

AN HR COMPLIANCE UPDATE ON THE UNLAWFUL DEI ENFORCEMENT LANDSCAPE

DirectEmployers Association

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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.

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

OF COUNSEL

James McCauley is Of Counsel 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.

TOPICS

- Certifications
 - Executive Order 14173
 - Proposed SAM Registration Certification
- “Unlawful” DEI
 - EEOC and Department of Justice
 - Federal Court Cases
- Enforcement
 - Department of Justice
 - EEOC
 - Regulatory Pressure
- Observations

CERTIFICATIONS

EXECUTIVE ORDER 14173 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
- [Interim Final Rule Implementing EO 14173](#) (FAR Council)
 - Submitted to OIRA on April 15, 2025
 - Pending federal court cases and injunctions?

PROPOSED SAM REGISTRATION DEI CERTIFICATION (1 OF 3)

- System for Award Management (SAM) – Registration with system to be eligible to be a recipient of federal financial assistance
- Proposed DEI-related certification requirement in SAM for entities wishing to be eligible for **federal financial assistance**
 - [Published in Federal Register](#) on January 28, 2026
 - Supporting statement [webpage](#) and [download](#)
- Accepting comments on proposal – March 30, 2026 deadline

PROPOSED SAM REGISTRATION DEI CERTIFICATION (2 OF 3)

Certification Language:

“Will comply with the U.S. Constitution, all Federal laws, and relevant executive orders prohibiting unlawful discrimination on the basis of race or color in the administration of federally funded programs (See Titles VI and VII of the Civil Rights Act of 1964, the Equal Protection Clause of the Fourteenth Amendment, and 2 C.F.R. § 200.303 Internal controls). Federal antidiscrimination laws apply to programs or initiatives that involve discriminatory practices, including those labeled as Diversity, Equity, and Inclusion (DEI) or “diversity, equity, inclusion, and accessibility” (DEIA) programs. Entities that receive federal funds, like all other entities subject to federal antidiscrimination laws, must ensure that their programs and activities comply with federal law and do not discriminate on the basis of race or color.”

PROPOSED SAM REGISTRATION DEI CERTIFICATION (3 OF 3)

Examples of practices that may violate applicable Federal anti-discrimination laws include:

- (i) Granting **preferential treatment** based on race or color, such as race-based scholarships or programs, preferential hiring or promotion practices, or access to facilities or resources based on race or ethnicity, including through the use of “cultural competence” requirements, “overcoming obstacles” narratives, or “diversity statements;”
- (ii) Segregation based on race or color, such as **race-based training sessions, segregation in facilities or resources, or implicit segregation through program eligibility;**
- (iii) Other unlawful use of race or color as criteria, such as **race-based “diverse slate” policies in hiring, race-based selection for contracts, or race-based program participation or resource allocation;**
- (iv) **Training programs that stereotype, exclude, or single out** individuals based on protected characteristics or **create a hostile environment;** or
- (v) **Retaliation** by taking adverse actions against employees, participants, or beneficiaries because they engage in protected activities related to **opposing DEI practices** they reasonably believe violate federal antidiscrimination laws. Protected activities **include raising concerns or filing complaints** about, or **objecting to or refusing to participate in,** discriminatory programs, trainings, or policies;” (emphasis added)

PROPOSED INFORMATION COLLECTION – SAM REGISTRATION NONDISCRIMINATION AND DEI CERTIFICATION – OBSERVATIONS

- Certifications mention only “unlawful discrimination on the basis of race or color”
 - No mention of gender (note Administration’s positions on segregating bathrooms and intimate spaces by sex; also religious freedom)
- Language goes well beyond Executive Order 14173 certification language
- “This revision modifies the Financial Assistance General Representations and Certifications to align with updated executive branch guidance including **DOJ Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination** and executive order 14173 applicable to all entities receiving grants, cooperative agreements, and financial assistance such as loans, insurance, and direct appropriations.” (emphasis added)

“UNLAWFUL” DEI

EEOC/DOJ GUIDANCE ON “UNLAWFUL” DEI

- EEOC DEI at Work [Poster](#) and DEI-Related Discrimination at Work [FAQs](#) – Issued March 19, 2025
 1. 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
 2. Limiting membership in ERGs or employee affinity groups
 3. Separating employees based on race, sex, or another protected category
 4. Harassment (DEI training messaging)

ATTORNEY GENERAL GUIDANCE FOR RECIPIENTS OF FEDERAL FUNDING REGARDING UNLAWFUL DISCRIMINATION (1 of 2)

