Recent Developments

This article has been updated to include additional legal actions and guidance. Although there have some been further developments, the alert's general themes and takeaways remain unchanged.

Updated April 7, 2025

- IRS Investigation Requested – On April 1, 2025, the American Alliance for Equal Rights (AAER), a nonprofit organization focused on challenging race-based scholarships and programs, formally requested that the IRS open investigations into the Lagrant Foundation, the Gates Foundation, and the Create Capital Foundation . All three foundations have scholarship or grant programs open to individuals of color, which AAER alleges are incompatible with public policy and Supreme Court precedent. Citing *Bob Jones University v. United States*, AAER argues that the exclusion of white students and professionals is incompatible with public policy and Supreme Court precedent that organizations engaged in racial discrimination are not eligible for tax-exempt status. These investigation requests are in line with Executive Order 14173, which directed federal agencies to eliminate private-sector programs with race and sex-based preferences.
- Department of Education – On March 20, 2025, President Trump signed an Executive Order entitled "Improving Education Outcomes by Empowering Parents, States, and Communities," calling for the closure of the U.S. Department of Education and return of its functions and authority over to the states.
- DOJ and EEOC Guidance – On March 19, 2025, the DOJ and EEOC issued two new technical assistance documents addressing DEI in the workplace - What To Do If You Experience Discrimination Related to DEI at Work and What You Should Know About DEI-Related Discrimination at Work. The first document, which was issued jointly by the DOJ and EEOC, encourages employees to file discrimination charges with the EEOC if they believe they have experienced DEI-related discrimination at the workplace. The second document, which was issued by the EEOC, provides additional guidance on how Title VII applies to DEI-related discrimination in the workplace. The technical assistance documents

provide some clarity around the EEOC and DOJ's positions on what might constitute DEI-related discrimination, including limiting who can join employee affinity groups based on protected traits, DEI trainings that create a hostile work environment, and retaliating against employees who oppose DEI-related programming.

- **President Trump's DEI Executive Orders** – On March 14, the U.S. Court of Appeals for the Fourth Circuit ruled that President Trump's DEI Executive Orders – including Executive Order 14173 discussed in the alert – could be enforced as a lawsuit challenging them proceeds. Significant portions of the DEI Executive Orders had been on hold, having been enjoined nationwide on February 21 by the U.S. District Court for the District of Maryland in response to a lawsuit filed on February 3. Another lawsuit challenging President Trump's DEI Executive Orders was filed on February 19 in U.S. District Court for the District of Columbia.
- **Dear Colleague Letter** – The U.S. Department of Education issued FAQ on February 28 in conjunction with the Dear Colleague Letter, including the Department's analysis of SFFA and how its Office of Civil Rights will interpret SFFA in enforcing Title VI of the Civil Rights Act of 1964.
- Two lawsuits seeking to enjoin the Dear Colleague Letter have been filed: one on February 25 in U.S. District Court for the District of Maryland and the other on March 5 in U.S. District Court for the District of New Hampshire. To date, no injunction has been issued.
- **Massachusetts Guidance** – Governor Maura Healey and Attorney General Andrea Joy Campbell issued guidance on February 26 in response to President Trump's recent DEI Executive Orders and the U.S. Department of Education's Dear Colleague Letter. The guidance reiterates that "[e]ducational institutions should continue to foster diversity, equity, inclusion, and accessibility among their student bodies" and provides updated legal guidance on the U.S. Supreme Court decision in *Students for Fair Admissions* (*SFFA*) and lawfully promoting access to educational opportunity.

Continue reading

Table of Contents

Navigating the Current DEIA Legal Landscape

The Trump administration continues to focus on diversity, equity, inclusion (DEI) efforts, both inside and outside the federal government. For example, on February 14, the U.S. Department of Education issued a "Dear Colleague" letter announcing that it will apply the Supreme Court's *Students for Fair Admissions* decision expansively to prohibit federally funded educational institutions from using race in decisions about virtually any aspect of their operations. Among other things, the announcement takes aim at DEI programs.

Meanwhile, some states, including Massachusetts, are pushing back on the administration's anti-DEI efforts. On February 13, attorneys general of Massachusetts and 15 other states, issued guidance (the State AGs' Guidance) on workplace diversity, equity, inclusion, and accessibility (DEIA) initiatives in light of President Trump's Executive Order 14173 targeting what the order terms "illegal DEI and DEIA policies."

Executive Order 14173 directs federal agencies to take steps to "combat illegal private-sector DEIA preferences, mandates, policies, programs, and activities."

