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EXECUTIVE SERIES:
LABOR & EMPLOYMENT

The Battle over DEI Becomes an Administration Priority

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Agenda

- Overview
- This “battle” is not new
- Who is most affected?
- Executive Orders
- Agency interpretations
- The focus on antisemitism
- Conflicts with existing laws and regulations
- Assessing your risk tolerance and self-audits

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Navigating Uncertainty and Rapid Change

- The pace of action and coordination across multiple federal agencies is unprecedented, but with multiple agencies interpretations can vary.
- Announcements or guidance may change within weeks.
- This is being done primarily by guidance, policy statements and Executive Orders. The Administration may eventually use formal rulemaking.
- In many cases, we or your lawyers are not going to have an immediate answer to the client's questions.
- At best, we or your lawyers can give their best recommendations for now, but interpretation can change in the future, and will be influenced by litigation.

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Overview

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Who is Left to Enforce?

- Mass layoffs at the Department of Education Office for Civil Rights.
- An estimated 50% or more of attorneys and investigators at the DOJ Civil Rights Division have taken buy-outs or been forced out.
- At HUD, many local offices have closed or only have 1-2 people to process all issues, including Fair Housing Act compliance.
- The EEOC has seen significant decreases in staffing.
- Commitment to compliance with all Executive Orders and interpretations is required of the remaining employees.

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One Example– DOJ Individual Employee Rights (IER) Group

- Enforces the non-discrimination provision of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b.
  - The compromise bill includes non-discrimination provisions designed to protect those who are legally entitled to work in the U.S.
- Traditionally, this unit had 25-30 attorneys and investigators dealing with complaints about "U.S. Citizen only" advertisements or policies and other forms of discrimination.
- There are now only two employees. Director issued a press release soliciting complaints from U.S. citizens who believe they were passed over for jobs in favor of an immigrant.

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So What is "Illegal DEI?"

- While federal agency guidance is evolving, "Illegal DEI" includes:
  - Any practices by employers or schools that identify or categorize applicants, employees, or participants by their protected categories.
  - Actions/practices contrary to Executive Orders, including those on disparate impact and declaring there are only two genders.
- The actions of the Department of Education in Higher Ed and K-12 schools could easily be extended to non-discrimination in housing, places of public accommodation, healthcare, and other business activities regarding their customers, patients, and participants.

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What Can We Tell About the Administration's Priorities?

- This Administration has been pretty transparent, but has gone further than the first Trump Administration.
- Immigration is the biggest issue, and it is taking resources from other issues. Discrimination against immigrants is a low priority.
- Claims of antisemitism.
- Claims of "reverse discrimination," harassment of white individuals, and of preferences for women over men.
- Ending protections for gender identity, and possibly sexual orientation.
- Workplace harassment and discrimination against Christians.

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This "Battle" Is Not New

Carolyn Pellegrini and Erik Pramschufer discussed in detail in the Fall 2024 Executive Series.

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Litigation

- *Frank v. Xerox Corp.*, 347 F.3d 130 (5th Cir. 2003)
  - Existence of Balanced Workforce program "is sufficient to constitute direct evidence of a form or practice of discrimination."
- *White v. Oakland Cnty. Cmty. Coll.*, Case No. 19-10465, 2020 WL 5908319 (E.D. Mich. Oct. 6, 2020)
  - Court dismissed, finding no evidence that college considered race in hiring, and no evidence that "promotion of racial diversity" equated to bias in hiring.
- *Young v. Colo. Dep't of Corrections*, 94 F.4th 1242 (10th Cir. 2024)
  - Court held that "the racial subject matter and ideological messaging in the training is troubling on many levels." However, a single instance of training did not rise to the level of being severe or pervasive.

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Section 1981 Claims, Including "Reverse Discrimination" Claims, Have Been Increasing

- Four-year statute of limitations.
- Covers non-employees.
- No need to exhaust administrative remedies.
- Applies to all employers.
- Individual liability for supervisors.
- No cap on punitive damages.
- Immediate injunctive relief.

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Examples—Challenging Training

- *King v. Johnson & Johnson* (E.D. Pa. filed Mar. 6, 2024; settled July 2024). White male plaintiff alleged discrimination against him in the pursuit of DEI, which allegedly aimed to "eliminate" older, white males. Alleged violations of § 1981, Title VII, and ADEA.
- *Arsenault v. HP Inc.* (D. Conn. filed May 29, 2024). White male plaintiff alleges that he was subject to a "shaming session" after expressing his negative opinions on DEI, which led to retaliation, termination of his employment, and refusal to rehire him. Alleged violation of § 1981 and Title VII.

