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DEI Programs and Enforcement: What Employers Can Expect in 2026

Presented by:

T. Scott Kelly (Birmingham/Washington, D.C.)

Nonnie L. Shivers (Phoenix)

Moderated by:

Anna K. Potter



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Speakers



T. Scott Kelly

Birmingham/Washington, D.C.

scott.kelly@ogletree.com



Nonnie L. Shivers

Phoenix

nonnie.shivers@ogletree.com

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Today's Agenda

- Update on anti-DEI legal challenges
- Recent and anticipated federal agency activity
 - GSA
 - EEOC
 - DOJ
 - FTC/FAA
- Recent and anticipated state agency/legislative activity
 - Attorney General opinions
 - Legislative developments
- DEI litigation trends
- Employers' toolkit

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Status of Anti-DEI Legal Challenges

- EO 14151 – “Ending Radical and Wasteful Government DEI Programs and Preferencing”
- EO 14168 – “Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government”
- EO 14173 – “Ending Illegal Discrimination and Restoring Merit-Based Opportunity”
- 18 current constitutional challenges to these EOs
 - 1 Government action blocked
 - 7 Government action temporarily blocked
 - 1 Government action not blocked pending appeal
 - 2 Temporary block of government action denied
 - 3 Case closed/dismissed in favor of government
 - 4 Awaiting court ruling

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Moving Toward a Definition of “Unlawful DEI”?

- Attorney General – July 2025 Guidance interpreting anti-discrimination law
- EEOC Chair – November 2025 interview
 - DEI programs that result in discrimination, stereotyping, or racism are illegal
- Frustration from courts regarding lack of definition
 - “[Y]ou understand the frustration from everybody dealing with this case. On the court side has been the government’s failure to answer that question.”
 - Judge David F. Hamilton – Seventh Circuit (*Chicago Women in Trades v. Trump*)
 - “[T]he evidence cited by plaintiffs, their amici, and the district court suggests a more sinister story: important programs terminated by keyword; valuable grants gutted in the dark.”
 - “Follow the law. Continue your critical work. Keep the faith. And depend on the Constitution.”
 - Chief Judge Albert Diaz – Fourth Circuit (*NADOHE v. Trump*)
- Government lawyers admit
 - EO 14173 does not prohibit “educational, cultural, or historical observances that celebrate diversity, recognize historical contributions, and promote awareness without engaging in exclusion or discrimination.” (*Chicago Women in Trades v. Trump*)

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GSA’s Revised Certification Proposal

- Proposed revised System for Award Management (SAM) certification
- Moves beyond generally certifying compliance with federal anti-discrimination law
- Changes certification language to align with DOJ July 2025 guidance and EO 14173
- Examples of practices that may violate federal anti-discrimination laws
- Addresses topics beyond DEI, including immigration and anti-terrorism
- Appears to have been pared back from initial draft (e.g., language regarding gender-affirming care for minors removed)
- Public comment open until March 30

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“Unlawful DEI” Per GSA’s Proposal

Preferential Treatment	Segregation	Unlawful Use of Race as Criteria	Hostile Training Programs	Retaliation
• Race-based scholarships and programs • Preferential hiring and promotion • “Cultural competency” requirements • “Diversity statements”	• Race-based training sessions • Segregated facilities • Segregated resources	• “Diverse slate” policies • Race-based contract selection, resource allocation	• Stereotypes or singling out by protected characteristics • Training creating hostile work environment	• Adverse actions against those opposing DEI practice they reasonably believe violate the law

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Reiterated Priorities in DOJ Commentary

- FBA’s 2026 Qui Tam Conference in February 2026
- Comments by Brenna Jenny, Deputy Assistant Attorney General
- FCA enforcement is the “new normal” and a “flexible tool” while not being an “all-purpose anti-fraud statute”
- Increase in qui tam actions and civil investigative demands due to “data mining” by DOJ and whistleblowers
- Focus on illegal discrimination (v. unlawful DEI) under federal anti-discrimination law
- Discrimination can occur with or without DEI programs
- Companies can operate DEI programs without discrimination

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Reiterated Priorities in DOJ Commentary (cont.)

