



Blog

Backlash Against DEI: What's an Employer to Do?



Posted by [Patricia Lantzy](#) | Jan 24, 2024

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Since the U.S. Supreme Court's June 2023 decisions^[1] found that race-conscious admissions practices in higher-education violated both the Constitution's 14th Amendment Equal Protection Clause and Title VI of the Civil Rights Act of 1964, the potential ripple effect that this ruling may have outside the university context has been a cause for concern among private-sector employers. This unease comes at a time when Diversity, Equity and Inclusion (DEI) initiatives are increasingly under attack by non-BIPOC (Black, Indigenous, and people of color) complainants,



designed to advantage some workers amount to unlawful
ers.

The court's rulings may be read as a cautionary tale and likely preview of coming attractions in the context of employment discrimination. Within the past year or so, many employers have either explicitly ended their formal DEI initiatives or have quietly let them go dormant (including, in many cases, reducing DEI staff headcount or laying off their entire DEI teams), a trend that has seemingly picked up steam recently. Big business is worried – with good reason – that their DEI programs will result in negative PR or, worse, will be challenged in court and found to be illegal. In recent weeks, the growing unease with DEI has reached a fever pitch, with numerous and increasingly negative posts on social media, as well as media reports of pending and potential litigation related to various employment-related DEI programs and outcomes.^[2] Given the politicization of issues that normally comes with a presidential election, the controversy over DEI is bound to become even more fraught in 2024.

How did we get here?

Many employers have asked “how did we get here?” The short answer is, not by following existing law. Employers have long been and remain subject to anti-discrimination laws that prohibit using race and sex in individual hiring decisions. And the Supreme Court’s rulings in the admissions cases did not change this. Accordingly, employers who have carefully tailored their DEI programs and practices to meet federal and state/local anti-discrimination law probably have little cause for concern.

Nonetheless, an examination of DEI’s origins does provide useful context. The goal of DEI in the workplace was ostensibly to foster a diverse and inclusive workforce, thereby ending unlawful discrimination and expanding opportunities. But, in many organizations, especially large corporations, DEI initiatives have experienced “mission creep” by including within their scope express attempts to extinguish “implicit bias” against groups designated as underrepresented, along with explicit favoritism toward some categories of workers over others. Disfavored workers have often complained of being subject to mandatory “training” designed to teach them to recognize their “inherent bias” and “be less white.”^[3]

Regrettably, what DEI has meant in practice at some organizations is merely to substitute one form of unlawful discrimination for another. For example, many executives and hiring managers have been incentivized to recruit, hire and promote workers based on factors other than merit and qualifications.^[4] It also has been fairly common in recent years for Fortune 500 companies to tie executive pay to “diversity goals.”^[5] Playing this numbers game has created a variety of legal risks and issues ranging from workplace disharmony to public safety concerns, as well as potential or threatened lawsuits on behalf of shareholders or disfavored workers. In addition to the



3M's DEI initiatives, Meta[6], Comcast,[7] Amazon,[8] and Starbucks[9] EI-based racial discrimination.

Many companies had already begun to reassess their hiring practices and shed their DEI staffs during pandemic-related layoffs, with attrition rates for DEI roles reportedly outpacing those of non-DEI positions in more than 600 U.S. companies that laid off workers since late 2020, and attrition rates reportedly increased during 2023.[10] Private employers' decisions to slash DEI jobs and change DEI policies and practices were not related only to pandemic economics, but also to pushback against DEI initiatives in general and some DEI practices in particular.

And then came the Supreme Court decision in the university admissions cases, and the resulting spike in corporate concern along with DEI-related pushback and threats of litigation. Immediately following the Court's June 2023 ruling, the Equal Employment Opportunity Commission ("EEOC") weighed in and published commentary.[11] The statement from Commissioner Andrea Lucas urged "companies to take a hard look at their corporate diversity programs," while noting that "from the focus on ESG to the rise of 'equity' parlance in corporate diversity initiatives, companies remain under heavy pressure to take race-conscious employment actions," and that such pressure "has been enabled by common misunderstandings of the civil rights rules governing employers."

In the same statement, Commissioner Lucas emphasized that the EEOC is charged with "enforcing equal opportunity at work, not 'equity,'" (emphasis added) and its "mission is to prevent and eliminate discrimination, not impose 'equitable' outcomes," adding that, "poorly structured, voluntary diversity programs pose both legal and practical risks for companies." In discussing the difference between diversity interests as justifications for race-based university admissions decisions and the legal requirement that employers may not take race-based employment actions, even if based on an employer's interest in workforce diversity, Commissioner Lucas reminded employers that they "cannot use racial or sex-based quotas," nor may companies "take race-motivated actions to maintain a demographically 'balanced' workforce."

