



WORKING TOGETHER TOWARDS EQUALITY IN THE WORKPLACE



Through the Looking Glass – Looking Back and Ahead on Trump Administration 2.0

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Panel Discussion Topics For Today

- Key Trump Administration Highlights YTD
- EEOC, OFCCP, and DOL Highlights
- Key 2025 DEI Guidance, Enforcement Targets and More
- EO 14173 Certification Requirements
- DOJ's Civil Rights Fraud Initiative
- Basic Elements of FCA Claims and Risks
- Potential Issues for 2026
- Homework for the Start of 2026

Key Trump Administration Highlights YTD

- EO 14173

- Revoked EO 11246
- Created new federal anti-DEI certification requirements for federal contractors and grantees
 - EEOC and DOJ issued guidance on illegal DEI
 - DOJ expanded False Claims Act in new Civil Rights Fraud Initiative

- EO 14168

- Eliminated “gender identity” claiming only 2 sexes
- Expanded Presidential power over Executive Branch including firing independent agencies members

EEOC Highlights

- Chair [Andrea Lucas](#) has quorum with confirmation of Brittany Panuccio
 - Kalpana Kotagal only remaining Democratic Commissioner
- Enforcement focus on, among other things:
 - “Rooting out unlawful DEI-motivated race and sex discrimination”
 - “[P]rotecting workers from religious bias and harassment, including antisemitism” (see \$21M [Columbia Univ. settlement](#))
 - Partnership with DOL on Project Firewall, “protecting American workers from [anti-American national origin discrimination](#)”
 - Also expect revision of harassment guidance and PWFA regulations

OFCCP Highlights

- Director [Ashley Romanias](#)
 - Former OFCCP Director Catherine Eschbach now at EEOC as Principal Deputy General Counsel
- Future of agency unclear
 - Ongoing dismantling of OFCCP and related offices / staff
 - Proposed moving Section 503 to EEOC and VEVRAA to DOL VETS
 - Currently funded at Biden levels until end of January
- Pending rule changes
 - [Proposed rule](#) rescinding EO 11246 regs
 - [Proposed modifications](#) to Section 503 regs
 - [Proposed modifications](#) to VEVRAA regs

