

“DIVERSITY” AND “LAWFUL” ARE NOT CONTRADICTORY TERMS

Drawing the Line Between Lawful and
Unlawful DEI/DEIA

DirectEmployers Association

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MEET THE TEAM



JOSHUA S. ROFFMAN

MANAGING ATTORNEY

Joshua Roffman is the Managing Attorney of the Firm. His practice focuses primarily on advising and overseeing the preparation of affirmative action plans, conducting privileged pay equity analyses, and representing clients in various matters before the Office of Federal Contract Compliance Programs (OFCCP).

MEET THE TEAM



ALISSA A. HORVITZ

MEMBER ATTORNEY

Alissa Horvitz is a Member Attorney in the firm she co-founded with Josh Roffman. Alissa focuses her practice on representing clients in various matters before the OFCCP, preparing for and defending OFCCP audits and onsite visits, responding to OFCCP information requests, and conducting live and in-person training seminars on OFCCP compliance.

MEET THE TEAM



JAMES M. MCCAULEY

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James McCauley is an Associate Attorney with Roffman Horvitz. James's experience includes creation and review of affirmative action plans, preparation of EEO-1, VETS-4212, and CA Pay Reporting employment data, pay equity analyses, and analysis of applicant and hire records to address potential claims of hiring disparities.

OUTLINE

- Traditional Legal Framework
- Positions of Trump Administration and “Allies”
- Counter Views to Trump Administration
- Specific Actions Challenging DEIA Programs
- Framework for Assessing Legality of DEIA Initiatives
 - Unambiguously Legal
 - Legal But May Be Challenged At Some Point
 - Legal But Some In Trump Administration and Others Presuming Unlawful
 - Questionable Legality
 - Unlawful

TRADITIONAL LEGAL FRAMEWORK

- Title VII of the Civil Rights Act of 1964, as amended
- 1866 Civil Rights Act (bars discrimination in the making of private contracts)
- Equal Protection Clause of the 14th Amendment (state/public actors)
- EEOC Regulations
- EEOC Compliance Manual
- Rescinded OFCCP Executive Order 11246 Regulations
- Uniform Guidelines on Employee Selection Procedures

POSITIONS OF TRUMP ADMINISTRATION AND “ALLIES” (Slide 1 of 3)

- Executive Order 14173
 - Class Deviation of FAR Regulations Related to EO 11246
 - Secretary’s Order 03-2025
 - OFCCCP Closure Letters of EO 11246 Component of Compliance Reviews
 - Contractor Certification Language
- OPM February 5, 2025 Guidance Regarding Federal Government DEIA Programs
- DOJ February 5, 2025 Memorandum Regarding Illegal DEIA Discrimination and Preferences

POSITIONS OF TRUMP ADMINISTRATION AND “ALLIES” (Slide 2 of 3)

- FCC Correspondence
 - Comcast
 - Mergers and Acquisitions
- Department of Education February 14, 2025 Dear Colleague Letter and FAQs
- Perkins Coie Executive Order

POSITIONS OF TRUMP ADMINISTRATION AND “ALLIES” (Slide 3 of 3)

- EEOC/DOJ March 19, 2025 Press Release
- EEOC DEI at Work Poster and FAQs
- OFCCP Director Eschbach Email to OFCCP Staff
 - America First Legal February 14, 2025 Letter
- “Red State” Attorney Generals Letter to Costco

COUNTER VIEWS TO TRUMP ADMINISTRATION

- “Blue State” February 13, 2025 Guidance on DEIA Employment Initiatives
- “Blue State” March 5, 2025 Letter Related to Educational Institutions
- March 18, 2025 Former EEOC Officials Letter to EEOC Acting Chair Andrea Lucas

SPECIFIC ACTIONS CHALLENGING DEIA PROGRAMS

- Educational Institutions
 - Georgetown Law
 - Investigations of 51 Universities
- Legal Industry
 - Perkins Coie Executive Order
 - EEOC Letters to 20 Large Law Firms

