DEI's Ongoing Evolution:

Current Risks and Strategies for Employers

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Agenda

1 | Governing Law and Political/Cultural Framework

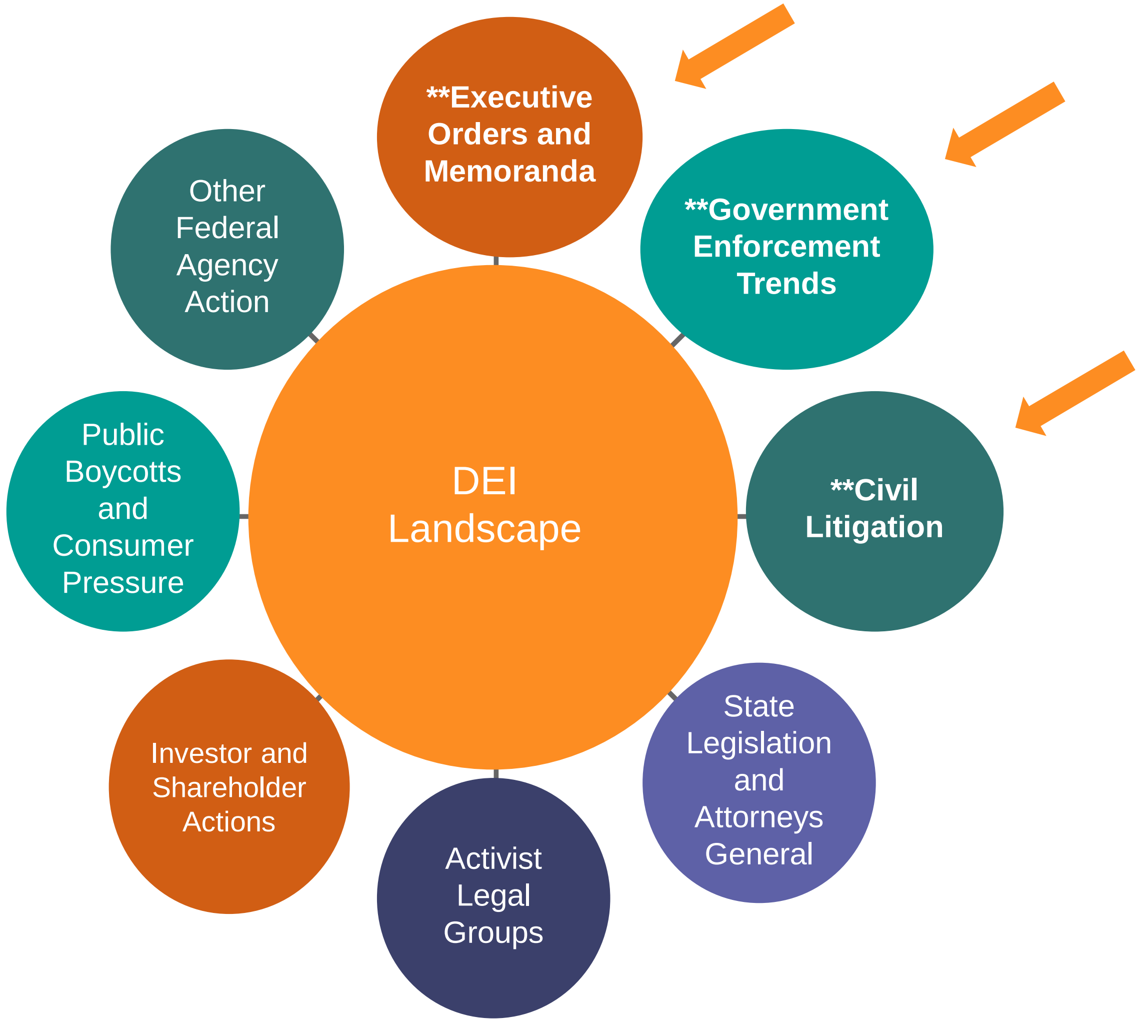
2 | Enforcement by the EEOC and DOJ

3 | Areas of Focus for 2026-2027

4 | Practical Risk Assessments

5 | Proactive Strategies to Support Inclusion and EEO

Key Forces Shaping DEI Risk and Strategy



Governing Law and Political / Cultural Framework

Key Legal Principles

- Civil Rights laws set the stage
  - – Title VII, ADA, ADEA, Section 1981 and state laws
- No decisions "because of" protected traits
- Motivating factor test
- Under current Supreme Court caselaw, Race/Gender-based preferences are unlawful except in very narrow circumstances:
  - – when specifically designed and narrowly tailored to temporarily correct a "manifest imbalance" in the workplace.
  - – Unlikely to survive judicial review in current climate

