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DEI Insights and Practical Guidance for Nonprofits Following Recent Executive Orders

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Introduction and Welcome by McGregor Smyth, Executive Director of NYLPI

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Agenda

I. Recent Executive Orders

II. The Existing Landscape of Anti-Discrimination/DEI Law for Nonprofits

III. Trends and Observations for Nonprofit Boards and Executive Directors

IV. Key Takeaways, Practical Guidance, and What To Expect Next

V. Questions & Answers

Recent Executive Orders

Recent DEI Executive Orders

"Ending Illegal Discrimination and Restoring Merit-Based Opportunity" (January 21, 2025)

- Orders the termination of all Executive Branch and agency "illegal" preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements.
- Revokes several executive orders that promoted DEI initiatives, including President Johnson's Executive Order 11246 requiring equal opportunity and nondiscrimination in government contracting.
- Orders the Office of Federal Contract Compliance Programs to cease (i) promoting diversity, (ii) holding federal contractors responsible for taking affirmative action to achieve DEI, and (iii) allowing federal contractors to engage in "workplace balancing" based on race, color, sex, sexual preference, religion or national origin.
- Federal contractors are now required to agree that their compliance with all federal anti-discrimination laws *is material to the government's payment decision*

Recent DEI Executive Orders

"Ending Illegal Discrimination and Restoring Merit-Based Opportunity" (January 21, 2025) continued

- Encourages the private sector to end "illegal" DEI discrimination by requiring the Attorney General to submit a report containing recommendations for enforcing the federal civil rights laws. The report must identify:
  - (i) key sectors of concern within each agency's jurisdiction,
  - (ii) the most egregious and discriminatory DEI practitioners in each sector of concern,
  - (iii) specific steps or measures to deter DEI programs or principles (whether denominated DEI or otherwise) that constitute illegal discrimination, including each agency identifying up to 9 potential civil compliance investigations of publicly traded companies, large non-profit corporations or associations, foundations with assets of $500 million or more, State and local bar and medical associations, and institutions of higher education with endowments over $1 billion, and
  - (iv) other strategies to encourage the private sector to end "illegal" DEI discrimination and preferences and comply with all federal civil rights laws
- Attorney General and Secretary of Education must issue report to educational institutions that receive federal funds regarding practices required to comply with the Supreme Court's 2023 decision on affirmative action in higher education

Recent DEI Executive Orders

"Ending Radical and Wasteful Government DEI Programs and Preferencing" (January 20, 2025)

- Revokes President Biden's Executive Order for "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government"
- Terminates all "illegal" DEI mandates, policies, programs, preferences and activities in the Federal Government, under whatever name they appear
- Federal employment practices shall not under any circumstance consider DEI factors, goals, policies, mandates or requirements
- Terminates "to the maximum extent allowable by law" all DEI offices and positions, all equity action plans, initiatives or programs, equity-related grants or contractors, and all DEI performance requirements for employees, contractors and grantees
- Seeks a list of all federal contractors who provided DEI training or DEI training materials to agency or department employees

Recent DEI Executive Orders

"Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government" (January 20, 2025)

- For Executive Branch purposes, there are only two sexes: male and female, and they are not changeable
- Federal government must in all circumstances treat people by their biologically assigned sex "at conception"
  - Restrooms
  - Identification (e.g., passports and visas)
  - Prisons (enjoined by multiple courts)
  - Military service (also covered by a later Executive Order)
- Attorney General must "issue guidance to ensure the freedom to express the binary nature of sex and the right to single-sex spaces in workplaces," and instructs agencies to prioritize enforcement of such rights
- Orders the EEOC to rescind the agency's "Enforcement Guidance on Harassment in the Workforce"

Recent DEI Executive Orders

National Association of Diversity Officers in Higher Education, et al. v. Donald J. Trump, Civil Action No. 25-cv-333 (D. Maryland) (February 21, 2025)

- A federal judge in Maryland issued a preliminary injunction blocking the following provisions:
  - Provision directing all executive agencies to terminate "equity-related grants or contracts"
  - Provision requiring contractors and grant recipients to certify that they do not operate any programs promoting unlawful DEI
  - Provision threating enforcement action to "encourage" the private sector to abandon DEI
- Parties seeking guidance from the Court on which agencies are covered by the injunction
- Government has appealed the injunction to the Court of Appeals

Current Landscape of Anti-Discrimination and DEI Law

- Employment and contracting decisions
- Educational programs
- Obligations of federal funding recipients
- Program eligibility

Key Takeaway: the Executive Orders do not change substantive law; they represent the President's view. But they do increase the stakes on compliance, by way of False Claims Act Liability.

