

# Helping Nonprofits Navigate the Changing Landscape for Inclusive Programs

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# Introductions – Robin L.S. Burroughs



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Robin Burroughs assists employers with employment litigation, counseling, and labor relations. Robin regularly represents nonprofits, clients in the public sector, schools and higher education institutions, and private businesses. She provides counsel to clients at every step, whether that means preventing disputes with strong employment policies, resolving disagreements before litigation arises, or taking fights to a jury verdict. Robin has provided extensive counseling to clients regarding COVID-19-related concerns, vaccination policies, and health and safety liability. Her litigation experience includes defending against discrimination claims (such as failure to provide reasonable accommodations), retaliation, wage and hour violations, and employment-related tort and contract claims.

# Introductions – George E. Constantine



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George Constantine is a co-chair of Venable's Nonprofit Organizations Group and leads Venable's associations practice. George concentrates his practice on providing legal counseling to and advocacy for nonprofit organizations, including trade associations, professional societies, advocacy groups, charities, and other entities. He has extensive experience with many of the major legal issues affecting nonprofit organizations, including tax exemption, antitrust, governance, and transactional matters. He is well versed in matters related to association standard setting and enforcement, certification, accreditation, and code-of-conduct reviews.

George is the former staff counsel of the American Society of Association Executives (ASAE). As ASAE's sole staff attorney, he gained in-depth experience with the many legal issues facing associations.

# Overview

What we'll cover today



Employment Law Landscape



Considerations and Trends for Employers



Nonprofits' Programs and Activities



Questions and Conclusions

# Employment Law Landscape

# Context and Background

- DEI Defined: Diversity, Equity, and Inclusion (DEI) initiatives often aim to promote representation and fairness within organizations.
- The Trump administration has issued executive orders impacting DEI policies.
  - Executive orders are directives issued by the President of the United States to federal agencies and departments. They are used to manage government operations, implement federal statutes, or set administrative policies.
  - While executive orders cannot create new laws or change existing laws, they can significantly influence how existing laws are enforced and how federal programs are administered.
  - Executive orders are binding on federal agencies, but do not directly apply to private entities; compliance with executive orders can be made a condition of federal funding or federal government contracts.

# Key Executive Orders from the Trump Administration

- EO 14151: Ending Radical and Wasteful Government DEI Programs and Preferencing
  - Requires the termination of all “discriminatory programs, including illegal DEI and [DEIA] mandates, policies, programs, preferences and activities **in the Federal Government**, under whatever name they appear.”
- EO 14168: Defending Women from Gender Ideology Extremism
  - Defines “sex” as an individual’s “immutable biological classification as either male or female,” removing any concept of “gender identity.”
  - “‘Gender identity’ reflects a fully internal and subjective sense of self, disconnected from biological reality and sex and existing on an infinite continuum, that does not provide a meaningful basis for identification and cannot be recognized as a replacement for sex.”
  - Instructs the attorney general to issue guidance to clarify that Title VII does not require gender identity-based access to single-sex spaces.

# Key Executive Orders from the Trump Administration (cont.)

- EO 14173: Ending Illegal Discrimination and Restoring Merit-Based Opportunity
  - Requires executive departments and agencies to terminate “all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders and requirements.”
  - Rescinds, among others, the EO that required federal contractors to develop and implement affirmative action programs.
  - Requires the heads of agencies to take action to encourage the private sector to end any illegal DEI preferences, mandates, policies, programs or activities through a “strategic enforcement plan.”



# Legal Challenges

## ***Nat'l Association of Diversity Officers in Higher Ed. v. Trump* (D. Md. Case No. 1:25-cv-00333-ABA) (Fourth Circuit Case No. 25-1189)**

- February 21, 2025 – Preliminary injunction was issued by a Maryland district court temporarily blocking the termination provision, certification provision, and portions of the enforcement provision.
- March 14, 2025 – Preliminary injunction was stayed by the Fourth Circuit.
- “The Executive Orders do not purport to establish the illegality of all efforts to advance diversity, equity or inclusion, and they should not be so understood. Instead, the [executive order] appl[ies] only to conduct that violates existing federal anti-discrimination law.”

# Federal Anti-Discrimination Laws

- Title VII of the Civil Rights Act of 1964: Prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin.
- Other Federally Protected Categories in Employment
  - Disability (Americans with Disabilities Act)
  - Age over 40 (Age Discrimination in Employment Act)
  - Genetic Information (Genetic Information Nondiscrimination Act)
  - Military Service (Uniformed Services Employment and Reemployment Rights Act)
- Title VI of the Civil Rights Act of 1964: Prohibits discrimination on the basis of race, color, or national origin. Applies only to organizations that receive federal financial assistance.
- Title IX of the Education Amendments of 1972: States that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”
- Section 1981 of the Civil Rights Act of 1866: Prohibits race discrimination in contracts.

