

DEI in 2026: Legal Risk, Enforcement Shifts, and Employer Decision-Making

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Today's Objectives:

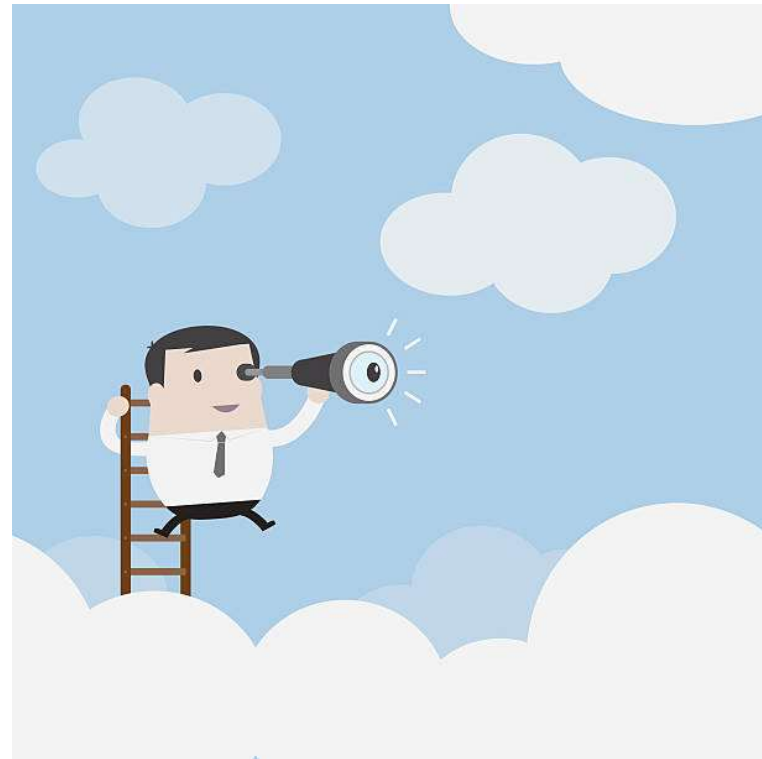
- Explain what has changed vs. what hasn't changed
- Synthesize recent Presidential Executive Orders
- Decode EEOC/DOJ signals
- Summarize post-SFFA litigation
- Highlight DEI recalibration
- Provide decision framework so employers can decide how to respond

Why This Topic Matters Now:

- EO 14173 revoked EO 11246 (affirmative action)
- EO 14151 dismantles DEI infrastructure
- Yet, core civil rights statutes unchanged
 - Risk is dynamic and varies by jurisdiction

Big Picture Takeaway:

- Race-neutral EEO measures remain lawful
- Naming, design, documentation matter



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Executive Orders & Federal Policy

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- EO 14151- "Ending Radical And Wasteful Government DEI Programs And Preferencing"-ends federal DEI infrastructure
- **Key Provisions**
 - Termination of DEI programs, mandates, and policies in federal government

End of EO-Based Affirmative Action

- EO 14173 revokes EO 11246
 - EO 11246 Basics
- Adds certifications for no unlawful DEI
- Agency implementation memos
- OFCCP: Narrowed Scope



What Did NOT Change:

- Civil rights statutes remain intact (e.g., Title VII, Section 1981, ADA, etc.)
- Courts—not agencies—define illegality
- State laws remain
- Difference between affirmative action requirements vs nondiscrimination law

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VI. EEOC & DOJ Enforcement

Agency Enforcement: A Shift in Focus

- Leadership priorities shifting
 - New Acting EEOC Chair
 - AG Guidance directing strategic plan to identify “sectors of concern.”
- Changed rhetoric
 - “Illegal DEI”



EEOC & DOJ Signals to Employers

- What are they skeptical of?
- What are they focusing on now?

Enforcement Reality Check

- Agency enforcement vs. private litigation risk



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VII. Litigation Developments

Litigation Trends Post Students for Fair Admissions v. Harvard

- Ripple effects beyond higher education
- Increased willingness to challenge employer DEI programs
- Courts scrutinizing *how* programs operate

DEI-Related Claims

- Types:
 - Reverse Discrimination Claims
 - Title VII Disparate Treatment
 - Section 1981 Contract Discrimination
 - False Claims Act/False Certification
- What Courts are Most Skeptical of
- Who is most likely to sue?



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VIII. Corporate DEI Trends

What Employers are Doing Nationally

- National reassessment
- Audits & re-engineering

Survey & Trend Highlights

- A June 2025 National study reveals that most U.S. business and legal leaders believe scaling back diversity, equity, and inclusion (DEI) initiatives may increase corporate risk — including legal exposure, financial and talent loss, and reputational damage.
 - 76% of employees (86% of Gen Z) are more likely to stay with an employer that supports DEI. Sixty-one percent of Gen Z say they would never apply to a company that does not support DEI.

