

# Insights

## Rock, Meet Hard Place: Reflections from 2020 on Compliance Risks Surrounding Workplace Diversity, Equity, and Inclusion Initiatives

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"Daddy changed the world!" – Gianna Floyd, daughter of George Floyd

This year has been a study in contrasts in so many aspects of life, including with respect to diversity, equity and inclusion ("DEI") initiatives within the workplace. By any measure, the community conversation surrounding racial justice and equity found renewed urgency in Spring 2020 with the killing of George Floyd and several other individuals. Employers found themselves navigating this critical conversation within the workplace, where it manifested as sometimes-tense interactions among employees at every level, renewed scrutiny of Human Resources ("HR") policies and practices, and candid examination of the measurable impact of well-intentioned DEI initiatives. HR leaders found themselves tasked both with advancing DEI-related principles and practices in a meaningful manner while also remaining alert and responsive to evolving compliance obligations and risks. The following is a reflection on some key risk management considerations for employers during this unprecedented year.

### Do you understand your compliance ecosystem?

When considering the motivations driving your DEI initiative, have you fully delineated the formal anti-discrimination, equal employment opportunity ("EEO") and/or affirmative action obligations you have as an employer? Nearly all organizations are covered by one or more anti-discrimination laws, including **Title VII of the Civil Rights Act of 1964** ("Title VII"), the **Americans with Disabilities Act** ("ADA"), the **Age Discrimination in Employment Act** ("ADEA"), and/or the **Uniformed Services Employment and Reemployment Rights Act** ("USERRA") or their state-law counterparts. In addition, employers may have specific DEI-related training obligations, such as state or local requirements for periodic sexual harassment prevention training.

Certain organizations, such as programs and activities receiving federal financial assistance or federal contractors and subcontractors, are also required to comply with formal federal **equal employment opportunity ("EEO") or affirmative action requirements**. Some covered organizations must establish an "approved" **affirmative action plan**, while others may elect to participate by establishing a "voluntary" or "unapproved" plan.

Still others may be obligated to adopt certain DEI-related principles or activities pursuant to private or public contractual agreements, including collective bargaining agreements, or in accordance with applicable professional responsibility or credentialing standards. A properly developed and implemented DEI initiative, fashioned in accordance with applicable anti-discrimination, anti-harassment, EEO, and/or affirmative action obligations, is a critically important risk management tool for employers.

### Are you monitoring for changes to your compliance obligations?

In addition to the above-referenced existing obligations, 2020 brought a new compliance challenge for employers in the form of President Donald Trump's **Executive Order on Combating Race and Sex Stereotyping** (the "Trump EO"), which was issued on September 22, 2020. The Trump EO applies generally to federal departments and

agencies, the military, federal contractors and subcontractors with contracts in excess of \$10,000/year, and certain federal grantees. The Trump EO generally prohibits training on “divisive concepts,” a term defined to include “race or sex stereotyping” and “race or sex scapegoating,” as well as a set of enumerated topics. The Trump EO sets forth various monitoring and enforcement mechanisms, including a **whistleblower hotline** to report violations. Of particular note, however, is that the Trump EO imposes somewhat different substantive obligations on different types of organizations, such as federal contractors versus certain federal grantees. Employers scrambled to determine their **compliance obligations** under the Trump EO with respect to their workplace training programs. Even private employers, which are not directly targeted by the Trump EO, are on notice that the U.S. Attorney General is instructed to “... continue to assess the extent to which workplace training that teaches the divisive concepts set forth in section 2(a) of this order may contribute to a hostile work environment and give rise to potential liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq.” (Trump EO, 58.)

The Trump EO is a particularly apt example of employment-related compliance obligations changing within a relatively short period of time. Although the Trump EO has remained in effect since September 2020 and has been promoted in **remarks** by current Secretary of Labor Eugene Scalia, it already faces **legal challenges**, is the subject of **proposed legislation** in opposition, and is likely to be rescinded by President-elect Biden. Nonetheless, the contents of the Trump EO will continue to be important to employers, as it establishes a specific framework to challenge certain DEI-related training topics as themselves being discriminatory.

### **Are you poised to manage risk effectively with respect to both required and voluntary DEI-related activities and initiatives?**

With national conversations surrounding racial justice and equity as a driving force, many organizations<sup>1</sup> decided in 2020 to take bolder action than they had previously in moving toward a more diverse, equitable, and inclusive workplace. With bold action comes increased risk, particularly in a polarized society that is also under intense economic stress. An effective risk management strategy does not entail elimination of all conceivable risk; rather, it thoughtfully considers various risk-based components and charts a course forward that is both prudent and consistent with the organization’s mission and objectives.

For example, times of economic stress typically herald more employment-related claims and litigation, including **charges of discrimination** filed with the U.S. Equal Employment Opportunity Commission pursuant to federal laws such as Title VII, the ADA, the ADEA, and USERRA. While such statistics regarding 2020 charges will not be released until early 2021, it is expected that such statistics will reveal an upswing both in overall discrimination-related claims and as may be pursued by members of historically majority populations (e.g., a white employee filing a charge of race discrimination or a male employee filing a charge of sex discrimination), sometimes referred to as “reverse discrimination” claims. As the Trump EO makes clear, workplace DEI-related training programs may become important evidence in such claims. Employers cannot eliminate risk in this area but must carefully evaluate their activities to ensure that legitimate DEI objectives combine with effective risk management strategies to minimize overall risk while fostering meaningful progress in this area.

### **Where will your organization go next with its DEI initiative?**

As your organization prepares for 2021, don’t let hard-earned progress in diversity, equity, and inclusion fall by the wayside. Krieg DeVault LLP’s **Labor and Employment Team** stands ready to assist your organization in navigating the complexities of developing and managing an effective and compliant DEI initiative. For more information, including a complimentary consultation to discuss your organization’s unique situation, contact **Shelley M. Jackson**.

*Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have.*

[1] See, e.g., Wells Fargo CEO: ‘A Watershed Moment’ Charlie Scharf Announces Specific Commitments to Advance Diversity Efforts Across All Levels of the Company, Wells Fargo, available at <https://stories.wf.com/wells-fargo-ceo-a-watershed-moment>; see also, Addressing Racial Injustice: Email from Microsoft CEO Satya Nadella to Microsoft Employees, Microsoft, available at <https://blogs.microsoft.com/blog/2020/06/23/addressing-racial-injustice/>.