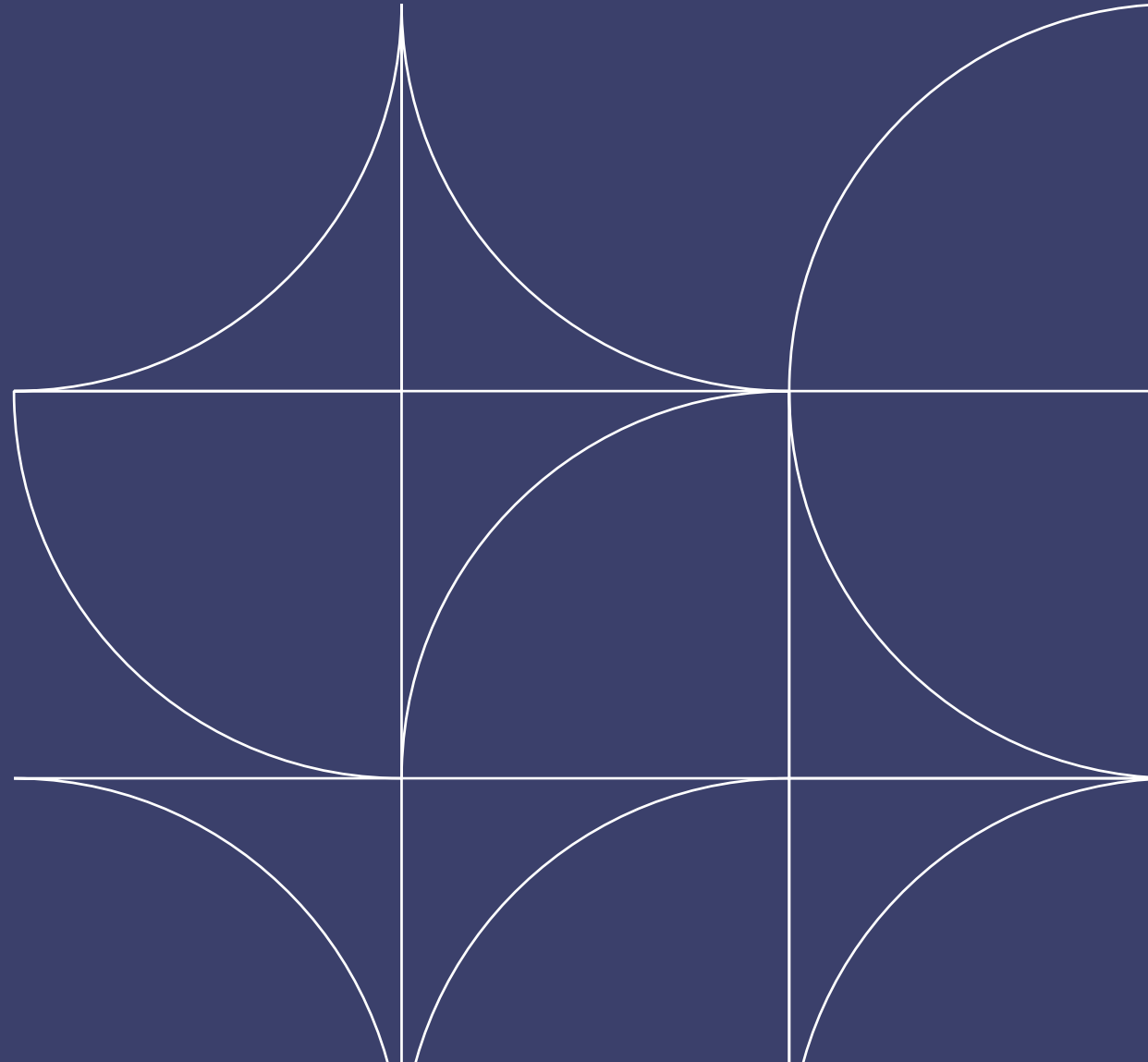




Seyfarth Shaw & ACC: Emerging Issues and Trends in DEI

Seyfarth Shaw LLP

"Seyfarth Shaw" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).
©2025 Seyfarth Shaw LLP. All rights reserved.



Legal Disclaimer

This presentation has been prepared by Seyfarth Shaw LLP for informational purposes only. The material discussed during this webinar should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The content is intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have.

Seyfarth Shaw LLP

“Seyfarth” refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).

©2026 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

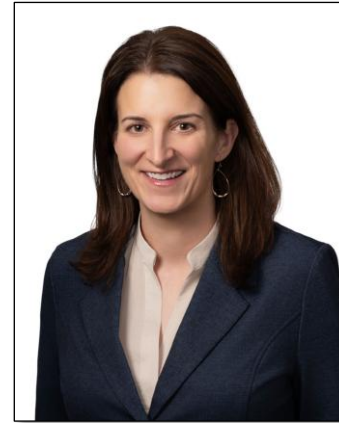
Speakers



Annette Tyman
Partner
Chicago



Teddie Arnold
Partner
Washington, D.C.



