

The Anti-DEI Agenda: What Employment Lawyers Need to Know

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Today's Agenda

Objectivity Reminder



Shifting Legal Landscape



Benchmarking



Anti-DEI Executive Orders



Trump Administration Enforcement Efforts



Resources



Shifting Legal Landscape

Lenses of Review



Lens 1:

Existing law, including Title VII and state/local analogues

Lens 2:

Your organization's risk tolerance based on lenses 1 and 3, plus other factors

Lens 3:

Trump administration's and federal agencies' priorities, including EEOC, DOL, and DOJ

Existing Federal EEO Law Remains Unchanged

- Title VII, Section 1981 and Equal Protection HAVE NOT CHANGED
- EEO laws *prohibit making employment decisions in whole or in part based on protected characteristics*, including race and sex
 - Prohibit using protected characteristics as a negative or positive factor (even if not the “deciding” factor)
 - Prohibit using protected characteristics as a preference or “plus” versus others
 - Some exceptions such as voluntary affirmative action, BFOQs, etc.
- Section 1981 “offers relief when *racial discrimination blocks the creation of a contractual relationship*, as well as when racial discrimination *impairs an existing contractual relationship*, so long as the plaintiff has or would have rights under the existing or proposed contractual relationship.”



But the Law is *Evolving*

- *Students for Fair Admissions*
- *Fearless Fund*
- *Muldrow*
- *Ames*
- *Skrmetti*
- *Loper Bright*
- *Obergefell, Lawrence and Loving next?*
- State and local protections both receding & expanding

Title VII's Prohibition on Sex Discrimination

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

Sec. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise

Evolution of LGBTQ+ Legal Protections

- After Title VII passed in 1964, EEOC decided LGBTQ+ not covered under Title VII; courts followed suit
- Courts' application of Title VII's prohibition on sex discrimination extended to LGBTQ+ employees
 - *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989): discrimination against an employee based on sex stereotyping (a person's nonconformity to social or other expectations of that person's gender) constitutes impermissible sex discrimination
 - *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998): sex discrimination consisting of same-sex sexual harassment is actionable under Title VII
- EEOC shift in federal sector decisions
 - Gender identity and sexual orientation discrimination constitute sex discrimination in *Macy v. Holder* (2012) and *Baldwin v. Foxx* (2015)
 - Transgender employees must be permitted to use the bathroom consistent with gender identity and intentional misgendering constitutes harassment in *Lusardi v. Department of the Army* (2015)

Obergefell v. Hodges, 576 U.S. 644 (2015)

- Supreme Court granted all same-sex couples right to marry and have marriages recognized nationwide
 - Inherent to one's personal liberty
 - Due Process and Equal Protection clauses of the Fourteenth Amendment prohibit states from depriving same-sex couples' right to marry
- Myriad of workplace implications, including benefits, leave, etc.
- Justice Thomas called for reconsideration of *Obergefell*, *Lawrence*, and *Griswold* in his *Dobbs* concurrence
- Petition for writ of certiorari filed July 24, 2025, in *Davis v. Ermold*
 - “Whether *Obergefell v. Hodges*, 576 U.S. 644 (2015), and the legal fiction of substantive due process, should be overturned.”

Bostock v. Clayton County, 590 U.S. 644 (2020)

- Three plaintiffs: two gay men and a transgender woman
- Answered one question: “[**W**]hether an employer can fire someone simply for being homosexual or transgender.”
- Majority opinion authored by Justice Neil Gorsuch
- Simple and straightforward holding: Title VII’s prohibition against sex bias includes sexual orientation and gender identity
- **“The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.”**
- **“[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”**

Statements From EEOC Chair Lucas on *Bostock* During Her Confirmation Hearing



- “*Bostock* is unquestionably the binding precedent of the Supreme Court; it’s entitled to respect as such.”
- “*Bostock* did clearly hold that discriminating against someone on the basis of sex included firing an individual who was transgender or based on their sexual orientation.”
- Chair Lucas focused exclusively on termination.

