



The Shifting Federal Landscape

**How Nonprofit Organizations Can Effectively Navigate the
Presidential Executive Orders, Federal Guidance,
and Court Decisions of 2025**

Today's Presenters

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Agenda

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- **Presidential Executive Orders (“EOs”) and Related Administrative Action**

2025: Where we started (January) + Where we are now (October):

- Diversity, Equity & Inclusion
- Grant Funding and Certifications
- **Practical Guidance: How to Promote Diversity, Equity & Inclusion in the Face of the EOs**
- **U.S. Supreme Court Discrimination Case Updates**
- **The First Amendment and Employee Speech**
- **Q&A**

Executive Orders: January 2025

Where We Started

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- EO 14151 – Ending Radical and Wasteful Government DEI Programs and Preferencing
- EO 14173 – Ending Illegal Discrimination and Restoring Merit-Based Opportunity

Executive Orders: January 2025

Where We Started

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- Focus on “illegal and immoral discrimination programs, going by the name, ‘diversity, equity, and inclusion’ (DEI).”
- Directs termination of “all discriminatory programs, including illegal DEI and [DEIA] . . . mandates, policies, programs, preferences, and activities . . . , under whatever name they appear.”
- Grant recipients/contractual counterparties must “certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.”

Where We Started: Multi-State AGO Guidance Concerning DEI Employment Initiatives (February 2025)*

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Emphasizes the “continued viability and important role of [DEIA] efforts . . . in creating and maintaining legally compliant and thriving workplaces”; emphasizing that DEIA “best practices are not illegal.”

Policies and practices that promote diversity are not the same as preferences in hiring or promotion based upon protected characteristic which is unlawful except in narrow circumstances.

Employment policies incorporating DEIA best practices reduce employer’s litigation risk by affirmatively protecting against discriminatory conduct that violates the law.

*Available at: <https://www.mass.gov/doc/multi-state-guidance-concerning-diversity-equity-inclusion-and-accessibility-employment-initiatives/download>

Where We Started: Litigation

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Shortly after EOs issued, a flurry of litigation in federal courts around the country, with significant challenges to EOs

Injunctions started to issue enjoining, e.g.,:

- funding freezes
- requirement that employers “certify” compliance with EOs

Where We Are Now

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- July 29, 2025: Memorandum Issued by U.S. AGO: “Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination”
 - “clarifies the application of federal antidiscrimination laws to programs or initiatives that may involve discriminatory practices, including those labeled as Diversity, Equity, and Inclusion (‘DEI’) programs.”
 - Provides “non-binding best practices”
 - Prohibition on activities using race
 - “Legal pitfalls of DEI Programs”
 - “Unlawful Proxy Discrimination”
 - “Cultural Competence” requirements (lived experience)
 - Geographical or Institutional Targeting
 - “Overcoming Obstacles” Narratives or “Diversity Statements”

Where We Are Now: Certifications

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August 7, 2025: New EO entitled “Improving Oversight of Federal Grantmaking”

Provides in pertinent part that discretionary awards may not be used **to fund, promote, encourage, subsidize or facilitate:**

- Racial preferences or other forms of racial discrimination by the grant recipient, including activities where race or intentional proxies for race will be used as a selection criterion for employment or program participation;
- Denial by the grant recipient of the sex binary in humans or the notion that sex is a chosen or mutable characteristic;
- Illegal immigration; or
- Any other initiatives that compromise public safety or promote anti-American values.