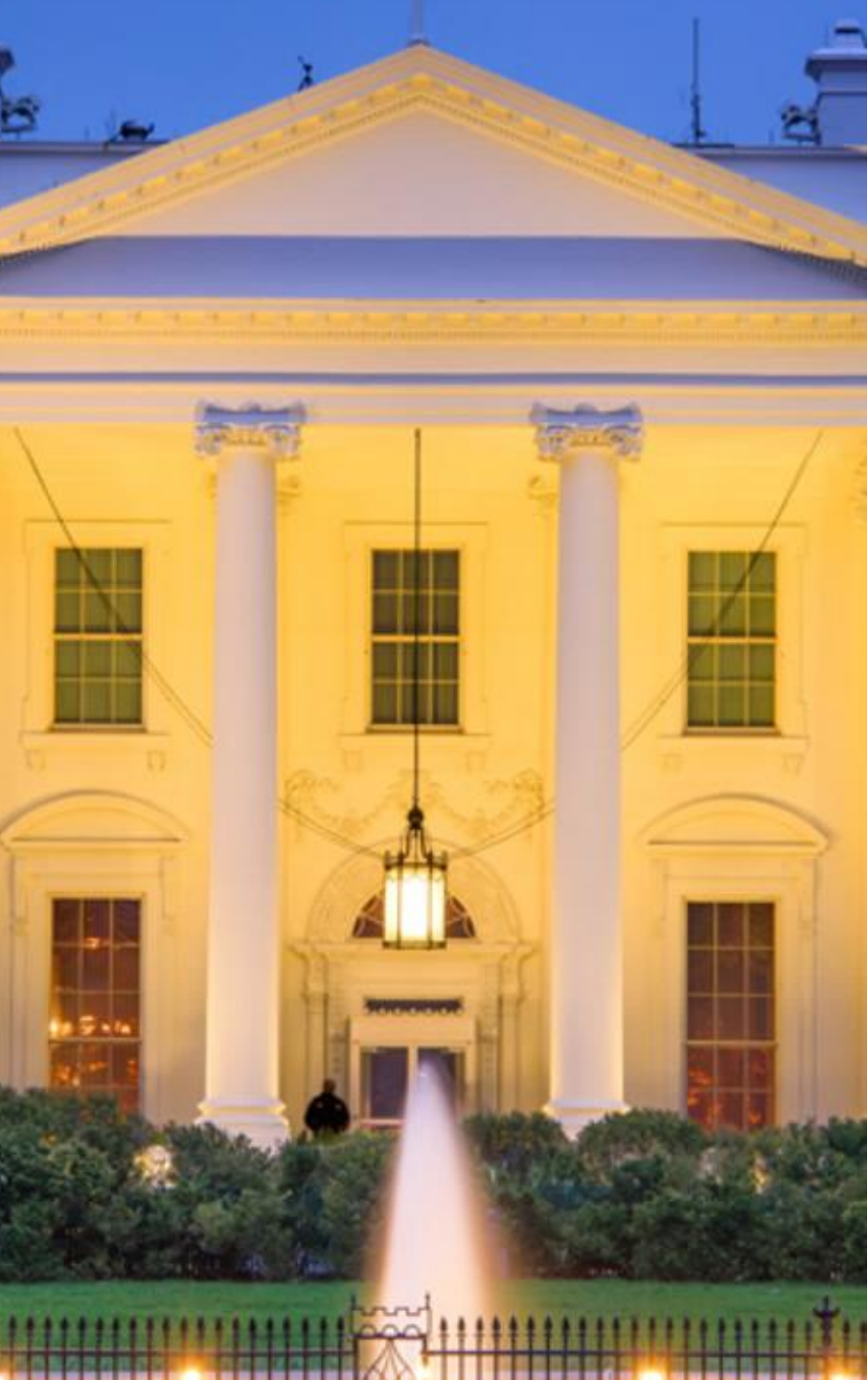
Jennifer Serafyn
Partner
Boston



Anuj Khetarpal
Counsel
Boston

Key Forces Shaping DEI Risk and Strategy





Current Administration Has Introduced Executive Orders that Directly or Indirectly Influence Diversity, Equity and Inclusion 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

- Prohibits “racially discriminatory” activities
 - does not address gender or other protected traits
- Sweeps in the “allocation or deployment of resources”
 - significantly broadens areas subject to scrutiny
- Contractors must report any “known or reasonably knowable” conduct by subcontractors that “may” violate the Order
- Must provide government access to books, records and accounts to permit agency to “ascertain compliance”
- Investigation assigned to (untrained) contracting agencies and officers
- No central civil rights agency like the EEOC or OFCCP in charge of compliance



EOs Carry False Claims Act liability

Why the Compliance Requirements Matter

Two orders, one obligation: EO 14173 and EO 14398 both tie Federal funding to anti-discrimination compliance.