U.S. Law Requires Balance

There are risks to doing too much (leading to "reverse discrimination" claims or social media challenges)

There are also risks to doing too little (leading to discrimination claims challenges to commitment regarding EEO)

The Current Administration Has Introduced Executive Orders that Directly Target (federal funds/contracts) and Indirectly Influence (all employers) DEI Programs

1. **EO 14148**: “Initial Recissions of Harmful Executive Orders and Actions” (January 20, 2025)

2. **EO 14151**: “Ending Radical And Wasteful Government DEI Programs And Preferencing” (January 20, 2025)

3. **EO 14173**: “Ending Illegal Discrimination And Restoring Merit-Based Opportunity” (January 21, 2025)

4. **EO 14281**: “Restoring Equality of Opportunity and Meritocracy” (April 23, 2025)

5. **EO 14398:** “Addressing Discrimination by Federal Contractors” (March 26, 2026)

EO 14398

Addressing DEI Discrimination by Federal Contractors

March 26, 2026

- Reflects continued emphasis on DEI, ongoing skepticism by government
- Focus continues *and evolves*
- No “racially discriminatory” activities
- Sweeps in the “allocation or deployment of resources”
- Includes a “tattletale” provision
- Investigation assigned to (untrained) contracting agencies / officers

Federal Signals on DEI: Why They Matter Beyond Contractors

- Even though EOs formally apply to federal agencies and contractors, they signal a broader enforcement direction (EEOC, DOJ, private litigation)
- Shift from programmatic DEI to legal risk framing
- Renewed emphasis on “merit-based” decision-making
- Language and labeling matter
- Documentation and governance expectations increasing
- Need for clear rationale, consistency, and audit trails for employment and program decisions
  - Private sector exposure rising
  - Increased likelihood of employee claims, third-party challenges, and reputational scrutiny, even outside contractor status

The Litigation Wave

<u>“Reverse” Discrimination Claims</u>

- Eliminated higher evidentiary standard for whites/males
- Numerous cases in 2025-2026, with more to come
  - Gender “representation targets”
  - Diversity quotas
  - Demotion after accusation of racism
  - Denied promotion in favor of protected class
  - White employee subjected to discrimination by black managers, treated worse than coworkers
  - Opposition to DEI training

<u>…And “Traditional” Discrimination Claims Continue with Equal Force</u>

Key Federal Enforcement Activity

DOJ Guidance July 29, 2025

- Focused mainly but not exclusively on “recipients” of federal funding.
- Signaled further escalation of aggressive anti-DEI enforcement
- Many questions left unanswered

Key Takeaways and Advised Best Practices

- Use of protected characteristics is illegal *per se*.
- Facially neutral “proxies” for protected characteristics (income, geography, diversity statements, “lived experiences”) are subject to scrutiny and may be illegal
- Sex or race-based contracting decisions likely illegal
- Avoid supporting third-party programs “that discriminate.”
- Shared intimate spaces with the opposite sex “would typically be unlawful”
- Prohibit demographic-driven criteria
- Eliminate diversity quotas
- Avoid exclusionary training programs

DOJ Opinion on Disparate Impact

June 9, 2026

- Federal enforcement posture is shifting
- EEOC formally asked DOJ's Office of Legal Counsel whether disparate impact liability—especially as reflected in EEOC guidance—is constitutional (hoping it was not)
- DOJ: current EEOC interpretations – which allow liability based on statistical disparities alone -- are unconstitutional
- Disparate impact may exist only as an evidentiary tool, supplemented by evidence of *an improper motive*
  - It cannot impose liability absent a strong link to intentional discrimination
- EEOC is dismissing / deprioritizing disparate impact charges and litigation

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BUT, ***not* gone and *not* forgotten**

- Title VII
- State law

Employer-Friendly Implications:

Application of the DOJ's Disparate Impact Opinion

1. Flexible Business Necessity Standard

- Practice is lawful if **reasonable and tied to a legitimate business purpose**
- Common tools (tests, background checks, education requirements) are **presumptively job-related**

2. Strong Causation Requirement

- Plaintiff must identify a **specific practice**
- Must prove it **actually caused** the disparity—not just statistical imbalance

