

CHECKLIST FOR COMPANIES NAVIGATING DEI EFFORTS POST-EXECUTIVE ORDER “ENDING ILLEGAL DISCRIMINATION AND RESTORING MERIT-BASED OPPORTUNITY”

Given the potential impact of the recent Executive Order (EO) on diversity, equity, and inclusion (DEI) initiatives, private employers who are deemed federal contractors, must carefully navigate their obligations and risks. This checklist is an evolving, non-exhaustive guide to help companies navigate the challenges posed by the recent EO. It outlines good practice for balancing compliance with a commitment to diversity, equity, and inclusion. While tailored to address the potential risks of the EO, these steps reflect sound business strategies that strengthen DEI initiatives and legal compliance – regardless of federal mandates. So, below are key actions for private employers who are also federal contractors, including those with well-known DEI commitments, to protect their programs while mitigating risks:

1. Conduct a Legal and Risk Assessment

- **Review All DEI Programs for Compliance:** Ensure all DEI efforts comply with existing anti-discrimination laws (e.g., Title VII of the Civil Rights Act, Equal Pay Act) and do not inadvertently create preferences or quotas based on protected characteristics.
- **Assess Affinity Groups (Employee Resource Groups):** Evaluate affinity group policies to ensure they focus on professional development, mentorship, and community-building rather than explicit inclusion based solely on protected characteristics. Tip: Emphasize voluntary participation and avoid exclusionary language in group missions.
- **Audit Contracts and Federal Obligations:** Review all federal contracts and grants to understand how compliance with the EO may affect funding or continued eligibility.

2. Reinforce a Merit-Based Approach Without Sacrificing DEI Goals

- **Consider shifting language in DEI Initiatives:** Reframe DEI efforts to emphasize a culture of care at the company and a commitment to individual opportunity, professional development, and meritocracy while continuing to promote equity and inclusion.
- **Promote Broad-Based Programs:** Structure DEI programs around business goals like increasing innovation, enhancing employee engagement, or fostering leadership development. Programs should benefit all employees, regardless of demographics. Terminology is key!
- **Develop Objective Metrics for Advancement:** Use neutral, non-biased performance measures to ensure hiring, promotion, and pay decisions align with merit-based principles.

3. Monitor and Adapt to Potential Regulatory Risks

- **Stay Updated on Federal Guidance:** Monitor updates from the Department of Labor, OFCCP, and Attorney General’s Office for clarity on how the EO will be enforced. Be prepared to pivot based on enforcement trends.
- **Prepare for Compliance Reviews:** Anticipate potential civil compliance investigations by conducting internal reviews of DEI and hiring practices. **Key Focus Areas:** Public statements about DEI, workforce data, and any program funding sources.

4. Protect and Sustain Affinity Groups

- **Reframe Objectives:** Position affinity groups (employee resource groups or ERGs) as forums for professional development, leadership training, and collaboration across diverse employee populations. Avoid tying them to hiring or promotion metrics directly.
- **Voluntary Participation:** Clearly communicate that participation in affinity groups is optional and open to all employees with shared interests.
- **Diversity Beyond Identity:** Focus on intersectionality and shared interests rather than restricting participation based solely on protected characteristics (e.g., creating a “working parents” group versus solely a “women’s group”).

5. Strengthen Training and Communications

- Implement Legal and DEI Compliance Training: Provide updated training to HR teams, managers, and DEI leaders on balancing compliance with DEI values. **Training Topics:** Avoiding implicit bias claims, legal boundaries of DEI initiatives, and reinforcing workplace inclusion.
- Avoid Polarizing Language in DEI Communications: Focus communications on universal goals such as employee engagement, organizational innovation, culture of care, and fostering leadership opportunities.

6. Develop Contingency Plans

- Prepare for Scrutiny: Be ready to defend DEI initiatives by clearly documenting how they align with business needs and comply with anti-discrimination laws.
- Proactive Crisis Management: Develop a strategy for responding to public or regulatory criticism of DEI programs, including media statements and internal messaging.

7. Strengthen Relationships with External Stakeholders

- Collaborate with External Counsel: Continue to engage Ogletree to evaluate DEI programs and provide guidance on mitigating legal risks.
- Consider Engaging in Advocacy: Seek out and join industry coalitions or advocacy groups pushing back against efforts to dismantle DEI initiatives. This can include lobbying for more balanced interpretations of civil rights laws.

KEY RISKS AND CONSIDERATIONS

- Affinity Groups/Employee Resource Groups: If these groups appear to favor specific demographics without broader inclusivity, they could be scrutinized under the EO's directive. Ensure these groups are framed as voluntary, collaborative spaces for all employees.
- Contract Loss Risk: Companies that remain visibly committed to DEI may risk losing future federal contracts. Carefully balance public statements and policies with compliance obligations.
- Reputational Risks: Scaling back DEI programs too aggressively could harm employee morale and damage the company's reputation among diverse candidates and consumers.

CONCLUSION

While the EO poses significant challenges, companies committed to DEI can adapt their efforts to remain compliant while sustaining their core values. A thoughtful, proactive approach to evaluating and restructuring DEI programs can help private employers with federal government contracts navigate this new regulatory landscape without abandoning their progressive commitments.