Employment Law Corner

Monthly Report

FOLEY & FOLEY P C
ATTORNEYS AT LAW

May 2025

May Updates

Real Performance Reviews Are Good for Business

More Courts Adopting Broad View of ADA Accommodations

Summer Workplace Prep: Child Labor Law Review

Dress (Code) for Success!

DEI – The Policy That Must Not Be Named

Employment Authorization
The Trump administration is pulling every non-legislative lever it can to drive diversity, equity, and inclusion policies out of the workplace. The new administration has issued sweeping anti-DEI cuts in the federal government, executive orders against DEI policies for federal contractors and undermining the disparate impact liability, and EEOC advisories threatening discrimination lawsuits for employers with internal DEI policies. These actions threaten to turn federal anti-discrimination measures against employers who have and continue to use DEI policies to strengthen their workforce and protect themselves from the threat of litigation.

While the administration's actions face serious legal challenges and are likely to be struck down at least in part, employers – fearful that invoking DEI will bring down a storm of federal action – are increasingly treating *DEI as the Policy That Must Not Be Named.*

What can employers do in this shifting and uncertain legal landscape? There is no one-size-fits-all approach, but here is some general guidance that employers can use as a guiding light:

- **Executive orders cannot change the law**, and the law on discrimination has not been changed. State and federal anti-discrimination laws are still in effect, and individuals are still free to bring discrimination lawsuits against employers who engage in discrimination, regardless of the EEOC's direction. This is particularly true for employers in states where the state Attorney General has signaled that DEI policies are still consistent with anti-discrimination law.

- **Location, Location, Location.** The practical upshot of all of these actions for private employers (other than federal contractors) is that EEOC investigations will be slower and will likely result in fewer findings against employers. The EEOC is a critical anti-discrimination enforcement tool, as it allows employees to bring discrimination actions without having to bear the often insurmountable cost of securing legal representation. In states where the EEOC is the only body enforcing anti-discrimination policies, employers are likely to see a reduction in

litigation risk, as employees are often not well-positioned to carry lawsuits through to their conclusion. Conversely, in states with state agencies modeled after the EEOC, such as California and New York, employers may expect more vigorous enforcement from state agencies in the face of federal pullback. Legal counsel can help assess the risk your business faces as the EEOC pulls back from enforcing certain parts of anti-discrimination laws.

- **DEI serves a purpose.** Putting legal risk aside, employers would be wise to remember that DEI policies have been embraced for a variety of reasons. They reduce risk of litigation overall, of course, but they also function to ensure that employers are not using hiring practices that restrict the candidate pool or prevent the most qualified candidates from rising to the top, regardless of their background. They can improve professional development and retention and ensure that internal assessments are capturing the employee's actual value to the company. The guiding principle of DEI programs should be to remove artificial barriers and improve internal assessment tools to objectively capture each employee's full value to the company.

- **DEI policies can also signal the company's values and priorities**, which can be a valuable recruiting tool when DEI policies continue to enjoy support among large swathes of the workforce. Employers may also expect the government's attacks on DEI policies to make the issue more salient for its workers and customers, meaning that a decision to axe your DEI program may be seen as a social or political decision, with all the disruption and dissent that a company taking what is perceived as a political stance can entail. So, as a practical matter, moving quickly to denounce DEI runs the risk of alienating workers and customers while throwing away the significant benefits that a properly organized DEI policy can confer.

- **DEI is just a label.** As discussed above, that label can have significant implications in terms of the company's public and internal perception, but employers can capture the practical benefits of a DEI program without labeling it DEI. If the federal government's approach is using a word-search method of targeting, renaming an existing policy may be successful compliance strategy and if DEI is the subject of a taboo, an employer may consider describing the same bundle of policies as a Workforce Development and Retention policy instead.

The Trump administration has injected significant uncertainty into the business environment, and its changes to long-standing federal guidance on anti-discrimination laws are yet another source of uncertainty. Employers should think carefully about how they respond to these challenges – whether the right move is to stand firm behind your DEI policy, revise it, rename it, or scrap it all together is going to vary from employer to employer. Legal counsel can help you balance your business needs against legal risk and

determine the best course. Your workplace has its own culture and history, which matters going forward. Contact us for a chat about the best next moves. We can help!

Meet Gregory Paal

Greg has experience advising employers on regulatory compliance, contract matters and employment-related litigation. Greg has worked with employers both large and small to meet various challenges, including implementing overtime and leave policies, drafting employment agreements and privacy policies, and resolving discrimination complaints!

For more info, check out his full bio **here**!

Contact Us

FOLEY & FOLEY P C
ATTORNEYS AT LAW

www.foleylawpractice.com

info@foleylawpractice.com

(844) 204-0505