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A Path Forward For Cos. Amid Trump's Anti-DEIA Efforts

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In its ongoing campaign against diversity, equity, inclusion and accessibility, or DEIA, programs, the Trump administration has begun contemplating criminal prosecutions.

On Feb. 5, Attorney General Pam Bondi issued a memorandum directing the U.S. Department of Justice to explore criminal enforcement options to penalize DEIA in the private sector.[1]

While legal experts strain to identify which criminal statutes could apply — with only a handful of possibilities listed below — this development underscores the need for clarity around which DEIA practices remain lawful.

This is especially true considering ongoing support for diversity principles — support that, according to a 2024 Scientific Reports study, is even more widespread than most Americans realize.[2]

With the Feb. 21 nationwide injunction temporarily halting enforcement of Trump's DEIA-related executive orders, companies will have some breathing room to carefully structure their programs. For private companies looking to safeguard their DEIA efforts, a path forward remains.

What does the Trump administration say about DEIA?

According to Bondi's Feb. 5, memorandum, titled "Ending Illegal DEI and DEIA Discrimination and Preferences," the DOJ's "Civil Rights Division will investigate, eliminate, and penalize illegal ... DEIA preferences, mandates, policies, programs, and activities in the private sector and in educational institutions that receive federal funds."

For this purpose, Bondi specifically requests "proposals for criminal investigations," in addition to civil compliance investigations of companies in the private sector.

Unfortunately, the DOJ memo omits any description of which policies would be considered "illegal."

In terms of authority, the DOJ memo specifically references (1) the 2023 U.S. Supreme Court decision, Students for Fair Admissions Inc. v. President & Fellows of Harvard College, ending affirmative action in higher education;[3] and (2) Trump's Executive Order No. 14173, titled "Ending Illegal Discrimination and

Restoring Merit-Based Opportunity."[4]

However, on Feb. 21, in National Association of Diversity Officers in Higher Education v. Trump, the U.S. District Court for the District of Maryland issued a nationwide preliminary injunction against this executive order.[5]

Concluding that it likely violates the First Amendment by imposing content-based restrictions on speech, while also violating the Fifth Amendment for being unconstitutionally vague, the court enjoined the Trump administration from: (1) defunding equity-related grants or contracts, (2) compelling anti-DEIA certifications from grantees and contractors, and (3) bringing any False Claims Act or other enforcement action.

Importantly, this preliminary injunction did not bar the DOJ from preparing its internal strategic enforcement plan discussed in the DOJ memo, nor does it enjoin the DOJ from commencing investigations.

What does current antidiscrimination law say?

Ultimately, what violates antidiscrimination laws is determined by Congress and the courts — not the president.

At least 16 state attorneys general agree. In their Feb. 13 "Multi-State Guidance Concerning [DEIA] Employment Initiatives" analyzing federal antidiscrimination law, multiple state AGs assert that the anti-DEIA "Executive Order cannot and does not prohibit otherwise lawful practices … to promote diversity, equity, inclusion and accessibility."[6]

While this administration has developed a different view — as evidenced by its demands that federal grant recipients terminate all DEIA-related activities[7] — courts will not simply defer. In its decision last June in Loper Bright Enterprises v. Raimondo,[8] the Supreme Court made clear that an agency's interpretation of the law will not be given deference.

Thus, neither the president nor the DOJ can determine what is illegal in this regard — rather, their guidance signals an enforcement approach and areas of risk.

Ultimately, antidiscrimination law controls, including the Students for Fair Admissions decision. And notably, the Supreme Court in SFFA described diversity as a "worthy" and "commendable" goal.

Although antidiscrimination law is rapidly developing, the majority opinion in SFFA provides some guidance on what remains lawful. SFFA held that diversity was no longer a measurable compelling interest justifying race-conscious admissions, and further found that Harvard's and the University of North Carolina at Chapel Hill's race-conscious approaches were not narrowly tailored.[9]

The Supreme Court explained that such holistic admissions programs violated the equal protection clause by weighing minority status favorably, i.e., as a "plus" in the context of other factors, like academics, extracurricular activities, recommendations, etc.[10]

SFFA, however, did not hold that DEIA programs per se violate the equal protection clause, and the court has still not expanded the SFFA holding into other sectors — although this is anticipated.

Furthermore, SFFA did not prohibit colleges and universities from considering an applicant's discussion of how race affected the applicant's life. Rather, the majority affirmed that discussion of race by an applicant

may be relevant to understanding the applicant's unique experience.[11] And the equal protection clause, upon which the SFFA decision was based, does not embrace colorblind language in its text.[12]

What criminal laws could potentially apply?