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Ames v. Ohio Dept. of Youth Servs., No. 23-1039, 2025 WL 1583264 (U.S. June 5, 2025)

- Whether a majority-group plaintiff must, beyond proving the other elements of Title VII, show "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority."
- Involved a heterosexual woman alleging her former employer discriminated against her by denying her a promotion and demoting her "because she is straight."
- The Supreme Court held that the "background circumstances" rule cannot be squared with the text of Title VII, which "draws no distinctions between majority-group plaintiffs and minority-group plaintiffs."
- The Court's ruling eliminates the "background circumstances" rule in the Sixth, Seventh, Eighth, Tenth and District of Columbia Circuits and clarifies that Title VII does not impose a heightened evidentiary standard on plaintiffs who are members of majority groups.
- A similar interpretation will apply to Section 1981.

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Who is Most Affected?

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IHEs and Other Recipients of Federal Dollars

- Many of the Executive Orders expressly target Institutions of Higher Education.
- Key leverage is to threaten to, or actually cut off, federal financial assistance.
- Any business that directly or indirectly receives federal financial assistance could be a target.
  - ACA Section 1557 incorporates Title VI, Title IX, Section 504 and the Age Discrimination Act.
  - Medicare or Medicaid reimbursement.
  - State and local government programs.

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Federal Contractors & Grant Recipients

- Federal contractors were among the first affected by the termination of Executive Order 11246.
- New contract requirements addressing “illegal DEI” and other Administration priorities.
- DEI grant provisions required by prior Administrations, or the grants designed for DEI activities, are a target.

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Every Employer Covered by Title VII

- The multiple changes in interpretations of existing law are changing EEOC enforcement activities.
- Employers now need to grapple with what is “legal” and conflicts with state laws.

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The Executive Orders

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Executive Orders–Background

- Official documents executed by the President.
- Used to direct and manage the Executive Branch.
- Are not laws, but have force of law, similar to agency regulations.
- Target the Executive branch alone.
  - Not state agencies or private entities.
  - BUT reach many businesses as federal contractor and recipients of federal grants.
  - And the subsequent actions by various agencies to implement the EOs affects future guidance, regulations and enforcement.
- Trump administration has revoked some EOs, and issued new EOs.

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Revoked–EO 11246

- Had been in effect since September 1965.
- Prohibited discrimination by federal contractors and subcontractors on the bases of race, color, religion, sex, and national origin – later updated to include additional protected classes, and required them to take affirmative action to prevent such discrimination.
- All federal contractors were ordered to stop their affirmative action programs for employees by April 21, 2025.
- No more goals, timetables or reporting for race, gender and national origin.
- DOL's Office of Federal Contract Compliance Programs (OFCCP) has had substantial reductions in force. For now, they still enforce Section 503 (disability) and various veteran's rights laws, which still have affirmative action provisions.

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Issued–EO 14173

- "Ending Illegal Discrimination and Restoring Merit-Based Opportunity."
- Directs federal agencies to require contractors/grantees to certify that they do not "operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws."
- Expressly states that compliance is "material to the government's payment decisions for purposes of [the False Claims Act]."

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Issued–EO 14168

- "Restoring Biological Truth to the Federal Government"
  - *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 … (a) ''Sex'' shall refer to an individual's immutable biological classification as either male or female. ''Sex'' is not a synonym for and does not include the concept of ''gender identity.''*

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Issued–EO 14321

- "Restoring Equality of Opportunity and Meritocracy."
  - *"It is the policy of the United States to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, Federal civil rights laws, and basic American ideals."*
- Directs the Attorney General to "review with all agencies existing regulations, guidance, rules, or orders that impose disparate-impact liability or similar requirements, and detail agency steps for their amendment or repeal, as appropriate under applicable law."
- Also review of existing settlements and investigations based upon disparate impact regulations, and take action to end them.

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Impacts of the EO on Disparate Impact

- Taking actions on the basis of disparate impact is itself illegal, because it results in "reverse discrimination."
- "Disparate Impact" is written into the ADA, Title VII and other laws, and integral to the DOL 29 CFR Part 30 regulations.
- The EEOC and DOL can elect not to investigate claims of disparate impact, or use this theory, but it is still the law.
- No guidance yet from the EEOC and DOL on what employers are supposed to do.
- WHEN IN DOUBT, COMPLY WITH THE LAW UNTIL ORDERED OTHERWISE.

