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DEI risks and opportunities: What businesses need to know in 2025

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I. Introduction

Over the previous few years, American companies have experienced a whirlwind of cultural, political, and legal changes regarding the treatment of Diversity, Equity, and Inclusion ("DEI") in the workplace. Following the killing of George Floyd in May of 2020, many companies moved quickly to embed DEI principles into their corporate values.

The backlash was multifaceted. On the legal front, the Supreme Court's 2023 ruling in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* ("*SFFA*") — though focused on educational institutions — energized opponents of DEI to seek out more victories in the courts. On the sociopolitical front, consumer revolts inflicted economic damage on companies such as Target for perceived faults over the handling of DEI-related issues.[1]

Opponents of DEI are already attempting to extend SFFA's reasoning into corporate hiring practices.

Following his re-election, President Trump moved to dismantle federal DEI programs through two executive orders. Executive Order 14151, issued on January 20, 2025, directs federal agencies to eliminate DEI-related offices, policies, and funding, while also mandating a review of federal contractors and grantees involved in DEI initiatives.

On January 21, Executive Order 14173 revoked multiple executive actions, most notably Executive Order 11246 — a 1965 directive that mandated affirmative action for federal contractors to promote equal employment opportunity — significantly weakening the Office of Federal Contract Compliance Programs, which enforces anti-discrimination laws for government contractors. The order also pressures private-sector organizations, including corporations and universities, by calling for investigations against so-called "illegal DEI discrimination."

Already, these Executive Orders are facing judicial scrutiny, including a lawsuit filed in the U.S. District Court for the District of Maryland seeking declaratory and injunctive relief against Executive Orders 14151 and 14173. More challenges are expected to follow.

This article is intended to provide an overview of the legal landscape as it stands today, so that companies can make informed decisions regarding their DEI programs. We will also offer practical strategies for those companies wishing to retain or expand their initiatives to ensure they comport with the law.

II. The evolving legal landscape

Two developments dominate the evolving legal landscape surrounding DEI. First, the Supreme Court's ruling in *SFFA* has led to questions as to what extent the holding can be expanded outside of the higher education context. Second, lawsuits challenging the legality of DEI programs are proliferating.

These cases tend to fall into three "buckets": (1) discrimination claims brought under traditional employment law principles; (2) shareholder derivative suits and securities class actions; and (3) State Attorneys General ("AG"). Each is described in more detail below.

A. Navigating the post-*SFFA* environment

In a departure from its previous precedent, the U.S. Supreme Court held in *SFFA* that using race as a "plus factor" to achieve a diverse student body is in violation of the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act. On its face, *SFFA* dealt only with the use of race in higher education admissions, and diversity has never been a permissible justification for affirmative action in the employment context.

Nonetheless, *SFFA* was seen as an "essential victory" by DEI opponents, and this has emboldened them to attack DEI policies in contexts outside of higher education.[2]

Indeed, America First Legal recently cited an employer's amicus brief filed in support of affirmative action in the *SFFA* case as evidence of their discriminatory practices in a recent complaint filed in the U.S. District Court for the District of Idaho.[3] In that suit, the Plaintiff (a White male) alleged that he was discriminated against and ultimately fired by the software company Red Hat on the basis of his race and gender.

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The complaint frames Red Hat's decision to join an amicus brief in support of affirmative action as a "promotion of unconstitutional and discriminatory practices [that] demonstrates their attitude towards such discrimination in regard to employment decisions."[4] In other words, America First Legal argues, Red Hat's support for affirmative action is indicative of systemic discrimination.

Opponents of DEI are already attempting to extend *SFFA*'s reasoning into corporate hiring practices.

For example, a case filed by America First Legal analogized corporate hiring quotas to the admissions policies struck down in *SFFA*. The complaint alleges that race-conscious hiring practices violate federal anti-discrimination laws, contending that executive hiring is a "zero-sum" game in which Expedia's quotas improperly favor non-white candidates over White candidates.

Citing Justice Gorsuch's concurrence, it contends that Title VI and Title VII mandate race-neutral equality, making Expedia's policies as legally impermissible as those struck down in SFFA.[5]

More attempts to expand the reasoning of *SFFA* to the employment context can be expected in the coming years.