In light of the current state of antidiscrimination law, what criminal laws could the DOJ attempt to apply to DEIA programs?

Although the Trump administration may be hard-pressed to enforce them, the following laws could be stretched to chill DEIA:

- Title 18 of the U.S. Code, Section 241, Conspiracy Against Rights: This statute criminalizes an agreement of "two or more persons [to] conspire to injure, oppress, threaten, or intimidate any person ... in the free exercise or enjoyment" of rights or privileges secured by the U.S. Constitution or U.S. law. The prosecution must show that the offender acted with specific intent — i.e., intent to violate this law — to interfere with the federal rights in question.[13]

- Title 18 of the U.S. Code, Section 242, Deprivation of Rights Under Color of Law: This statute criminalizes anyone acting "under color of any law" — e.g., a government entity or a federally funded institution — to willfully deprive a person of rights, privileges or immunities protected by the Constitution or federal law.[14]

- Title 18 of the U.S. Code, Section 245, Federally Protected Activities: This statute prohibits willful interference, "by force or threat of force," of certain protected activities — such as attending public school, applying for public or private employment, or receiving federal assistance — on the basis of race, color, religion or national origin.[15]

- Title 18 of the U.S. Code, Section 1001, False Statements to Federal Government Agency: This statute prohibits knowingly and willfully making materially false statements or concealing material facts in matters within federal jurisdiction. The accused must have both the specific intent to make a false statement and the knowledge that such conduct was unlawful.[16]

- Title 18 of the U.S. Code, Section 287, Criminal False Claims: This statute criminalizes knowingly making false claims to the federal government, e.g., for payment or approval.[17]

Proving intent will likely be a high hurdle in such cases, if stretched to DEIA initiatives in the private sector. To be prosecuted, actors need criminal intent justifying criminal punishment.

There are several levels of criminal intent, ranging from deliberate ignorance, to knowingly, willfully, general intent and, ultimately, specific intent to violate the statute in question — the highest level.

In every instance above except for Section 287, criminal false claims, the government must prove that the accused acted either willfully or with specific intent to break the law in question.

The Supreme Court has observed that "willful" can mean many things, depending on the context.[18] In the context of healthcare fraud and the Anti-Kickback Statute, willfulness generally means acting with knowledge that the conduct was unlawful.[19] In securities fraud, one acts willfully by undertaking an action one knows to be "wrongful."[20]

Likewise, in the case of criminal civil rights violations under Sections 242 and 245 — deprivation of rights

under color of law and federally protected activities, respectively — willfulness requires proof that the defendant acted in a nefarious manner to intentionally deprive victims of their constitutional rights.

With a Section 242 violation, the Supreme Court confirmed in its 1945 Screws v. U.S. decision that it is not sufficient to prove that the accused had a "bad purpose," but that the government must show an intent to deprive the victim of a constitutional right.[21]

Similarly, a Section 245 violation requires proof that the accused acted with the specific intent to interfere with the victim's enjoyment of a federally protected right.[22]

If the purpose of a company's practice or policy is well intentioned to promote inclusivity, and not designed to deprive others of their rights, then meeting this evidentiary burden should be difficult. Companies may also be able to rely on the "advice of counsel" defense, should the DOJ target its program.

In past practice, criminal referrals under the above statutes were pursued only when there was strong evidence of willful deprivation of rights or outright fraud.

Historically, criminal enforcement in employment or educational discrimination contexts has been rare — even in extreme cases, i.e., violent threats against people of color integrating into historically white schools. Since criminal charges were scarcely pursued in those contexts, it would be a significant departure for the government to pursue criminal cases against well intentioned programs designed to celebrate diversity in a compliant way.[23]

Furthermore, the long-standing legal principle of in dubio pro reo — i.e., "when in doubt, for the accused" — should counsel most prosecutors against criminal prosecution given the current confused and developing legal landscape, where different administrations have put forth conflicting interpretations of antidiscrimination laws. When uncertainty exists, the accused should receive the benefit of the doubt.

How should companies adapt DEIA initiatives to comply with the law?

If DEIA practices are not carefully tailored, penalties may be on the horizon, notwithstanding the recent preliminary injunction, which could be lifted at any time.

Performing a careful review and institutional introspection will allow companies to confirm and even certify that they are complying with both the letter and the spirit of antidiscrimination law.

Determine the approach.