Legal Framework for Nonprofits

Private employers are subject to Title VII of the Civil Rights Act of 1964 and Section 1981 of the Civil Rights Act of 1866.

- Title VII prohibits employment discrimination based on race, color, religion, sex and national origin (applies to most private employers of 15 or more).
  - Quotas not allowed
  - Setting aside positions not allowed
- Where there is discrimination, individuals can file with EEOC, then federal court.

Legal Framework for Nonprofits

Private employers may be subject to Title VI of the Civil Rights Act of 1964 as well.

- Title VI prohibits discrimination based on race, color, religion, sex and national origin and applies to program services provided by recipients of federal funding (even a little).
  - Grants, loans, federal property
  - Federal personnel
  - Federal contracts that provide assistance

Aggrieved individuals can file administrative complaints with the funding agency, file lawsuits in federal court, and initiate fund termination proceedings or refer to DOJ.

Students for Fair Admissions, Inc. v. Harvard and UNC, Nos. 20-1199 and 21-707 (June 29, 2023)

In a 6-2 decision against Harvard and a 6-3 decision against UNC, the U.S. Supreme Court struck down their affirmative action programs.

The question presented was whether the race-conscious admission programs at Harvard and UNC violated Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.

- The court evaluated the admissions programs under the standards of the Equal Protection Clause since discrimination that violates the clause committed by institutions that accept federal funds–like Harvard and UNC–necessarily violates Title VI.

The Court's majority ruled that both programs were unconstitutional under the Equal Protection Clause because they failed to survive strict scrutiny, the highest standard of judicial review.

- Here, the analysis is whether the universities' race-conscious admission programs are used to further a "compelling governmental interest" and, if so, if the use of race is "narrowly tailored" (*i.e.*, necessary to achieve the "compelling governmental interest").

The Court stated that the Equal Protection Clause does not "prohibit[] universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."

- For example, universities can evaluate how a student overcame racial discrimination, as long as such evaluation is tied to that student's *individual* courage and determination.

Supreme Court Lowers the Bar for Title VII Plaintiffs

Muldrow v. *City of St. Louis*, No. 22-193, 601 U.S. ____ (April 17, 2024)

- Concerns the scope of the "adverse action" requirement under Title VII.
- Muldrow, a police officer, was working in one department when she was transferred against her wishes to a different department, where her rank and pay remained the same. Muldrow alleged that other aspects of her job changed after her transfer, including her job responsibilities, perks, and work schedule.
- Muldrow sued alleging Title VII violations because of her sex. The federal district court granted summary judgment against Muldrow, explaining that Muldrow failed to show that her transfer caused a "significant" change that produced a "material employment disadvantage." The Eighth Circuit affirmed, concluding that Muldrow failed to show that the transfer caused her to suffer a "materially significant disadvantage."
- Issue: Whether a lateral job transfer without an accompanying change in pay or benefits constitutes an adverse action sufficient to give rise to liability under Title VII.
- The Court ruled that a discriminatory transfer claim requires the employee to show "some harm respecting an identifiable term or condition of employment" but does not require the employee to show that the harm "was significant, or serious, or substantial, or any similar adjective suggesting that the disadvantage to the employee must exceed a heightened bar." There is no heightened-harm requirement in the text of Title VII.
- The majority made clear that "this decision changes the legal standard used in any circuit that has previously required significant, material, or serious injury" and "lowers the bar Title VII plaintiffs must meet."

Will the Supreme Court Lower the Bar for "Reverse" Discrimination Plaintiffs?

