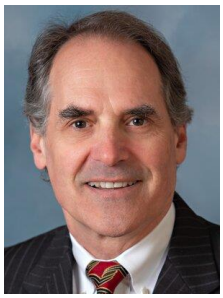
A Path Forward For Employers, Regardless Of DEI Stance

By **Daniel S. Levy** (March 20, 2025)



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The Trump administration has announced an end to the federal government's long-standing relationship with diversity, equity and inclusion programs, including for federal contractors, subcontractors and grantees.

In Executive Order No. 14173, the administration also ordered all government agencies to "combat illegal private-sector DEI preferences, mandates, policies, programs, and activities."

Whether a company is grieving this loss, happy to no longer be fulfilling a decreed affirmative action plan, or simply trying to create the most productive workforce for itself while steering clear of the rocks, this change is significant and rearranges the set of hazards employers face in employment, promotion and pay discrimination.

However, there is a path that avoids hiring and pay discrimination, as well as the now-illegal DEI and accessibility programs. At the same time, this path sets up companies for increased productivity, whether DEI is out of the picture forever or there is a reconciliation four years from now.

This path is based on the definition of discrimination in the workplace described by economists more than six decades ago, and the statistical methods used in courts to measure discrimination in employment and pay.

Commitment and Regret

The U.S.' love-hate relationship with DEI and DEIA[1] programs is exemplified by more than a dozen executive orders and presidential memorandums that have been issued over the years supporting DEI, which have now been revoked by President Donald Trump through Executive Orders No. 14148, 14151 and 14173.

Executive Order No. 14148 eliminates 78 previous executive orders, including at least 10 related to promoting equity and protecting against discrimination for various demographic groups, e.g., Executive Orders No. 13985 and 13988, which President Joe Biden issued in 2021 to protect underserved and LGBTQ populations.

Executive Order No. 14151 has a goal to eliminate equity action plans in federal agencies and to "terminate, to the maximum extent allowed by law, all DEI, DEIA, and 'environmental justice' offices."

Executive Order No. 14173 has the stated goal of eliminating "illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements."

In addition, the acting chair of the U.S. Equal Employment Opportunity Commission, Andrea Lucas, has committed to "even-handed protections provided to all workers by Title VII's prohibition against national origin discrimination,"[2] which would place additional attention on employment and pay discrimination against nonminority groups.

Some of the now revoked executive orders focused on ensuring that specific racial or ethnic groups received equal protection, access to jobs and compensation in both public services and private markets, e.g., Executive Orders No. 14031, 14045 and 14050, which Biden issued in 2021 focusing on opportunities for Asian, Hispanic and Latino, and Black Americans.

Other revoked orders called for affirmative action, or for the enforcement of affirmative action plans, by government agencies, contractors and grantees to attain or strive for certain proportions of protected groups in their labor force and at various levels of employment, e.g., Executive Order No. 11246, signed by President Lyndon B. Johnson in 1965.

The initial separation from these past policies has been swift, but as is often the case, this breakup is a messy one.

On Feb. 21, the U.S. District Court for the District of Maryland issued a preliminary injunction against portions of Trump's Executive Orders No. 14151 and 14173 in National Association of Diversity Officers in Higher Education v. Trump.

In addition, some governors and state attorneys general are challenging the breadth of the executive orders through official written guidance, at least as they affect admissions policies at educational institutions.[3]

Trump's executive orders not only withdraw support for DEI, they also prohibit private companies from engaging in affirmative actions that would provide hiring targets or beneficial consideration for certain demographic groups.

As an example, Lucas stated that her "priorities will include rooting out unlawful DEI-motivated race and sex discrimination; protecting American workers from anti-American national origin discrimination."[4]

This active enforcement means that firms that the Office of Federal Contract Compliance Programs previously required to implement affirmative action programs may not only need to slam the brakes on those programs, but they may also need to jam them in reverse to undo what may now be considered illegal preferential hiring of protected groups.

Similarly, companies that have proclaimed their DEI and DEIA initiatives and commitments, whether by aspirational and motivational statements or by actual observable and measurable actions, may become targets of the EEOC or other agencies.

This is exemplified in Executive Order No. 14173, which requires the heads of all federal agencies to prepare a report containing a list of "[t]he most egregious and discriminatory DEI practitioners in each sector of concern."[5]

Other companies that have been evaluating pay inequity for protected groups may now have heightened concerns about claims of reverse discrimination, i.e., discrimination against traditionally advantaged groups.

Additionally, the U.S. Supreme Court's pending decision in Ames v. Ohio Department of Youth Services could lower the standard of proof in reverse discrimination cases to match what is required in direct discrimination cases, i.e., discrimination against typically disadvantaged groups.[6]

Such claims are not new, but Lucas' statements and the pending decision in Ames create the potential for a flurry of reverse and direct discrimination cases, leaving companies damned if they do comparatively too much for a demographic group and damned if they do too little, at least if the difference is statistically significant.[7] As such, statistical tests of discrimination must check for discrimination both against and for minority groups.

The Comfy Space Between the Rock and the Hard Place

Employers can obtain guidance about how to avoid pay and employment discrimination, while not running afoul of DEI programs that give preference to a given demographic group, by reviewing how labor economists have defined discrimination for decades and how the courts measure departures from nondiscrimination in pay and employment discrimination cases.