This complaint also exemplifies an additional reason why *SFFA* might reverberate beyond higher education — the Justices themselves hinted at the broader implications of their ruling. As the plaintiff above notes, Justice Gorsuch strongly implies a similar outcome for suits brought under Title VI (like *SFFA*) and Title VII, which underpins many employment discrimination cases.

B. Trends in DEI-related litigation

1. Employment law cases

The first type of common DEI-related lawsuit is the traditional employment discrimination suit brought under Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, and national origin, or under 42 U.S.C. § 1981, which ensures all individuals have the same right to make and enforce contracts regardless of race. Even post-*SFFA*, these claims tend to be governed by traditional employment law principles.

In the Title VII context, an aggrieved employee alleges discrimination in employment based on a "reverse discrimination" theory, often pointing to the company's DEI program as evidence. These suits tend to fail because the presence of a DEI program is usually too attenuated from the plaintiff's injury.

For example, in *Vavra v. Honeywell International*,[6] a plaintiff was fired from Honeywell after refusing to complete an online unconscious bias training based on his belief that the training would vilify white people. The Seventh Circuit affirmed that his refusal to watch the training was not a protected activity under Title VII or the Illinois Human Rights Act.

To sustain a retaliation claim under these laws, a plaintiff must demonstrate an objectively reasonable belief that the action they opposed was unlawful. The Court determined that such a belief cannot be reasonable unless the employee has some knowledge of the conduct they are opposing. In this case, the employee did not know the contents of the training he objected to because he never opened it.

Similarly, in *John Franc v. Moody's Analytics*,[7] a plaintiff brought race and age discrimination suits under Title VII and the Age Discrimination in Employment Act, as well as Pennsylvania's Human Relations Act.

In this case, the plaintiff had been fired after his refusal to fill in a COVID vaccination survey. He pointed to the company's diversity initiatives as evidence that his firing was in fact pretextual.

However, the court granted summary judgment for the defendant, ruling that the mere existence of a diversity initiative is insufficient to prove discrimination. The plaintiff needed to demonstrate a direct connection between the diversity initiative and his termination, which he was unable to do in this case.

Companies should be aware that a DEI training *could* contribute to a judicially cognizable hostile work environment, "[…] when official policy is combined with ongoing stereotyping and explicit or implicit expectations of discriminatory treatment."[8]

In the coming years, companies can expect increasing anti-DEI pressure from state AGs, federal agencies, shareholders, employees, and consumers.

That being said, most DEI trainings will not rise to this level. For example, the Tenth Circuit recently upheld a dismissal of a Title VII challenge because the training materials were not severe or pervasive enough. However, the Tenth Circuit called the company's DEI trainings "troubling on many levels" and signaled a willingness to hear future challenges of a similar nature.[9]

Furthermore, the Supreme Court's 2024 decision in *Muldrow v. St. Louis* held that an individual bringing a claim under Title VII need only show "some harm with respect to an identifiable term or condition of employment."[10]

Under *Muldrow*, opponents of DEI will find it easier to bring claims on the basis that a DEI program harmed a term of their employment, as previous precedent required a greater showing of a materially adverse or significant change to the individual's employment.

In February, the Supreme Court is scheduled to hear oral arguments in *Ames v. Ohio Dept. of Youth Services*,[11] another case that could make reverse discrimination suits under Title VII more viable. In *Ames*, the Court is being asked to resolve a circuit split on whether nonminority plaintiffs must show "background circumstances" supporting their claim of discrimination in addition to the elements that all plaintiffs must prove.

Section 1981 is a provision of the U.S. Code that prohibits discrimination in "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits,

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privileges, terms, and conditions of the contractual relationship." The statute has become a powerful tool for opponents of DEI programs to challenge "targeted" diversity programs that are only open to certain demographic groups.

These targeted programs are vulnerable to litigation. The American Alliance for Equal Rights ("AAER") recently used Section 1981 in a barrage of suits against entities running targeted diversity programs including the Fearless Fund (which had a grant program only open to Black females), Founder's First Community Development Corporation (which ran a grant program only open to certain demographic groups), and a trio of law firms (making available diversity fellowships only to certain demographic groups).