- “At the top of the list for me, and what’s coming into focus as the heart of many of our investigations, are companies that implemented programs and practices that pressured supervisors and management to make hiring and promotion decisions based on race or sex.”
 - Creating and tracking demographic goals that have connection to remedying underutilization per OFCCP framework
 - Tying employee compensation to achievement of corporate demographic goals
 - Requiring employees to develop their own DEI goals affecting their compensation and promotion
- Also, “executive training and mentoring programs where participation is restricted on the basis of race or sex and diverse slate policies.”
- Expect other action (e.g., *United States v. Minnesota*)

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EEOC Tactical Adjustments and Impact

- 2-1 Republican majority with quorum restored
 - Chair controls meeting agendas
 - Commission approval required for major litigation
 - Removed delegation of these issues to EEOC General Counsel
 - Rescinded harassment guidance
 - Potential action on PWFA, EEO-I, and Uniform Guidelines
- *DOE I et al v. EEOC* – Stipulation of Dismissal (February 9)
 - Chair sent letters to 20 firms requesting DEI data
 - EEOC admitted responses were voluntary, and most firms didn’t comply
 - EEOC considers the matter closed

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EEOC's Ongoing Solicitation of Charges Matching Key Federal Policy and Objectives

- EEOC Chair Lucas' solicitation of white men to file charges
 - <https://x.com/andrealucasEEOC/status/2001439099907961012>
- EEOC suit filed February 18 aligned with top enforcement priority – race and sex-based preference
 - Networking program invite allegedly limited to women; full pay received with no PTO used
 - Does the program/offering impact the terms and conditions of employment?
 - Do all employees “enjoy equal access to all aspects of their employment, including in employer-sponsored events, regardless of their sex, race, or other protected category”?
 - How do we meet the need within lawful parameters?

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DOJ Leveraging Social Media

- Reminder: social media and AI usage used to find “unlawful DEI”
- Tennessee musician alleged denied role with orchestra due to DEI
- Tagged Harmeet Dhillon, Assistant AG for Civil Rights Division, on post
 - Dhillon posted online tagging CEO – “we have questions”
 - Dhillon also shared the email and phone of symphony's CEO
- Not an isolated occurrence
 - Social media users tagging Dhillon with videos of alleged DEI with online responses from Dhillon (including emojis)
 - Presume being used related to FCA and interpretations set forth in DOJ memo re: unlawful proxy discrimination, like cultural competence

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Other Federal Agencies in the Fray: FTC

- January 30, 2026 – FTC letter to 42 Mansfield certified law firms
- Mansfield is an “inclusive source process” not a “diverse slate policy” or “illegal quota”
- One federal court stated lawful: “the Mansfield Rule expressly does not establish any hiring quotas or other illegally discriminatory practices, requiring only that participating law firms consider attorneys from diverse backgrounds for certain positions.”
- FTC warns Mansfield can violate antitrust laws when the certified firms engage in collusion in their hiring practices, including by “coordinating on the personal characteristics of their candidate pools and sharing sensitive information about pay and benefits.”

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Other Federal Agencies in the Fray: FTC (cont.)

- “Potentially anticompetitive collusion between law firms on DEI metrics can include quotas by which they agree to compose panels of job candidates based on race, sex, or other personal characteristics other than the candidate’s merit, or by which law firms agree to make final decisions about hiring and promotions based on those personal characteristics.”
- “Such agreements can distort competition for labor in legal professions, including along dimensions like hiring decisions, pay, and promotions.”

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FTC Is Not an Isolated Example – Expect More

- U.S. Department of Transportation – Federal Aviation Administration
- Existing federal regulatory scheme requires commercial airline pilots to meet exacting minimum requirements and pass rigorous training
- New mandatory “Operations Specification” issued on February 13, 2026, to air carriers
- Air carriers must hire only on “specific experience and technical aptitude”
- Requires all commercial airlines to formally commit to merit-based hiring for pilots and certify compliance
- Federal investigations threatened
- Issued in accordance with EO 14173, citing allegations of hiring based on race and sex in industry

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U.S. Department of Education’s Enforcement Tactics

- ED “Dear Colleague” Letter
 - Required institutions to certify compliance or lose funding
 - Targeted use of proxies and third-party contractors to circumvent race prohibitions
 - Federal district court blocked and Ed. Dept. withdrew appeal – January 2026
- DOJ Civil Rights Division ordered investigations into 75+ schools
 - Antisemitism, DEI practices, student aid fraud
 - 18 DOJ lawyers quit, citing a politically motivated focus on blue state schools
 - Enforcement actions against several institutions
 - Settlements, proactive changes to DEI activities, and self-censorship to avoid scrutiny
 - Judicial skepticism of DOJ efforts – “used antisemitism as a smokescreen for a targeted, ideologically-motivated assault” – Judge Burroughs (MA)

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Takeaways From ED Enforcement Tactics

