



PRACTICAL DEI STRATEGIES FOR NONPROFITS

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LEGAL ADVICE
WITH PERSPECTIVE

**Tom Downey
Michelle B. Ferguson
Rachel Del Grosso**

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Disclaimer

This presentation is provided as an overview of the primary laws governing the Executive Orders on DEI. We have strived to provide thorough and accurate information for today's training; however, this presentation is not meant to cover every law that could apply or issue that could arise. Additionally, it is possible that future changes in the law may affect some of the material discussed today. Please discuss specific issues that may arise with your legal counsel before acting.

Executive Order 14173

- “Ending Illegal Discrimination and Restoring Merit-Based Opportunity”
- Requires various actions by federal agencies to eliminate DEI practices
- Directs all federal agencies to take action against “DEI discrimination”
- Directs OFCCP to hold federal contractors and subcontractors responsible for taking “affirmative action”
- Prohibits OFCCP from allowing or encouraging federal contractors or subcontractors to engage in workforce balancing based on protected class
- Attempts to deter DEI policies in private sector by requiring each federal agency to identify key sectors of concern, the most egregious and discriminatory DEI practitioners; plan to deter DEI programs that are illegal, including identifying of up to 9 civil compliance investigations of publicly traded corporations, large non-profit corporations or associates, foundations with assets of \$500 million or more.
- Illegal DEI discrimination carves out preferences for veterans and blind

Executive Order 14173

- Federal contractors required to:
 - Agree that their compliance with federal anti-discrimination laws is material to the government's payment decisions; and
 - Certify they do not operate any programs promoting DEI that violate any applicable federal anti-discrimination laws
- Designed to trigger False Claims Act liability if certification deemed inaccurate

Executive Order 14151

- “Ending Radical and Wasteful Government DEI Programs and Preferencing”
- Terminates all DEI-related training and initiatives in federal workplaces
- Eliminates all DEI personnel positions in federal agencies
- Requires review of federal hiring practices to ensure “merit-based hiring” replaces any “race or gender-based preferences”
- Eliminate any equity-related grants or contracts
- Removes DEI-related benchmarks for federal contractors which ends the requirement for companies to demonstrate diversity efforts in government contract applications

Executive Order 14168

- “Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government”
- Defining sex as “individual’s immutable biological classification as either male or female”
- Removes “gender identity” protections across federal government and federal programs
- Prohibits any federal funds used to promote gender ideology and requires agencies to assess grant conditions and grantee preferences to ensure grant funds do not promote gender ideology
- Freedom to express binary nature of sex, right to single sex spaces, and that intimate spaces are designated by sex, not identity.
- Seeking legislation to overturn Supreme Court’s decision in *Bostock v. Clayton County* finding gender identity discrimination is prohibited by Title VII of the Civil Rights Act
 - Does not change law YET, but EEOC has rescinded most recent guidance regarding gender identity.

What is Illegal DEI?



Balancing Diversity, Equity & Inclusion with “Illegal DEI”

- EEOC Guidance on DEI-Related Discrimination (issued end of March 2025): “DEI initiatives, policies, programs or practices may be unlawful if they involve an employer taking an employment action motivated – in whole or in part – by an employee’s or applicant’s race, sex or another protected characteristic.”
- If lawful under Title VII previously, remains lawful (set-asides, quotas, preference-based hiring)
- Focus on “everyone” -- equity and inclusion
- Consider defining these terms and not using acronym, or finding different words to identify goals

Don't Forget about EEOC

- Consider implications not only as government contractor, but as employer
- “Illegal DEI” is not new – Title VII always prohibited such preferences (except in limited circumstances to rectify historical discrimination)
- EEOC’s focus and guidance has changed to align with these Executive Orders and use the same “language”
- Cracking down on “Anti-American” employment bias (typically EEOC actions aim to prevent bias against historically marginalized groups; that is no longer the case)
- BFOQ – defense in very limited circumstances if religion, sex or national origin is a bona fide occupational qualification “reasonably necessary to the normal operation of that particular business.” Very narrow. Does NOT include race or color.
- Look at your messaging on career pages – anything expressing preferences is problematic
- Not unlawful for an employer to promote its inclusion and diversity efforts, but beware that some may see those efforts as discriminatory. And yet, if you eliminate all mention of DEI from your website, that could turn off applicants. Be clear about nondiscrimination and qualifications.