Where we are now: Certifications

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- Some courts have granted preliminary relief enjoining the enforcement of certifications while the case is pending, and others have not.
- Example of court granting preliminary relief enjoining certification pending final outcome:
 - *King County v. Turner* (W.D. Wash. 2025): Coalition of cities/counties (including Boston) challenged this certification from the U.S. Department of Housing and Urban Development (“HUD”):

“Pursuant to section (3)(b)(iv)(B), Executive Order 14173, Ending Illegal Discrimination and Restoring Merit-Based Opportunity, by entering into this Agreement, Recipient certifies that it does not operate any programs promoting diversity, equity, and inclusion (DEI) initiatives that violate any applicable Federal anti-discrimination laws”; and

Where Are We Now: Certifications + DEI Challenges

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- Courts are divided in their interpretation of identical certifications.
 - “DEI program[s] that violate federal anti-discrimination laws”
- Courts have repeatedly noted that **organizations may still challenge the government’s enforcement of their interpretation of anti-discrimination laws**, e.g., cutting funds for DEI efforts.
- Because these cases are ongoing, it remains to be seen whether courts will issue permanent injunctions against the agencies at the close of the litigation.
- **Certification Language Matters:** Are you being asked to certify that the organization is not violating anti-discrimination law **OR** that you **are** complying with an EO (which is not law)?

Options When Confronted with Certification – What do we do?

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Accept funds,
adjust DEI efforts

- Pause DEI efforts most subject to attack (e.g., anything that looks like a preference/quota or identity-based hiring or mandated trainings).
- Cases currently in litigation will provide some future clarity regarding “illegal DEI” practices that are sufficient to withhold federal funds.

Mobilize: Join (or
file) suit as a
named plaintiff

- Can accept funds and sue later, *i.e.*, sign and challenge later.
- Network with other non-profit organizations.
- If you need the funds immediately but also want relief, consider accepting and joining (or bringing) a suit.

Decline the money

- May not be feasible for many organizations, but if compliance directly conflicts with indispensable programming, mission of organization, may be only option; Consider alternative funding sources/fundraising.

Practical Guidance: How to Promote DEI Initiatives in the Face of the EOs

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DEI Analysis Framework: Thinking Like a Lawyer

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- What is desired?
- What is required?
- What are additional considerations?
- What is the range of available options?
- What is the right balance to strike in moving forward?

What is Desired?

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- What are the organization's mission, goals, and values?
- Consider:
 - Role/importance of DEI to the organization's mission and work
 - Scope of outward-facing messaging (e.g., ribbon-cutting events, marketing, website)
 - Internal strategies and messaging (office culture, policies, practices)
 - Availability of non-governmental funding sources
 - Organization's risk tolerance

What is Required?

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- Compliance with federal (e.g., Title VI, Title VII, ADA/504) and state laws (e.g., G.L. c. 151B)
 - Including as they might apply to employees **and** clients/beneficiaries of the organization's programs
- Consider relevant interpretation of laws from:
 - Executive Orders
 - EEOC DEI Guidance
 - U.S. AGO Memorandum
 - MA AGO/Multi-state Guidance

What Else must be Considered?

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- Federal certification requirements
- Whistleblowers/False Claims Act
- Shifting landscape at the federal level (e.g., EOs, USDOJ, EEOC, other guidance materials)

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What is the Range of Available Options?

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Still Allowed and Recommended

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- Anti-Discrimination and Anti-Harassment Policies and Grievance Procedures
 - Provide important civil rights protections; and
 - Protect the organization by establishing the framework, responsibilities, and expectations necessary to comply with federal and state laws which reduces risk

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Currently Prohibited or Likely to Trigger a Challenge

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- Race-based quotas or hiring preferences tied to a protected class
- Mandatory DEI training that singles out attendees by race or other protected characteristics
- Scholarships or fellowships tied to a protected class

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Proceed with Caution



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- Any focus on “Firsts”: First-time homebuyer programs; first generation students/graduates
- Targeted recruiting (e.g., zip codes, neighborhoods, HBCUs)
- Socio-economic status/disadvantaged background as a factor (including for fellowship or internship programs)
- Affinity Groups; Employee Resource Groups
- Mandatory DEI training (e.g., implicit bias training)

Affinity Groups

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Typically, employee-led with minimal employer sponsorship or involvement



May have a focus on shared cultural backgrounds and/or shared interests
BUT



Membership must be open to all (no restrictions or eligibility requirements based on membership in a protected class).