3. Equally Effective Alternative Requirement

- Plaintiff must show a **less discriminatory alternative**
- Alternative must be **just as effective** in achieving the employer's goals

First Major DOJ Settlement under the Civil Rights Fraud Initiative

- April 2026, reaches $17 million settlement with tech company based on allegations of:
  - –use of diverse interview slates
  - –demographic goals
  - –selective eligibility for programs
  - –consideration of protected traits in employment decisions

DOJ Formal Issuance of Findings

August 6, 2026

- Found university engaged in discrimination against Whites and Asians with regard to admissions
- 2023, 2024, 2025 classes
- “Good intentions” does not give a “free pass”
- Cited:
  - Announced goal of diversity
  - Use of diversity statements
  - Instructing interviewers to flag traits that correlate with race (like Pell grant recipients)
  - LSAT scores of *rejected* Whites and Asians were higher than those of *admitted* Black applicants
  - Potential settlement / conciliation, or litigation

EEOC Activity

The Agency plans to stay “**very busy**.”

- February 2026, Subpoena enforcement action against national retailer arising out of DEI programs
- February 2026, “reminder” letters to Fortune 500 companies (with follow-ups and a second round starting in April 2026)
- February 2026, EEOC sues major manufacturer due to an alleged company-sponsored networking event for women
- March 2026, $500k settlement with nonprofit for segregated racial affinity meetings, disparate treatments towards whites
- April 2026, $500k settlement with IT company for rejecting an applicant who was “not diverse”
- May 2026, EEOC sues media outlet for allegedly promoting a less qualified minority female over a white male

EEOC Activity

*

Not “business as usual”

Rescission of EEO-1s

- July 27, 2026: Voted to approve a Notice of Proposed Rulemaking (NPRM) to rescind the **EEO Data Reports** (EEO-1 thru EEO-6)
  - 30-day comment period
  - Hearing on August 11, 2026
- Reports in place - by statute and regulation - since 1966
- Reports are “inconsistent with equal employment opportunity law” and may be unconstitutional
- Data is not useful and counter to enforcement priorities

EEOC Activity

*

Not “business as usual”

The Fate of UGESP?

- Uniform Guidelines on Employee Selection Procedures (1978)
- Series of regulations adopted by enforcement agencies
- Employers use race/gender data collected from applicants and employees to monitor for adverse impact
- Announced intent to rescind Guidelines, Appendix, and Recordkeeping requirements
- May raise questions about voluntary and mandatory data collections, conflicts with state laws, etc.

Looking Back and Forwards: Areas of Focus for 2026-7

What Have Companies and Organizations Done Since January 2025?