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Litigation Update

- Multiple lawsuits challenging the EOs, including vagueness and infringement on First Amendment rights.
- The *Supreme Court in Trump v. CASA* made it more difficult for individual judges to issue preliminary injunctions that go beyond the parties that filed suit.
  - One alternative being pursued is to certify a class.

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Agency Interpretations

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ED OCR Feb. 2025 DCL and FAQs

- Because DOJ is so involved in ED OCR interpretations, these are likely to inform positions at the EEOC and other agencies.
- The following are forms of school-on-student harassment that could create a hostile environment under Title VI.
  - Requiring students to participate in "privilege walks."
  - Segregating students by race for presentations and discussions with guest speakers.
  - Pressuring students to participate in protests or take certain positions on racially charged issues.
  - Investigating or sanctioning students for dissenting on racially charged issues through DEI or similar university offices.
  - Mandating courses, orientation programs, or trainings that are designed to emphasize and focus on racial stereotypes.
  - Assigning students coursework that requires them to identify by race and then complete tasks differentiated by race.

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DOJ False Claims Act Enforcement

- On May 19, 2025, DOJ issued a memorandum, referencing EO 14173, announcing its "Civil Rights Fraud Initiative," designed to vigorously enforce the federal False Claims Act ("FCA") against those who "defraud the United States by taking its money while knowingly violating civil rights law."
- The *DOJ intends to target entities who receive federal funds* and who have allegedly implemented DEI practices, or who "knowingly engage[] in racist preference, mandates, policies, and activities that […] that assign benefits or burdens on races, ethnicity, or national origin."
- The memo cites certain behavior that the DOJ believes violates civil rights laws and the FCA:
  - Encouraging anti-Semitism and refusing to protect Jewish students;
  - Allowing men into women's restrooms; and
  - Requiring women to compete with men in athletic competitions.
- The initiative also solicits whistleblowers to bring private lawsuits to enforce the FCA.

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DOJ July 29, 2025 Guidance

- "Guidance for Recipients of Federal Financial Assistance Regarding Unlawful Discrimination."
- Targets "DEI" and other programs and practices that discriminate.
- Identifies "Best Practices" as non-binding recommendations.
  - Translation—failure to follow these may be a violation of law.
- Examples:
  - "Preferential Hiring or Promotion Practices: A federally funded entity's DEI policy prioritizes candidates from "underrepresented groups" for admission, hiring, or promotion, bypassing qualified candidates who do not belong to those groups, where the preferred "underrepresented groups" are determined on the basis of a protected characteristic like race." [Note—this has always been illegal]
  - Use of "unlawful proxies" such as "cultural competency"; recruitment strategies targeting specific geographic areas, institutions, or organizations chosen primarily because of their racial or ethnic composition rather than other legitimate factors; or "overcoming obstacles narratives."

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DOJ July 29, 2025 Guidance

Further Examples of Unlawful Practices:

- No biological men in women's and girls' restrooms, changing areas, etc.
- No separate race (or other group) training or facilities.
- Race-based or "diverse slate" policies in hiring.
- Sex-based selection for contracts (e.g., all preferences for minority or women-owned businesses).
- Any decisions based upon "under-represented" groups.
- DEI training that includes "statements stereotyping individuals based on protected characteristics-such as "all white people are inherently privileged," "toxic masculinity," etc. Such trainings may violate Title VI or Title VII if they create a hostile environment or impose penalties for dissent in ways that result in discriminatory treatment.

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Office of Personnel Management (OPM) February 5, 2025 Guidance

- This guidance memo to all federal agencies states that to be unlawful, a protected characteristic does not need to be the sole or exclusive reason for an agency's action.
- Among other practices, discrimination includes ending unlawful diversity requirements for the composition of hiring panels, as well as for the composition of candidate pools (also referred to as "diverse slate" policies).

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EEOC Actions and Guidance

- "What You Should Know About DEI-Related Discrimination at Work"
- "Title VII does not provide any "diversity interest" exception to these rules. Nor has the Supreme Court ever adopted such an exception. 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."
- The EEOC also explains how DEI training can create a hostile work environment.
- One specific issue singled-out is segregation:
  - "Unlawful limiting, segregating, or classifying workers related to DEI can arise when employers separate workers into groups based on race, sex, or another protected characteristic when administering DEI or any trainings, workplace programming, or other privileges of employment, even if the separate groups receive the same programming content or amount of employer resources."