# Enforcement of Discrimination Laws

- Equal Employment Opportunity Commission (EEOC)
  - Investigates discrimination complaints; issues right-to-sue letters; can litigate on behalf of employees
- Department of Justice
  - Enforces federal statutes prohibiting discrimination in employment (under limited circumstances); education; housing; public accommodations; federally funded programs
- Federal Grant-Making Agencies
  - Example - Department of Education (Office of Civil Rights): Discrimination in schools and universities
- Private Lawsuits

# Considerations and Trends for Employers

# EEOC and DOJ Joint Guidance

- EEOC's What To Do If You Experience Discrimination Related to DEI at Work
  - “Under Title VII, DEI policies, programs, or practices may be unlawful if they involve an employer or other covered entity taking an employment action motivated—in whole or in part—by an employee’s race, sex, or another protected characteristic.”
- DEI-related discrimination might include:
  - Disparate Treatment
  - Limiting, Segregating, and Classifying
  - Harassment
  - Retaliation

## WHAT TO DO IF YOU EXPERIENCE DISCRIMINATION RELATED TO DEI AT WORK



Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on protected characteristics such as race and sex. Different treatment based on race, sex, or another protected characteristic can be unlawful discrimination, no matter which employees are harmed. Title VII's protections apply equally to all racial, ethnic, and national origin groups, as well as both sexes.

**Before you can sue in federal court, you first must file a charge of discrimination with the EEOC.** The U.S. Equal Employment Opportunity Commission (EEOC) investigates charges of discrimination and can file a lawsuit under Title VII against businesses and other private sector employers. The Department of Justice can file a lawsuit under Title VII against state and local government employers based on an EEOC charge, following an EEOC investigation.

### What can DEI-related discrimination look like?

Diversity, Equity, and Inclusion (DEI) is a broad term that is not defined in the statute. Under Title VII, DEI policies, programs, or practices may be unlawful if they involve an employer or other covered entity taking an employment action motivated—in whole or in part—by an employee's race, sex, or another protected characteristic. In addition to unlawfully using quotas or otherwise “balancing” a workforce by race, sex, or other protected traits, DEI-related discrimination in your workplace might include the following:

#### Disparate Treatment

DEI-related discrimination can include an employer taking an employment action motivated (in whole or in part) by race, sex, or another protected characteristic. Title VII bars discrimination against applicants or employees in the terms, conditions, or privileges of employment, including:

- Hiring
- Firing
- Promotion
- Demotion
- Compensation
- Fringe benefits
- Exclusion from training
- Exclusion from mentoring or sponsorship programs
- Exclusion from fellowships
- Selection for interviews (including placement on candidate slates)

#### Harassment

Title VII prohibits workplace harassment, which may occur when an employee is subjected to unwelcome remarks or conduct based on race, sex, or other protected characteristics. Harassment is illegal when it results in an adverse change to a term, condition, or privilege of employment, or it is so frequent or severe that a reasonable person would consider it intimidating, hostile, or abusive. Depending on the facts, DEI training may give rise to a colorable hostile work environment claim.

#### Limiting, Segregating, and Classifying

Title VII also prohibits employers from limiting, segregating, or classifying employees based on race, sex, or other protected characteristics in a way that affects their status or deprives them of employment opportunities. Prohibited conduct may include:

- Limiting membership in workplace groups, such as Employee Resource Groups (ERGs) or other employee affinity groups, to certain protected groups
- Separating employees into groups based on race, sex, or another protected characteristic when administering DEI or other trainings, or other privileges of employment, even if the separate groups receive the same programming content or amount of employer resources

#### Retaliation

Title VII prohibits retaliation by an employer because an individual has engaged in protected activity under the statute, such as objecting to or opposing employment discrimination related to DEI, participating in employer or EEOC investigations, or filing an EEOC charge. Reasonable opposition to a DEI training may constitute protected activity if the employee provides a fact-specific basis for his or her belief that the training violates Title VII.

#### Who can be affected by DEI-related discrimination?

Title VII protects employees, potential and actual applicants, interns, and training program participants.