Survey & Trend Highlights Cont.: Case Studies

- **Microsoft** reduced DEI references by 76% in its 2024 10-K, shrinking the section from approximately 250 to 60 words and eliminating identity group mentions entirely.
- **JPMorgan Chase**: The bank maintained demographic reporting but rebranded "Diversity, Equity, and Inclusion" as "Workforce Composition" in its 2025 10-K
- **Berkshire Hathaway**: continues to exclude DEI terminology entirely from its disclosures across 2022-2025 10-K
- **Apple**: Shareholders overwhelmingly rejected an anti-DEI proposal titled "Request to Cease DEI Efforts."

What has NOT Disappeared

- Anti-harassment / EEO Trainings
- Pay equity audits & analytics
- Compliance focused initiatives

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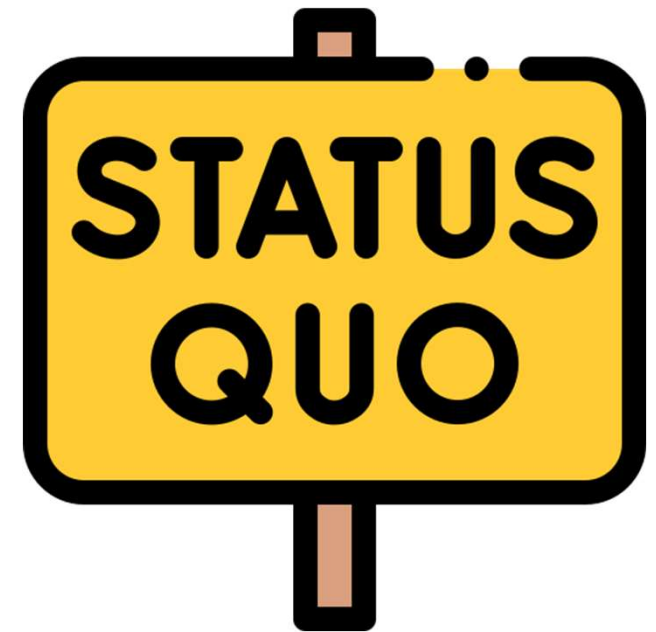
IX. Decision-Making Framework

Decision-Making Framework Details

- Values + risk tolerance – No one-size-fits-all solution
- Option 1: Status quo
- Option 2: Modify/Rebrand
- Option 3: Retire DEI programs

Option 1: Keep the Status Quo

- Benefits
 - Continuity supports culture
- Risks
 - Increased litigation exposure
- What type of employer this would work for
 - Low-visibility employers
 - Industries with strong DEI expectations
 - Low-litigation exposure

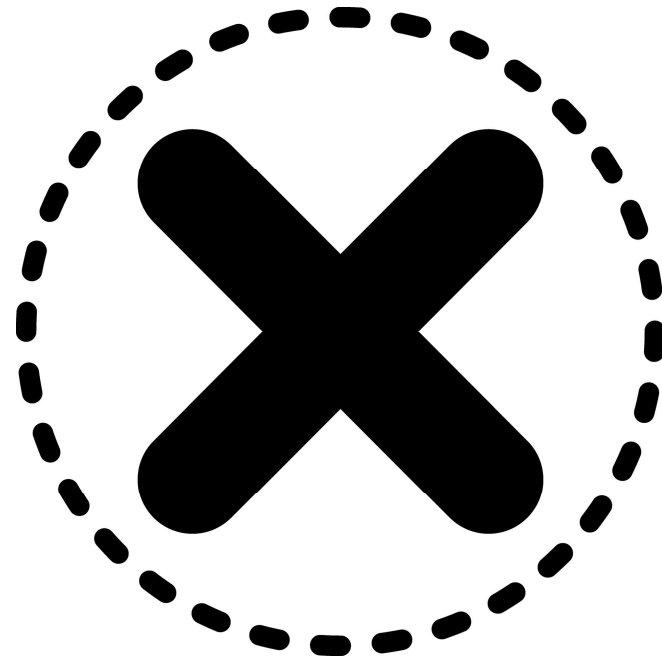


Option 2: Modify or Rebrand/Rename Programs

- Benefits
 - Risk mitigation without abandoning goals
- Risks
 - Superficial rebranding without criteria changes can be viewed as pretext
 - Internal morale risk
- Best Practices

Option 3: Eliminate Formal DEI Programs

- Benefits
 - Reduces risk
- Risks
 - Culture and retention costs
 - Reputational impact



Factors that should drive decision:

- Industry and regulatory environment
- Industry litigation climate
- Contractor/grantee status
- Workforce demographics
- Union context
- State law considerations / overlay
- Company's governance and disclosure commitments

Key Takeaways:

- Structure > labels
- Avoid overcorrection
- Documentation is critical
- Legal review essential