Each of these cases were settled favorably for AAER or withdrawn after the Defendants changed their eligibility criteria — demonstrating the relative strength of Section 1981.

Two additional important aspects about Section 1981 should be noted. First, it is applicable beyond the employment context, and could encompass supplier diversity programs, grant programs, and any contractually based relationship.[12] Second, the inclusion of "non-diverse" demographics in the eligibility list will not necessarily protect the program from liability under the statute.

The Founder's First case is illustrative. There, the grant program was open to anyone who identified as "Latinx, Black, Asian, Women, LGBTQIA+, a Military Veteran, or someone located in a low to moderate income area."

In granting a preliminary injunction against the program, the District Court found that the fact that a White male *could* be eligible was not sufficient to outweigh "the repeated and unequivocal statements that applicants must belong to one of its preferred demographic groups."

In fact, the Court considered the fact that only a single White male had been awarded the grant as an indication that he was "a fringe outlier that eluded Founders demographic eligibility requirements" rather than evidence that the program was inclusive of all identities.[13]

2. Shareholder suits

Shareholder suits opposing DEI programs are typically styled as either shareholder derivative actions, or as class action suits brought under Securities law. Of the two, derivative suits tend to be weaker because businesses who make well informed decisions are protected from judicial second-guessing by the so-called "business judgement rule."

When the rule applies, directors and officers are protected from liability for unprofitable or detrimental corporate actions, provided those actions were taken in good faith, with due care, and within their authority.[14] Therefore, plaintiffs pursuing a derivative suit must demonstrate more than just harm to the company from a DEI program; they must also prove that the decision involved self-dealing, exceeded the directors' authority, or was made without adequate information.

For example, an advocacy organization recently brought a derivative suit seeking to enjoin Starbucks' DEI initiatives, alleging that the initiatives were illegal, a breach of fiduciary duty, or *ultra vires* acts. The case was dismissed because the court found that: (1) the DEI initiatives enjoyed the protection of the business judgment rule; and (2) the group could not show their position was representative of the average shareholder.[15]

This result shows that so long as the initiative is well-informed, DEI programs enjoy strong protection under the business judgement rule.

It should also be noted that companies can face derivative suits for not going far enough with their DEI programs. For example, Lululemon recently became the subject of a shareholder derivative suit alleging, *inter alia*, that it failed to live up to its DEI commitments insofar as it's initiative "was not structured so as to meaningfully combat discrimination within Lululemon; and [...] as a result, Lululemon employees continued to experience discriminatory treatment."[16]

Shareholder class actions arising under the Securities Exchange Act typically involve a plaintiff shareholder suing for false or misleading statements made pertaining to the company's DEI program. The relative strength of these suits is fact-intensive.

Interestingly, recent examples have arisen from both the political left and right. In one instance, plaintiffs in the Middle District of Florida alleged that Target made a series of misleading statements or omissions in their annual proxy statements regarding the risk of consumer backlash to their LGBT "Pride" initiatives. The suit recently survived a motion to dismiss.

On the other hand, Wells Fargo is facing a claim that the bank made false and/or misleading statements pertaining to its "Diverse Search Initiative," which required a diverse slate of candidates be interviewed for jobs making over $100,000.

According to the plaintiffs, Wells Fargo brought in "sham" diverse candidates to satisfy the program's requirements without seriously considering them. An amended complaint in that case also survived a motion to dismiss, and it will proceed to discovery. To avoid such a challenge, companies should ensure their communications regarding their DEI initiatives are clear and truthful — not understanding or overstating any elements.

3. State attorneys general

Action taken by state AGs — whether in support or against a DEI initiative — remains one of the most dynamic and evolving considerations that companies must account for. In the wake of *SFFA*, several "red" state AGs sent a letter to corporations advising them that their DEI programs could be illegal — especially considering the *SFFA* decision. In response, several "blue" state AGs sent a letter expressing the opposite conclusion.[17] The result has left companies in the middle of a political tug-of-war.