The exposure: accepting create False Claims Act liability.

Compliance with civil rights (including employment) laws are deemed to be “material” for purposes of FCA liability

Either Order Can Create False Claims Act Exposure

3×

TREBLE DAMAGES

*no actual damages
required*

- **Private whistleblowers (relators)** can sue on the government’s behalf.
- They keep a **percentage of any recovery** — a built-in incentive to report.
- Employees, competitors, and watchdog groups are all potential plaintiffs.



Current Legal Status

- Although there have been a few challenges, EO 14398 and EO 14173 have not been rescinded or challenged in a way that would impact grant recipients broadly;
- Individual implementation measures have faced injunctions, some of which have been vacated, and litigation continues;
- Grant and program terminations decisions have faced legal challenges under APA, though jurisdictional hurdles.

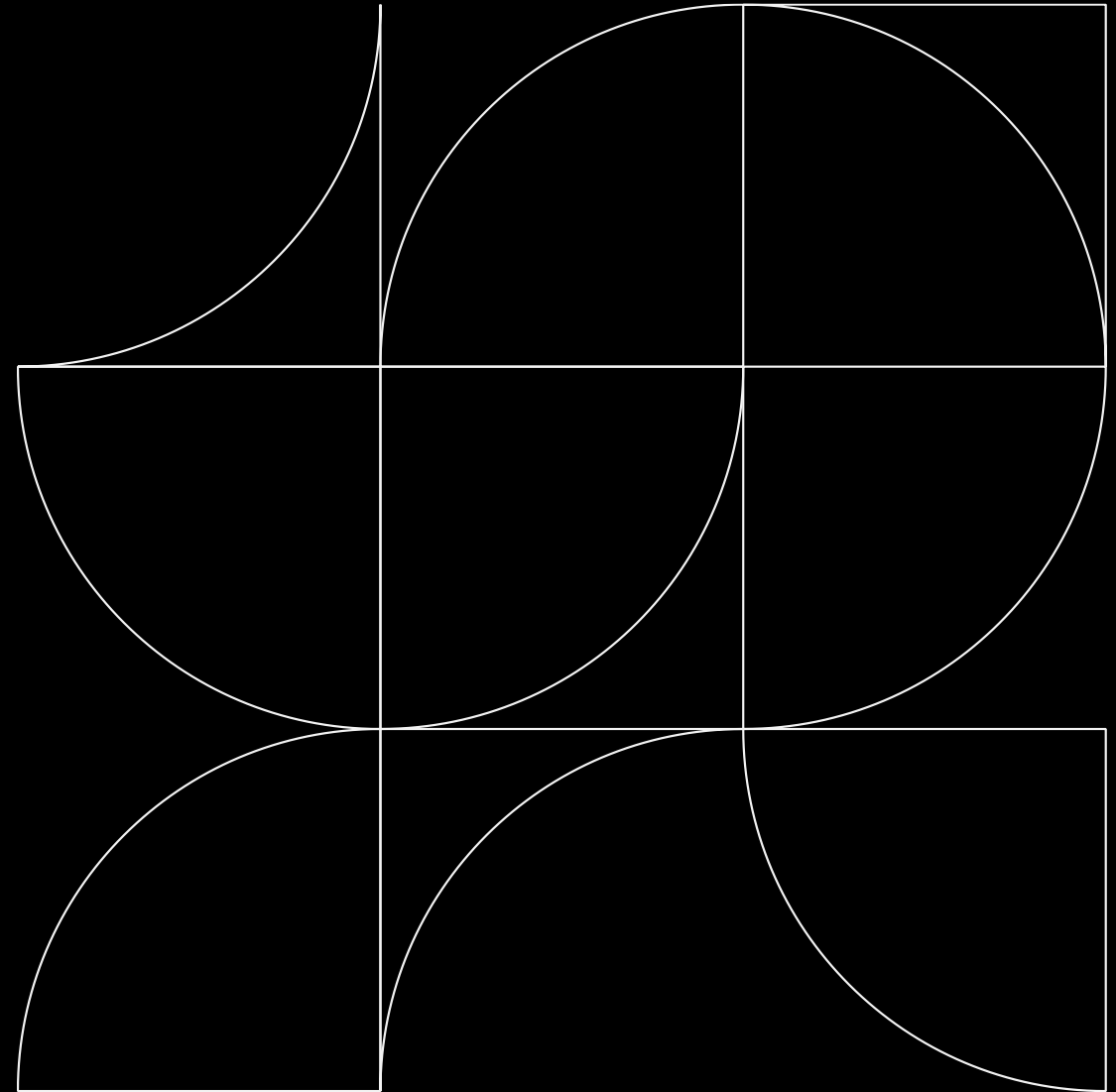
What is “illegal DEI”