This alert reviews these and other recent legal developments involving DEIA initiatives, examines their potential impact on nonprofits' tax-exempt status, and provides some general suggestions on navigating the current DEIA legal landscape.

The Executive Order

In addition to prohibiting DEIA initiatives in the federal government, Executive Order 14173 (the Executive Order) directs federal agencies to take steps to "combat illegal private-sector DEIA preferences, mandates, policies, programs, and activities." However, it does not define what policies or practices the Trump administration deems "discriminatory" or "illegal."

Among other things, the Executive Order requires recipients of federal grants and contracts to certify that they do not operate any programs promoting DEI that violate any applicable federal anti-discrimination laws – a certification that is difficult to make

because interpretation of those laws is changing under the Trump administration. It also requires federal grantees and contractors to agree that their compliance in all respects with all federal anti-discrimination laws is "material" to the government's payment decisions for purposes of establishing federal False Claims Act liability. By doing so, however, federal grantees and contractors risk exposing themselves to claims from the federal government and private individuals that could result in significant potential civil and criminal penalties.

Lawsuits have been filed challenging the Executive Order.

The State AGs' Guidance

The conflict between the State AGs' Guidance and the Executive Order puts employers – especially those that rely on federal funding – in a difficult spot, particularly because the Executive Order does not identify what DEIA initiatives are "discriminatory" or "illegal."

The State AGs' Guidance takes issue with the Executive Order, observing that efforts to seek and support diverse, equitable, inclusive and accessible workplaces are not illegal and that the order conflates legal best practices supporting DEIA in the workplace with unlawful preferences in individual hiring and promotion decisions. The Guidance notes that although detractors of DEIA initiatives often reference the *Students for Fair Admissions* (*SFFA*) decision, in which the Supreme Court held unlawful affirmative action programs that explicitly consider race as a factor in college admissions, that decision does not apply to properly designed and implemented workplace DEIA initiatives. The Guidance further asserts that the federal government cannot, by executive order, "prohibit[] otherwise lawful activities in the private sector or mandate[] the wholesale removal of these policies and practices within private organizations, including those that receive federal contracts and grants."

The Guidance makes clear that combatting discrimination is a strategic priority for the 16 attorneys general's offices that issued it. It notes that, while generally similar to federal antidiscrimination laws, some state civil rights laws prohibiting workplace

discrimination based on race, sex, national origin, disability and other protected characteristics are more protective of employees than federal law. According to the Guidance, when employers implement employment policies incorporating legal DEIA best practices, their employees are less likely to be subjected to unlawful discrimination, and they are less likely to be held liable for discriminatory conduct. Observing that enforcement authorities and courts may consider the absence of these policies and procedures when assessing liability for discriminatory conduct, the Guidance provides some examples of lawful DEIA best practices. It also notes that the 16 issuing attorneys general "stand ready to support" employers in their states implementing lawful workplace DEIA policies.

The Guidance suggests that pulling back on workplace DEIA initiatives in response to the Executive Order could leave employers vulnerable to state enforcement action and private litigation for violations of civil rights laws. The conflict between the State AGs' Guidance and the Executive Order puts employers – especially those that rely on federal funding – in a difficult spot, particularly because the Executive Order does not identify what DEIA initiatives are "discriminatory" or "illegal."

The Department of Education Letter

The Education Department will take measures to assess compliance with applicable law based on its broad legal interpretation of *Students for Fair Admissions.*

The Education Department's Dear Colleague letter maintains that it "explains and reiterates existing legal requirements under Title VI of the Civil Rights Act of 1964, the Equal Protection Clause of the United States Constitution, and other relevant authorities." The letter acknowledges that it "does not bind the public or create new legal standards" and that the *Students for Fair Admissions* opinion only addresses college admissions decisions. Nevertheless, the letter asserts that "the Supreme Court's holding applies more broadly" to encompass the use of race in decision-making not only about admissions but also about hiring, promotion, compensation,

financial aid, scholarships, prizes, administrative support, discipline, housing, graduation ceremonies, and all other aspects of student, academic, and campus life.

The letter puts federally funded educational institutions on notice that, within 14 days, the Education Department will take measures to assess compliance with applicable law based on its broad legal interpretation of *Students for Fair Admissions* and that failure to comply may result in loss of federal funding. The letter advises federally funded educational institutions to ensure that their policies and actions comply with existing civil rights law and to cease efforts to circumvent prohibitions on the use of race by relying on proxies or other indirect means.

