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The Many Challenges of DEI Law and Policy for Corporate Counsel

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One of the most challenging issues that businesses and their in-house counsel face today is the sweeping public policy effort to dismantle the Diversity, Equity, and Inclusion ("DEI") movement and the litigation, PR, and political landmines that companies must avoid while navigating this space.

For years, and especially after the George Floyd protests in 2020, corporations have built out DEI offices, hired "Chief Diversity Officers," instituted policies that promote DEI, and touted their DEI *bona fides* as a marketing tool. But just as quickly as companies built out these programs, the law and public policy has shifted away from DEI. In 2022, the Supreme Court held that the Fourteenth Amendment prevents colleges from using race as a factor in admissions, and that decision is now being tested in other areas beyond education. Further, President Trump has carried out his campaign promise to dismantle DEI, issuing a series of sweeping Executive Orders that instruct the Justice Department and other agencies to excise DEI—not only from government but from the private sector as well.

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Because of these trends, many companies are acting quickly to get out of the government's anti-DEI crosshairs. Every day, the news is replete with major corporations "rolling back" or "removing" DEI, including Pepsi, Citigroup, and Ford, among others. But avoiding the litigation, PR, and political risks from the anti-DEI policy is not so simple as announcing roll backs. Companies and their in-house counsel should be aware that removing DEI in compliance with federal and state law will be an extremely complicated and sensitive endeavor.

First, there are tricky questions about what "DEI" encompasses and, therefore, what it means to

"remove" it. Many of the companies that have announced rollbacks, for example, are merely renaming DEI offices or shifting DEI employees to other positions. While those moves could take companies out of the spotlight in the short term, it is likely that these officers and employees will continue to promote or enforce DEI-like policies internally. Those companies may eventually face whistleblower lawsuits or government investigations if it emerges that they are implementing DEI by another name. After DEI has been so embedded in corporate culture, successfully removing it will take more than a few new titles.

Second, companies should understand the various federal and state enforcement mechanisms that they will confront, and the many applicable statutes and regulations. On the federal level, the DEI EOs are not self-executing "law" but instead calls for agencies to investigate, study, and issue new rules and regulations. For example, under President Trump's EOs, the Attorney General, with the heads of all "relevant agencies," must issue a report within four months with "recommendations for enforcing Federal civil-rights laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI." This directive will lead to myriad "regulatory action and subregulatory guidance" affecting the private sector and federal contractors. That could involve several agencies, such as DOJ, EEOC, FTC, SBA, SEC, and GAO, just to name a few. Each of these agencies have various statutes and regulations at their disposal to fight DEI—including civil and criminal enforcement statutes, funding and subsidies, and federal procurement.

Notwithstanding the attention on President Trump's EOs, the more immediate risks may come from Republican State AGs, who have been mobilizing to eliminate DEI. State AGs can move much faster than federal agencies, which take a while to issue rules and guidance as they navigate D.C. politics and notice-and-comment requirements for rules. The Republican State AGs have much more agility in their investigatory and enforcement powers. Indeed, they have already begun to act in this space. Shortly after taking office this year, the new Florida AG sued Target for allegedly failing to disclose the risks of DEI to shareholders, in violation of the securities laws. This lawsuit will likely become a model for other State AGs around the country.

In addition to securities law, State AGs also have the power to enforce civil rights law, consumer protection laws, deceptive and unfair practices laws, and state employment laws—all of which could be deployed to defeat DEI. And as State AGs investigate and enforce these laws, plaintiffs' lawyers will inevitably file follow-on or "copycat" class actions on behalf of shareholders, employees, and consumers.

Third, companies must be aware that there are many *countervailing* risks they could face by moving away from DEI—from disgruntled or former employees, pro-DEI shareholders, Blue State AGs, a Democrat-led House in two years, or a new federal administration in four years. As noted above, renaming DEI offices and changing personnel titles likely will not suffice; on the other hand, laying off those employees could lead to all kinds of lawsuits. Similarly, highly publicized efforts to remove DEI by companies in Blue States could embolden Democrat AGs to retaliate with their own employment and civil-rights actions, claiming that the roll backs violate state law. Democrat State AGs will be looking to make loud

political statements on behalf of the pro-DEI and "resistance" movement.

Companies rolling back DEI are also facing backlash from left-wing activists and groups. Target, for example, has scaled back its DEI; but it is now dealing with left-wing activists attempting to promote boycotts. Further, Democrats may control the House again by the 2026 mid-terms, in which case they can launch all kinds of committee hearings and investigations, especially against companies whose leaders have been vocal about anti-DEI or have worked with President Trump.

Finally, corporate counsel must be aware that this landscape is going to change rapidly and become even more complicated. Not only is it necessary to follow the many developments in policy guidance, regulations, and enforcement actions at the federal and state levels, but companies will also need to be aware of the many judicial developments on the horizon. As advocacy groups challenge anti-DEI policies or companies defend against enforcement actions, courts around the country will grapple with several issues-including the scope of DEI, the boundaries of civil-rights and other relevant laws, administrative law issues for new regulations, and the reach of the Supreme Court's decisions regarding race-based admissions (*SFFA v. Harvard* (2022)) and gender discrimination in employment (*Bostock v. Clayton County* (2020). In other words, navigating DEI is not a one-and-done project, but an ongoing issue for corporate counsel.

Our recommendation: Do not underestimate the complexity of this fast-developing area of law and policy. For companies that have not done anything, they face myriad and immediate risks from agencies and State AGs. For companies that have announced "rollbacks," they still may face litigation risks for not doing enough. And for companies that have taken quick and extensive measures to remove DEI, they may face several countervailing legal and political forces from the left.

Accordingly, companies should work with outside counsel to conduct internal investigations, review all applicable laws and regulations in the relevant jurisdiction, and develop broad PR and legal strategies to navigate this minefield. And then they should monitor developments to adjust their strategies as needed.

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