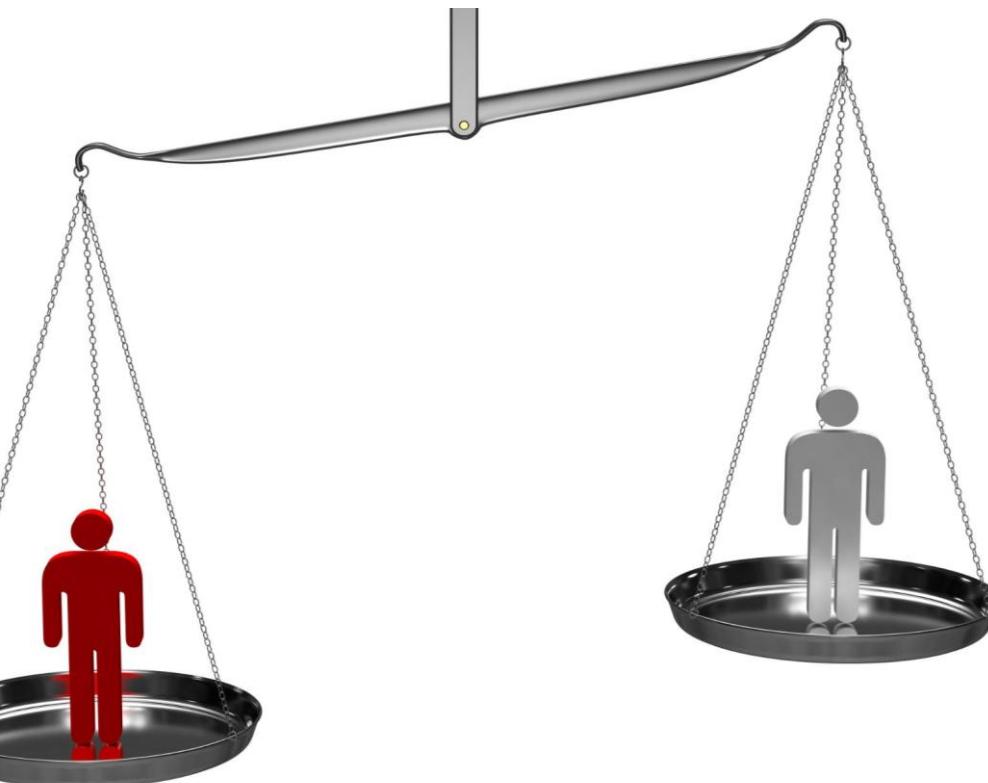
Non-OFCCP DOL Highlights

- Secy. of Labor [Lori Chavez-DeRemer](#), newly confirmed W&H Administrator [Andrew Rogers](#), and Solicitor [Jonathan Berry](#)
- Biden Admin. FLSA independent contractor classification shelved + [pending re-do](#)
- FLSA joint employer status [Sept. 2025 Opinion Letter](#) issued + [pending redo](#)
- Opinion letters are back
- Biden Admin. FLSA [exempt salary thresholds](#) canceled as a matter of agency enforcement + 2019 rule applied for now

Key 2025 Federal DEI Guidance

- Feb. 5, 2025 – [DOJ Memo](#) Ending Illegal DEI and DEIA Discrimination and Preferences (All Department Employees)
- Feb. 5, 2025 – [OPM Memo](#) Further Guidance Regarding Ending DEIA Offices, Programs and Initiatives (Heads and Acting Heads of Departments and Agencies)
- March 19, 2025 – [EEOC Technical Assistance Guidance](#) What You Should Know About DEI-Related Discrimination at Work
- March 19, 2025 – [EEOC / DOJ Joint Guidance](#) What To Do If You Experience Discrimination Related to DEI at Work
- May 29, 2025 – [OPM Memo](#) Hiring and Talent Development for the Senior Executive Service (Heads and Acting Heads of Departments and Agencies)
- July 29, 2025 – [DOJ Guidance](#) Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination

A Visual Sliding Scale: Political vs. Enforcement Agency Views On DEI Legality



Political Spectrum on DEI

Political views on DEI legality range widely from strong support to critical opposition, reflecting diverse ideologies.

Enforcement Agency Perspectives

Enforcement agencies often adopt pragmatic and distinct approaches to DEI legality, focusing on policy implementation.

Complexity of DEI Enforcement

Understanding the spectrum between political views and enforcement helps clarify challenges in DEI policy enforcement.

What is “Illegal” DEI?

Quotas

Preferences

Set-asides

Any selection
procedure that
supersedes merit

Exclusion based on
protected
characteristics

Illegal harassment

Key Federal Enforcement DEI Program Targets

US diversity representation goals or quotas for hiring, promotion, or leadership (especially with short periods for achievement)

EU or other global diversity goals or quotas linked to US operations, metrics, or managers

Manager performance evaluation ratings tied to representation goals or other DEI outcomes

Manager compensation or bonuses tied to representation goals or other DEI outcomes

General employee compensation or bonuses tied to DEI activities, leadership, or values

Employee retention programs or compensation based on protected characteristics

Key Federal Enforcement DEI Program Targets

Diverse interview slate or
“Rooney Rule” hiring or
promotion practices

Diverse applicant pool or
recruiter / hiring manager
referral pool hiring or
promotion practices

Real-time vs. backward-
looking applicant
demographic metrics access,
use, and reporting

Recruitment strategies
targeting geographic areas,
institutions, or orgs “chosen
primarily because of their
racial or ethnic composition”

Recruitment at race or
gender focused or restricted
orgs with related
“ring-fenced” applicant
pools

Targeted employee
advancement pipelines
based on protected
characteristics

Key Federal Enforcement DEI Program Targets

Internships or apprenticeships exclusive to certain groups (or with criteria deemed a “proxy” for race / gender)

Scholarships or grants exclusive to certain groups (or with criteria deemed a “proxy” for race / gender)

Race or gender denominated ERGs or affinity groups (and related programming)

Mentorship programs and retreats exclusive to certain groups or ERGs (or with criteria deemed a “proxy” for race / gender)

DEI training that “requires participants to separate into race-based groups” or that “excludes or penalizes individuals based on protected characteristics”

Supplier diversity programs that use race or gender in selection or in providing stipends, discounts or other advantages

