

TEXAS ATTORNEY GENERAL TARGETS DEI IN THE WORKPLACE: ANSWERS TO KEY QUESTIONS FOR TEXAS EMPLOYERS

Insights
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Texas's Attorney General recently issued a 74-page Opinion questioning the legality of various Diversity, Equity, and Inclusion (DEI) initiatives across the state in both public and private sectors, and employers are sure to have questions about what it means to them. This controversial Opinion, released on MLK Day, declares that over 100 state and federal non-discrimination laws that could be construed as promoting DEI are unconstitutional. While not binding on the courts – and in fact running counter to other established legal principles – AG Opinions are often highly persuasive when it comes to investigations and litigation. This Insight will provide an overview of the potential impact of the Opinion on employers and offer practical steps that you can implement to minimize your chances of facing unwanted litigation.

Private schools in Texas will want to read our companion [Texas Attorney General Takes Aim at DEI With New Opinion 6 Steps For K-12 Private Schools To Consider](#).

Texas Attorney General's Account of 5 Alleged DEI Lapses By Employers

The Texas AG's opinion, [which you can find here](#), alleges that there are five initiatives taken by employers where "present day DEI practices" can potentially lead to legal exposure, including:

- hiring and promotion processes;

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- pay, bonuses, and promotion goals;
- employee resource groups, mentoring, and training;
- supplier diversity; and
- governance structures and public goals.

Hiring and Promotion Processes. The Texas AG alleges that DEI is often inappropriately involved from recruitment to the job offer stage and beyond. He states that companies routinely create policies, benchmarks, or numerical targets designed to increase representation of certain demographic groups in an effort to meet quotas or mandates. This can include requiring interview panels or candidate pools to include specific demographic groups. He alleges that doing so minimizes the concept of hiring based solely on merit. He continues that the creation and implementation of DEI pipelines that create internships, fellowships, and student programs, specifically those geared towards historically black colleges and universities, might be classified as a DEI lapse by employers.

Pay, Bonuses, and Promotion Goals. Here, the Texas AG alleges that DEI measures are often implemented as “discrete performance goals or as components with broader environmental, social, or governance scorecards.” The Opinion cites a study showing that companies that tied executive compensation to DEI metrics ended up adjusting up to 20% of compensation based on whether the executive achieved certain DEI goals.

Employee Resource Groups, Mentoring, and Training. The Texas AG alleges that the creation of internal corporate programs can fall within the DEI framework as well, including those that are typically classified as “Employee Resource Groups” or “Affinity Networks.” The Texas AG believes that these groups offer certain career opportunities that provide certain demographic cohorts with “an unfair advantage” compared to non-members. He continues on to say that DEI trainings could also violate the law if they include “physical segregation, stereotypes, or negative generalizations.”

Supplier Diversity. The Texas AG alleges that companies may run afoul of the Constitution when prioritizing working with diverse businesses as outside vendors, including those that are women-owned or minority-owned.



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Governance Structures and Public Goals. The Texas AG believes that the creation of positions such as “Chief Diversity Officer” or other C-Suite positions furthers companies’ opportunities to hit “certain percentages” rather than their stated missions, which include compliance with company policies and the laws surrounding DEI.

How These DEI Initiatives May Expose Employers to Legal Liability

In his Opinion, the Texas AG suggests that these initiatives may create (or invite) legal liability among companies that participate.

1. Title VII and the Texas Commission on Human Rights Act (TCHRA)

Under Title VII of the Civil Rights Act of 1964 and the TCHRA, the Texas AG alleges that “evidence that such a policy was actually relied upon in taking a specific employment action may support a finding of unlawful discrimination.” He states that companies must be careful not to take adverse employment actions based on race or gender. For example, the Opinion references a 4th Circuit case where the Court found that a white male presented sufficient evidence for a jury to find that his protected characteristics played a motivating factor in his termination because he was replaced by three women, two of whom were racial minorities.

2. Hostile Work Environment under Title VII and the TCHRA

Aside from adverse employment actions, the Texas AG warns that employers must be careful not to create hostile working environments when they implement DEI initiatives. He warns that DEI training programs may run a risk of actually creating a hostile working environment. Although the requirement to undergo the trainings will not in and of itself create a hostile working environment, he says, including rhetoric regarding “exclusionary white norms, white exceptionalism, fakequity, and beliefs that white allies are an exception to racism” can do so. He states that “there can be no claim that employers are free to infuse the workplace with discriminatory rhetoric under the guise of teaching ‘diversity.’”

3. Section 1981 Liability

Here, the Texas AG alleges that corporate DEI initiatives could create legal exposure if they seek equal racial representation. [He references an 11th Circuit case where the court allowed a race discrimination case to proceed against a venture capital firm that held a grant contest for Black women business owners.](#) The Texas AG alleges that this ruling should apply to DEI training, resource groups, advancement opportunities, and compensation programs.

4. Federal and State Securities Liability

Finally, the Texas AG warns that employers could face backlash for violating state and federal securities laws by implementing certain DEI programs. He alleges that failing to disclose these DEI programs and the impact that they have on hiring decisions and investor profits could be considered fraudulent practices. He also alleges that companies could breach their fiduciary duties by incorporating DEI initiatives to further their own personal interests instead of their investors' interests.

How to Proceed in Light of the Texas AG's Enforcement Priorities

After the overview of this Opinion, you're probably wondering whether you can even continue your DEI efforts in Texas. Employers should consider these following steps in order to best position yourself in today's environment.

- 1. Evaluate Your DEI Mission Statement.** Review your mission statements, goals, and values, and consider whether the current phrasing puts you at risk due to the heightened scrutiny that you can expect as a result of this Opinion.
- 2. Review and Revise Policies.** Examine all DEI-related policies and ensure that they do not give preference or impose illegal requirements based on protected characteristics. This includes reviewing job postings, application forms, internal training materials and programs.
- 3. Shift Your Focus.** Consider broader inclusion efforts that don't single out or favor any demographic groups to avoid allegations of preferential treatment.
- 4. Regularly Train Your Staff.** As the laws continue to change, keep your HR and managerial employees abreast of new laws so they can work towards compliance.

5. Assess Litigation Risk. Work with your Fisher Phillips counsel to determine whether you are at risk of litigation from your current DEI initiatives or ones that you are looking to implement in the future.

Conclusion

Please consult your Fisher Phillips attorney, the authors of this Insight, any attorney on our [DEI and EEO Compliance Team](#), or any attorney in our [Texas offices](#) to obtain practical advice and guidance on how to navigate this new Opinion. Be sure that you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information.