#### What should I do if I encounter discrimination related to DEI at work?

If you suspect you have experienced DEI-related discrimination, contact the EEOC promptly because there are strict time limits for filing a charge. The EEOC office nearest to you can be reached by phone at 1-800-669-4000 or by AGI videophone at 1-844-234-5122.



www.EEOC.gov

# EEOC and DOJ Joint Guidance (cont.)

- EEOC's FAQs: "What You Should Know About DEI-Related Discrimination at Work"
  - Unlawful DEI discrimination may occur when employers consider protected categories in access to training opportunities, mentoring, sponsorship, workplace networking, internships, fellowships, and interview selection
  - Unlawful DEI segregation can include limiting membership in employee affinity groups and separating employees based on protected categories for workplace training
  - No such thing as "reverse discrimination"; there is only discrimination
  - Business necessity or interest or client/customer preference will not justify an employer taking an employment action based on a protected category
  - Diversity or other DEI-related training may create a hostile work environment if discriminatory in content, application, or context

# Employer Impact

- Hiring
  - Avoid using race- or gender-conscious practices in hiring
- Affinity groups
  - Must be open to all employees, not just those in the target group
- Training
  - Effective anti-discrimination remains an important tool
  - Employers should ensure that all training avoids stereotypes and language that could be divisive or segregating
- Complaint processing
  - Take all employee objections seriously

# Best Practices for Employers Today

- **Policy Review:** Assess DEI programs for compliance with current federal and state laws
- **Practice Audit:** Review hiring processes and group practices to ensure they are following your policies
- **Training:**
  - Ensure employee training materials do not include prohibited concepts
  - Train management and hiring committees on permissible practices
- **Legal Consultation:** Engage legal counsel to navigate the evolving regulatory environment or when complaints arise



# **Nonprofits' Programs and Activities**

# Considerations for Nonprofits

Supporting Inclusivity in Programs and Activities



Federal grant recipients have special considerations and risks



Private plaintiffs have become aggressive



Balance mission-related considerations against risks



Ensure communications are consistent with risk tolerance

# For Grant Recipients and Contractors—Executive Order 14173

Issued January 21, 2025

- Titled “Ending Illegal Discrimination and Restoring Merit-Based Opportunity”
- Order directs agencies, with the assistance of the attorney general, to develop a plan to deter “DEI” programs in the private sector
- Prevents federal contractors and grantees from considering “race, color, sex, sexual preference, religion, or national origin in ways that violate the Nation’s civil rights laws in their employment practices”
- Agencies must require that contractors and grant recipients **affirmatively certify** “that [they do] not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws”
- Risk of liability under the Federal Claims Act by virtue of submitting invoices to the government for payment
  - Whistleblowers encouraged by administration
  - No real definition of what constitutes “illegal” DEI
- Contractors cannot be forced to comply with pre-2025 affirmative action requirements, including “[a]llowing or encouraging Federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin.”
- Legal challenges continue

# For Grant Recipients and Contractors—Executive Order 14168

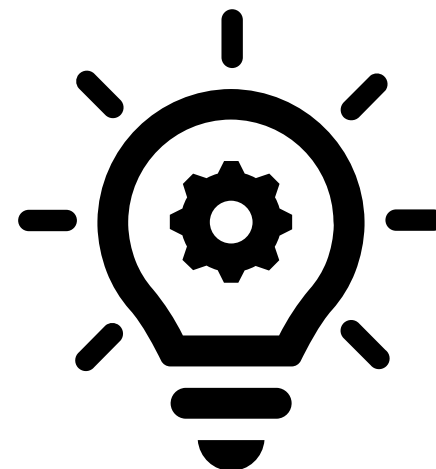
## “Gender Identity” Executive Order

- The administration issued EO “**Defending Women From Gender Ideology Extremism And Restoring Biological Truth To The Federal Government**,” mandating the federal government to recognize only two sexes (male and female) and directing agencies to:
  - Eliminate gender ideology from forms, communications, and messages
  - End federal funding of gender ideology
  - Review grant conditions and preferences to ensure funds do not promote gender ideology
- **Revokes EOs aimed at advancing gender equity:**
  - [EO 14075](#) (2022): Directed HHS to protect LGBTQI+ medical care from restrictive state and local laws, sought to limit federal funding for entities supporting conversion therapy, and aimed to eliminate regulatory barriers to federal benefits for LGBTQI+ individuals
  - [EO 13988](#) (2021): Directed agencies to address discrimination based on gender identity and sexual orientation
  - [EO 14020](#) (2021): Established the White House Gender Policy Council to promote gender equality, combat violence, and challenge stereotypes
  - [EO 13672](#) (2014): Expanded federal nondiscrimination protections to include sexual orientation and gender identity