Employee Resource Groups

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Typically, employer-sponsored;
employee-led

Focus on professional development, mentorship, networking (not recruitment/hiring influence)

Generally, more structured than affinity groups, aimed at advancing the organization's goals/initiatives

Diversity Trainings: Increased Scrutiny

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- **July 29, 2025 Memorandum addresses “Training Programs That Promote Discrimination or Hostile Environments”**
 - “Unlawful DEI training programs are those that – through their content, structure, or implementation – stereotype, exclude, or disadvantage individuals based on protected characteristics or create a hostile work environment.”
 - “This includes training that:
 - Excludes or penalizes individuals based on protected characteristics”
 - “Creates an objectively hostile environment through severe or pervasive use of presentations, videos, and other workplace training materials that single out, demean, or stereotype individuals based on protected characteristics.”
- **EEOC’s March 19, 2025 Guidance:** “What You Should Know About DEI Discrimination at Work,” including Paragraph 10 (“Can an employer’s DEI training create a hostile work environment?”).

Where We Are Now

Increased Scrutiny on Diversity Trainings

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The EOs and U.S. AGO Guidance heighten likelihood that employees will sue employers on hostile work environment (HWE) claims stemming from DEI trainings or other initiatives required by employer.

Examples of Legal Action Asserting Hostile Work Environment in Context of Diversity Trainings

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Young v. Colorado Dep't of Corr. (10th Cir. 2024)

- Employee challenged a single, mandatory DEI training, alleging it promoted stereotypes about white employees. The court held that one training, without ongoing stereotyping, ridicule, insults, or workplace spillover, is not “severe or pervasive.”
- A follow-on suit based on the same training was also dismissed for failing to show workplace impact.

Examples of Legal Action Asserting Hostile Work Environment in Context of Diversity Trainings

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Chislett v. New York City Dept. of Ed. (2nd Cir. 2025)

- On 9/25/25, 2nd Circuit held that mandatory implicit bias training not inherently unlawful; however, can give rise to HWE claim based on race under Section 1983.
- Promoting DEI in way that helps employees identify their own implicit biases could expose employer to liability if implemented improperly (e.g., in manner that stereotypes racial group).
- Court determined that reasonable jury could find Defendant's implicit bias training contributed to a racially charged HWE.

Examples of Legal Action Asserting Hostile Work Environment in Context of Diversity Trainings

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Diemert v. City of Seattle (W.D. Wash. 2025; on appeal)

- City required two trainings/activities per year on topics like race, gender, poverty, Indigenous affairs, LGBTQ+ rights; plaintiff said resulting comments were offensive.
- Court granted summary judgment to the City. Passive exposure to concepts like “white privilege,” “white fragility,” implicit bias, or CRT doesn’t create an objectively hostile workplace, and DEI/anti-discrimination trainings aren’t per se unlawful.

Examples of Legal Action in Context of Diversity Trainings

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Grande v. Hartford Board of Education (D. Conn. Sept. 2025)

- Teacher sued school board claiming that he was unfairly disciplined after spoke out against board presentation on white privilege.
- Asked for his opinion during a breakout session and said “I’ve been teaching in this system for 32 years and I’ve never had to sit through something like this. All I know are minority kids. I was just man-bashed and white-shamed. I’m gonna sit here quietly.”
- Court denied the Board’s motion for summary judgment on First Amendment retaliation claim.

Hostile Work Environment Case Law

Takeaways for DEI Trainings

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DEI discussions in trainings or otherwise are not, on their own, unlawful.

Disagreement or discomfort with a single training is not sufficient to bring a hostile work environment claim.

However, plaintiff employees fare better in litigation when there are repeated, specific instances of trainings targeting a protected characteristic (severe and pervasive requirement).