Ames v. State of Ohio Department of Youth Services, No. 23-1039 (awaiting decision)

- The plaintiff argues that she was discriminated against based on her sexual orientation (heterosexual) when the defendant denied her promotion to Bureau Chief and demoted her from the position of PREA Administrator.
- The district court granted summary judgment to the defendant and the Sixth Circuit affirmed holding that the plaintiff lacked evidence of "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority."
- The plaintiff appealed to the Supreme Court on March 20, 2024.
- Issue: whether, in addition to pleading the other elements of an employment discrimination claim under Title VII, a majority-group plaintiff must show "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority."
- If the Supreme Court eliminates the requirement to show "background circumstances" in such cases, it will make it easier for majority-group plaintiffs to succeed in asserting discrimination claims under Title VII.

Workplace Discrimination

Beneker v. CBS Studios Inc. and Paramount Global, No. 2:24-cv-01659-JFW-SSC (C.D. California) (Aug. 14, 2024)

- The plaintiff, a heterosexual white man, claims that he was not hired as a staff writer for SEAL Team due to his race, sex, and/or sexual orientation in violation of Title VII and Section 1981. CBS allegedly showcases diverse storytelling by hiring people of color and/or queer writers to help tell those stories.
- CBS argues that the First Amendment displaces anti-discrimination laws that would force an expressive enterprise to compromise its messaging. Granting the plaintiff's claim would prevent CBS from hiring the storytellers whom CBS believes are best suited to tell the stories CBS wants to produce and broadcast.
- The district court denied CBS's motion to dismiss holding that "the issues raised by Defendant are more appropriately resolved on a motion for summary judgment."

Harker. v. Meta Platforms, Inc. et al., No. 1:23-cv-07865 (S.D.N.Y.) (Aug. 29, 2024)

- The plaintiff challenged a hiring program that doubled certain positions on film productions so that Black, Indigenous, People of Color candidates could obtain an apprenticeship and shadow experienced workers.
- The plaintiff alleged that the challenged program prevented plaintiff from forming and maintaining an employment relationship on the basis of race.
- The defendant argued that the plaintiff lacked standing and failed to state a claim because the plaintiff was not qualified to participate in the challenged program because he already had significant exposure to the commercial production industry.
- The district court dismissed the claim due to lack of standing. The court found that the plaintiff did not apply for the relevant position on the production or at any other relevant time, so he did not suffer the necessary injury to bring a lawsuit.

Workplace Discrimination

Franc v. Moody's Analytics, Inc., No. 2:22-cv-1401 (W.D. Pa.) (Oct. 4, 2024)

- The plaintiff, a 52-year-old white man, was fired in 2021 for failing to respond to the company's mandatory COVID-19 vaccination survey. He sued, claiming that the defendant actually fired him based on his age and race because of the company's diversity hiring initiative.
- The district court dismissed the claim finding no evidence that the company's diversity initiatives related to the plaintiff's termination. "Mere diversity initiatives alone within a company do not establish that Moody's was engaging in discriminatory practices."

Grant, Scholarship, and Fellowship Programs

American Alliance For Equal Rights v. Morrison & Foerster LLP, No. 1:23cv23189 (S.D. Fl.); *American Alliance For Equal Rights v. Perkins Coie LLP*, No. 3:23cv1877 (N.D. Tex.); and *American Alliance for Equal Rights v. Winston & Strawn LLP*, No. 4:23cv04113 (S.D. Tex.)

- From August – October 2023, the American Alliance for Equal Rights filed lawsuits against three law firms, alleging that the firms engaged in racial discrimination by limiting fellowship positions to applicants who are diverse, identify as LGBTQ+, or have disabilities, in violation of Section 1981.
  - At least four other firms received letters threatening suit and changed their programs in response.
- In October 2023, two cases were dismissed by stipulation after Morrison & Foerster and Perkins opened the fellowships to all. Morrison & Foerster and Perkins will not consider race except as contemplated by *Students for Fair Admissions*.
- Winston & Strawn appeared poised to litigate, but later settled the suit against it, too. Winston & Strawn changed its fellowship to eliminate a requirement that applicants come from "a disadvantaged and/or historically underrepresented group in the legal profession."
- In December 2023, American Alliance for Equal Rights announced it did not expect to sue additional law firms.

