CLIENT ALERTS & INSIGHTS

Recent Guidance from the EEOC Targets DEI. So How Should Employers React?

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The Equal Employment Opportunity Commission ("EEOC") and the Department of Justice ("DOJ"), two federal agencies responsible for policing discrimination in the workplace, recently issued informal guidance outlining what could constitute a "discriminatory diversity, equity, and inclusion program" ("DEI Program") under Title VII of the Civil Rights Act ("Title VII"), the federal law against workplace discrimination. This activity comes on the heels of the current administration's broader stated goal of, at minimum, reigning in DEI programs, with some suggesting that the Administration's obvious goal is to eliminate such programs altogether.

In guidance jointly issued by the EEOC and DOJ, which is entitled, "What to do if you experience discrimination related to DEI at work," the two agencies suggest that DEI Programs might be unlawful if the program causes an employer to take an employment action motivated in whole or in part by an employee's race, sex, or another characteristic protected by federal and state anti-discrimination laws. The EEOC and DOJ specifically reference "quotas" or other attempts to "balance a workforce" based on characteristics protected by Title VII as conduct that might violate anti-discrimination laws. In reminding employers that DEI Programs are not a shield against discrimination claims, the guidance informs its readers that discrimination can come in the form of decisions made with respect to promotion, demotion, compensation, and other company programs, including membership or participation in "employee resource groups." Finally, the EEOC and DOJ's guidance closes by indicating that anyone could be a victim of DEI-related discrimination, and that if any employee or applicant for work feels that they are a victim, they should contact their local EEOC office.

Under Title VII, any "individual employed by an employer," plus all applicants for employment, are protected from discrimination because of race, color, religion, national origin, or sex, and Title VII does not require membership in particular groups within those classifications. Any employment decision motivated by an individual's membership in any of the listed protected characteristics runs afoul of Title VII. This creates an inherent conflict between Title VII's language and the traditionally perceived purpose behind many DEI programs to prioritize for hire or promotion individuals possessing one protected characteristic over another.

The EEOC and DOJ's joint guidance puts employers on notice that this traditional purpose of DEI (to explicitly favor particular groups to increase diversity in the workplace) may be illegal under Title VII, which is consistent with the current administration's vocal opposition to DEI programs, and is supported by the Administration's recent win before the Fourth Circuit Court of Appeals which allowed it to temporarily ban all DEI programs within the federal government.

The EEOC provided additional guidance through a question and answer on its website. This guidance (1) reiterates that Title VII protects all individuals, not just minority or historically underrepresented groups; (2) reminds employers that many DEI programs and considerations are not Title VII compliant merely because the program uses, or the employer considered, several characteristics when making an employment decision; (3) that "diversity" is not a business necessity that justifies discrimination under Title VII; and (4) that mere DEI training could, under certain circumstances, create a hostile work environment.

Recent actions taken by the EEOC are consistent with the joint guidance. On Tuesday, the EEOC sent written requests for information to 20 law firms whose DEI programs "may entail unlawful disparate treatment" or other unlawful conduct related to "terms and conditions" of employment in violation of Title VII. The EEOC pointed out that one firm made available to certain employees several "Resource Groups" that were "divided" on characteristics protected by VII, and that such conduct might constitute unlawful discrimination. The EEOC's request demanded that the firm answer 37 separate inquiries concerning, among other topics, the firm's (1) internships, fellowships, and scholarships; (2) its partnership decisions; (3) and DEI-related actions taken in response to client requests. The EEOC also cited several of the firm's public statements touting the achievement of a particular DEI initiative as a basis for its "concern" over the firm's Title VII compliance. Copies of all 20 of the EEOC's law firm demand letters can be found here.

As for what employers should do in the face of the Administration's recent actions, employers could consider abandoning aggressive DEI initiatives or consider maintaining some elements of their DEI initiative while working with counsel to craft a plan capable of surviving Title VII scrutiny. We recommend that employers who maintain or may implement DEI initiatives in the workplace reach out to counsel for guidance on how best to navigate the Trump Administration's position with respect to the lawfulness of DEI programs under the country's workplace anti-discrimination laws. If you have any questions, our Benesch team stands ready to answer them.

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