Impact of *Muldrow v. City of St. Louis*, 601 U.S. ____ (2024)

- Title VII forbids discrimination in hiring and firing **AND** the terms or conditions of employment
- No heightened threshold of harm to constitute an adverse action
- Harm must actually occur, but very little harm is required to be shown
 - “Worse treatment”
 - “Disadvantageous”
 - “Harm”
 - “Some harm”
 - “Disadvantageous change”
 - “Some injury”

Impact and Use of *Muldrow*, *Ames*, and *Skrmetti*

- Trio of cases are broad in language and impact
- Reiterates *Bostock* is settled law and sex includes sexual orientation/gender identity
- Makes breadth of Title VII clear: protects employment actions and terms and conditions other than hiring, firing, and promotion
- Anticipate aggressive use by the plaintiffs' bar:
 - “I’ve been doing a lot of thinking in light of the Supreme Court’s *Muldrow* and *Ames* decisions. Taken together, I think the Court is trying to tell us that judge-made doctrines that were designed to weed out employment cases at summary judgment have developed in such a way as to make getting to trial harder than it should be. Perhaps our courts will take *Muldrow*’s instruction and find harassment upon a showing of ‘some harm.’ The Sixth Circuit has already adopted this framework in a case called *McLean*. That makes sense: if there’s a showing that unwanted conduct caused a change in terms or conditions of employment, that amounts to a showing of ‘harm’ for purposes of Title VII.”

A stylized world map with a light blue background and white landmasses. The map is centered on the Atlantic Ocean, showing North America, South America, Europe, Africa, and parts of Asia and Australia.

Benchmarking

Benchmarking – Evolving Nomenclature

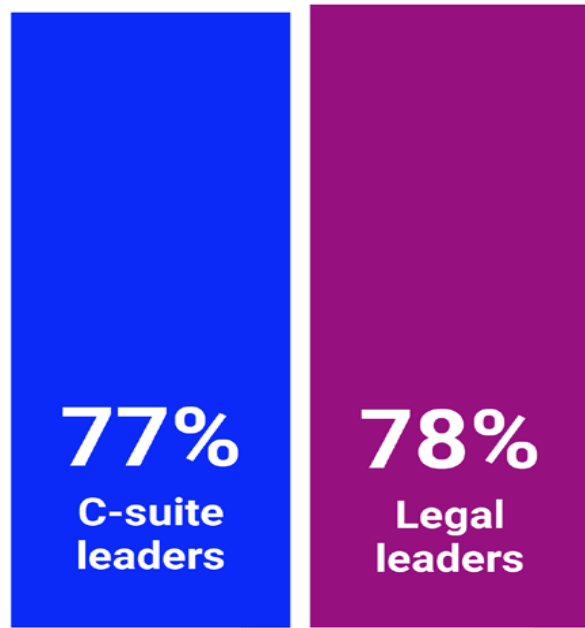
- Belonging and Culture
- Equal Opportunity and Inclusive
- Building a Diverse and Inclusive Workplace
- Inclusion for All
- Corporate Culture and Engagement
- Inclusion, Diversity, and Equal Employment Workplace Culture

“[M]any corporations and schools continue to adhere to racist policies and preferences – albeit camouflaged with cosmetic changes that disguise their discriminatory nature.” U.S. DOJ

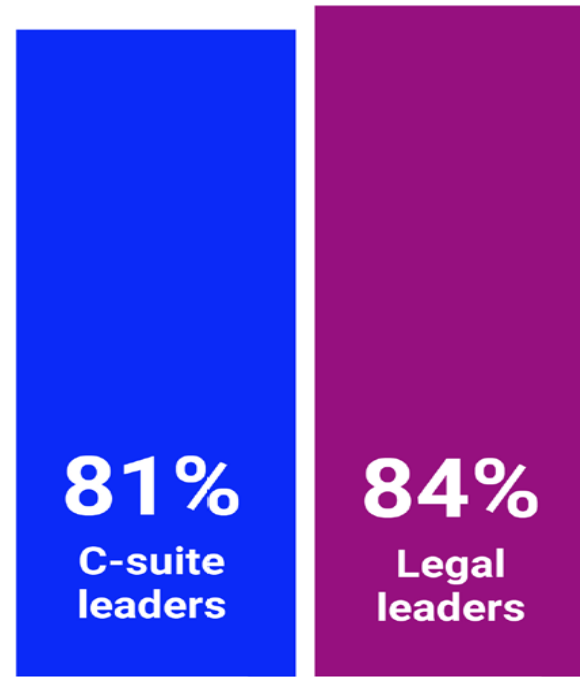
(5/19/25)

