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DEI CHANGES COULD LEAVE BUSINESSES EXPOSED TO DISCRIMINATION CHARGES

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The U.S. Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Justice (DOJ) are warning employers that certain "diversity, equity, and inclusion" (DEI) policies and training programs could violate Title VII of the Civil Rights Act of 1964 by discriminating against a person's race, sex, or other protected characteristics in employment matters.

The EEOC and DOJ recently issued two technical assistance documents titled What You Should Know About DEI-Related Discrimination at Work and What to Do If You Experience Discrimination Related to DEI at Work, in which the EEOC explains that different treatment based on any protected characteristic can be discriminatory, and "there is no such thing as 'reverse' discrimination; there is only discrimination." The EEOC goes on to state that it applies the same standard of proof to all race discrimination claims, regardless of the claimant's race. This comes after President Trump announced that he is committed to ending "discrimination under DEI policies" and the practice of engaging in "blatant race-based and sex-based discrimination, including quotas." These sentiments are echoed by EEOC Acting Chair Andrea Lucas. "Far too many employers defend certain types of race or sex preferences as good, provided they are motivated by business interests in 'diversity, equity, or inclusion.' But no matter an employer's motive, there is no 'good,' or even acceptable, race or sex discrimination," said Lucas.

WHAT EMPLOYER ACTIONS ARE UNLAWFUL?

The EEOC explained that an employer policy, program or initiative may be unlawful if it involves an employment action motivated by race, sex, or another protected characteristic. That includes: hiring; firing; promotions; demotions; compensation; fringe benefits; access to or exclusion from training (including training characterized as leadership development programs); access to mentoring, sponsorship, or workplace networking; internships (including internships labeled as "fellowships" or "summer associate" programs); selection for interviews, including placement or exclusion from a candidate "slate" or pool; and job duties or work assignments. This extends to workplace groups like Employee Resource Groups, Business Resource Groups, or other employee affinity groups that are based on members' protected categories like women-only groups.

Notably, an employment action is unlawful even if race, sex, or another protected characteristic was just one factor contributing to the employer's decision or action—it does not have to be the deciding factor. Additionally, client or customer preference is not a

defense to race or color discrimination; business interests in diversity and equity, including perceived operational benefits or customer/client preference are not enough to allow race-motivated employment actions.

Employers should also be aware of potential hostile work environment claims. The EEOC states that employees may be able to plausibly allege that a diversity/DEI training creates a hostile work environment if they can show the training was discriminatory in its content, context, or application.

Finally, it is important to recognize that employees who oppose or complain about employer policies, trainings, or practices labeled as "DEI" can also be legally protected from retaliation.

POTENTIAL SUPREME COURT REVERSE DISCRIMINATION RULING

The Trump Administration's approach to the standard of proof for reverse discrimination claims may soon be backed by the courts. On February 26, 2025, the U.S. Supreme Court heard oral arguments in *Ames v. Ohio Department of Youth Services*. In that case, a heterosexual woman alleged she was passed over for a promotion and later demoted in favor of a LGBTQ+ colleague. Ms. Ames stated she was discriminated against because she was not gay and made a claim of reverse discrimination. Legal precedent in some circuits require plaintiffs in reverse discrimination cases to meet a higher burden than that of a traditional discrimination case. Legal experts have predicted that the Court will find that reverse discrimination cases should be decided based on the same standard, which would make it easier to allege and prove reverse discrimination.

In light of these recent developments, reverse discrimination cases are expected to increase. Employers should review their policies, training programs, and hiring programs to ensure they are in compliance with the EEOC's guidance and anticipated ruling in the *Ames* case.

Hill Ward Henderson will continue to monitor this issue. Please do not hesitate to contact a member of our team if you have any questions.

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