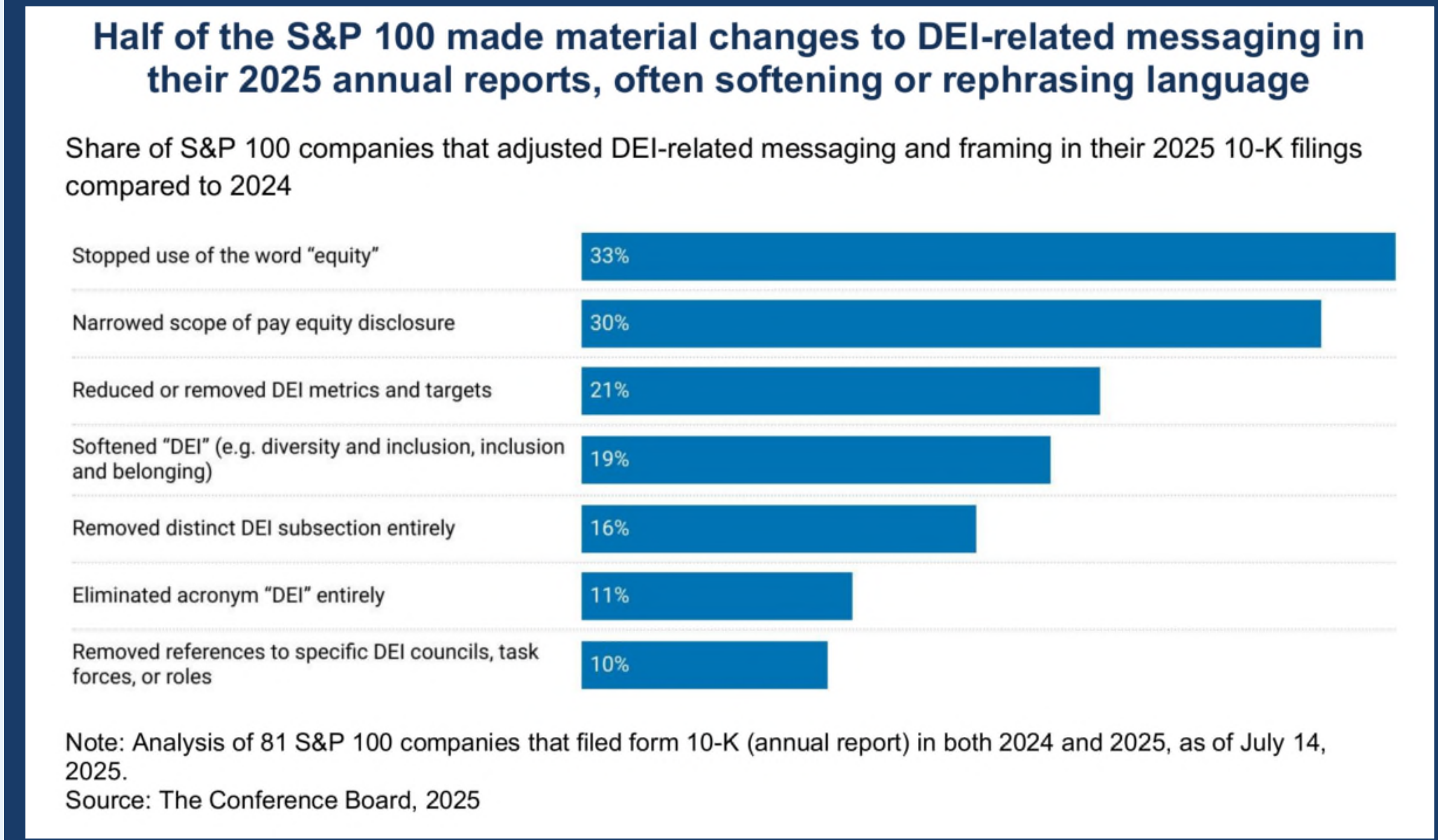
Scaled Back or Ended Initiatives

Evolved Values and Programs

Affirmed Existing Commitments

Not “one size fits all”

Survey Research on Corporate Diversity Disclosure Trends



Note: Analysis of 81 S&P 100 companies that filed form 10-K (annual report) in both 2024 and 2025, as of July 14, 2025.
Source: The Conference Board, 2025

Where Things Stand for Employers

- Expanded legal risk and litigation pathways
- Shifting enforcement posture from agencies
- Alignment toward **merit-based,** equal treatment frameworks (lower tolerance for outcome-driven approaches)
- Increased tension among stakeholder expectations
  - Balancing employee, leadership, regulatory, and external pressures in a changing environment
- Heightened importance of defensibility and documentation
  - Clear, job-related criteria and consistent decision-making are critical
- Continued business need for inclusion and talent strategy
  - Organizations still expected to support engagement, retention, and access—within evolving guardrails

Ensuring Equal Pay Is Still a BEST PRACTICE Practice and Is Still THE LAW

- Title VII and the Equal Pay Act have not changed
- States continue to focus on pay equity
- The EOs do not target or undermine pay equity practices
- Some companies have evolved how they approach traditionally “favored” groups
  - ALL groups – including whites and males – are protected from discrimination
- A global issue
  - Varied approaches in different countries, especially for race
- The EU Pay Transparency Directive

Predictions?

Likely Areas of Focus Going Forward

- Data, data, data
  - how, when, where, why, who – use cases
- **Intangible job benefits and opportunities**
  - mentoring, sponsorships, training, leadership development, succession planning, 9-box, visibility to leadership
- Intentional discrimination, improper motive
- "Shaming and blaming" DEI or bias training
- Unregulated or poorly designed ERGs
- Supplier diversity
- Pay equity
- Attempts to correct or address "historical" imbalances or representation (Johnson/Weber overruled?)

Supplier Diversity Requirements: Key Considerations

Section 1981 of Civil Rights Act of 1866 prohibits discrimination based on race, color, and ethnicity when making and enforcing contracts

Initiative that seeks to increase procurement opportunities for certain businesses based on status.

