

“DEI” UNDER ATTACK: EMPLOYER RISKS AND WORKFORCE UPDATE

DISCRIMINATION AND THE FUTURE OF DEI

Much has been said lately about “DEI” (‘Diversity, Equity, and Inclusion’). Web-site edits, funding cuts, and executive orders from President Trump are just a few of the fronts on which fights to eliminate and preserve rights are taking place. Here in New York, however, we have our own standards, and it’s important to understand what impact this debate will and will not have on your workplace.

THE HARVARD COLLEGE and UNIVERSITY of NORTH CAROLINA (“UNC”) DECISIONS

Erosion of the rights (or obligations, depending on where you stand) to have certain “immutable characteristics” (for example, race or gender or religion) taken into consideration in educational opportunities started with the 2023 Supreme Court decisions *Students for Fair Admissions, Inc. (‘SFFA’) v. President and Fellows of Harvard College* and *SFFA v. UNC at Chapel Hill*. In too simple terms, the Court held that the schools’ admissions processes, which took into account an applicant’s race, was illegal. The Court said that the policies violated the Equal Protection Clause of the 14th Amendment to the U.S. Constitution because they treat candidates a certain way based solely on their race.

On February 14, 2025, the federal Department of Education interpreted this to mean that they should order all educational institutions to eliminate all DEI consideration at all levels. They gave the schools until February 28th to do so or risk investigations and funding loss.

FALLOUT: IMPACTS ON THE WORKPLACE

Almost immediately following the 2023 decision, elected officials from across the country sent threatening letters to pri-

vate entities – companies not considered government actors – telling them that they, like the schools sued by SFFA, were violating the law by engaging in ‘DEI’ initiatives. Those letters have become lawsuits. Cases claiming individual discrimination due to DEI initiatives have proliferated.

Other challenges addressed funding; the Small Business Administration was forced to change questions asked on its application for government funding. Rather than asking about race, the application was changed to ask about the applicant’s finances. Worth noting: When I asked an official there whether the change had impacted their lending, they responded that it did not; the correlation between race and economic challenge is real.

Now, the impact is spreading. The threat of the 2023 decisions changing the workplace has come to fruition, and has daily implications for business owners and employees alike.

The EEOC has abandoned litigation. Guidance on the Pregnant Workers Fairness Act (PWFA) has changed (though there will be no further changes for a while; there is no quorum due to firings). Most significantly, the agency has shifted its focus to “anti-American discrimination” and “Defending the biological and binary reality of sex” including single sex bathrooms.

In January, a series of executive orders required all agencies and federal contractors to remove “DEI” language from its websites and to cease efforts to employ diversity, equity, or inclusion in its hiring and employment practices. Another order required that only “male” and “female” be recognized as genders in official documentation.

On the state front, a lawsuit was filed February 11th by the Attorney General of Missouri against Starbucks, alleging that their “DEI” initiatives, consisting of (amongst other things) a mentor program, publicizing data on its workforce demographics, and having diversity goals, are illegal.

FALLOUT: IMPACTS ON THE WORKPLACE

Here in New York it’s important to note that things have not changed. In fact, local and state enforcement may actually ramp up to compensate for the lack of enforcement on the federal level.

Here, all employers – regardless of the business’ size – must go through annual sexual harassment training. As a best practice, I recommend a program that addresses all forms of discrimination (of which harassment is only one).

Here, if someone complains of harassment, there is an affirmative obligation to investigate it. Individuals in the workplace can be held personally liable for failure to protect workers and every executive, manager and supervisor needs to be trained on that.

Here, the New York State Bar Association implemented a mandate that the continuing legal education required for every lawyer to renew their license every two years, including DEI credits. New York’s commitment to DEI is here to stay.

As for DEI and other efforts to address discrimination, remember that the only controlling precedent deals with using race as the only basis to do something. That means that it can be one of several criteria, or that an employer can consider criteria related to diversity but that are not explicitly protected by law; for example, a person’s economic disadvantage or geographic location. In other words, unless you are directly affected by the federal orders, there is no reason that any employer needs to abandon its commitment to DEI.

This article is for informational purposes only and is not legal advice.

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