Now is the time to decide what your institution's stance will be on DEIA, and its risk tolerance. Although the preliminary injunction is in place barring enforcement actions temporarily, it is not permanent.

Furthermore, the DOJ can begin to investigate organizations while it litigates the anti-DEIA executive order.

Conduct an internal review.

Companies should review current programs and policies in hiring, mentorship, advancement,

compensation and even supply chain considerations.

Among the questions to ask is whether any protected class characteristic is given weight in extending a benefit.

Protect permitted practices.

The following practices have been blessed as permissible by either the Supreme Court or the DOJ under Bondi.

Historical or Educational Observances

The DOJ memo unambiguously allows "educational, cultural, or historical observances — such as Black History Month [or] International Holocaust Remembrance Day ... that celebrate diversity, recognize historical contributions, and promote awareness without engaging in exclusion or discrimination."[24]

Unique Experiences

The SFFA majority agreed that its decision did not prohibit "considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration or otherwise."[25]

Ability to Overcome Obstacles

According to the SFFA decision, an applicant's demonstration of "courage and determination" in their ability to overcome discrimination may be seen as beneficial.[26]

Inspiration

An applicant's leadership abilities, which may have been motivated by one's heritage, may be seen as beneficial.[27]

Consider implicit bias testing.

Another approach is to determine whether your program is narrowly tailored to combat known issues of unconscious or implicit bias — thereby distinguishing it from SFFA.

The Implicit Association Test gained traction years ago when it uncovered enduring unconscious bias against women, minorities and other traditionally marginalized groups, fueling the rise of DEIA countermeasures.[28]

The Implicit Association Test and similar tools could help companies tailor DEIA programs to remediate specific, documented biases, in an anonymous way that aggregates data.

Explore neutral practices.

The SFFA decision does not prohibit practices that promote diversity, equity, inclusion or accessibility in principle. Thus, widespread recruiting efforts — e.g., at historically Black college and universities — would not violate SFFA.

Similarly, neutral practices, consistent with SFFA, such as those recommended in the state AGs' Feb. 13 guidance are permitted — e.g., using panel interview approaches, setting standardized hiring criteria, setting up employee resource groups and providing diversity training.[29]

Finally, current antidiscrimination law does not bar cross-department mentorship programs that emphasize career development, provided pairings are based on goals rather than identity.

Conclusion

While the benefits of diversity — e.g., increased productivity, better financial performance and higher employee morale — remain, institutions should anticipate increased regulatory scrutiny and inquiries regarding DEIA.

Companies will need to tailor programs to align with evolving legal standards. However, public support for DEIA remains.[30] And several state AGs have likewise supported DEIA initiatives, reinforcing that such programs are not inherently unlawful so long as they are carefully tailored to comply with the law.[31]

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[1] This Memorandum was provided in furtherance of Executive Order 14173 signed on January 21, 2025, by President Trump. https://www.justice.gov/ag/media/1388501/dl?inline.

[2] A large-scale Scientific Reports study (over 5,400 participants) showed that, on average, 82% of respondents actually supported pro-diversity statements, yet most participants believed only about 55% of Americans would do the same—indicating a significant underestimation of public support for DEIA efforts. This gap persisted across various demographic groups, suggesting many underestimate support for diversity. Moreover, when researchers provided accurate statistics highlighting broad public support, participants became more likely to embrace inclusive behaviors themselves, indicating that stronger DEIA backing may exist than most Americans realize. See Diversity and inclusion have greater support than most Americans think, Naomi Isenberg and Markus Brauer, Scientific Reports 14, Article: 28616 (November 2024), https://doi.org/10.1038/s41598-024-76761-8.

[3] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 206 (2023). The SFFA majority overturned years of precedent holding diversity to be a compelling interest—namely Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003); Fisher v. Univ. of Tex. at Austin, 570 U.S. 297 (2013).

[4] 90 Fed. Reg. 8633.

[5] No.1:25-cv-00333. Dkt. Nos. 44-45. The court also considered another anti-DEIA executive order, which focused on internal federal government programs and activities.

[6] https://oag.ca.gov/news/press-releases/attorney-general-bonta-provides-guidance-businesses-diversity-equity-inclusion.

[7] For example, the Centers for Disease Control and Prevention sent a letter on January 29, 2025 to grant recipients to terminate all activities promoting DEI and that any remnants of DEI programs funded by the U.S. government is immediately terminated ("CDC Letter"). Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump, No. 1:25-cv-00333-ABA, Dkt No. 44 (Opinion) at 10 (D. Md. Feb. 21, 2025). Likewise, the Department of Education issued a letter on February 14, 2025 warning educational institutions against using race-conscious DEIA practices or their proxies and against curricula teaching about "systemic and structural racism" ("DOE Letter").

