

DEIA DEVELOPMENTS WEBINAR SERIES

Webinar #2

ROFFMAN HORVITZ, PLC
LEGAL COUNSELING
FEDERAL CONTRACT COMPLIANCE & EMPLOYMENT DATA ANALYTICS

**JOSHUA S. ROFFMAN
ALISSA A. HORVITZ
JAMES M. MCCAULEY**

APRIL 4, 2025

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MEET THE TEAM



JOSHUA S. ROFFMAN
MANAGING ATTORNEY

Joshua Roffman is the Managing Attorney of the Firm. Josh's practice focuses on advising and assisting employers with using data and statistical tools to evaluate their employment practices. He has been advising federal contractor employers about compliance with federal and state equal employment opportunity and "affirmative action" requirements for over twenty years. He currently is guiding employers in assessing their DEIA and similar programs for risk mitigation and compliance with nondiscrimination laws.

Josh also advises and assists employers with privileged pay equity statistical analyses. He develops and runs the statistical analyses and combines that with knowledge of the law and a pragmatic understanding of businesses and other employers to ensure analytical rigor, usefulness, and legal soundness.

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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 evaluating nondiscrimination and equal opportunity throughout all phases of employment using data and employment analytics. This includes analysis and advice regarding EEO in recruiting, hiring, promotions, terminations, and compensation (pay equity), as well as DEI reviews for government contractor employers seeking to unwind their compliance with EO 11246. Alissa also does live and virtual training on relevant employment law topics.

MEET THE TEAM



JAMES M. MCCAULEY
ASSOCIATE ATTORNEY

James McCauley is an Associate Attorney with Roffman Horvitz. James's experience includes evaluation and analysis of employment practices to ensure equal opportunity; preparation of EEO-1, VETS-4212, and California Pay Data Reporting filings; pay equity analyses; and analysis of applicant and hire records to address potential claims of hiring disparities.

OUTLINE

- Clarification from Prior Webinar
- Notable Nomination Activity
- Notable Litigation Activity
- Statement of Former EEOC Officials
- Other New Developments
- Refresher – Contractor Certification and False Claims Act
- April 21 Executive Order 11246 Phase Out
 - Women and Minorities Affirmative Action Plans
 - Revising Policies, Procedures, Taglines, and Statements
 - Auditing and Refining DEIA Programs

CLARIFICATION FROM PRIOR WEBINAR

- Federal Contractor Minimum Wage Executive Orders
 - Reversion to Obama Federal Contractor Minimum Wage Executive Order 13658
 - Biden Executive Order 14026 Rescinded by President Trump
 - 14026 “superseded” Obama Executive Order 13658, which hasn’t been rescinded

NOTABLE NOMINATION ACTIVITY

- Jonathan Berry Nominated for Solicitor of Labor role – March 31
 - Held Chief Counsel and DOL Principal Deputy Assistant Secretary for Policy roles during President Trump's first term
 - Role oversaw changes to DOL regulations during previous Trump term
 - Authored the Department of Labor chapter of Project 2025
 - Worked on matters challenging ESG and corporate board diversity initiatives in his private practice
- Scrutiny of DC US Attorney Nominee Ed Martin
 - Martin had written letter to Georgetown Law inquiring about its teaching and promotion of DEI
 - Senator Schiff placed hold on his nomination – April 1
 - Senate Judiciary committee Democratic ranking member calls for committee hearing on his nomination – April 2

NOTABLE LITIGATION ACTIVITY

- Additional Challenge to Anti-DEI Executive Orders
 - *San Francisco Unified School District v. AmeriCorps*, California federal district court
 - Temporary restraining order granted – March 31
- *Dill v. IBM*, Michigan Federal district court
 - Denied employer's motion to dismiss claim by white male alleging discrimination that was motivated by company's diversity policy – March 26
- Injunctions against Department of Defense Transgender Ban
 - *Talbott v. United States*, DC federal court – March 18 and March 28
 - *Ireland v. Hegseth*, New Jersey federal court – March 24
 - *Schilling v. Trump*, Washington federal court – March 27

STATEMENT OF FORMER EEOC OFFICIALS

- April 3 Statement In Response to March 19 “What You Should Know About DEI-Related Discrimination at Work” EEOC Document
 - March 19 guidance fails to specify what DEI programs are lawful
 - Having an interest in diversity is lawful and can and is done without illegal preferences
 - Diversity training very unlikely to create a hostile work environment and rarely singles out specific groups of criticism
 - No guidance about lawful diversity training and specific things to avoid
 - Employee Resource Groups
 - Expanded recruiting initiatives
 - Collecting workforce data and running equal employment opportunity barrier analyses