Key Risk Assessment Factors

- ✓Is there an applicable state or federal supplier diversity program requirement?
- ✓Is the program open to all suppliers?
- ✓Are all vendors subject to the same performance, quality, and pricing requirements?
- ✓What types of businesses are considered “diverse” or “disadvantaged” - Minority, Women, Vets, Disabled, Small, HUBZone, etc.?
- ✓Do certain suppliers receive any “points” or additional weight in the bidding process?
- ✓Does the company require Minority/Women-Owned Business Enterprise (MWBE) certification?
- ✓Does the company have diverse supplier spend targets?

Practical Risk Assessments

What is Unlawful DEI? Key Questions

1 Does the Program/ Contract?

- Provide consideration or preference
- Exclude or divide
- Confer some harm or benefit
- Impair contractual right, benefit or opportunity

2 Based on protected characteristic (like race or sex)?

DEI Risk Assessment Framework

Step 1: Design

- Does the program use protected characteristics?

Step 2: Structure

- Are there preferences, exclusions, or differential access?

Step 3: Criteria

- Are neutral factors acting as proxies?

Step 4: Outcomes

- Could results disproportionately impact groups?

Step 5: Justification

- Is there a documented, legitimate business purpose?

Common Risk Triggers Attorneys Should Recognize

1. Narrow Pipelines

- Recruiting from limited schools, programs, or networks
- Over-reliance on referrals or affinity-based sourcing

2. Subjective or Loosely Defined Criteria

- “Culture fit,” “lived experience,” “leadership potential”
- Criteria that are difficult to apply consistently

3. Targeted Program Design

- Leadership, mentorship, or development programs
- Access shaped in ways that may limit who can participate

4. Neutral Rules with Uneven Effects

- Geographic targeting, tenure requirements, or income-based filters
- Policies that disproportionately screen in/out certain groups

