Advancing Diversity, Equity, Inclusion, and Accessibility in a Time of Uncertainty: What Employers Need to Know[1]

Talent is everywhere. From the hardworking mother who developed skills on the job to the rising star graduating from a lesser-known college to the homegrown leaders who just need the opportunity to shine, the best people can be found in both expected and unexpected places. Broad recruiting efforts, hiring practices that focus on job-related skills and address bias, mentoring programs, and other initiatives can help organizations find the best people and ensure they thrive in the workplace. These programs also help employers comply with federal laws prohibiting discrimination in employment[2] and retaliation against individuals who oppose discrimination, participate in related proceedings, or request accommodations.[3] While federal laws have not changed, federal agencies, including the U.S. Department of Justice (DOJ) and the U.S. Equal Employment Opportunity Commission (EEOC), have advanced radical new interpretations of these protections that could close the doors of opportunity. But while these agencies are reversing decades-old positions, they cannot rewrite federal laws. Here is what employers need to know.

Recent Supreme Court cases do not change employers' ability to lawfully advance diversity, equity, inclusion, and accessibility.

The U.S. Supreme Court has repeatedly emphasized that institutions can take action to improve diversity and equal opportunity by using initiatives that do not make decisions based on race or other protected characteristics. While the Trump Administration has cited to the following Supreme Court decisions to justify its attack on diversity, equity, inclusion, and accessibility, none of these cases prohibit such programs:

- *Ames v. Ohio Department of Youth*: The Court held that the standard for unlawful discrimination under Title VII is the same for all plaintiffs bringing suits under Title VII.[4] This decision maintains the status quo in many places around the country that already followed that approach, and does not change the standard for bringing employment discrimination claims under Title VII.
- *Muldrow v. City of St. Louis*: The Court held that lateral transfers may constitute discrimination under Title VII, rejecting the prior requirement that plaintiffs demonstrate "significant harm" to establish a violation.[5] This decision means workers of all racial and other backgrounds have the opportunity to show that discriminatory transfers that did not change their pay could still be harmful and thus addressable by Title VII. Any citation to *Muldrow* to undermine diversity, equity, inclusion, and accessibility programs represents a fundamental misunderstanding of the case. In reality, it is the exact opposite. While unfair barriers can disproportionately exclude some workers, closing gaps in opportunities helps workers from every background.

- *Students for Fair Admissions v. President & Fellows of Harvard College*: This case involved programs adopted by Harvard and the University of North Carolina in which race was considered as one factor in admissions decisions.[6] The Court held that these specific admissions programs did not satisfy the strict scrutiny standard (which is the highest standard used to evaluate laws) because they were not narrowly tailored to achieve a compelling governmental interest.[7] However, the Court stated that universities can still consider an applicant's discussion in their essays about how race shaped their life and ability to contribute to the institution.[8] Moreover, the Court recognized that race-based action can be used to remedy specific instances of past discrimination.[9] Justices also emphasized that institutions may increase diversity through policies that are not based on race.[10] The Court did not consider the laws governing employment or rule on any processes outside of the higher education admissions context.

As discussed below, courts have routinely held that many diversity, equity, inclusion, and accessibility efforts are lawful.

Anti-bias trainings can help employers comply with anti-discrimination laws.

A hostile work environment results from either severe harassment[11] or a pattern of discriminatory remarks and/or conduct. Courts have generally rejected the idea that anti-bias trainings, initiatives, or other programs that discuss racism, bias, or the history of or experiences with discrimination in themselves create a hostile environment.[12] In fact, anti-bias trainings are often necessary to ensure compliance with civil rights laws, and employers who provide anti-bias training may point to such training and related policies as an affirmative defense to harassment claims.[13]

Employers can collect and analyze demographic data to identify policies that create unfair barriers to hiring and thriving in the workplace.

Employers' collection of demographic data is both fully lawful and essential to identifying and assessing a pattern or practice of unlawful employment practices, as long as that data is not used to make hiring or other selection decisions. Collecting data does not in itself benefit or harm any worker or applicant or change the terms and conditions of their employment. By contrast, employers who don't collect data may fail to identify discriminatory hiring, promotion or other practices, exposing them to discrimination lawsuits.

Employers can assess employees for cultural competence and other job-related skills.