- DOJ sues university for race discrimination in admissions – February 2026
 - DOJ opened Title VI investigation – April 2025
 - Demanded 5 years of admissions data disaggregated by race
 - Demand certification that race is not used in admissions or financial aid
- Selective admission institutions **MUST** submit to feds
 - 6 years of applicant, admittees, and enrollee information – due March 18
 - Title VI enforcement expected
- Looking ahead
 - Administration drafting second version of voluntary university compact, addressing gender, tuition freezes, and international student caps
 - State Department prioritizing visas for schools under 15% international undergraduate enrollment

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What to Expect Next From the Fed in 2026

- “Scare tactics work, at least in the short term”
- Ongoing focus on “change makers”
- Even more federal agencies engaged in moving forward federal DEI policy
- Industry-specific targets with nuanced requirements and enforcement aligning with federal policy focused on merit v. race/sex preference
- Tethers to other laws and claims applicable to employers that are not government contractors or federal money recipients
- Potentially motivated by current events
- Recasting of cases/charges to support current priorities

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What to Expect Next From the Fed in 2026 (cont.)

- Expect more EOs and flow downs, such as guidance and technical assistance
- Doubling down on high-impact investigations
- More commissioners' charges and action on them
- Ongoing and ramped up use of government and person social media accounts to amplify users alleging discrimination
- More "informal information gathering" like law firm data requests
- Quick movement to next opportunity to chill lawful behavior
- RFI for training and demographic information in unrelated charges
- Anticipate more litigation and industry targets
- Patchwork quilt of state laws will grow alongside increasing reliance on some state agencies by plaintiffs' bar

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State Action

- Anti-DEI legislation (e.g., Arizona HB 2135)
 - Hundreds of bills proposed
 - 20+ states enacted laws restricting DEI, particularly in public institutions
 - Cover: affirmative action, diversity statements, DEI spending, divisive concepts, etc.
- Bathroom bills passed (e.g., Kansas) and coming (e.g., Idaho), expanding into places of public accommodation, creating causes of action and offering bounties
- Attorneys' General guidance and investigations
 - Texas AG: employers' DEI-informed hiring, promotion, compensation, affinity groups, training, and governance practices could lead to liability under federal and state laws
 - Florida AG: will not defend race-based hiring goals, contracting goals, and representation requirements embedded in state statutes
 - Less blue state commentary, more litigation activity

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What Can Employers Do?

- Follow enforcement agencies and officials on social media
- Lean into lobbyists/others to anticipate enforcement and use all tools available
- Shore up lawful tracking of social media mentions, including government commentary and tags
- Continue to evaluate online presence of company and leaders, including historical postings (e.g., job descriptions/postings, LinkedIn posts, press releases)

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What Can Employers Do? (cont.)

- Continue to lean into the law and remain updated on pending legal challenges relevant to your organization/industry while evaluating your risk tolerance
 - Compare ongoing and past programs to enforcement priorities and legal interpretations
 - Identify and mitigate risk related to past programs, if needed, possible and within risk tolerance
- Identify and implement creative, effective and practical solutions to both identify and mitigate risk proactively in current environment
 - Example: de-escalation training, policies and vehicles (e.g., mediation for all employee disputes with a neutral paid for by company)

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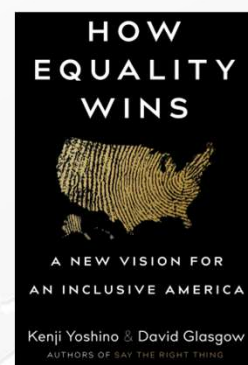
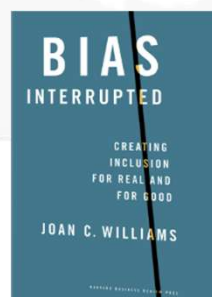
What Can Employers Do? (cont.)

Broad But Shallow (Higher Risk)	Narrow But Deep (Lower Risk)
Demographic hiring/promotion targets	Remove hidden barriers
Restricted programs/fellowships	Programs open to all
DEI metrics in executive compensation	Auditing for unexplained disparities
Diverse slate requirements	Structured interviews, standardized criteria
Training that singles out by race	Removing unnecessary job barriers
Heritage month celebrations as centerpiece	Posting all promotion opportunities

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Additional Resources

- **The Lost Generation** by Jacob Savage
<https://www.compactmag.com/article/the-lost-generation/>
- **How Equality Wins** by David Glasgow and Kenji Yoshino
- **Bias Interrupters**
 - Equality Action Center – UC College of the Law, San Francisco



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Thank you!

T. Scott Kelly

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
420 20th Street North, Suite 1900 | Birmingham, AL 35203
scott.kelly@ogletree.com
Phone: 205.986.1024

Nonnie L. Shivers

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
2415 East Camelback Road, Suite 800 | Phoenix, AZ 85016
nonnie.shivers@ogletree.com
Phone: 602.778.3706

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