For now, the threat remains mostly theoretical, but that could be about to change. In June of 2024, Missouri became the first state to act against a company on the basis that their DEI program amounted to illegal discrimination, by filing a complaint against IBM in state court. Missouri is essentially alleging that IBM's

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diversity program amounts to an illegal quota. As of this writing, the Court is considering a motion to dismiss.

III. Practical strategies and best practices for maintaining DEI objectives

The decision to pursue a DEI initiative (or not) requires a careful analysis of the regulatory, sociopolitical, and shareholder environment. Some companies do not wish to roll back their DEI programming — whether because their customer base and staff continue to support DEI, it aligns with their corporate values, or because they have made an independent business judgement that DEI is good for corporate performance, innovation, and employee morale.

The board of Costco, for example, recently unanimously recommended voting against a shareholder resolution asking to produce a report on the risks posed by maintaining DEI. The board of Apple also recommended that shareholders reject a similar proposal. Others are rolling back their initiatives in response to changing customer preferences and the risk of adverse action by AGs.

In the coming years, companies can expect increasing anti-DEI pressure from state AGs, federal agencies, shareholders, employees, and consumers. With this background in mind, it is crucial for companies wishing to maintain their DEI objectives to carefully balance their DEI initiatives with legal compliance under Title VII and other anti-discrimination laws.

We offer several practical strategies below:

(1) **Ensure legal compliance:** At the risk of stating the obvious, companies should first and foremost ensure that their programs are legal. Any DEI initiative that involves racial or gender quotas, or otherwise treats people differently based on a protected characteristic is likely to run afoul of anti-discrimination laws. To avoid shareholder suits based on false or misleading statements, companies must be clear-eyed about the risks of DEI and communicate those risks effectively.

(2) **Avoid high-risk programs:** Companies should avoid high risk programs. For example, tying executive compensation to specific DEI metrics could be used to support arguments in discrimination lawsuits by employees who feel they were passed over for promotions or laid off. In 2021, a Charlotte, NC, jury awarded $10 million in a lawsuit brought by a former White senior vice president of a hospital network who accused his employer of firing him as part of a diversity push.[18] Targeted programs, like the Fearless Fund initiative, are also vulnerable to litigation. Companies opting for such programs should refocus them on race- and gender-neutral criteria, such as non-traditional qualifications, income level, geographic location, or unique experiences. Chief Justice Roberts' opinion in *SFFA* underscores this point: "[...]nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life."[19] Companies can adopt similar approaches while avoiding actions deemed unlawful.[20]

(3) **Base DEI decisions on informed judgments:** A company cannot invoke the business judgment rule without well-informed decisions. Each company should closely study the link between its diversity goals and corporate performance, and tailor their initiatives accordingly. Courts are less likely to second-guess DEI decisions made pursuant to well-informed research and consultation. On the other hand, haphazard applications of stock diversity initiatives are more likely to fall outside of the business judgement rule's protection.

(4) **Understand your market:** In the same vein, companies should understand their market — both geographically and socially. Does the company operate in a state with an AG who has signaled disapproval of DEI initiatives? How does the company's customer base feel about DEI initiatives? Understanding these elements is crucial to understanding the risk (or lack thereof) of employing a DEI program. For companies in adverse environments, "light touch" DEI options, such as Employee Resource Groups ("ERGs"), can advance DEI principles while minimizing litigation risks. ERGs can host initiatives promoting DEI values and fostering workplace belonging without the pitfalls of high-risk programs.

(5) **Regularly review and adapt DEI programs:** DEI initiatives must remain aligned with corporate goals and the evolving sociopolitical landscape. Companies should conduct regular reviews and adjust programs as needed to ensure they align with their unique corporate values and that they focus on improving the bottom line. Given the likely rapid changes in DEI dynamics over the next administration, flexibility and adaptation are essential.