- Issued July 29, 2025
 - Provides guidance to federal agencies and public about how DOJ interprets laws
 - Does not change laws, regulations, or legal precedent
- [Memo](#) is focused on application of federal antidiscrimination laws to programs or initiatives that may involve discriminatory practices, including those labelled as Diversity, Equity, and Inclusion (“DEI”) programs
 - Largely focused on grant recipient and academic institution practices, but is instructive for all employers
- Provides “best practices,” but notes they are not mandatory
- Broader than prior guidance
- Guidance referenced in SAM certification proposal

ATTORNEY GENERAL GUIDANCE FOR RECIPIENTS OF FEDERAL FUNDING REGARDING UNLAWFUL DISCRIMINATION (2 of 2)

- Noteworthy Sections

- Unlawful Proxies for Protected Classes

- Selection or eligibility criteria designed to target certain protected classes
 - Geographic or institutional targeting in recruitment strategies
 - Best practices: document legitimate nondiscriminatory reasons for criteria

- Segregation

- Access to programs, activities, or resources based on protected classes
 - Separation of groups allowed to access or participate (i.e. target group and allies)
 - Programs, activities, or resources that are “technically” open to all, but identity-based in focus
 - Perception of segregation
 - Hostile work environment

- DEI Trainings and Harassment

- Programs that through content, structure, or implementation stereotype, exclude, or disadvantage individuals based on protected characteristics
 - Excludes or penalizes individuals
 - Creates hostile work environment – severe or pervasive
 - Retaliation – adverse action against individuals that object or refuse to participate in trainings

- Optional nondiscrimination flow-down clauses, and third-party liability

EEOC LETTER TO FORTUNE 500 COMPANIES

- EEOC [letter](#) to Fortune 500 – February 26, 2026
- Points to March 19, 2025 DOJ/EEOC guidance regarding unlawful DEI-related discrimination
- Refers to guidance as “non-binding documents”
- RH perspective: guidance is a reasonable distillation of what DEI initiatives may violate nondiscrimination laws

FEDERAL COURT CASES (1 of 2)

- *Chicago Women in Trades v. Trump* (7th Circuit)
 - Oral argument hearing – January 30, 2026
 - “What is ‘unlawful DEI’?”
- *Young v. Colorado Dept. of Corrections* (10th Circuit)
 - Oral argument hearing – January 22, 2026
 - Skeptical that DEI training created a hostile work environment

FEDERAL COURT CASES (2 of 2)

- *Missouri v. Starbucks* (E.D. Mo.)
 - Suit brought by Missouri Attorney General that alleged that Starbuck's DEI programs were discriminatory was dismissed – February 5, 2026
 - “Plaintiff fails to allege any actual adverse employment action undertaken as a result of unlawful discrimination, and the policies and goals described do not confer employment opportunities to one protected class at the expense or to the exclusion of another. Plaintiff's reliance on allegations that Defendant adopted certain alleged policies does nothing to establish actual justiciable claims without any allegations as to how those policies were actually enforced in a way that violated any law.”
- *EEOC v. Coca-Cola Beverages Northeast, Inc.* (D.N.H., 2/18/2026)
 - EEOC lawsuit alleges that two-day employer-sponsored trip and networking event open only to female employees discriminated against male employees
 - EEOC [press release](#)

ENFORCEMENT

DEPARTMENT OF JUSTICE

- Civil Rights Fraud Initiative – May 19, 2025 Deputy Attorney General [memo](#)
- Utilize the False Claims Act to investigate and, as appropriate, pursue claims against any recipient of federal funds that knowingly violates federal civil rights laws
- Will be co-led by the Civil Division's Fraud Section, which enforces the False Claims Act, and the Civil Rights Division, which enforces civil rights laws
- Encouragement of private party qui tam action under the False Claims Act
- Civil Investigative Demand Letters

PRESENTATION BY DOJ OFFICIAL ABOUT FALSE CLAIMS ACT ENFORCEMENT

- Presentation of Deputy Assistant Attorney General Brenna Jenny – Federal Bar Association’s 2026 Qui Tam Conference – February 19, 2026
- According to reporting:
 - Existence of DEI programs doesn’t necessarily mean that employer is violating nondiscrimination laws
 - DOJ is focusing on discrimination (i.e., DEI programs that actually discriminate on the basis of sex and race/ethnicity)
 - Problematic practices:
 - Numeric demographic goals
 - Tying employee compensation and bonuses to meeting diversity targets
 - Tying performance evaluations to diversity efforts
 - Training or mentoring programs open only to certain groups
 - Diverse slate policies
 - DOJ using data-mining capabilities in addition to qui tam relators

EEOC'S ROLE

- Andrea Lucas December 17, 2025 [LinkedIn post](#) recruiting White male victims of discrimination
- Centralizing policy and litigation decisions with EEOC chair and majority
- Information requests and subpoenas