OTHER NEW DEVELOPMENTS

- FCC Letter to Disney / ABC about Promotion of DEI – March 27
 - FCC sent similar letter to Comcast / NBC Universal in February
- USCIS Updated Policy Manual to Recognize Only Two Biological Sexes – April 2
 - Reverse of 2023 Biden administration policy
- Department of Education Certification Requirement for K-12 School Districts Receiving Federal Financial Assistance – Announced April 3
 - Sites Title VI and *Students for Fair Admissions v. Harvard*
 - Follow up from February 14 “Dear Colleague” Letter
 - Certification document explicitly references “illegal DEI practices” without specifying what practices are illegal
- “Red State” Attorney Generals Letter to EEOC’s 20 Law Firms – April 3
 - States have authority “to enforce employment discrimination laws that ensure DEI and other policies that promote the employment of a person based on race, color, religion, sex or national origin are not being used.”
 - Send the information requested by EEOC also to the offices of these twelve state attorney generals

CONTRACTOR CERTIFICATION

- That compliance in all respects with all applicable Federal anti-discrimination laws is material to the government's payment decisions for purposes of the False Claims Act
- It does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws

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.

APRIL 21 EXECUTIVE ORDER 11246 PHASE OUT

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WOMEN AND MINORITIES AFFIRMATIVE ACTION PLANS

- Option 1 – Shut down all gender and race/ethnicity employment analytics
- Option 2 – Conduct privileged equal employment opportunity analyses
 - Privileged analyses of hires, promotions, terminations, etc.
 - Can assess and ensure nondiscriminatory employment decisions
 - Run vis-à-vis both men and women and for each race/ethnicity group including whites
 - Privileged incumbent versus availability analysis to inform recruiting initiatives
 - Recommend running for both men and women and for each race/ethnicity group including whites
- Modifications to outreach documentation and approach to communications

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REVISING POLICIES, PROCEDURES, TAGLINES, AND STATEMENTS

- Equal opportunity clauses in subcontracts and purchase orders need to remove references to EO 11246 and 41 CFR 60-1.4
 - Also 41 CFR 60-4.3 for federally assisted construction contractors
 - Must maintain references to VEVRAA, Section 503, 41 CFR 60-300.5, and 41 CFR 60-741.5
 - If want/need to have equal employment opportunity for other categories (race, color, religion, sex, sexual orientation, gender identity, national origin, etc.) in purchase orders and contracts, may want to include in a separate clause from the clause referencing VEVRAA and Section 503
- EEO tagline/statement for employee solicitations or advertisements
 - VEVRAA and Section 503 regulations require explicit references
 - “equal employment opportunity, including veterans and individuals with disabilities”
 - Permissible to include other protected characteristics
- Affirmative action plan policy statement
- Posters/Notices (pending updates)

AUDITING AND REFINING DEIA PROGRAMS

- Recommend conducting privileged audit that can provide a candid assessment of current initiatives and recommended revisions
- Conduct and implement recommendations before making a False Claims Act certification
- Areas of review:
 - Language
 - Specific diversity metrics and statements on external and internal websites
 - Participation in third party programs tied to specific diversity metrics
 - Performance evaluations and bonuses tied to diversity metrics
 - Set asides and diverse slates
 - Employee resource groups
 - Corporate statements
- Employee communication about revisions to programs

DEIA DEVELOPMENTS WEBINAR SERIES INFORMATION

- Recording of March 28 Webinar
 - <https://attendee.gotowebinar.com/recording/2350460537810695518>
- Registration for April 11 Webinar (Noon Eastern)
 - <https://attendee.gotowebinar.com/register/5658267602830056791>

ROFFMAN HORVITZ DIRECTEMPLOYERS WEBINARS

- April 9 (2 PM Eastern) – Conducting Pay Equity Analyses – Legal and Practical Considerations
 - https://directemployers.zoom.us/webinar/register/WN_0-_rtvP3SJKffS6LyJ5w5Q#/registration
- April 23 (2 PM Eastern) – The First 90 Days: Developments Since Executive Order 11246 Was Rescinded
 - https://directemployers.zoom.us/webinar/register/WN_1PvqBbVMRqy0E7C8JxVmUA#/registration

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**THANK
YOU**