C-suite and legal leaders see business benefits of diversity, equity, and inclusion efforts

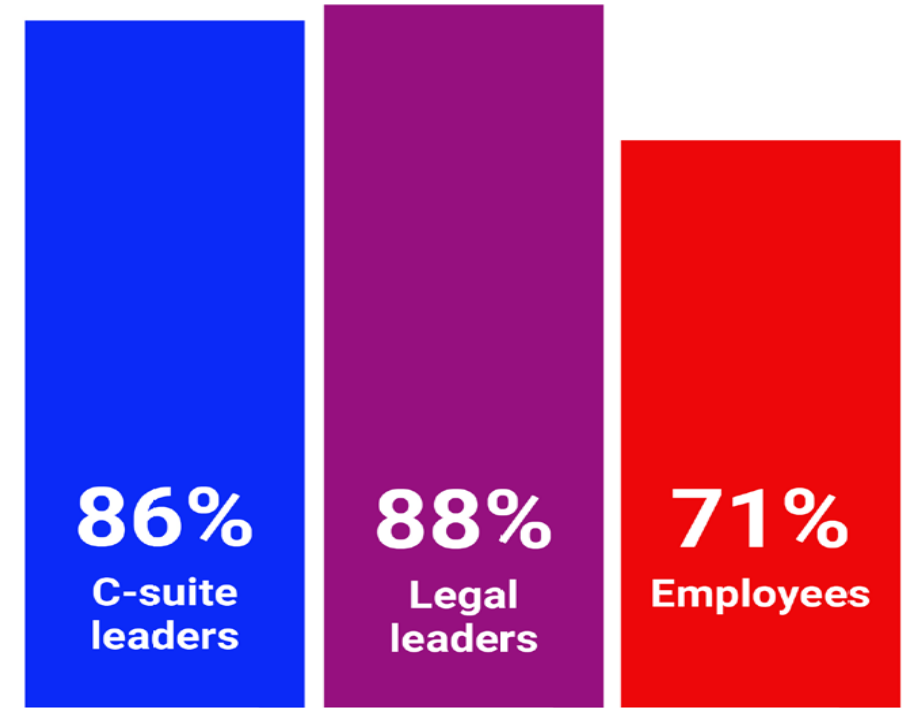
% endorsement



Their organization has seen a positive correlation between its DEI programs and financial performance



Over the next few years, continuing to support DEI programs will have a positive correlation with financial performance



Diversifying executive and senior leadership roles at US organizations would have a positive impact on business outcomes such as innovation, creativity, and financial performance

Benchmarking – Legal Risk Mitigation

- **90%** have taken at least one step to address potential DEI-related legal risks
- **88%** agree retaining or expanding DEI programs helps avoid legal risk
- **65%** say moving away from DEI would create more legal risk
- **56%** report DEI-related social media attacks, threatening letters from advocacy groups, increase in EEOC charges/litigation, and protests

30 Companies Defeat Anti-DEI Shareholder Proposals So Far in 2025

Shareholder Proposal	Stated Purpose
“Request to cease DEI efforts”	Seeks to “restrict [company’s] ability to manage...ordinary business operations”
“Consider abolishing its DEI program, policies, department, and goals.”	Full cease request, citing legal risk from <i>SFFA</i> and subsequent litigation
Report on “statistical differences in hiring across race and gender”	To expose discrimination against whites and males

A stylized world map in the background, with landmasses in a light beige color and oceans in a light blue color. The map is centered on the Atlantic Ocean, showing North and South America on the left and Europe and Africa on the right.