Grant, Scholarship, and Fellowship Programs

American Alliance for Equal Rights v. Fearless Fund Management, LLC et al., No. 23-13138 (11th Cir.) (June 3, 2024)

- On August 2, 2023, plaintiff filed a complaint alleging that Fearless Fund Management, LLC, a venture capital fund, violated Section 1981 by "excluding all non-black entrants from the program" that provides small business grants to Black women.
- Relying on *SFFA*, plaintiff alleged that by precluding those who are not black from participating, the defendant engaged in intentional racial discrimination in the making of its contracts.
- In September 2023, the district court denied plaintiff's requests for a temporary restraining order and preliminary injunction concluding that the First Amendment, which protects an organization's expressive conduct, may bar plaintiff's claim.
- Eleventh Circuit reversed, finding that the grant program "is substantially likely to violate" Section 1981
  - Plaintiffs have standing even though they proceed anonymously and did not apply.
  - The grant is a contract because it requires the recipient to relinquish certain rights.
  - *Weber* and *Johnson* do not apply because grants created absolute bar to non-black applicants.
  - First Amendment does not protect discrimination on the basis of race. Not "expressive" conduct.

Grant, Scholarship, and Fellowship Programs

Alexandre v. Amazon.com, No. 22-cv-1459 (S.D. CA.) (May 23, 2024) and
Progressive Preferred Insurance Co. v. Gaughan, No. 23-cv-1597 (N.D. Ohio) (May 21, 2024)

- Plaintiffs allege that Amazon and Progressive Insurance discriminate on the basis of race by having diversity grant programs where only Black or people of color entrepreneurs who wish to contract with the Companies are provided grants to help support their applications for further opportunities with the Companies.
- Plaintiffs asserted violations of Section 1981.
- Complaints dismissed for lack of standing. The *Amazon* Plaintiffs did not apply for the grants and neither set of plaintiffs alleged that they would have been awarded contracts with the companies under race-neutral policies.

Do No Harm v. Pfizer Inc., No. 23-15 (2d Cir. Jan. 10, 2025)

- Suit filed against Pfizer under Section 1981, Title VI of the Civil Rights Act and NY state and local laws alleging that a Pfizer fellowship program unlawfully excludes white and Asian-American applicants on the basis of race. The plaintiff is a membership organization that claimed to bring suit on behalf of two anonymous members who indicated that they would have applied if eligible.
- The district court denied the plaintiff's request for a preliminary injunction. The court held that the plaintiff lacked standing because it failed to identify a single injured member by name.
- After initially affirming the district court, the Second Circuit reversed holding that the district court applied the more stringent summary judgment standard rather than the more lenient motion to dismiss standard. The matter was remanded to the district court to reassess the plaintiff's standing using the appropriate test.

New Areas of Litigation: EOs and the Constitution

National Coalition of Diversity Officers in Higher Education v. *Trump* (D.Md. 2025) Private employers may be subject to Title VI of the Civil Rights Act of 1964 as well.

- Plaintiffs contend that the Certification Provision (we don't "promote DEI"); the Termination Provision (terminate all "equity-related" grants); and Enforcement Threat Provision (identifying targets for civil investigations into "illegal DEI") are unconstitutional:
  - Certification and Termination violate separation of powers principles
  - Termination and Enforcement Threat Provisions are vague (Fifth Am.)
  - Certification and Enforcement Threat Provisions restrict content and viewpoint (First Am.)

Judge temporarily enjoined on Due Process and First Amendment claims. Injunction affects all three provisions (no current awards to be altered, no "certification" required, and no FCA or other enforcement action to be brought)

Trends and Observations for Nonprofit Boards and Executive Directors

Internal Revenue Code Section 501(c)(3)

501(c)(3) organizations have tax exempt status from the IRS.

- Charitable, religious and educational organizations.
- Treasury Regulations section 1.501(C)(3)-1(d)(2)(ii) provides explicitly that the term “charitable” includes eliminating prejudice and discrimination.
- Consider how regs may be modified, or read differently, in this era.

Key Considerations

Board Alignment:

- Key to ensure that strategy and risk tolerance at the staff and board level are aligned.
- What are the fiduciary duties board members owe to non-profits?

Mission Alignment:

- Remember that many non-profits have missions that focus on eliminating prejudice or serving the underprivileged.
- Board members of non-profits whose missions align with DEI considerations or strategies can and should consider that mission-alignment when making determinations as to DEI strategy and risk tolerance.