In many fields and workplaces, cultural competence – the ability to interact effectively with different populations – is a critical skill. In health care, medical professionals who understand the backgrounds of their patients provide better care.[14] In education, culturally-competent teachers can communicate more effectively with their students and better manage relationships between students.[15] In business, employees who can navigate racially and otherwise diverse groups are better able to serve customers, develop positive professional relationships, and close deals. Cultural competence is not a skill reserved for people from any single group and can be developed by individuals from varying backgrounds. While employers cannot assume people from particular backgrounds exhibit cultural competence, they are permitted to assess to what extent applicants and employees demonstrate these valuable job related skills, including through a discussion of past life experiences and jobs.

Employers can take active steps to expand their applicant pool.

Employers can lawfully engage in broad recruiting efforts designed to increase the number of qualified applicants, including by reaching out to people of color, women, and other groups who are underrepresented in their applicant pool.[16] Such efforts do not violate federal antidiscrimination laws, provided employers decide who to hire or promote based on an applicant's qualifications rather than on race, gender, or other legally-protected characteristics.

Employers can develop internships, pipeline programs, and other initiatives using selection criteria other than race, gender, or other protected characteristics.

Programs that do not use race, gender, or other protected characteristics as a selection criterion – such as an internship program for first-generation students, a pipeline program targeted at high schools in a particular geographic area, or recruitment at Minority Serving Institutions to address underrepresentation of women of color in STEM fields – are generally permissible under Title VII. The Supreme Court has repeatedly encouraged using such programs to increase diversity and expand equal opportunity, including in *Students for Fair Admissions v. President & Fellows of Harvard College*.[17] Courts have rejected recent challenges claiming that such efforts are unlawful.[18]

Employers can host employee resource groups and other programs that are open to all.

Employee resource groups, mentorship programs, and other efforts that are open to all are generally lawful even if they focus on highlighting a particular background or identity. For example, groups can be focused on employees of color, LGBTQ+ staff, or on disability rights and all interested participants may plan various programs or celebrations that are open to all staff.[19]

Employers should allow employees to use facilities appropriate to their gender identity.

Federal civil rights laws support the rights of transgender employees to use bathrooms, locker rooms, and other spaces consistent with their gender.[20] The Supreme Court has held that workers are protected from sexual orientation and gender-identity related discrimination in employment.[21] This right extends to all employment-related contexts.

Federal agencies cannot unilaterally change federal law.

A federal agency may publish documents to articulate how it will interpret laws, but neither DOJ nor other federal agencies can create or change the U.S. Constitution or congressionally-adopted federal statutes. Agencies' memoranda and guidance – like DOJ's "Guidance for Recipients of Federal Funding on Unlawful Discrimination" – may indicate how they will pursue enforcement, but they are not a binding interpretation of the law.

This administration has weaponized civil rights agencies' ability to investigate claims of discrimination to further the administration's political agenda. For that reason, it is important to note that the fact that an agency takes an enforcement action, standing alone, does not mean an employer has violated civil rights or other laws. Nor does it mean that a federal agency alone determines if an employer is liable under the False Claims Act (FCA). While DOJ has made clear it intends to use the FCA to pursue recipients of federal funding whom it deems to have falsely certified their compliance with federal civil rights laws, courts, not agencies, ultimately interpret

federal statutes. Agency interpretations — especially new or changed ones — in guidance or memoranda cannot substitute for, or contradict, judicial interpretations.

Initiatives like data collection, anti-bias trainings, and expanding the applicant pool are a few examples of tools available to help employers find and retain the best workers, promote merit, and comply with the law. Employers who roll back these programs risk violating antidiscrimination laws and lose out on the business benefits of diversity, harming their companies and our economy as a whole.

For more information, please see the following resources:

- *The Economic Imperative to Ensure Equal Opportunity: Guidance for Employers, Businesses, and Funders* by LDF.
- Advancing Equal Employment Opportunity; Putting the Affirmative Action College Admissions Cases in Context by the Lawyers' Committee for Civil Rights Under Law
- Safeguarding and Strengthening Diversity, Equity and Inclusion (DEI) Initiatives (July 2024) and Despite Attacks, Civil Rights Protections Endure, Supplemental Report (July 2025) by Democracy Forward.