Suits Alleging Discrimination in Contracting

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Following the Supreme Court's *SFFA* decision, there has been an uptick in private lawsuits against DEIA initiatives. A number of these suits have resulted in settlements ending those initiatives or modifying them to remove race-based criteria.

Many of the suits assert claims under section 1981 of the Civil Rights Act of 1866, which states that "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." Although section 1981 is a Reconstruction-era law designed to achieve racial equity in contracting for Black people, courts since the 1970s have held that it prohibits intentional racial discrimination against people of all races in making and enforcing contracts.

Perhaps the most well-publicized of these post-*SFFA* suits involved a grant contest run by the Fearless Fund, a Black-woman owned venture capital fund, and its affiliated 501(c)(3) Fearless Foundation. Eligibility was limited to businesses majority-owned by Black women. The suit – which was brought by an organization run by Edward Blum, who also spearheaded the *SFFA* litigation – alleged that the grant program created a

contractual relationship between Fearless Fund and the grant applicants, and that restriction of eligibility to businesses owned by Black women violated section 1981. The U.S 11th Circuit Court of Appeals granted a preliminary injunction to prevent Fearless Fund from administering the contest, holding that it was a contract and was substantially likely to violate section 1981. In reaching its decision, the court determined the contest to be discriminatory conduct rather than speech protected under the First Amendment. The parties subsequently settled, with the Fearless Fund agreeing to discontinue the grant program. Defendants in other similar cases have also settled, presumably because they are wary of how the Supreme Court might rule.

Potential Impact on Tax-Exempt Status

In light of the Trump administration's anti-DEI efforts, there is concern that the IRS could use the public policy doctrine outlined in the Supreme Court's 1983 *Bob Jones University* decision to revoke the tax-exempt status of nonprofit organizations it believes engage in illegal racial discrimination. In that decision, the Supreme Court upheld the IRS's denial of section 501(c)(3) status to private, religious schools that implemented racially discriminatory admissions policies – including prohibiting interracial dating and marriage – on the basis of their sincerely held religious beliefs. The Court opined that "entitlement to tax exemption depends on meeting certain common law standards of charity – namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy." It determined that Congress, in Titles IV and VI of the Civil Rights Act of 1964 had "clearly expressed its agreement that racial discrimination in education violates a fundamental public policy." The Court concluded that the government's compelling interest in eradicating racial discrimination in education substantially outweighed the burden that denial of tax benefits placed on the schools' exercise of their religious beliefs.

Since the era of *Brown vs. Board of Education*, federal tax regulations have specifically recognized eliminating prejudice and discrimination and defending human and civil rights secured by law as charitable purposes under section 501(c)(3). Thus, organizations engaged in these efforts are doing so on the basis of longstanding legal precedent. Moreover, organizations that educate the individuals and the public on DEIA and other racial justice issues are engaging in speech protected under the First Amendment. Nevertheless, there is concern that the IRS could attempt to challenge

the tax-exempt status of charities involved in activities that the IRS determines to be furthering racial discrimination.

Takeaways

Following are steps your nonprofit can take to navigate the current DEIA environment:

- ✓ Review your mission and values and use them to guide decision-making about DEIA matters.
- ✓ Inventory your programs, policies and practices that relate to categories protected by federal and state civil rights law, such as race, color, national origin, sex, and disability.
- ✓ Evaluate whether those programs, policies and practices and your messaging about them comply with current antidiscrimination laws, which generally prohibit providing or denying benefits to individuals on the basis of race or other protected characteristics.
- ✓ Assess the degree of risk each such program, policy or practice poses. Keep in mind that:
    - Expressing your organization's values about DEIA, educating the public on racial justice issues (using facts rather than mere unsupported opinion), advocating for civil rights and social change, and celebrating diversity constitute First Amendment-protected speech.
    - Initiatives that do not use race or other protected characteristics to determine an individual's eligibility or to select or exclude them generally will not violate antidiscrimination laws.
    - Taking steps to publicize initiatives and to attract applicants or participants from a wide range of communities and backgrounds helps further DEIA and establish nondiscriminatory intent.
- ✓ Identify any funds subject to donor restrictions based on race or other protected characteristics, evaluate whether those restrictions comply with applicable law

and, if not, whether court or attorney general's approval is required to modify them.

- ✓ Review and, if necessary, modify policies on accepting gifts with such restrictions.
- ✓ Consider structuring your organization's racial equity initiatives so as not to be contracts – for example, by not imposing obligations on recipients or participants to receive funding from or benefits of those initiatives.
- ✓ Consult with experienced counsel as needed.

Contact Us

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