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The DOL Office of Apprenticeship

- The Department of Labor Office of Apprenticeship has long had regulations in 29 CFR Part 30 that require non-discrimination.
- DOL regulations have also required apprenticeship programs in various industries, including the building trades, to do an annual self-assessment of disparate impact in selection, set goals, and pursue "affirmative action" (but not discriminate).
- In response to the Executive Orders, OA stopped all registration of new apprenticeship programs, and has issued an NPRM to simply eliminate most of its existing requirements.

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The OPM Memos on Religious Expression

- July 16, 2025 memo to all federal agencies, and implementing the principles in *Goff v. DeJoy*.
  - Includes a wide range of religious compensatory time off, telework and other flexibility for those abstaining from work during certain ties or participating in religious observances or practices.
- July 28, 2025 memo discusses "Protecting Religious Expression in Federal Workplaces."
  - Employees must be allowed to engage in private religious expression in work areas to the same extent that they may engage in nonreligious private expression. Agencies may, however, reasonably regulate the time, place and manner of all employee speech, provided such regulations do not discriminate based on content or viewpoint (including religious viewpoints).

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The Focus on Antisemitism

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The Administration's Actions Based upon Antisemitism

- The Administration has included antisemitism as the basis for many of its actions against colleges, universities and other entities.
  - The most frequently-cited examples include failure to protect Jewish students or employees during protests against Israel for its actions in Gaza.
- There is also a rise in cases by private plaintiffs alleging a culture of antisemitism.

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What Does This Mean for Employers?

- The EEOC is prioritizing complaints of harassment and discrimination by Jewish employees.
- If you receive allegations of harassment, examine individually and decide whether there is any evidence of a broader (climate) concern.
- If yes, take measures to end the harassment, eliminate the HE and its effects, prevent the harassment from recurring.
- Maintain a consistent and centralized, or effectively centralized, response.
- Have and publicize procedures.
- How to file complaints; availability of supportive measures; investigation steps; notice of outcome to complainants and respondents.

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Conflicts with Existing Laws and Regulations

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Disparate Impact Under Title VII and State Laws

- Disparate impact is a recognized theory of liability under Title VII.
- The EEOC may no longer bring those claims, but private plaintiff's attorneys can do so. And the federal courts are likely to permit those claims until and unless the Supreme Court changes its longstanding position and finds that such theories violate the Constitution under an expansive interpretation of *SFFA v. Harvard.*
- State and local FEP agencies are likely to continue to bring these types of claims under local law.

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Lawful "Affirmative Action"

- There is a long history of interpretations by the EEOC, DOL, other agencies and the courts that there are a wide range of activities that can be done to "expand the pool" of qualified applicants.
  - Examples include outreach to under-represented groups, mentoring and skills programs, and other targeted efforts.
- But once these applicants apply, the selection is supposed to be neutral toward protected classifications.
- In the past, employers could also engage in efforts to maintain underrepresented groups, such as mentoring, coaching and affinity groups.
- All such efforts are now being scrutinized by DOJ, ED, and the EEOC.

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The "Supremacy Clause"

- A number of states are fighting federal actions that they claim are interfering with rights traditionally given to the states. "DEI" is one of those issues.
- Most federal discrimination laws include provisions that they do not preempt state laws that provide equal or greater protection.
- The Administration is taking the position that state laws cannot.
  - Protect classes that are "illegal" (gender identity).
  - Permit "illegal" conduct (sports, use of restrooms based upon gender identity).
  - Violate the Constitution or Title VII.

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Assessing Your Risk Tolerance and Self-audits

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Ongoing, Constant Risk Assessment

1. The actual law.
2. Executive Orders, proclamations, "Dear Colleague Letters."
3. Enforcement from all areas of the Executive Branch – Department of Energy, HHS, Department of Agriculture, etc. - sometimes not obviously tied to #1 or #2.
4. Unpredictability: seeming snap judgments, programs "not aligned with Administration's priorities and policy preferences."
5. Maintaining your mission. Stakeholder understanding and buy-in.
6. Ultimately: which battle do you want to fight?
   (Note: Currently over 300 lawsuits challenging Administration actions).

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Avoid the Pitfalls

- Quotas.
- Using diversity as a "tie-breaker."
- Narrow definitions of diversity.
- Group-specific programs.
- Tying compensation to diversity goals.

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Critically Examine Current DEI Initiatives

- What are the employer's goals?
- Are the employer's goals lawful?
- Are the employer's initiatives legally defensible?
- Are the company's statements regarding DEI creating risk?

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