful or illegal policies and practices.

DOJ Examples

- “Race-Based Scholarships or Programs”
- “Preferential Hiring or Promotional Practices”
- “Access to Facilities or Resources Based on Race or Ethnicity”
- “Unlawful Proxies” i.e. trying to substitute something apparently neutral for race – including “cultural competence” requirements, targeting specific geographies or institutions, or requiring applicants to describe “obstacles they have overcome.”

DOJ Examples cont.

- “Unlawful Segregation” – hosting DEI training that “requires participants to separate into race-based groups” and prohibiting “individuals of other races from participating.”
- “Segregation in Facilities or Resources”
- “Race-Based ‘Diverse Slate’ Policies in Hiring” – i.e., requiring a “minimum” number of minority candidates.

DOJ Examples cont.

- “Trainings That Promote Discrimination Based on Protected Characteristics” – requiring DEI training that includes “statements stereotyping individuals based on protected characteristics – such as ‘all white people are inherently privileged,’ ‘toxic masculinity,’ etc.”

Conclusion

- DEI remains legal and a best practice so long as you are cautious not to give any group a preference or else give them a palpable or tangible benefit denied to others.
- It is best to focus on “universal” frameworks in tailoring a DEI program such that they apply to everyone and do not benefit some groups over others. Examples include psychological safety, allyship, authenticity, and cultural competence. But everyone must be included or it may be subject to legal challenge.

Conclusion cont.

- However, the great grey area right now is if and when SCOTUS might extend the logic of the Harvard case to the employment arena, and possibly overrule Weber and Johnson.
- Trump administration seems to mostly be going the route of ruling by Executive Order (and not amending regulations) as its easier, quicker, and doesn't allow for public comment. At some point though, it is possible that the regulations under Title VII and others could be comprehensively amended assuming SCOTUS doesn't just invalidate them.

Questions?

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