Anti-DEI Executive Orders

Level Set on Executive Orders

- EOs are NOT laws
- EOs do not NOT change existing federal law
- EOs are directives issued by the President that manage the operations of the federal government
- EOs direct federal agencies on how to interpret and implement existing federal law
- EOs are subject to judicial review
- EOs can be overturned on legal grounds



EOs by the Numbers

- 207 Executive Orders issued as of September 28, 2025
- 90+ proclamations and multiple memoranda
- More than 400 legal challenges
- Legal challenge/injunction trackers (Bloomberg, JustSecurity.org, etc.)
- Wide subject matter distribution

presidential power Medicare FEMA foreign affairs transportation reproductive health elections civil rights education
environment trade food police cyber security health childcare housing immigration labor reproductive rights unions media census
energy student loans reorganization personnel DEIA Medicaid staffing economy accountability intel LGBTQIA FAA criminal justice
defense public assistance technology TSA aid taxes

Anti-DEI Executive Orders



Executive Order 14151 - “Ending Radical and Wasteful Government DEI Programs and Preferencing”



Executive Order 14168 - “Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government”



Executive Order 14173 - “Ending Illegal Discrimination & Restoring Merit-Based Opportunity”



Executive Order 14281 – “Restoring Equality of Opportunity and Meritocracy”

EO 14151 – “Ending Radical and Wasteful Government DEI Programs and Preferencing”



Purpose: “Americans deserve a government committed to serving every person with equal dignity and respect, and to expending precious taxpayer resources only on making America great.”



Directive: OMB/OPM to **terminate** all “discriminatory programs, including illegal DEI and ... DEIA mandates, policies, programs, preferences, and activities in the Federal Government, under whatever name they appear.”



Implications for federal money recipients

EO 14168 “Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government”



Defines sex as immutable and binary.



Defines “gender ideology” as replacing “the biological category of sex with an ever-shifting concept of self-assessed gender identity, permitting the false claim that males can identify as and thus become women and vice versa, and requiring all institutions of society to regard this false claim as true.”



States gender identity is subjective, disconnected from biological reality and not a replacement for sex.

2025 Employment-Adjacent LGBTQ-Related Executive Orders

Military

- EO 14185: Restoring America's Fighting Force
- EO 14183: Prioritizing Military Excellence and Readiness

Schools/Children

- EO 14190: Ending Radical Indoctrination in K-12 Schooling
- EO 14187: Protecting Children From Chemical and Surgical Mutilation

Sports

- EO 14201: Keeping Men Out of Women's Sports

EO 14173 – “Ending Illegal Discrimination & Restoring Merit-Based Opportunity”



“Private sector” employers is not defined but seemingly includes any employer subject to U.S. non-discrimination laws; can include:

Federal contractors
Federal grant recipients
Employers with no federal business (contracts or grants)



Within 120 days, the Attorney General will create strategic enforcement plans identifying targets for “illegal” DEI in private sector



Identify key sectors of concern, most “egregious” DEI practitioners in each sector, specific measures to deter “unlawful” DEI, up to 9 civil compliance investigations, and strategies to encourage ending “illegal” DEI, including litigation and regulation

The EO 14173 Certification Requirement

[T]he head of each agency “shall” include in every contract or grant award:

“A term requiring the contractual counterparty or grant recipient to agree that its compliance in all respects with all applicable Federal anti-discrimination laws is material to the government’s payment decisions for purposes of section 3729(b)(4) of title 31, United States Code.”

“A term requiring such counterparty or recipient to certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.”

Executive Order 14281 – Restoring Equality of Opportunity and Meritocracy



All executive agencies should de-prioritize enforcing statutes and regulations with disparate impact, including Title VII.



Attorney General

Repeal or amend regulations on disparate-impact under Title VII

Report to White House by May 23 on regulations with repeal suggestions

Review all consent judgments/injunctions by July 22 for action

Assess if federal laws preempt state disparate-impact laws and act accordingly



Attorney General and acting EEOC Chair

Review all ongoing investigations, civil suits, and matters based on disparate-impact theory and take necessary action

Provide guidance to employers on promoting equal employment access regardless of an applicant's education background



Anti-DEI E.O. Legal Challenges

- Executive Order 14151
- Executive Order 14168
- Executive Order 14173
- Others

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Trump Administration Enforcement Efforts

EEOC Enforcement Priorities

“Rooting out unlawful DEI-motivated race and sex discrimination;

protecting American workers from anti-American national origin discrimination;

defending the biological and binary reality of sex and related rights, including women’s rights to single-sex spaces;

protecting workers from religious bias and harassment; and

remediating other areas that have been historically under-enforced by the agency.”