FRAMEWORK FOR ASSESSING LEGALITY OF DEIA INITIATIVES

UNAMBIGUOUSLY LEGAL

- Participation in recruiting initiatives designed to attract diverse applicants for employment
- Evaluating employment practices (hiring, promotions, terminations, compensation) to ensure nondiscrimination
 - Evaluations cannot be limited to nondiscrimination vis-à-vis “minority” groups
 - Should only be performed under attorney-client privilege
- Establishing and maintaining employee resource groups and affinity groups for diverse employees
 - Need to be open to everyone
 - Be careful about being inconsistent or excluding groups based on a protected characteristic
- Cultural and historical observances that promote diversity and awareness
 - Black History Month
 - Holocaust Remembrance Day

LEGAL BUT COULD EVENTUALLY BE CHALLENGED

(Slide 1 of 2)

- Solicitation of Gender and Race/Ethnicity Information

- EEOC FAQ – DEI Related Discrimination at Work, footnote 26

“[P]re-employment questions about race can suggest that race will be used as a basis for making selection decisions. If the information is used in the selection decision and members of particular racial groups are excluded from employment, the inquiries can constitute evidence of discrimination.”

- Quoted language in context (EEOC Facts about Race/Color Discrimination):

“Employers may legitimately need information about their employees or applicants race for affirmative action purposes and/or to track applicant flow. One way to obtain racial information and simultaneously guard against discriminatory selection is for employers to use separate forms or otherwise keep the information about an applicant's race separate from the application. In that way, the employer can capture the information it needs but ensure that it is not used in the selection decision.

Unless the information is for such a legitimate purpose, pre-employment questions about race can suggest that race will be used as a basis for making selection decisions. If the information is used in the selection decision and members of particular racial groups are excluded from employment, the inquiries can constitute evidence of discrimination.”

LEGAL BUT COULD EVENTUALLY BE CHALLENGED

(Slide 2 of 2)

- Solicitation of Gender and Race/Ethnicity Information
 - Further context
 - EEOC letters to law firms requested race/ethnicity information of applicants/candidates/employees who participated in or were evaluated or selected for various employment programs and decisions
 - Federal contractors will need to certify that they do not operate programs promoting DEI that violate any applicable Federal anti-discrimination laws
 - False Claims Act (next slide)
 - EEO-1 and state/local filings and reporting

FALSE CLAIMS ACT

“Two essential elements of an FCA violation are (1) the falsity of the claim and (2) the defendant’s knowledge of the claim’s falsity.”
United States et al. Ex Rel. Schutte v. Supervalu, Inc., 143 S.Ct. 1391, 1394 (2023).

- Knowledge (based on subjective beliefs)
 - Actual Knowledge
 - Deliberate Ignorance
 - Reckless Disregard

See id.

LEGAL BUT SOME IN TRUMP ADMINISTRATION AND OTHERS ARE PRESUMING UNLAWFUL

- All DEI/DEIA programs
- Diversity training
 - Can assert that depending on substance of training, it can create a hostile work environment
- Continuing to maintain an Executive Order 11246 type plan after April 21, 2025
- Recruiting placement goals
 - Recharacterize as recruiting initiatives
 - Best to do for all race/ethnicity groups and for both males and females
 - Any data analysis driving recruiting initiatives should be performed under attorney-client privilege

NOTHING MANDATED UNDER EXECUTIVE ORDER 11246 OR ITS IMPLEMENTING REGULATIONS WAS OR IS UNLAWFUL UNDER TITLE VII

QUESTIONABLE LEGALITY

- Meeting certain diversity metrics in hiring, promotion, workforce representation, etc.
- Participating in programs, awards, recognitions that require the same

UNLAWFUL

- Disparate treatment in:
 - Hiring
 - Firing
 - Promotion
 - Demotion
 - Compensation
 - Fringe benefits
 - Access to or exclusion from training (including training characterized as leadership development programs)
 - Access to mentoring, sponsorship, or workplace networking / networks
 - Internships (including internships labeled as “fellowships” or “summer associate” programs)
 - Selection for interviews, including placement or exclusion from a candidate “slate” or pool
 - Job duties or work assignments
- Limiting membership in ERGs or employee affinity groups
- Separating employees based on race, sex, or another protected category
- Harassment
 - DEI training messaging

See EEOC DEI At Work Poster and DEI-Related Discrimination at Work FAQ

FUTURE ROFFMAN HORVITZ DIRECTEMPLOYERS WEBINARS

- April 9, 2025
 - Conducting Pay Equity Analyses – Legal and Practical Considerations
- April 23, 2025
 - The First 90 Days – Developments Since Executive Order 11246 Was Rescinded

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THANK
YOU