

EEOC ISSUES GUIDANCE ON UNLAWFUL WORKPLACE DEI PROGRAMS: TOP TAKEAWAYS FOR EMPLOYERS

Insights
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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](#)

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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. Notably, 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

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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.