

Employment Law Corner

Monthly Report



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May Updates

[What Does the FTC Non-Compete Ban Mean?](#)

[The Supreme Court Lowers the Bar for Harm Under Title VII](#)

[Religious Belief v LGBTQIA: Title VII Wars](#)

[Pay Transparency and Pay Equity: What You Need to Know Now](#)

[Call of Duties Test: The Most Important Factor for Exempt Status](#)

Employment Law Corner: DEI Is Not DOA: Don't Abandon Your Efforts!

THE CURRENT CLIMATE: Diversity, Equity, and Inclusion (DEI) programs have increasingly been in the crosshairs, with conservative lawmakers and activists attacking DEI programs as illegal discrimination. Some employers have begun to pull back from DEI amid anxiety over the relative risk and benefits of DEI programs mount. Two recent Supreme Court cases – one striking down race-based admissions programs (*Students for Fair Admissions v. President & Fellows of Harvard College*), the other lowering the bar for plaintiffs bringing discrimination lawsuits (*Muldrow v. St. Louis*) – appear to be setting the stage for a case against DEI programs. In the wake of *Students for Fair Admissions*, 13 Attorneys General wrote an open letter to Fortune 100 CEOs decrying DEI efforts and threatening legal action against employers who made hiring decisions based on race. Employers might be forgiven for thinking that DEI is on its way out.

THE CASE FOR DEI: Despite these attention-grabbing challenges, DEI efforts remain deeply embedded in American businesses and are a valuable tool for building a successful company. A well-crafted DEI program can produce a variety of benefits for employers:

- better recruitment and hiring results,
- better collaboration,
- improved innovation,
- higher retention rates,
- and improved employee morale, motivation and satisfaction.

HOW TO MINIMIZE RISK: There are a few risks to embracing DEI programs. Employers should review their DEI programs to ensure that they are effective and compliant with the law as it stands today.

- *More than just box-checking.* A well-crafted DEI program is not just hiring applicants based on a desired protected class. Employers who explicitly hire based on race expose themselves to Title VII discrimination lawsuits. Instead, employers should ensure that they are recruiting from a wide pool of applicants so that they bring in candidates with diverse backgrounds and viewpoints that can strengthen the employer's workforce, provide new perspectives that break out of groupthink, and improve innovation.
- *Communicate thoughtfully and accurately.* Employers should be mindful of both internal and external communications about their DEI programs. It is critical that managers understand the why of DEI programs and understand the company's goals.
- *Structural improvements.* DEI efforts should also focus internally on the company's own decision-making processes. Training programs that focus on implicit bias, audits of hiring processes that ensure transparency and fairness, and implementation of systems to process, investigate and address complaints about racial bias are all key components of DEI programs that can lead to durable, structural improvements in the company's operations while mitigating risk.
- *Meritocracy.* DEI programs should promote meritocracy in the workplace by helping employers develop metrics and analytical tools to evaluate the whole impact of an individual employee while removing barriers to advancement that are rooted in bias (implicit or explicit) rather than in the best interests of the employer. For example, transparent criteria and pathways towards career advancement can ensure that the company's resources are being invested in individuals who are making concrete contributions to the employer. Mentorship and sponsorship programs can promote growth, help employees feel supported and heard, and ensure that talented employees are not overlooked.
- *Open to All.* One of the strongest defenses for DEI programs is the ability to affirmatively say that no individual employee is harmed by the program and every employee has a place in the program. Hiring programs should be based on race-neutral factors while acknowledging the benefits of having diverse viewpoints to solving problems and implementing solutions.

THE TAKEAWAY: DEI as an aspirational goal and as a strategy of evaluating employees, internal structures, and policies can continue to be a key element to build successful and effective workforces going forward. The challenge for employers committed to DEI will be to maximize the benefits of their DEI programs while mitigating their risks.

Fortunately, **we can help!**

Who We Are:

- We represent employers exclusively from coast to coast in all facets of employment law and litigation. Our mission is solving problems and anticipating issues so you can concentrate on your business.
- We are constantly searching for the trends and upcoming issues in the law that will impact our clients. We want our clients to be informed and ready. Our familiarity with the workplace and our approach sets us apart from other law firms, making us well equipped to handle your unique needs.
- We are not like other firms: Anyone can tell you what the law states and its limits. That is easy. We find creative solutions within those restrictions that move your business forward. We seek to minimize your risk so you can get back to business. Learn how we can help your business: **[Foley & Foley PC attorneys specialize in Employment and Labor Law in the Public and Private Sectors \(foleylawpractice.com\).](http://foleylawpractice.com)**

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Meet Gregory Paal

Greg has experience advising employers on regulatory compliance, contract matters and employment-related litigation. Greg has worked with employers both large and small to meet various challenges, including implementing overtime and leave policies, drafting employment agreements and privacy policies, and resolving discrimination complaints! For more info, check out his full bio [here!](#)