Soon after the Court's ruling, thirteen Republican state Attorneys General wrote to Fortune 100 CEOs to "remind [them] of [their] obligations as employers under federal and state law to refrain from discriminating on the basis of race, whether under the label of [diversity, equity, and inclusion] or otherwise." The CEOs were urged "to immediately cease any unlawful race-based quotas or preferences [their companies had] adopted for employment and contracting practices." [12] As might have been expected, only days later, twenty-one Democratic state Attorneys General wrote to the same Fortune 100 executives to offer reassurance "that corporate efforts to recruit diverse workforces and create inclusive work environments are legal



for claims of discrimination.” Indeed, they urged the CEOs to “double-
d programs.”^[13] ^[14]


So what is a prudent employer to do?

Clearly, many large employers are tuned in and paying heed to potential legal liabilities. Of the 25 major U.S. corporations that received public shareholder letters of complaint since 2021, claiming that their DEI programs constitute illegal discrimination and a breach of the directors’ duties to investors, many are modifying their policies.^[15] Changes have included the removal of language identifying certain programs as being intended only for groups designated as underrepresented, as well as the modification of executives’ goals relative to racial representation in the workforce.

After JPMorgan was notified in May 2022 of allegations that 10 of its DEI initiatives were discriminatory and unlawful, the bank changed the descriptions for its “Advancing Hispanics & Latinos” and “Advancing Black Pathways” programs. Previously offered only to Black and Latino students, these programs now invite applications from all students, “regardless of background.” Likewise, investment management and financial services firm BlackRock removed language stating that a scholarship it offered was “designed for” members of specific underrepresented groups, and now has expanded eligibility. Lowe’s, Pizza Hut operator Yum! Brands (deleting references to specific racial groups), and American Airlines (discontinuing numerical diversity targets) have also made changes to their diversity programs, according to the above-cited Reuters review of publicly-available information.

Pending and future litigation may provide greater clarity in this area. Until then, employers may wish to consider taking the following steps:

- Review DEI policy and program initiatives carefully, and be prepared to make revisions.
- Link executive/manager performance and compensation to diversity and inclusion *efforts*, not results. Consider working with counsel, within the legal privilege, to assess and monitor workforce demographics, conduct compensation audits, and develop or revise policies.
- Reconsider representation objectives based on EEO-1 categories, and avoid unnecessary data-gathering and discussion of DEI data points.
- Be mindful of corporate communications, both internal and to the public, to help avoid the possibility that anyone will misconstrue the organization’s purpose and motives.
- Review recruiting programs to ensure that the organization is casting a wide net that is likely to attract applicants from a truly diverse talent pool.
- Ensure recruiting, onboarding, and training are all geared toward the elimination of unlawful workplace discrimination and harassment, with equal opportunity for all.
- In supervisors and managers to ensure that promotion and disciplinary processes are neutral and consistently administered.

- erials, and be prepared to discontinue any that are discriminatory on characteristics or are offensive toward “disfavored” groups. This is because some state laws now prohibit or restrict DEI training topics.
- Ensure that organization-sponsored training and mentoring programs are available to all employees, irrespective of any protected characteristics.
- Consider seeking and promoting diversity based on characteristics that do not involve protected classes (e.g., instead of race or sex, consider economic background, first-generation college graduates, diverse experiences and viewpoints).
- Review other existing policies to ensure they are neutral and that they promote professionalism, respect, and courtesy to all employees.

If you would like to consult on DEI issues or other employment law matters, please contact Patricia Lantzy at plantzy@outsidegc.com. You can also register to attend Patricia’s upcoming webinar, *The Future of DE&I in the Workplace*, on February 21, 2024 at 12:00pm EST: **[Register Now](#)**

A member of our Washington D.C.-based team, [Patricia Lantzy](#) is a highly skilled labor and employment attorney with almost 30 years of experience. Trish works with a wide range of clients, from individual executives and small businesses to the Fortune 500, on employment-related issues across the employee lifecycle, including recruiting, hiring, workplace harmony and leave issues, performance and discipline/discharge, corporate reorganizations and reductions in force.

[1] *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No-20-1199, and *Students for Fair Admissions Inc. v. University of North Carolina et. al*, No. 21-707, 600 U.S. 181 (2023).

[2] See, e.g., “The DEI Rot In The Airline Industry Is Way Worse Than You Think,” Daily Wire, Jan. 10, 2024 (<https://www.dailywire.com/news/the-dei-rot-in-the-airline-industry-is-way-worse-than-you-think>). See also “Pilots Should Be Hired Based on Merit, Not Diversity, If Safety is the Top Priority, Aviation Expert Says,” Jan. 17, 2024 (<https://www.msn.com/en-us/travel/news/pilots-should-be-hired-based-on-merit-not-diversity-if-safety-is-the-top-priority-aviation-expert-says/ar-AA1n6SRs>).