Key Supreme Court Decisions

Relevance to DEI, at a glance

Case	Holding	Why It Matters for DEI
Students for Fair Admissions v. Harvard <i>Decided June 2023</i>	Race may not be used as a standalone factor in university admissions decisions.	Catalyzed a wave of employment-bias complaints and emboldened state AGs, legislators, and interest groups to challenge employer DEIB programs.
Muldrow v. City of St. Louis <i>Unanimous — April 2024</i>	A Title VII plaintiff need only show “some harm” from a job action (e.g., a forced transfer) — not “significant” harm.	Lowers the threshold to sue. Kavanaugh’s concurrence lists intangible harms (prestige, status, career prospects, networking), inviting challenges to DEIB access and non-selection.
Ames v. Ohio Dept. of Youth Services <i>Unanimous — June 2025</i>	The “background circumstances” test is invalid; Title VII draws no distinction between majority- and minority-group plaintiffs.	Clears the path for “reverse discrimination” claims nationwide. The EEOC’s Acting Chair tied the ruling directly to scrutiny of employer DEI initiatives.

Key Agency DEI Focus





EEOC National Enforcement Plan: DEI Practices

- Signed June 4, 2026, the National Enforcement Plan (FY2025–2029) replaces the prior Strategic Enforcement Plan and takes effect immediately, nationwide.
- It targets programs labeled “DEI” or “similar euphemisms” as potential race- or sex-based preferences, prioritizing intentional discrimination while moving to eliminate disparate-impact theories.

DEI Practices in the Crosshairs (depending on the facts)

- Aspirational diversity goals, quotas, and diverse slates or interview panels
- Limited-access training, mentoring, fellowships, and networking events
- Diversity statements and demographic data shared beyond HR and legal
- Tying compensation or bonuses to diversity goals
- Restricting ERG or affinity-group membership by protected traits



DOJ Issues DEI-Related Guidance

- Civil Rights Fraud Initiative
- On July 29, 2025, DOJ issued guidance on DEI programs focused on, but not clearly limited to, “recipients” of federal funding.
- DOJ guidance signaled further escalation of aggressive anti-DEI enforcement while leaving many questions unanswered.

Some Key Takeaways

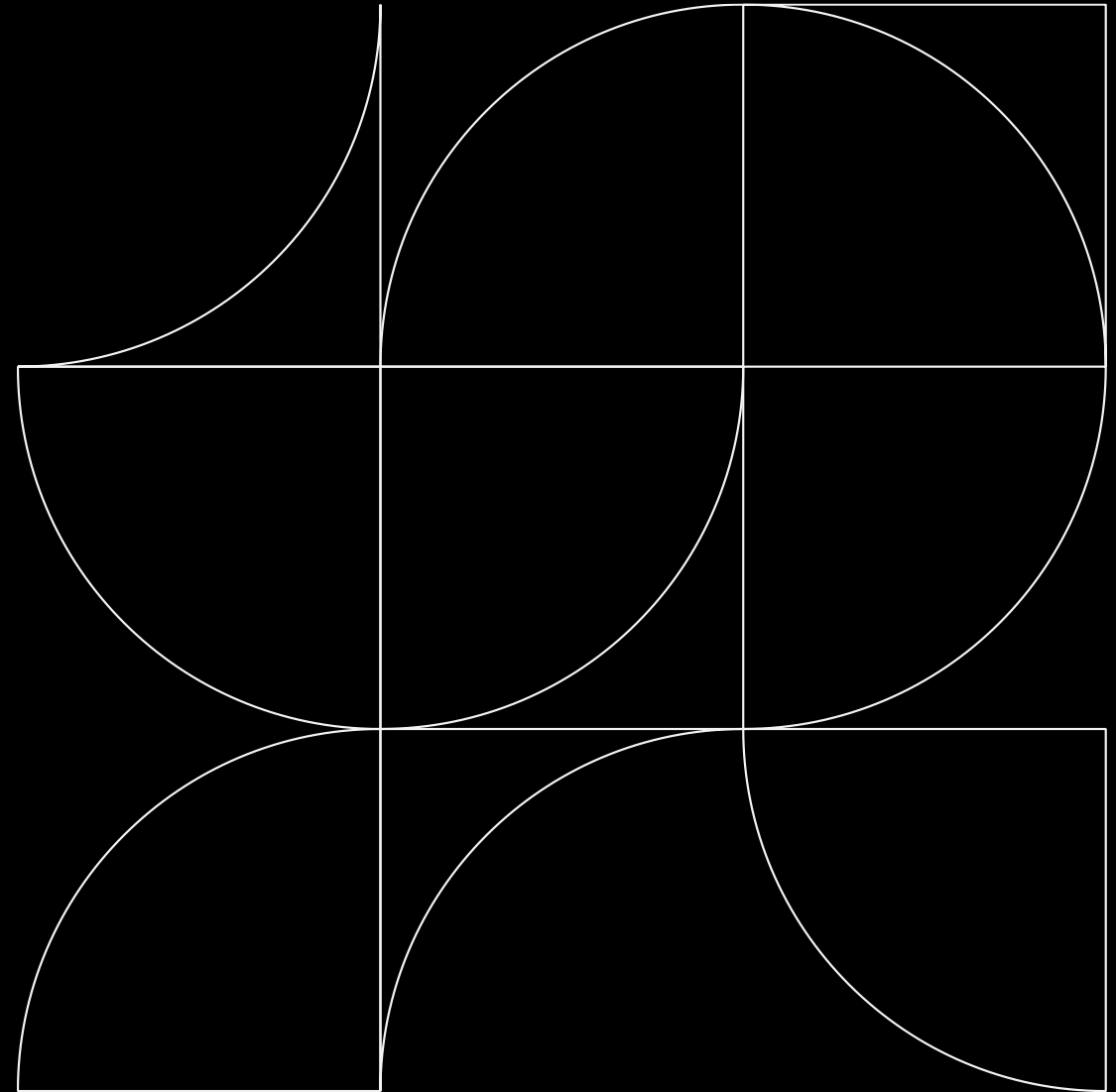
- Use of protected characteristics is illegal *per se*.
- Facially neutral “proxies” for protected characteristics—such as income requirements, geographic targets, diversity statements, or “lived experiences”—are subject to scrutiny and DOJ takes the position they may be illegal.
- Sex or race-based contracting decisions likely illegal.
- Fed funding recipients should avoid supporting third-party programs “that discriminate.”
- Shared intimate spaces with the opposite sex “would typically be unlawful.”