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[1] This FAQ is not intended to, and should not be understood to, provide legal advice. Specific programs, initiatives, or questions should be reviewed with counsel.
[2] 42 U.S.C. § 2000e-2 *et seq*. These statutes were codified as Title VII of the Civil Rights Act of 1964; 42 U.S.C. § 1981.
[3] 42 U.S.C. § 2000e-3.
[4] *Ames v. Ohio Dep't of Youth Serv.*, 605 U.S. 303, 310 (2025)
[5] *Muldrow v. City of St. Louis*, 601 U.S. 346, 395 (2024).
[6] *Students for Fair Admissions v. Pres. & Fellows of Harv. Coll*, 600 U.S. 181, 214-16 (2023).
[7] *Id.* at 230.
[8] *Id.*
[9] *Id.* at 207.
[10] *Id.* at 265 (Thomas, J., concurring) (explaining that the University of California and University of Michigan achieved racial diversity through race-neutral means and noting "[r]ace-neutral policies may thus achieve the same benefits of racial harmony and equality without any of the burdens and strife generated by affirmative action policies"); *id.* at 317 (Kavanaugh, J., concurring) (explaining "governments and universities still can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race" (internal quotations omitted)).
[11] *Hartman v. Pena*, 914 F. Supp. 225 (N.D. Ill 1995) (holding that there was a genuine issue of material fact that must be decided by a jury regarding whether the plaintiff experienced a hostile work environment as a result of a three-day training; plaintiff claimed he was "ridiculed for being unwilling to participate in an exercise of walking between rows of co-employees, then groped in a sexual manner by the co-employees forming the lines, and later humiliated by subscribing [his] name to a graphic of a small, flaccid human penis").
[12] *Compare Young v. Colorado Dep't of Corrections,* 94 F.4th 1242 (10th Cir. 2024) (holding, on a motion to dismiss, plaintiff failed to allege sufficient facts to show he was subjected to a racially hostile work environment where there was no evidence of "any race-based harassing conduct, ridicule, or insult from either his co-workers or his supervisors within his workplace that occurred as a result of the training") *with Chislett v. New York City Department of Education,* --- F.4th ----2025 WL 2725669 (2d Cir. 2025) (holding, on appeal from a motion for summary judgment, that a reasonable jury could conclude that the plaintiff experienced a hostile work environment based on evidence of comments expressed during anti-bias trainings as well as a pattern of comments to the plaintiff and a co-worker outside of the trainings).
[13] *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (discussing affirmative defense to harassment liability available where, among other things, an employer

"exercised reasonable care to prevent and correct promptly any sexually harassing behavior" such as by informing employees of internal anti-harassment policies); *See Faragher*, 524 U.S. at 809 ("While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense."); *Agusty-Reyes v. Dep't of Educ.*, 601 F.3d 45, 55 (1st Cir. 2010) (holding that a reasonable jury could conclude that the failure to disseminate the harassment policy and complaint procedure precluded the employer from establishing the first prong of the defense); *Ortiz v. Sch. Bd.*, 780 F. App'x 780, 786 (11th Cir. 2019) (per curiam) (denying summary judgment to the employer on the *Faragher-Ellerth* affirmative defense where there was evidence that the employer had failed to take reasonable steps to disseminate its anti-harassment policy); *EEOC v. Spud Seller, Inc.*, 899 F. Supp. 2d 1081, 1095 (D. Colo. 2012) (determining a trial was required on the issue of whether the employer, which employed some individuals who spoke only Spanish, could satisfy the *Faragher-Ellerth* affirmative defense where the employer's handbook contained an anti-harassment policy in English, but there was no evidence that its provisions were translated into Spanish or that written translations were supplied to Spanish-speaking employees); *Miller v. Woodharbor Molding & Millworks, Inc.,* 80 F. Supp. 2d 1026, 1029 (N.D. Iowa 2000) (stating the gravamen of an effective anti-harassment policy includes three provisions: (1) training for supervisors, (2) an express anti-retaliation provision, and (3) multiple complaint channels for reporting the harassing conduct) (collecting cases supporting inclusion of each provision), *aff'd*, 248 F.3d 1165 (8th Cir. 2001); C*lark v. United Parcel Serv., Inc.*, 400 F.3d 341, 349-50 (6th Cir. 2005) ("While there is no exact formula for what constitutes a 'reasonable' sexual harassment policy, an effective policy should at least … provide for training regarding the policy.").

[14] *See, e.g,* Tulane University Celia Scott Weatherhead School of Public Health and Tropical Medicine, How to Improve Cultural Competence in Health Care (Mar. 1, 2021), https://publichealth.tulane.edu/blog/cultural-competence-in-health-care/.