In "The Economics of Discrimination,"[8] Gary Becker, who won the Nobel Memorial Prize in Economic Sciences, laid out the foundational concept of discrimination in the labor market. In a later discussion of Becker's work, Orley Ashenfelter and Ronald Oaxaca described the concept as follows: If two demographic groups "are perfect substitutes in production, in the absence of discrimination [the two groups] would have the same wage rates."[9]

A central point of Becker's 1957 Ph.D. dissertation is that controlling for other explanatory factors that influence individuals' wages in the same or similar jobs, differences in average wages across demographic groups reflect discrimination.[10]

The legacy of this work has generated the type of econometric testing that is used in courts today to analyze discrimination while controlling for other relevant factors, and it provides the guidance companies need: Base employment and compensation decisions on the productive characteristics of each worker.

Of course, the devil is in the details, and in this case there may be two devils in those details.

First, what are the relevant explanatory factors, including which jobs are comparable and what factors drive worker productivity in those jobs?

In Eisenhauer v. Culinary Institute of America in 2023, the U.S. Court of Appeals for the Second Circuit even said that a factor that has nothing to do with the worker's productivity can be used as an explanatory factor, as long as it is not a proxy for the demographic characteristic at the core of the potential discrimination.[11]

The second detail that appears to be bedeviling some is how large of a difference is statistically significant.[12] However, putting those important implementation issues aside, there should be no statistically significant difference in wages, on average, across demographic groups when controlling for the job and the individual characteristics of employees that are relevant for the job.

In 1957, this was a radical idea. Today, this is consistent with Trump's definition of "merit-based opportunity,"[13] and it is either the initial motivation for, or consistent with, how discrimination is tested for and defined in U.S. courts.

Implementing compensation and hiring programs based on these well-tested economic standards also has a valuable corporate benefit, even if it is collateral to the moral or legal

motivations; controlling for explanatory factors, pay that is discriminatory is economically inefficient.

By definition, wage discrimination pays different wages to two groups of people that are producing similar output in similar jobs. That is generally not a recipe for efficient production or profit maximization. And that is putting aside any moral, legal or demotivational effects of discrimination.

For publicly traded companies, discriminatory wages demonstrate that the management of the firm is not protecting shareholders' economic interests, in addition to exposing the firm to elevated litigation risks.

Therefore, the end of DEI programs and the EEOC's stance on even-handed enforcement of discrimination laws do not eliminate the economic incentive or legal requirement to pay employees in traditionally protected groups equally to those in traditionally advantaged groups, controlling for explanatory factors and similarity of the job. It does eliminate employers' ability to provide them any advantage.

For those distressed about the country's separation from DEI, as well as those striving for an efficient workforce, it is important to note that there continues to be a non-DEI and nondiscriminatory economic incentive to seek the best workers from across the landscape of potential employees.

There may be valid economic, nondiscriminatory corporate reasons to seek employees who have the tenacity to overcome adversity, who have achieved despite challenging backgrounds, who speak multiple languages or who exhibit some other merit, as called out in the title of Executive Order No. 14173, "Ending Illegal Discrimination and Restoring Merit-Based Opportunity."[14]

People of high merit exist in a diversity of neighborhoods and schools. Allocating search and compensation equally, controlling for explanatory factors, and including and compensating valuable employees with the motivation of improving corporate performance puts hiring and compensation practices in that comfortable spot.

It ensures that companies will be far from both the now-illegal DEI programs favoring any race, color, religion, sex or national origin, and discriminatory practices against any of those groups.

Viewing the economic incentives to avoid discrimination in their full form may help companies see the breadth of actions that they can and should take to maximize profitability, and may help weather the country's separation from DEI.

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[1] In this article I use DEI, but recognize that Executive Order 14173 references both DEI

and DEIA, adding accessibility.

[2] EEOC Acting Chair Vows to Protect American Workers from Anti-American Bias, EEOC Press Release, February 19, 2025.

[3] See Governor's Office State of Massachusetts, Governor Maura Healey and Attorney General Campbell Issue Joint Guidance Affirming Commitment to Education in Massachusetts, Press Release, February 27, 2025.

[4] President Appoints Andrea R. Lucas EEOC Acting Chair, U.S. Equal Employment Opportunity Commission, Press Release, January 21, 2025.

[5] Executive Order 14173, January 21, 2025, §4(b)(ii).

[6] Marlean A. Ames v. Ohio Department of Youth Services, United States Supreme Court, No. 23-1039.

[7] For a discussion of court standards of statistically significant differences see Daniel S. Levy "High Court's Old, Bad Stats Analysis Can Miss Discrimination," Law360, November 16, 2023.

[8] Gary S. Becker, The Economics of Discrimination, PhD Dissertation, The University of Chicago, 1957. Also published as Gary S. Becker, The Economics of Discrimination, 2nd edition, University of Chicago Press, 1972.

[9] See Orley Ashenfelter and Ronald Oaxaca, "The economics of Discrimination: Economists Enter the Courtroom," The American Economic Review, Vol. 77, No. 2 May, 1987, pp. 321-325, discussing the 1957 PhD Dissertation of Nobel Prize Winner, Gary S. Becker.

[10] Gary S. Becker, PhD Dissertation, The University of Chicago, 1957.

[11] See Eisenhauer V. Culinary Institute of America, (No. 21-2919-cv), United States Court of Appeals for The Second Circuit, P. 33. This case dealt with sex discrimination. Also see Daniel S. Levy, Anything Goes, 'Except for Sex! Says the Second Circuit on Factors that Can Explain Pay differences by Sex." https://www.aacg.com/news/.

[12] D.S. Levy Op. Cit. xi.

[13] Ending illegal Discrimination and Restoring Merit-Based Opportunity, Executive Order 14173, January 21, 2025.

[14] Ending Illegal Discrimination and Restoring Merit-Based Opportunity, Executive Order 14173, January 21, 2025.