DOJ Recommendations on Best Practices

July 2025

- Ensure inclusive access
- Focus on skills and qualifications
- Prohibit demographic-driven criteria
- Document legitimate rationales for decisions
- Scrutinize neutral criteria for proxy effects
- Eliminate diversity quotas
- Avoid exclusionary training programs
- Establish clear anti-retaliation procedures and create safe reporting mechanism

Recent Enforcement



DOJ False Claims Act DEI Settlements

- **April 2026:**
 - \$17 million settlement with tech company
- **Aug. 2026:**
 - \$21.5 million settlement with professional services firm
- **Sept. 2026:**
 - \$25 million settlement with consulting co. and its subsidiary

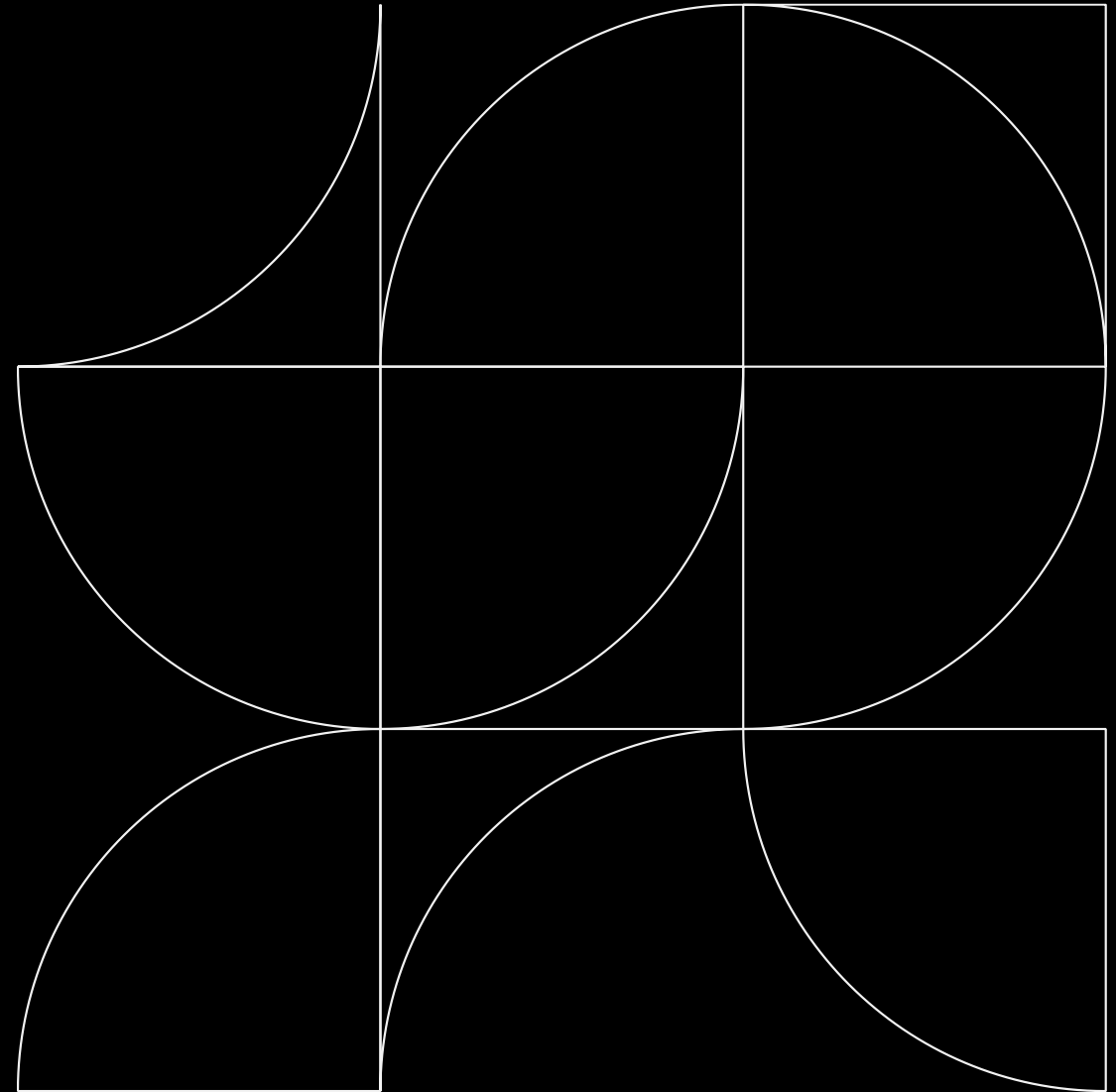
What were the allegations?