Consider

- Executive Orders do not directly suspend or terminate a contract with a federal agency
- Agency must implement the directive on a contract-by-contract basis
- Only certain officials (typically contracting officers or grants administrators) can suspend or terminate contracts and financial assistance agreements
- Consider rights under your contract regarding suspension, stop work, or terminations

Unresolved Issues

- How to comply with existing federal court interpretations of Title VII
- How to comply with conflicting state and local anti-discrimination civil rights laws?
- Will certification requirements have a “flow-down” requirement for sub-contractors?
- Apply to new or existing contracts?

U.S. DOJ Memorandum

- February 5th memo saying that the DOJ Civil Right's Division will investigate, eliminate and penalize illegal DEI preferences, mandates, policies, in private sector and educational institutions that receive federal funds.
- Carves out “educational, cultural or historical observances such as Black History Month, International Holocaust Remembrance Day, or similar events – that celebrate diversity, recognize historical contributions and promote awareness without engaging in exclusion or discrimination”

Evaluate

- Consider all programs and employment practices.
 - Do you have diverse slate hiring or promotion practices;
 - DEI aspirational goals;
 - Board requirements for diverse members?
 - Give grants, discounts or preferences to groups, vendors, suppliers, organizations based on protected characteristic?
- Consider risk profile for DEI programs. What would a public search of your website and documents reveal about DEI? Conduct a search on your organization.
- Are opportunities open to all, without regard to an individual's sex, race, or any other protected status?
- Does the program generate opportunities to participate based on an individual's qualifications?
- Is the availability of the program effectively communicated to all individuals so participation is open to all?
- Does program provide opportunities to develop relevant qualifications for all individuals?
 - Are hiring practices consistent for all applicants (consider where you are posting for positions)
 - Any employee support/resource groups or "affinity" groups?

Key Takeaways

- Evaluate
- Identify areas to pivot or revise
- Think about internal messaging
- Stay up to date on litigation/timing
- Be mindful that some agencies may act afoul of injunction
- Demonstrate reasonableness and good faith compliance where possible
- Consider making pronoun use optional
- Emphasize treating everyone with respect and dignity
- Continue to address complaints promptly

Discussion Framework for Staff & Board

- **Acknowledgment** - Acknowledged that this is a very uncertain time with all the issues coming at us from the Federal level.
- **Current Status** - Shared what you know about the current DEI conversations on a national level.
- **DEI Audit** – Explain what the entity’s current programs and references (website, employee manual, etc.) to Diversity, Equity and Inclusion.
- **Conversation** - Open the conversation for people to share their initial thoughts and worries about these issues.
- **Positioning** - Share your unique position as a non-profit, your mission versus your risk, such as do you receive direct or indirect federal funds.
- **Risks** - Discuss possible challenges/risks based on our decisions going forward. (See Tiers of Risk in Assessing Compliance Policy)
- **Action Steps** – Affirmatively decide the entity’s course of action among these options:
 - 1) Eliminate all programs and references related to Diversity, Equity and Inclusion; or
 - 2) Make no substantive changes, but change the wording (A Thesaurus game); or
 - 3) Affirmatively decide to make no substantive or verbiage changes.
- **Safe Execution**
 - Discuss internal/external communications and timelines, if any.

TIERS OF RISK IN ASSESSING COMPLIANCE POLICY

Before making any policy decisions about how much or little your entity wishes to cooperate with federal agents, please consider the following risk factors:

1 – **Criminal**. Any individual or entity refusing to cooperate with federal agents may be at risk for criminal charges, including obstruction of justice. Even if you are refusing to cooperate with an illegal order, and the courts ultimately agree with you, the criminal process may be grueling and costly.

2 – **Regulatory**. If individuals or the entities hold any federal licenses, the administration may seek to suspend or revoke those licenses. For example, a physician refusing to divulge staff or patient information may lose their DEA license allowing them to prescribe medicine. A nonprofit refusing to allow entry to its facility may lose its 501C status.

TIERS OF RISK IN ASSESSING COMPLIANCE POLICY CONTINUED...

- **3 – Civil.** Any individual with a government contract or grant, may have them terminated for failing to cooperate with a federal search warrant. Due process rights attach to each of these tiers of risk. Criminal defendants have the most protections. Licenses are property rights, requiring notice and a hearing, but not all the protections of criminal defendants. Loss of a federal contract or grant offers only civil protections, such as the possibility for a breach of contract suit and/or challenging the legality of the termination.

Questions?



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