Both Wording

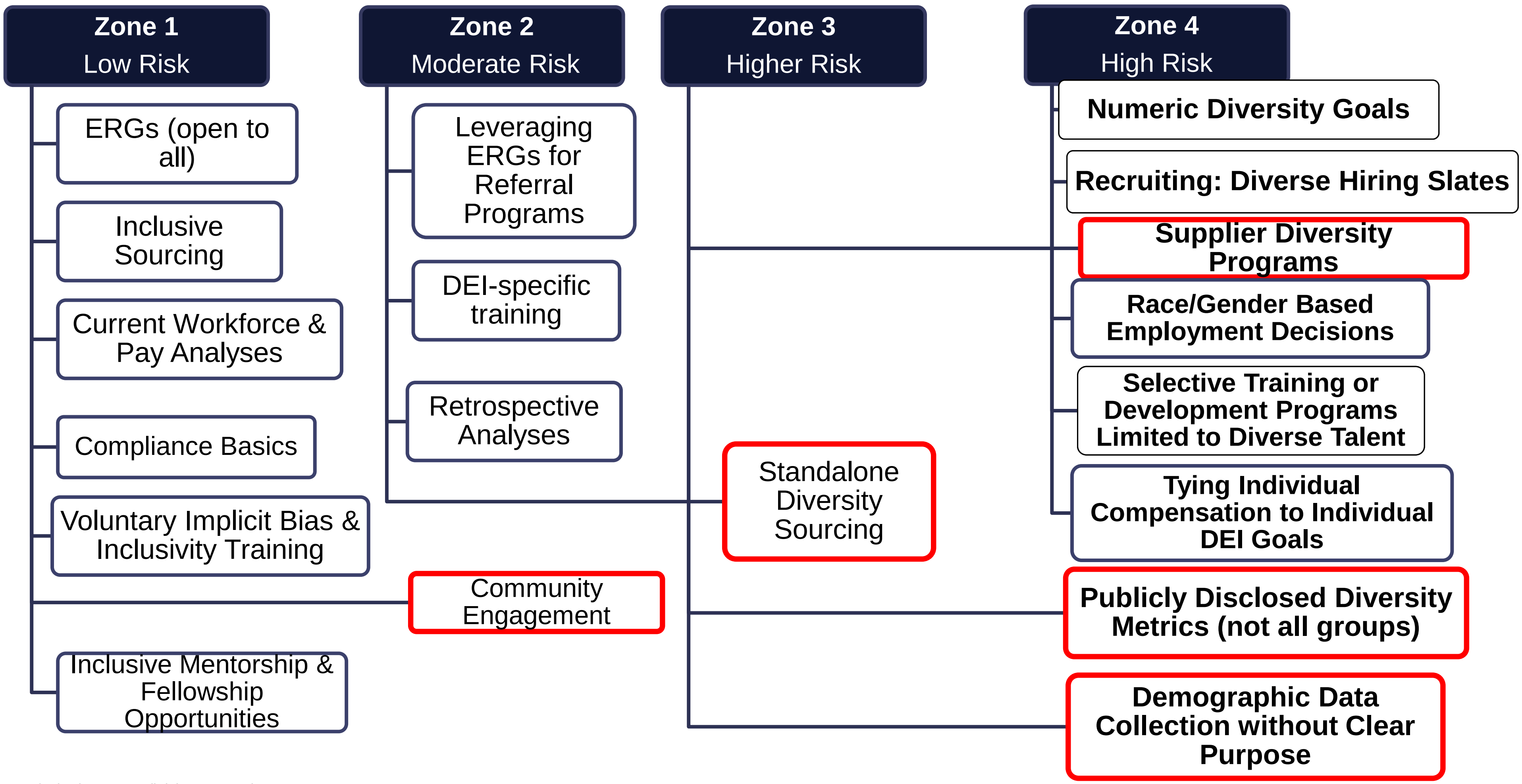
and

Details of Implementation

Matter Tremendously

and *Impact Risk*

Potential Risk Spectrum for Programs and Practices



Proactive Strategies to Support Inclusion and EEO

Proactive Strategies to Strengthen Commitments to EEO and Inclusion

- Emphasize respect, inclusion, employees' ability to present as they choose
- Reaffirm longstanding commitments to respect and inclusion
- Emphasize the business case for inclusion programs that create a culture of belonging: better recruitment, reduced turnover, increased productivity, fewer complaints, etc. = value for workforce, customers and stakeholders
- Periodically review word and language choices
- Define imprecise terms and embrace a broad view of "diversity"
- ***"Reclaim and Reframe"***

Proactive Strategies to Strengthen Commitments to EEO and Inclusion

- Continue to support ERGs ***so long as*** resources are distributed evenly and membership, leadership, events and leadership opportunities are open <u>and</u> welcoming to all
- Maintain commitment to equal pay for all employees and all groups
- Use employee engagement and exit surveys to identify issues and develop ideas
- Emphasize equality instead of equity
- Continue to internally track employee demographic data for *privileged, retrospective analyses designed to ensure nondiscrimination for all groups*

Proactive Strategies to Strengthen Commitments to EEO and Inclusion

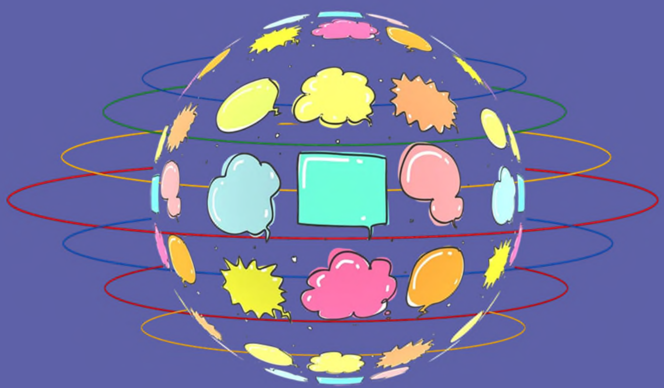
- Conduct an **attorney-client privileged detailed, program-by-program deep-dive analysis** to properly assess legal compliance and risks
  - Focus on ALL potential DEI related policies and practices, not just employment

    = procurement, third-party partnerships, operational "equity" considerations
- Confirm protected traits do not influence *any* employment-related benefits or opportunities
  - e.g., attendance at outside seminars and events, compensation, and client and customer assignments.
- Stress **merit-based** decision-making (which is consistent with lawful DEI)

Proactive Strategies to Strengthen Commitments to EEO and Inclusion

- If a program arguably violates the law – either stop it or change it
  - Consider the underlying objectives and reshape the strategy
- Account for additional state and local legal requirements
- Verify public-facing EEO commitments comply with legal standards
- Identify and remove outdated materials online

Closing Thoughts & Key Takeaways



- You can strategically stand by organizational values
- Identify, Evaluate, & Evolve
- Consider all aspects of risk: legal, political, reputational, practical
- Stay abreast of the fast pace of legal developments across a wide spectrum to ensure legal compliance, effectiveness, and awareness of developing policies and priorities

DEI remains a lawful and important business objective—when designed carefully

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Questions?

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