[15] *See, e.g.,* Johann le Roux, *Effective educators are culturally competent communicators,* INTERCULTURAL ED., vol. 13, no. 1 (2002), https://web.archive.org/web/20160705235819id_/http:/www.iupui.edu:80/~c482web/documents/PDFs/leRoux.pdf.

[16] *Duffy v. Wolle*, 123 F.3d 1026, 1038-39 (8th Cir. 1997) ("An employer's affirmative efforts to recruit minority and female applicants [do] not constitute discrimination. An inclusive recruitment effort enables employers to generate the largest pool of qualified applicants and helps to ensure that minorities and women are not discriminatorily excluded from employment. This not only allows employers to obtain the best possible employees, but it is an excellent way to avoid lawsuits.") (citations and quotation marks omitted); *see, e.g., Ricci v. DeStefano*, 557 U.S. 557 (2009) (explaining that "an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made" are lawful).

[17]*See* note 10, *supra*; *see also Ricci v. DeStefano*, 557 U.S. 557, 585 (2009) (declining to "question an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made"); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 789 (2006) (Kennedy, J., concurring in part and concurring in the judgment) (explaining that, when government officials utilize "mechanisms [that] are race conscious but do not lead to different treatment based on a classification that tells each [individual] he or she is to be defined by race, . . . it is unlikely any of [these mechanisms] would demand strict scrutiny to be found permissible."); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 526 (1989) (Scalia, J., concurring in judgment) ("A State can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race. In the particular field of state contracting, for example, it may adopt a preference for small businesses, or even for new businesses—which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have racially disproportionate impact, but they are not based on race.") (internal quotation marks omitted); *see id.* at 507, 509 (plurality opinion of O'Connor, J.) (criticizing the defendant city for not attempting to address racial barriers through race-neutral means and stating "the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races").

[18] *See, e.g., Boston Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for City of Bos.*, 89 F.4th 46, 61 (1st Cir. 2023), *cert. denied*, No. 23-1137, 2024 WL 5036302 (U.S. Dec. 9, 2024); *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864 (4th Cir. 2023)*, cert. denied,* 218 L. Ed. 2d 71 (Feb. 20, 2024) (upholding race-neutral high school admissions policy that produced more equitable admissions outcomes).

[19] *Compare Diemert v. City of Seattle*, 776 F.Supp.3d 922 (W.D. Wash. 2025) (dismissing plaintiff's claim that the City of Seattle's affinity groups violated the Equal Protection Clause, as the groups were "open to any City employee, regardless of their race or how they identify or choose not to identify") (internal citations and quotations omitted), *with Flood v. Bank of Am. Corp.,* 780 F.3d 1, 12–13 (1st Cir. 2015) (holding that the fact that plaintiff was not permitted to attend LGBT affinity-group meetings, "even though other employees were allowed to attend similar types of meetings" was a relevant factor in proving existence of a hostile work environment)*; Cf. Moranski v. General Motors Corp.*, 433 F.3d 537 (7th Cir. 2005) (employer, which had affinity groups based on race, gender, and sexual orientation that were open to all employees, did not violate Title VII by denying the plaintiff's request to start a Christian affinity group based on a policy that barred all affinity groups based on religion, as the policy treated all employees equally)

[20] *See Lusardi v. McHugh*, EEOC DOC 0120133395, 2015 WL 1607756 (Apr. 1, 2015) ("[W]e find that Complainant [a transgender woman] proved that she was subjected to disparate treatment on the basis of sex when she was denied equal access to the common female restroom facilities. We further find that the Agency is liable for subjecting Complainant to a hostile work environment based on sex by preventing her from using the common female restroom facilities and allowing a team leader intentionally and repeatedly to refer to her by male names and pronouns and make hostile remarks well after he was aware that Complainant's gender identity was female."). *Cf. Bostock v. Clayton County*, 590 U.S. 644 (2020) (holding that Title VII's ban on sex discrimination prohibits employment discrimination on the basis of sexual orientation and gender identity); *Karnoski v. Trump*, 926 F.3d 1180 (2019) (holding that intermediate scrutiny applies to classifications based on transgender status under the Equal Protection Clause).

[21] *Bostock v. Clayton County*, 590 U.S. 644 (2020).