Notes

[1] James Reinl, *Corporate America's DEI showdown: The anti-woke backlash against Target, Macy's and Bud Light has rocked the diversity industry, but its policies persist — under the radar*, Daily Mail, (Feb. 4, 2025, 12:02 PM), https://bit.ly/3Q5UYl9; Pamela N. Danziger, *Target and Lululemon Hit with DEI Lawsuits from Opposing Sides of the Controversy*, Forbes, (Feb. 4, 2025, 12:04 PM), https://bit.ly/4hqvsDf

[2] *Celebrating the One-Year Anniversary of Students for Fair Admissions v. Harvard/UNC, and the End of Race-Based Affirmative Action*, Students for Fair Admissions (Feb. 4, 2025), https://bit.ly/40ScFJM

[3] "Indeed, Red Hat has made it clear that it is in favor of discriminatory policies that the Supreme Court has found unconstitutional. In the case of [*SFFA*...], Red Hat, along with 70 other corporations, filed an amicus brief with the U.S. Supreme Court in support of affirmative action. In an August 2, 2022, email, Red Hat boasted of the company's involvement in this effort to its employees, claiming that Red Hat was 'proud to join this effort to ask the U.S. Supreme Court to continue to **allow colleges to consider race, as one of many factors, in admissions so that colleges can produce a diverse pipeline of graduates**.'" Complaint at 5, *Wood v. Red Hat, Inc.*, No. 2:24-cv-237 (D. Idaho May 8, 2024).

[4] *Id.*

[5] Complaint at 23-24, Kascsak v. Expedia, Inc. et al, No. 1:23-cv-01373 (W.D. Tex. Jan. 10, 2024).

[6] 106 F.4th 702 (7th Cir. 2024).

[7] No. 2-22-CV-01401-MJH, 2024 WL 4417165, at *1 (W.D. Penn. Oct. 4, 2024).

[8] *Young v. Colorado Dept. of Corrections*, 94 F.4th 1242, 1245 (10th Cir. 2024).

[9] *Id.*

[10] *Syllabus, Muldrow v. City of St. Louis, Missouri, et al.*, Supreme Court of the United States (Feb. 4, 2025), https://bit.ly/3WSoX3A

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[11] 144 S. Ct. 967 (2024); 87 F.4th 822 (6th Cir. 2023).

[12] For example, Section 1981 has been used to challenge supply chain diversity programs that seek to increase the diversity of downstream suppliers. These suits are often dismissed for lack of standing but could pose a risk if a plaintiff can actually tie a missed opportunity to the program.

[13] *Am. All. for Equal Rights v. Founders First Cmty. Dev. Corp.*, No. 4:24-cv-327-O, 2024 WL 3625684, at *4 (N.D. Tex. July 31, 2024) (order granting preliminary injunction).

[14] *Business-Judgement Rule*, Black's Law Dictionary (11th ed. 2019)

[15] *Nat'l. Ctr. for Pub. Pol'y. Rsch. v. Schultz et al*, No. 2:22-cv-00267-SAB, 2025 WL 5945958, at *3-4 (E.D. Wash. Sep. 11, 2023).

[16] *Wong v. McDonald et al*, Complaint at 3, No. 1:24-cv-08752-ALC (S.D.N.Y. Nov. 18, 2024).

[17] In addition to this letter, "blue" state AGs led by Illinois sent an additional letter in January of 2025 to Walmart CEO Doug McMillon expressing their concern regarding Walmart's DEI rollback. The letter emphasized that the rollback is not required by law, stressed that *SFFA* was limited to higher education, and asked for more information from Walmart. On January 28, 2025, a coalition of 19 Republican AGs, led by Texas AG Ken Paxton and Iowa AG Brenna Bird, sent a letter to Costco Wholesale, urging the company to abandon its DEI policies due to concerns over potential discrimination and legal risks. The letter accused Costco of undermining merit-based principles and violating federal law, giving the company 30 days to either repeal its DEI initiatives or justify their continuation. With legal challenges already emerging, businesses must now navigate an increasingly complex landscape of compliance, litigation risks, and evolving public expectations.

[18] *Duvall v. Novant Health Inc.*, No. 3:19-CV-00624-DSC, 2022 WL 3331263, at *2 (W.D.N.C. Aug. 11, 2022). On appeal, the punitive damages were reversed, but the jury verdict was upheld. *Duvall v. Novant Health*, 95 F.4th 778 (4th Cir. 2024).

[19] *Students for Fair Admissions*, 600 U.S. at 230 (citations omitted).

[20] *Id.*

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