Key Considerations

Optics Risk or Legal Risk:

- State attorneys general are the primary regulators of non-profits.
- Attorneys general from New York and 15 other states already have issued guidance emphasizing the "legality and importance" of DEI initiatives.
- At the federal level, consider touch-points.
  - Federal grants/contracts?
- Tax-exempt status.
- "Citizen journalist" /social media campaigns.

Key Considerations

Strategies to Mitigate Risk:

- Policy clarifications – how do we define diversity?
- Grant/scholarship/fellowship programs.
- Do we want to mitigate risk, or do we want to demonstrate a continued focus on mission (*i.e.*, "lean in")?

CLE Code

DEI311

Key Takeaways, Practical Guidance, and What to Expect Next

Key Takeaways, Practical Guidance, and What To Expect Next

The Executive Orders do not change substantive law; they represent the President's view.

- Substantive laws are those passed by Congress, signed by the President, and interpreted by the courts.
- This is even clearer after the Supreme Court's *Loper Bright* decision which reversed *Chevron* deference, meaning courts do not need to defer to an executive agency's interpretations of the law.
- However, False Claims Act hook and systematic targeting highlight need for caution.

Most ordinary course DEI work remains legal under existing court interpretations of the anti-discrimination laws.

- The Executive Orders do not require private employers or federal contractors to abandon or alter their *voluntary* DEI programs as long as they are consistent with federal anti-discrimination laws.
- Organizations that have not already done so, should work with counsel to conduct a privileged and thorough audit of their DEI programs to ensure compliance with existing anti-discrimination laws, and that your communications about your programs are accurate and up-to-date.

Key Takeaways, Practical Guidance, and What to Expect Next

Common Adjustments Made to DEI Programs to Mitigate Risk

- Maintain DEI objectives but remove characteristic-based qualifications
- Maintain DEI objectives for scholarship, grant and fellowship programs but remove characteristic-based qualifications and allow candidates to demonstrate how they as individuals can help achieve the organization's objectives
- Align stakeholders and be guided by your organizational values rather than shifting social or political winds
- Instead of relying solely on the DEI acronym, explain the full scope of what diversity, equity and inclusion means for your organization
  - DEI initiatives go beyond just leveling the playing field in hiring and promotions
  - DEI includes fostering an environment where everyone feels welcome and heard, removing bias, promoting allyship, and training
- Be wary of news coverage on how other organizations are responding

Key Takeaways, Practical Guidance, and What to Expect Next

Common Adjustments Made to DEI Programs to Mitigate Risk

- Consider all the risks in the DEI Landscape
  - Leaning into DEI: lawsuits from reverse discrimination plaintiffs or anti-DEI organizations, investigations by federal or state agencies, anti-DEI social media campaigns, alienating those who believe DEI is too political
  - Pulling back from DEI: lawsuits from traditional discrimination plaintiffs; alienating funders, recruits, and clients; Alienating employees, affecting morale and attrition; violations of fiduciary duties by not addressing known risks
- Consider the impact of particular programs in achieving your DEI goals
- Decide whether to continue with the programs with awareness of risks, terminate programs considered to be too risky, and/or make adjustments to programs to mitigate risk
- Reflect, instead of reacting – the landscape will continue to change quickly

Key Takeaways, Practical Guidance, and What to Expect Next

What Else is to Come

- The "Dismantle DEI Act" (approved out of House of Representatives Committee on party-line vote in November 2024)
- Litigation over the President's firing of two Democratic-appointed EEOC Commissioners whose terms were not scheduled to end until 2026
- Additional guidance from the Attorney General and other agency heads required by the Executive Orders
- Additional Executive Orders
- Potential enforcement actions by the DOJ and/or the EEOC
- Potential agency investigations
- Potential False Claims Act / Qui Tam Litigation
- Increase in "Reverse" Discrimination Suits
- Increase in "Traditional" Discrimination Suits
- State Attorney General Enforcement
- Increase in challenges to Boards' handling of DEI-related issues

Questions?

Closing Remarks by McGregor Smyth, Executive Director of NYLPI

Thank you.

Simpson Thacher Worldwide

** In November 2024, Simpson Thacher announced plans to open an office in Luxembourg.*