Enforcement – EEOC

- Quorum established October 3, 2025
- Social media/press
- Technical Assistance
- Non-traditional outreach to workers (hotline, email, etc.)
- Public investigations with demand letters
 - DEI policies
 - Applicant and selection criteria
 - Sponsorship and mentor programs
 - Compensation
 - Underlying applicant and employee demographic data
- Commissioner's charges (leaked)
- Subpoena enforcement and other enhanced approaches

The Current Administration's Gender Identity Policies Through EOs and EO-Related Guidance and Activity

- Rejects existence of transgender people
- Gender is not protected under Title VII
- Directs exclusive usage of the term “sex”
- Sex is binary
- Sex is immutable
- Gender affirming care for minors constitutes gender ideology, gender ideology inculcation, and surgical mutilation
- Remove “transgender” and “gender identity” from nomenclature by denying existence of terms and individuals
- Sex markers changes in issuance and usage of identification (passports, etc.)
- Compelling employees to share intimate spaces with the opposite sex viewed as “discrimination on the basis of protected characteristics” or hostile work environment

Changes in EEOC's LGBTQ+ Substantive Guidance

- Removal of LGBTQ+ webpage content and resources
- Prioritizing prohibiting transgender employees from using single-sex spaces consistent with their gender identity
- Will remove portions of Guidance on Harassment in the Workplace pertaining to gender identity and sexual orientation with quorum
- Currently grayed out based on Texas court's holding that four aspects of the EEOC's April 2024 Harassment Guidance is "contrary to law":
 - All language defining "sex" in Title VII to include "sexual orientation" and "gender identity" (including but not limited to the definitions found in Section I(A) and Section II(A)(5)(c));
 - The entirety of Section II(A)(5)(c) outlining harassment based on sexual orientation and gender identity;
 - Example 46 in Section III(B)(3)(d) (repeated misgendering/deadnaming)
 - All language defining "sexual orientation" and "gender identity" as a protected class (including but not limited to language in Section II(B)(3) and Section II(B)(6)).

EEOC Moves to Dismiss Disparate Impact Litigation ... Employee Intervenes

Workers seek to continue criminal history discrimination lawsuit after EEOC signals it will withdraw based on presidential directive

JOHNSTOWN, PA – A Black man who was denied employment by convenience store chain Sheetz has moved to intervene in a federal criminal history discrimination lawsuit after the U.S. Equal Employment Opportunity Commission (EEOC) notified plaintiffs that it plans to drop the case—not based on the evidence, but due to a directive from President Trump.



“This lawsuit represents years of public investment, serious legal findings, and real lives harmed by what EEOC found to be discriminatory policies,” said **Jenny R. Yang**, partner at Outten & Golden LLP, who previously served as Chair of the EEOC. “Our client is doing what the law allows—and demands—when government enforcement falls short: workers are stepping in to carry the case forward.”

Acting Chair Lucas' Reaction to EO 14281

“We will fully and robustly comply with this and all Executive Orders. But employers should take care not to conflate disparate impact claims arising from neutral employment practices with a materially different type of Title VII claim: intentional discrimination claims proven via the “pattern or practice” model of proof first set out by the Supreme Court in *Teamsters v. United States*, which may entail the use of statistical evidence, along with other evidence, to prove disparate treatment. The Commission will continue to relentlessly combat unlawful patterns or practices of intentional discrimination in violation of Title VII, including race and sex discrimination that may arise from DEI programs and national origin discrimination involving anti-American bias.”