Employers should be careful not to assign negative racial attributes, segregate participants by traits, or subject employees to additional trainings or repercussions based on their views of DEI initiatives.

Diversity Trainings

Conducting Compliant Trainings

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- Define the purpose of the training and guardrails
- Vet content, not just intent
- Make it job related and neutral
- Train the Trainers
- Strengthen reporting, investigations, and documentation
- Provide reasonable oversight of vendors and employee resource groups

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Supreme Court Discrimination Law Update

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- *Ames v. Ohio Dept. of Youth Servs.* (June 5, 2025)
 - Plaintiff, heterosexual female, sued Ohio alleging that she was denied a promotion in favor of a lesbian woman, and later demoted in favor of a gay man, claiming sexual orientation and sex discrimination.
 - Eliminated extra hurdle for majority-group plaintiffs (i.e., don't have to show background circumstances supporting a suspicion that the employer is the unusual employer who discriminates against the majority).
 - Post-*Ames v. Ohio* landscape: Cases with majority plaintiffs are still making their way through the courts, but we will likely see more “reverse-discrimination” cases.

Supreme Court Discrimination Law Update

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- *Muldrow v. City of St. Louis* (April 17, 2024)
 - SCOTUS lowered the adverse-action threshold for Title VII discrimination claims.
 - Plaintiff challenging a transfer need only show “some harm” to a term or condition of employment and not “significant/material” harm.”
 - Easier for plaintiff to prevail on discrimination theories tied to reassignments, schedule changes, loss of prestige, etc.

Supreme Court Discrimination Law Update

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Ames and *Muldrow* serve to **expand the scope of discrimination suits that are likely to proceed, including claims that employees link to DEI-motivated decisions (transfers, reassignments, promotions).**

Charting a Path Forward

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- Expect an increase in the scope of potential litigation and challenges to employment practices, in terms of plaintiff groups and types of matters.
- Ultimately, decisions about the scope of DEI activities and certification compliance at your organization for the immediate future will likely depend primarily on:
 - The extent the organization relies on federal funding;
 - The organization's public visibility on DEIA issues; and
 - The risk tolerance of the Board of Directors/Trustees and senior administrators.
- Consult with counsel, as needed.

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Public Employers

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- May impose restrictions on speech during work or work-related activities.
 - Speech that is made as part of the employee's typical job responsibilities is not protected speech.
- Generally, an Employer may not discipline an employee for out-of-work speech except in very limited circumstances:
 - Balancing test:
 - Did speech interfere with employee's performance?
 - Did speech create disharmony among staff?
 - Did speech undercut an immediate supervisor's authority?
 - Did speech destroy the relationship of loyalty and trust required of the employee?

Public Employers - Consider

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- Is the speech made as a private citizen (e.g., outside of work on social media)?
- Is the speech a matter of public or private concern?
- Where does the balance of interests tip between employee and employer?
 - Does post indicate bias toward a protected class that might impact employee's performance of duties? (e.g., a Facebook post by a teacher or supervisor indicating clear bias against a particular race or religion)?
 - Does an out-of-work post harm the reputation of the employer?

Private Employers

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- Private Employers are not bound by the First Amendment in the same way as public employers.
 - Generally, private employers may restrict certain speech at or outside of work, particularly if it is reasonably likely to damage employer's brand or reputation or cause disruption to the work environment.
- **However**, employees have certain protections under other state and federal laws.

Practical Guidance for Employers

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- ❑ Make sure discrimination/harassment policies and grievance procedures are updated and staff are trained regularly.
- ❑ Be clear in employee handbooks and staff trainings that any posts made outside of one's professional responsibilities must not reference the organization or suggest that views are that of the organization.
- ❑ Proceed cautiously when taking adverse employment action based upon an employee's out-of-work speech.
- ❑ Conflicts between employees can be tricky to navigate.
 - ❑ Consult with Counsel as needed.

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