# Tips for Grant Recipients and Contractors

## *Navigating Uncertain Times*

- Terms of grant or contract matter; review and consult with counsel
- If asked to sign certification on “illegal DEI,” consult with counsel first—risk of subsequent False Claims Act liability can be managed
- If you receive notice of grant termination, consider submitting an appeal regardless of whether the termination notice states no appeal is available
- Keep abreast of appropriations, funding for future grants/contracts, and budget accordingly
- Consider other sources of support (e.g., private foundation grants, states)



# Programmatic and Related Nonprofit Activity

## Administration

- Administration Executive Order 14173 directed federal agencies to “enforce our longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities.”
- Agency heads were required to advise administration within 120 days (by May 21, 2025) with recommendations, including identifying “the most egregious and discriminatory DEI practitioners in each area of concern”—large nonprofit corporations and associations and private foundations with assets over \$500 million are specifically mentioned
- No announcements made since May 21, 2025 deadline passed

# Programmatic and Related Nonprofit Activity (cont.)

## Private Plaintiffs

- Fearless Fund case was most visible
- Plaintiff groups continue active pursuit of litigation over private, non-federally funded programs that allegedly discriminate based on race
  - Lawsuit against American Association of University Women over its scholarship program, settled by AAUW in August 2024
  - Lawsuit against Founders First Community Development Corporation, preliminary injunction granted by U.S. District Court for the Northern District of Texas, where program is limited to Latinx, Black, Asian, women, LGBTQIA+, military veteran, or someone in low- to moderate-income area
  - Founders First settled after injunction granted; program is no longer in operation

# Fearless Fund Litigation

## Background

- No. 23-13138 (11th Cir. 2024)
- Fearless Foundation offered a grant program for which Black women business owners qualified
- American Alliance for Equal Rights (same plaintiff as in many similar cases) sues, alleging violation of 42 U.S.C. § 1981
  - Prohibits discrimination on the basis of race in the making or enforcement of contracts
  - Enacted in 1866 to remedy discrimination against Black people in the wake of the Civil War, granting all persons the same right to make and enforce contracts “as is enjoyed by white citizens.”
- Program’s applicants were required to agree to be bound by the rules, which, according to the terms, “are a contract.”



# Takeaways for Nonprofits

## Holding to Mission While Managing Risk

- No clarity about how Section 1981 claims would fare—courts have only ruled on injunction claims—still, trend points to a more restrictive environment
- Section 1981 language gives all citizens same rights as white citizens in contracts; does not address gender, sex, sexual orientation
- Other forms of “invidious discrimination” may be overturned on other theories (not Section 1981)—e.g., common law charitable trust doctrine
- Note Civil Rights Action Section 1982—“All citizens of the United States shall have the same right ... as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”
- Not all programs are the same:
  - Scholarships and grants
  - Awards
  - Affinity groups
  - Advocacy

# Takeaways for Nonprofits (cont.)

## Holding to Mission While Managing Risk

- Scholarships/Grants are likely most at risk
  - Law remains unsettled in this area, though recent actions suggest a trend toward prohibiting race-specific grant and scholarship programs
  - Changing eligibility requirements
  - Is it a contract?
- Awards
  - More able to argue not a contract
  - Benefits are intangible
  - Can further manage risk by looking at eligibility
- Affinity Groups
  - First Amendment right of association
  - Not a contract
- Advocacy/Mission-Related Communications and Discussions
  - Least at risk
  - But see exempt status discussion

# Exempt Status Questions

## Concepts of Illegality, Void Against Public Policy

- Illegality or void against fundamental public policy
  - Charitable trust law genesis
  - Rev. Rul. 71-447, 1971-2, C.B. 230
    - Mandates racially nondiscriminatory policy
    - Discusses application of trust law concepts to 501(c)(3)
  - *Bob Jones University* decision
    - Confirms 1971 Revenue Ruling position
    - “A declaration that a given institution is not ‘charitable’ should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy.”
    - Court points to position of all three branches of federal government in opposition to racial discrimination

# Exempt Status Questions

## Potential Administration Actions

- Possible avenues to pursue
  - Seek changes to the Code?
  - Treasury Regulations with notice and comment?
  - Retire, revise, update Revenue Rulings?

# Considerations and Actions

## Concrete Steps to Consider

- What is organization's risk profile? (legal, reputational, financial)
- What is organization's core mission?
- Is the organization a federal grant recipient or contractor? (If so, has a certification been signed?)
- Analyze programs for compliance and risk management
  - Scholarships
  - Awards
  - Affinity programs
  - Advocacy and communications
- Review website, public-facing documents
- Stay abreast of developments—this is a changing environment!



# Questions and Conclusion

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