- use of diverse interview slates
- demographic goals
- selective eligibility for programs
- consideration of protected traits in employment decisions
- goals applied to hiring
- pay ties to demographic goals

Take Aways from the Resolutions

- \$63.6M in six months.
- Ending a program doesn't end exposure.
- The company's words are evidence.
- Labels aren't a shield.
- A DOJ settlement doesn't end the matter.

Reviewing DEI Programs



Evaluating DEI Program Risk: Initial Risk Screen

1 Does the program:

- Give preferences of any kind in employment decisions (e.g., giving a “closer review” on the basis of demographics)
- Restrict or limit access to training, mentoring or networking
- Participate in programs or opportunities that emphasize or support a particular demographic group
- Limit access to contractual rights or opportunities
- Confer potential benefits

AND

2 On the basis of a protected characteristic?

Is that action taken because of a person's:

Race

Ethnicity

Sex

... or another protected characteristic (e.g., color, religion, national origin, age).

If yes to both: the practice may present disparate-treatment risk under applicable antidiscrimination laws. Further legal analysis is required.

DEI Program Review: How the Program Operates in Policy and Practice

Access	Who hears about the opportunity, receives invitations, and is eligible to participate? Are programs truly “open to all”?
Selection	How do decision-makers choose participants, including nominations, tie-breakers, and exceptions?
Opportunities & Resources	What opportunities or resources does participation provide, and who else can access them? Is networking access limited? If senior leaders of the organization participate, do all employees have access without regard to demographics?
Goals, metrics and accountability	What goals or metrics are tracked, how are expectations communicated, and what happens when targets are missed? What is shared internally or externally? Who gets access to demographic data, even if summary form?
Implementation	Do communications and actual decisions match the stated criteria? What explains any departures?

Fact-finding questions for legal review. No single answer establishes illegality.

STEP 1 OF 2 | EMPLOYMENT AND FEDERAL CONTRACTOR RISK

	General Employment Legal Risk	Federal Contractor / Agency Risk
Who brings it	EEOC, state investigator or private plaintiffs (employees, applicants, advocacy groups).	DOJ, Contracting Agency, third party “relator” for FCA claims.
Trigger	Discrimination charge, demand letter, civil suit; letters to EEOC	Compliance review, audit, or EO 14398 certification; DOJ investigation
Enforcement Process	EEOC process; state agency review; federal or state court.	DOJ, Agency enforcement
Key exposure	Title VII / Section 1981 damages, injunctions, class actions.	Contract loss or suspension, debarment, False Claims Act qui tam.