[8] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412-13 (2024).

[9] SFFA, 600 U.S. at 341-43 (J. Sotomayor, dissenting, quoting J. Thomas) ("Grutter is, for all intents and purposes, overruled.").

[10] Id. at 209-13.

[11] Id. at 209-13.

[12] To the contrary, drafters of the clause rejected such proposals in favor of the broad phrase "equal protection of the law. SFFA, 600 U.S. 181 at 322 (J. Sotomayor dissent) ("Congress chose its words carefully, opting for expansive language that focused on equal protection and rejecting proposals that would have made the Constitution explicitly color-blind'") (citing Cong. Globe 1287 (rejecting proposed language providing that "no State ... shall ... recognize any distinction between citizens ... on account of race or color").

[13] The offense is a felony and is most often used in law enforcement misconduct and hate crime prosecution. https://www.justice.gov/crt/statutes-enforced-criminal-section.

[14] A violation of the statute is a misdemeanor, unless prosecutors prove an aggravating factor, e.g., a bodily injury. Those prosecuted typically include law enforcement and prison guards but other government actors, such as judges, district attorneys or even public school employees can also act under color of law. Charges usually involve physical or sexual assaults. https://www.justice.gov/crt/statutes-enforced-criminal-section.

[15] A violation of the statute is a misdemeanor unless prosecutors prove one of the statutory aggravating factors. https://www.justice.gov/crt/statutes-enforced-criminal-section.

[16] This might be used if an institution that receives federal funds (e.g., a university) lied to the government about its compliance with anti-discrimination laws or about how it is using federal funds for DEIA programs. To make a false statement "willfully" in violation of this statute, the government must prove the specific intent to make a false statement; specific intent does not require evil intent. United States v. Heuer, 4 F.3d 723, 732 (9th Cir. 1993).

[17] This law could be applied against federal contractors and grantees that misrepresent their DEIA programs, in addition to bringing a civil False Claims Act case. The elements of an 18 U.S.C. § 287 offense are: (1) the defendant presented a claim against the United States to an agency or department thereof; (2) the claim was false, fictitious, or fraudulent; and (3) the defendant knew the claim was false, fictitious, or fraudulent. A defendant acts with knowledge if the government proves that, at the time of making the statement, they knew it was false. United States v. Barker, 967 F.2d 1275, 1279 (9th Cir. 1991). In practice, the government rarely pursues false claims in both civil and criminal actions—opting instead for a civil FCA lawsuit with its treble damages and penalties.

[18] Ratzlaf v. United States, 510 U.S. 135, 141 (1994).

[19] US v. Awad, 551 F.3d 930, 939 (9th Cir. 2009).

[20] US v. Reyes, 577 F.3d 1069, 1079 (9th Cir. 2009).

[21] Screws v. United States, 325 U.S. 91, 105 (1945). Screws is often cited for the definition of willfulness in this context. See United States v. Hill, 99 F.4th 1289 (2024); see also United States v. Pendergrass, 648 F.App'x 29, 33-34 (2d Cir. 2016) (listing appellate cases uploading willfulness jury instructions referencing an intention to do something the law forbids).

[22] United States v. Makowski, 120 F.3d 1078, 1080 (9th Cir. 1997).

[23] In terms of low-hanging fruit, it is much more likely this administration will attempt to enforce its interpretation of anti-discrimination laws in the civil context if the nationwide injunction is lifted or overturned on appeal. In that case, companies, particularly providers in healthcare, may see aggressive use of the False Claims Act to chill the use of DEIA programs while also pursuing financial gain. Likewise, the DOJ will likely rely heavily on Title VI (42 U.S.C. §§ 2000d, et seq.) and Title VII (42 U.S.C. §§ 2000e, et seq.) to target DEIA programs.

[24] DOJ Memo, fn. 1.

[25] 600 U.S. at 230.

[26] Id. at 231.

[27] See, id.

[28] https://www.psychologicalscience.org/observer/the-bias-beneath-two-decades-of-measuring-implicit-associations.

[29] These neutral practices may still not satisfy this administration based on the aggressive anti-DEIA positions taken by various agencies in letters to grant recipients (e.g., CDC Letter and DOE Letter). See n. 7 above.

[30] See n. 2 above.

[31] https://oag.ca.gov/news/press-releases/attorney-general-bonta-provides-guidance-businesses-diversity-equity-inclusion.