DOJ Civil Fraud Initiative

- Announced May 19, 2025.
- Uses **False Claims Act** to enforce federal antidiscrimination laws:
 - DEI that assigns benefits or burdens
 - Encourages antisemitism
 - “[A]llows men to intrude into women’s bathrooms”
 - Requires men to compete against women in athletics

	U.S. Department of Justice Office of the Deputy Attorney General
The Deputy Attorney General	Washington, D.C. 20530
	May 19, 2025
MEMORANDUM FOR	OFFICE OF THE ASSOCIATE ATTORNEY GENERAL CIVIL DIVISION CIVIL RIGHTS DIVISION CRIMINAL DIVISION EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS ALL UNITED STATES ATTORNEYS
FROM:	THE DEPUTY ATTORNEY GENERAL 
SUBJECT:	Civil Rights Fraud Initiative

DOJ Incentives Private Enforcement by Whistleblowers

The Department recognizes that it alone cannot identify every instance of civil rights fraud. Congress likewise has ... authorized private parties to protect the public interest by filing lawsuits and **litigation** claims under the False Claims Act—and, if successful, sharing in any monetary recovery. The Department strongly encourages these lawsuits.”

May 19, 2025 - Todd Blanche, Assistant Attorney General of the U.S.



AG Enforcement Plan

- Deadline of May 21, 2025, for AG to send to White House
- No public statements or announcement
 - Sources claim it contains bad actor companies
- *National Association of Diversity Officers in Higher Education v. Trump*
 - DOJ to Fourth Circuit: “I learned that the report was in fact provided to the President back in June.”

AG Guidance – Four “Unlawful Categories”

1. Granting Preferential Treatment Based on Protected Characteristics

- Race-exclusive scholarships
- Hiring or promotion preferences based on underrepresented status
- Access to facilities limited by race

2. Using Facially-Neutral Proxies for Protected Characteristics

- Requiring applicants to describe “cultural competence” or “lived experience” in ways that favor certain racial or ethnic backgrounds

AG Guidance – “Unlawful Categories”

3. Segregating Based on Protected Characteristics

- Race-based training sessions
- Identity-exclusive facilities
- Programs that restrict eligibility to certain racial or ethnic groups

4. Facilitating Training Programs That Promote Discrimination or Hostile Environments

- Training content that singles out or demeans individuals based on protected characteristics

AG Guidance “Best Practices”

- Ensuring Inclusive Access
 - Open to all qualified individuals, regardless of protected characteristics
- Using Job-Related Qualifications for Selections
 - Based on demonstrable skills, qualifications, or experience directly tied to performance or program participation
- Flow Down Clauses/Third-Party Agreements
 - Include clear nondiscrimination clauses in contracts, grants, or partnership agreements with third parties and **monitor** compliance
- Prohibiting Retaliation
 - Ensure protection for individuals who object to, raise concerns about, or refuse to participate in potentially unlawful DEI initiatives

Key Takeaways From AG Guidance

- **CAREFUL LEGAL REVIEW NECESSARY**
- Reflects DOJ's expansive view of illegality of several common DEI programs
- Not supported by existing case law
- Not binding and provides no safe harbor for compliance

Highest Risk DEI Programs – QUOTAS

- Numerical goals
- Aspirational numerical goals
- Goal setting with quotas
- Public data and reporting
- Workforce composition reporting
- Diverse slates
- Performance/pay based on protected characteristics
- Board/supplier diversity

Highest Risk DEI Programs – PREFERENCE

- Internships
- Mentorships
- Sponsorships
- Training and professional development
- Scholarships/fellowships
- Diverse slates
- Diverse panels
- Diverse supplier/board



Highest Risk DEI Programs – TRAINING

- Access to training
- Exclusion from training
- Includes access to or exclusion from leadership development programs

7. When is a DEI initiative, policy, program, or practice unlawful under Title VII?

Employers instead should provide “training and mentoring that provides workers *of all backgrounds* the opportunity, skill, experience, and information necessary to perform well, and to ascend to upper-level jobs.”[\[32\]](#) Employers also should ensure that “employees *of all backgrounds* . . . have equal access to workplace networks.”[\[33\]](#)

DEI Training = Actionable?

- Depends on the facts
- Employee may be able to plausibly allege or prove that a diversity or other DEI-related training created a hostile work environment by pleading or showing that the training was discriminatory in content, application, or context.

7. When is a DEI initiative, policy, program, or practice unlawful under Title VII?

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.[\[31\]](#)

Thank you!

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