STEP 2 OF 2 | SCRUTINY AND LEGAL DEFENSIBILITY

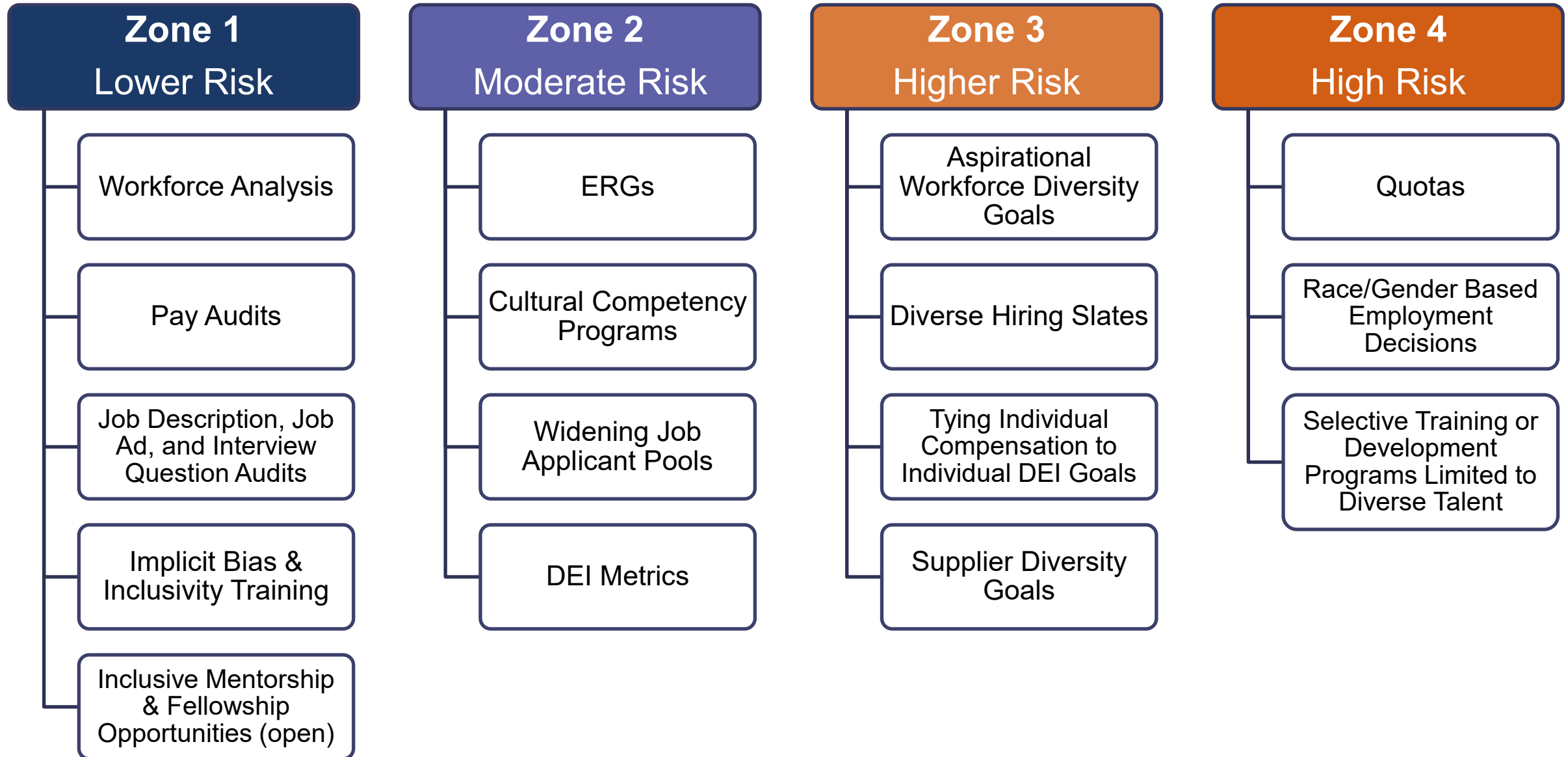
Note: Each program should be assessed along two distinct risk tracks:

1) General legal risk under Federal or State EEO laws 2) Federal contractor Risk

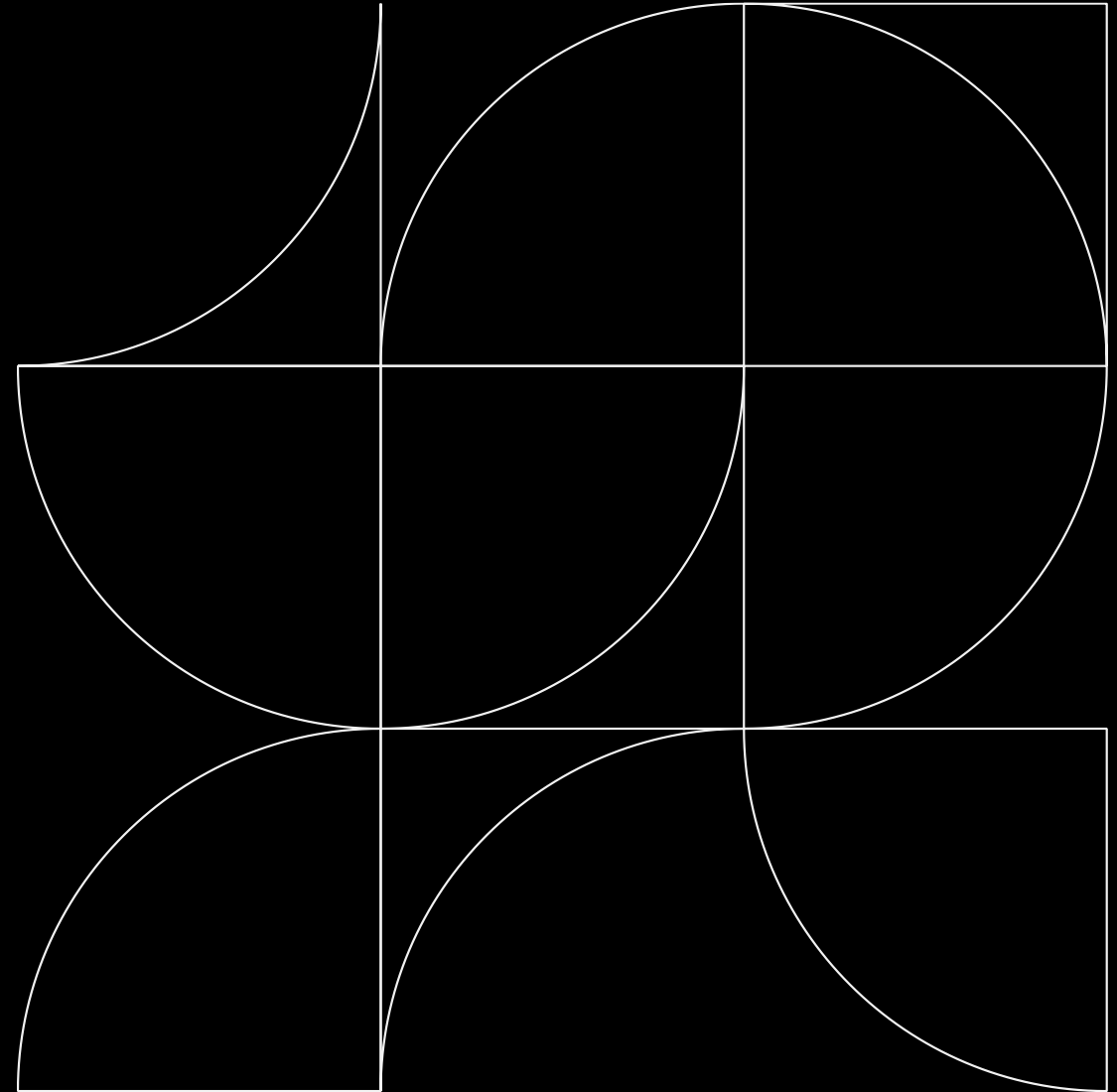
	LOWER	MODERATE	HIGHER
(T) Target Exposure <i>Potential that program draws scrutiny</i>	Neutral terminology; low public visibility; absent from external-facing materials; low whistleblower risk; no demographic-purpose spending.	Some DEI terminology internally; moderate public visibility; resource allocation may flag EO 14398 broad language. A possible target.	Prominent DEI terms in public-facing materials (website, SEC/ESG filings, press); named by advocacy, media, or political actors; high whistleblower visible demographic-purpose commitments including goals
(M) Merits / Adjudication <i>If examined, how likely is an adverse finding?</i>	Substantively defensible: no demographic eligibility criteria, quotas, or differential treatment; documented nondiscriminatory rationale.	Arguably defensible on the merits; defensibility turns on facts, jurisdiction, or evolving law; not facially unlawful but may be scrutinized. Reasonable counsel could disagree.	Difficult to defend: eligibility criteria, quotas, set-asides, or differential treatment arguably present; significant probability of an adverse finding under EEO laws or contract law under Section 1981

Potential Risk Spectrum for Programs and Practices

A detailed, program-by-program analysis is required to properly assess legal compliance and risks



Key Takeaways



Recommended Practices In Light of Federal Contractor Requirements and New EOs

- Route every federal-contract certification through legal before signing given implications.
- Inventory and remediate any program that could be characterized as “illegal DEI” before certifying compliance.
- Confirm the six-part EO 14398 anti-discrimination clause flows down to subcontractors at every tier.
- Be prepared to demonstrate compliance efforts
 - Agencies may seek “books, records, and accounts” to “ascertain compliance” on demand.
- Consider obligation to report “known or reasonably knowable” subcontractor conduct that “may” violate the Order.

Where Things Stand for Employers

- Expansion of legal risk and litigation pathways
 - Growing use of reverse discrimination, Title VII, and constitutional-based claims
- Shifting enforcement posture from agencies
 - Alignment toward merit-based, equal treatment frameworks with less tolerance for outcome-driven approaches
- Increasing 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

Closing Thoughts

- Key Takeaway: Identify, Evaluate, & Evolve
- Consider all aspects of risk – beyond the legal are the reputational and other stakeholder risks
- 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



SCAN ME

CLE ATTENDANCE VERIFICATION FORM

Please scan the QR code to complete the digital attendance verification form to receive CLE credit for this program.

QR code directs you to our electronic form which can also be found in the calendar invite that was sent to you for this program.

You will need:

1. **Title: DEI Enforcement in Transition - What Employers and Contractors Need to Know Now**
2. **Date Viewed: 10/14/2026**
3. **Attendance Verification Code: SS4958**

State-specific CLE credit information can be found in the form.