More on What's Deemed Unlawful DEI

- DOJ and EEOC commentary on “proxy” discrimination
 - Language seems to conflict with [EO 14281](#) “Restoring Equality of Opportunity and Meritocracy” barring *federal agency* use of disparate impact
- Former OFCCP Director Eschbach’s recent comments
 - “Whole government” enforcement; end of goals; data collection vs. access and use
- EEOC Chair Lucas’ recent comments
 - Equal treatment + merit focus; concern that unlawful DEI efforts are merely being rebranded

More on Legal Shifts Impacting DEI Compliance

- *Muldrow v. City of St. Louis, Missouri*, 601 U.S. 346 (2024)
- Prior law
 - Title VII only applied to “significant” or “material” effects on “terms, conditions, and privileges of employment”
 - And, arguably, any negative impacts flowing from some DEI activity were not “significant”
- Current law - *Muldrow*:
 - Employee plaintiffs challenging an action under Title VII must only prove “some harm” with respect to a term or condition of employment; they need *not* show “significant” harm

EO 14173 Certification Requirements

- EO 14173 new certification requirement
 - “[R]equiring 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”
 - “[R]equiring such counterparty or recipient to certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws”
- Litigation pending - U.S. District Court for the District of Maryland (Baltimore); U.S. District Court for the N.D. of Illinois
- Proposed FAR rule implementing EO 14173 sent 4/15/2025 to OMB but remains pending
 - FAR clauses and SAM database unchanged

DOJ's Civil Investigative Fraud Initiative

- May 19, 2025 DOJ [memorandum](#)
- The U.S. Attorney General may generally issue a Civil Investigative Demand (CID) if she or he has reason to believe a person or entity may be in possession of documents or information relevant to a False Claims Act (FCA) investigation (See 31 U.S.C. § 3733)
- Aug. 2025 - [California EPA](#)
- Sept. 2025 - [City of Austin, TX](#)

Basic Elements of a False Claims Act (FCA) Claim

1. A claim by the defendant submitted to the United States;
2. That was materially false or fraudulent; and
 - Under an “implied certification” theory, a contractor’s breach of contract or regulatory requirements can be grounds for FCA liability if it is “material” – namely that the breach has “a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property” (31 U.S.C. § 3729(b)(4))
 - Has the government received the “essence of [its] bargain?” *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176 (2016)
3. The defendant’s conduct was knowing – defined as actual knowledge, reckless disregard, or deliberate ignorance

False Claims Act Risks

- Both DOJ and whistleblowers can bring claims (31 U.S.C. § 3730)
- Two non-exclusive remedies:
 - Recovery of 3x the amount of “actual damages” to the government
 - Imposition of a civil penalty between approx. \$14K - \$28K per claim (e.g., which could be per invoice), regardless actual damages
- Private whistleblower (qui tam) claimants are generally entitled to between 15% and 25% of the government’s total settlement if the government intervenes, as well as attorney’s fees and costs
- FCA includes criminal enforcement risk + debarment risk
- Unlike Title VII, there is no “class” certification requirement
- General 6-year statute of limitations (and possibly up to 10)

Potential Issues for 2026

- Will EEOC end EEO-1 Reports after 2026?
- Will EEOC eliminate UGESP?
- Will OFCCP survive?
- If OFCCP is eliminated where will Section 503 and VEVRAA go?
- Will DOJ/EEOC provide further guidance on unlawful employee resource group (ERG) structure and activities?
- Will some states step up to fill the federal gaps?

Homework for the Start of 2026

- *Privileged* self-audit of DEI and other core employment procedures (and on-the-ground actions) for federal, state, and local compliance
- *Privileged* analysis of how applicant and employee EEO data is sought, collected, shared, and utilized (and the timing of the same)
- Reassess status of public DEI / affirmative action descriptions, including in:
 - Internal KPI and bonus award materials
 - Award submissions + third-party compilations (e.g., Vault surveys for law firms)
 - SEC and other filings
- Review settlements with higher education

Concluding Thoughts

- “One day Alice came to a fork in the road and saw a Cheshire cat in a tree. ‘Which road do I take?’ she asked. ‘Where do you want to go?’ was his response. ‘I don’t know,’ Alice answered. ‘Then,’ said the cat, ‘it doesn’t matter.’”





Thank You

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