EEOC FEDERAL COURT SUBPOENA ENFORCEMENT ACTIONS

- Nike (E.D. Mo., 2/4/2026)
 - Stems from 5/24/2024 Andrea Lucas Commissioner's Charge
 - Charge alleges DEI programs discriminate against White workers
 - Prompted by America First Legal 1/11/2024 investigation request
 - Scope of demand
 - Back to as far as June 1, 2018
 - Same court that recently dismissed the state attorney general's case against Starbucks
 - EEOC [press release](#)
- Napa Auto Parts (N.D. Tex., 2/5/2026)
 - Stems from 5/20/2024 Kalpana Kotagal Commissioner's Charge
 - Charge alleges discrimination against Black workers in hiring and recruiting
 - Scope of demand
 - Essentially all data stored in the employers' various HRIS and applicant tracking systems, back to October 1, 2019
 - EEOC [press release](#)

EEOC FEDERAL COURT SUBPOENA ENFORCEMENT ACTIONS

- Northwestern Mutual (E.D. Wis., 11/20/2025)
 - Stems from 3/1/2025 Charge Brought by Individual White Male Employee
 - Employee's charge alleges discrimination "against him and others on the bases of sex, race, color and national origin in violation of Title VII, when Respondent allegedly enhanced its existing Diversity & Inclusion policy to focus on providing additional support and opportunities for women and people of color."
 - Scope of Demand
 - Tied to specific allegations of charging party and the identified DEI programs, back to January 1, 2022; in original information request, some (like the AAPs) back to January 1, 2020
 - EEOC [press release](#)
- University of Pennsylvania (E.D. Pa., 11/18/2025)
 - EEOC investigation into antisemitic work environment
 - Demand for names and personal contact information of Jewish student organizations and their members and Jewish faculty members
 - EEOC [press release](#)
 - Five faculty and student organizations intervened as defendants in support of the University's challenge of EEOC's subpoena ([court filing](#))
 - Oral Argument – March 10, 2026
 - Judge notes that EEOC is afforded broad deference in how it conducts its investigations

[Blog post](#) by Alissa and Josh with more detail about these EEOC subpoena enforcement actions

REGULATORY PRESSURE (1 of 2)

- Department of Education
 - “Dear Colleague” [letter](#) and [FAQs](#) – February 14, 2025
 - Office of Civil Rights [investigations](#) of 51 universities for violation of Title VI of the Civil Rights Act
 - [Certification](#) requirement for K-12 School districts receiving federal financial assistance – [announced](#) April 3, 2025
 - Certification document explicitly references “illegal DEI practices” without specifying what practices are illegal
 - **Withdrawn**
 - *New York v. Dept of Education* (D. Mass., 2/6/2026)
 - *National Education Assoc. v. Dept of Education* (D.N.H., 2/3/2026)
 - *American Fed. of Teachers v. Dept. of Education* (4th Cir., 1/22/2026; D. Md., 8/14/2025)
 - Settlements: Columbia, Brown, Penn, Northwestern, Cornell, University of Virginia
 - Pressure campaigns
 - Use of IPEDS data to monitor race-based admissions

REGULATORY PRESSURE (2 of 2)

- Federal Communications Commission
 - Blocking mergers and acquisitions of businesses “promoting invidious forms of DEI discrimination”
 - Approvals issued immediately after receiving written assurances about DEI programs
- Federal Trade Commission
 - [Letters](#) to 42 large law firms
 - Sent on January 30, 2026 ([press release](#))
 - Diversity Lab’s Mansfield Certification Program participation = “anticompetitive collusion”
 - Program paused; Diversity Lab furloughed all but one employee
- EEOC letters to 20 large law firms (and Follow-Up By “Red State” Attorneys General)
 - **Withdrawn** - *DOE 1 v. EEOC* (D.D.C, 2/9/2026)

OBSERVATIONS

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- Achieving DEI retreat through regulatory/political pressure campaigns and via aggressive and burdensome information requests
- Reluctance and unwillingness to commit to specifics on what is “unlawful DEI”
 - Characterizing March 19, 2025 EEOC/DOJ and July 29, 2025 Attorney General documents as “nonbinding” or “best practices”
 - Won’t say in federal court
 - Holding back FAR Council approval of EO 14173 certification language
 - Why?
 - Risks invalidation of Executive Order
 - They’re losing when they do
 - As long as it’s not defined, they can take aggressive stances (except in court)
- The approach maximizes their ability to achieve employer retreats from DEI initiatives (including many that are lawful)

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**THANK
YOU**