[3] “Coca Cola Slammed for Diversity Training That Urged Workers to be ‘Less White,’” New York Post, Feb. 23, 2021.



It was recently charged in a federal civil rights complaint that America First Legal (“AFL”) filed on December 12, 2023 with the EEOC for alleged racial and sex discrimination, following



video clip in which its CEO Arvind Krishna confirmed that he awarded based on the number of preferred racial minorities and females hired by served IBM's Board of Directors a written demand to end the company's "systemic violations of law to prevent the waste of corporate assets and harm to shareholders." See <https://aflegal.org/america-first-legal-slams-ibm-for-racially-discriminating-against-white-and-asian-americans-files-federal-civil-rights-complaint>.

[5] See, e.g., "McDonald's Ties Executive Bonuses to Diversity, Released Workforce Data," Reuters, Feb. 18, 2021.

[6] See "Meta-Backed Diversity Program Accused of Anti-White Hiring Bias," Bloomberg Law, Sept. 5, 2023, reporting on Harker v. Meta Platforms et al, Case No. 1:23-cv-07865, filed 09/05/23 in U.S. District Court for the Southern District of New York (alleging "a race-based hiring program . . . [that] intentionally discriminates against white men and women, in violation of the Constitution and laws").

[7] See, e.g., "The Legal Assault on Corporate Diversity Efforts Has Begun," The Wall Street Journal, Aug. 8, 2023, reporting on April 2022 lawsuit filed in the U.S. District Court for the Southern District of Indiana by Wisconsin Institute for Law and Liberty on behalf of white male business owner plaintiffs: Moses et al. v. Comcast Cable Communications Management, LLC., Case No. 1:22-cv-00665-JPH-MJD; settled in November 2022.

[8] See, *ibid.*, reporting on Bolduc v. Amazon.com Inc., Case No. 4:22-cv-615, filed July 20, 2022 in U.S. District Court for the Eastern District of Texas (and seeking class-action status), alleging unlawful racial discrimination against Whites and Asian Americans relative to Amazon's providing a \$10,000 stipend only to "Black, Latinx and Native American entrepreneurs" who work as its delivery service partners.

[9] See, *ibid.*, reporting on Case No. 22-00267, U.S. District Court, Eastern District of Washington, filed in August 2022 by the National Center for Public Policy Research ("NCPPR"), an owner of shares in the company, and accusing Starbucks of violating Title VII and Section 1981, and the officers and directors of breaching their fiduciary duty to shareholders by embracing discriminatory policies with specific workforce percentage target goals for Black, indigenous or people of color, with executive pay pegged to the BIPOC targets; dismissed August 11, 2023.

[10] See "Cutting Costs at the Expense of Diversity," Revelio Labs, Feb. 7, 2023 and "Critics of Corporate Diversity Efforts Emerge, Even as Initiatives Falter," The Washington Post, April 1, 2023.

[11] See "With Supreme Court Affirmative Action Ruling . . ." by EEOC Commissioner Andrea Lucas, published in Westlaw Today June 29, 2023; <https://www.reuters.com/legal/legalindustry/with-supreme-court-affirmative-action-ruling-its-time-companies-take-hard-look-2023-06-29>. See



statement from U.S. EEOC Chair Charlotte Burrows, asserting that the programs are distinguishable from private sector DEI/accessibility programs, and encourage employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace.” <https://www.eeoc.gov/newsroom/statement-eeoc-chair-charlotte-burrows-supreme-court-ruling-college-affirmative-action>

[12] See July 13, 2023 Letter from state Attorneys General for Kansas, Tennessee, Alabama, Arkansas, Indiana, Iowa, Kentucky, Mississippi, Missouri, Montana, Nebraska, South Carolina, and West Virginia; <https://s.wsj.net/public/resources/documents/AGLetterFortune100713.pdf>.

[13] See July 19, 2023 letter from state Attorneys General for Nevada, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington; https://drive.google.com/file/d/1C7oPvvKg05xp-VCMznRxEEWRALxzde_o/view.

[14] As the Wall Street Journal editorial board noted, “Big corporations are caught in a pincer.”

[15] See “Some Companies Alter Diversity Policies After Conservatives’ Lawsuit Threat,” Reuters, Dec. 18, 2023, based on a recent review of publicly-available corporate statements.

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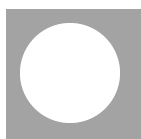
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