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“Reverse Discrimination” in the Workplace: Legal Risks, Standards, and the Future of DEI

June 30, 2025

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Agenda

- Purpose of today’s webinar:
- To define “reverse discrimination”.
- To provide a historical view of the “background circumstances” test and the Circuit split prior to the *Ames* decision.
- To provide background and an analysis of the *Ames* decision and what it may mean for employees moving forward.
- To discuss EEOC enforcement priorities and the current Administration.
- To analyze textual and atextual approaches to Supreme Court decisions and possible future challenges to the so-called *McDonnell Douglas* standard.
- To briefly discuss recent Executive Orders including the rescission of affirmative action requirements.
- To explore the changing legal landscape and the future of DEI programs and preferences.

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What this presentation will not address:

- This presentation is meant to examine and discuss the current status of the law, the recent *Ames* decision, and future of DEI programs and initiatives.
- The speakers’ intent is to provide information only.
- No opinions, political or otherwise, will be provided during this presentation.

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Topics

- The Supreme Court’s landmark *Ames* decision and what it means for employers.
- Unprecedented shifts in federal enforcement priorities under the current Administration.
- Heightened scrutiny and legal uncertainty for DEI programs.

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Legal Landscape Pre-*Ames*

Date

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WHAT IS “REVERSE DISCRIMINATION”?

Merriam-Webster defines as:

Discrimination against whites or males (as in employment or education).

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WHAT IS “REVERSE DISCRIMINATION”?

Black’s Law Dictionary (12 ed. 2024) defines as:

“Preferential treatment of minorities, esp. through affirmative-action programs, in a way that adversely affects members of a majority group; specific., the practice of giving unfair treatment to a group of people who have traditionally been privileged in an attempt to be fair to the group of people unfairly treated in the past.”

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CONTROVERSIAL TOPIC

Many argue it is not a true form of discrimination because it does not involve the systemic power imbalances associated with traditional discrimination.

Others argue the term is nebulous as to the precise meanings of “majority” and “minority.”

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WHERE DOES “REVERSE DISCRIMINATION” ARISE?

Typically arises in employment or education settings.

Decisions in employment (such as promotions or hiring) and education (admissions policies) favoring a minority group, even when a majority group member is more qualified.

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EXAMPLES OF REVERSE DISCRIMINATION

A company promoting a female, a minority, or LGBTQ+ individual over an [allegedly] more qualified white, heterosexual, or majority-group individual.

This also arises in the education setting in admissions and scholarships.

Affirmative action, which is based in trying to address historical inequities, is often criticized as a form of reverse discrimination, particularly when quotas or preferential treatment are involved.

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TITLE VII – THE BASICS

Prohibits discrimination in employment “because of such individual’s race, color, religion, sex, or national origin.”

Bars discrimination in hiring, firing, compensation, and other terms or conditions of employment.

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TITLE VII OF THE CIVIL RIGHTS ACT OF 1964—UNLAWFUL EMPLOYMENT PRACTICES

It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

SEC 20002-2 [Section 703]

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TITLE VII OF THE CIVIL RIGHTS ACE OF 1964— DISPARATE IMPACT

Title VII contains a provision addressing disparate impact cases, which provides in part—

K(1) (A) An unlawful employment practice based on disparate impact is established under the subchapter only if-

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity…

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THE *MCDONNELL DOUGLAS* TEST

Established in *McDonnel Douglas Corp. v. Green (1973).*

A judge-made legal framework used to analyze discrimination claims when there is no direct evidence of bias.

Involves three steps: (1) *prima facie* case; (2) employer's reason; and (3) pretext.

Designed to "bring litigants and the court expeditiously and fairly to the ultimate question," *i.e.*, whether intentional discrimination occurred.

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ORIGINS OF THE "BACKGROUND CIRCUMSTANCES" TEST IN "REVERSE DISCRIMINATION" CASES

The *McDonnell Douglas* test sets the general framework for evaluating discrimination claims under Title VII.

Some courts created an extra hurdle for "reverse discrimination" cases brought by majority-group plaintiffs.

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THE "BACKGROUND CIRCUMSTANCES" TEST

Originated in *Parker v. Baltimore & Ohio Railroad, Co.* (D.C. Cir. 1981).

Developed in the context of a "reverse discrimination" claim by a white male employee alleging that affirmative action policies unfairly disadvantaged him.

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THE "BACKGROUND CIRCUMSTANCES" TEXT

Majority plaintiffs, in addition to establishing a *prima facie* case of discrimination under the *McDonnell Douglas* framework, must show the existence of "background circumstances to support the suspicion that the defendant is that **unusual** employer who discriminates against the majority."

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HOW COULD A CLAIMANT ESTABLISH "BACKGROUND CIRCUMSTANCES"?

Common ways courts accepted:

- Demonstrating that the decision-maker is a member of the minority group and may have influenced the decision.

- Providing statistical evidence of a pattern of discrimination against majority-group employees.

- Pointing to past incidents or policies indicating bias against the majority group.

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WHICH CIRCUITS FOLLOWED “BACKGROUND CIRCUMSTANCES”?

Sixth Circuit

Seventh Circuit

Eighth Circuit

Tenth Circuit

DC Circuit

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Ames v. Ohio Dept. of Youth Services

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Ames v. Ohio Dept. of Youth Services

Argued: February 26, 2025

Decision: June 5, 2025

Unanimous Decision: Delivered by

Associate Justice Ketanji Brown Jackson

Concurrence: Associate Justice Clarence Thomas

Joined by: Associate Justice Neil Gorsuch

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Ames v. Ohio Department of Youth Services

IMPLICATIONS OF *AMES*

"Majority" groups no longer subject to "background circumstances" test in any Circuit.

Essentially levels the "playing field" for all Title VII claims.

By lowering the burden of proof, we can expect to see more "reverse discrimination" claims.

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AMES V. OHIO DEPT. OF YOUTH SERVICES BACKGROUND FACTS

Plaintiff: Marlean Ames, a straight, heterosexual woman.

Allegation: She was discriminated against in favor of LGBTQ+ colleagues (“reverse discrimination”).

Ames, a long-time employee, applied for a management position in 2019; not selected—position given to a lesbian woman.

Shortly after, Ames was demoted for her program administrator role; a gay man was hired to replace her.

Ames sued under Title VII, arguing sex and sexual orientation discrimination (protected post-Bostock).

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Lower Court Rulings in *Ames*

The District Court:

District court dismissed Ames’ claim at summary judgment.

The Court held that as a majority-group member, Ames had to show “background circumstances” indicating employer discriminates against the majority. Found Ames did not meet this heightened standard.

The Sixth Circuit

Affirmed the dismissal.

Reiterated that majority-group plaintiffs must provide extra evidence beyond the standard Title VII prima facie case.

Concluded Ames failed to show sufficient “background circumstances.”

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Question Before the Court: Whether Title VII Imposes a Heightened Evidentiary Standard on Majority-Group Plaintiffs

Ames argued that Title VII protects all individuals from workplace discrimination, regardless of majority or minority status.

She claimed the Sixth Circuit’s ruling contradicts both the statute’s text and Supreme Court precedent requiring equal treatment for all plaintiffs.

Ames asserted that the “background circumstances” test undermines Title VII’s goals by placing an unfair burden on majority-group plaintiffs.

Ohio conceded that Title VII’s prima facie burden is the same for majority- and minority-group plaintiffs and does not justify a heightened evidentiary standard for majority-group plaintiffs.

Ohio argued that the “background circumstances” rule does not impose a heightened evidentiary standard on majority-group plaintiffs.

According to Ohio, this requirement is simply another way of assessing whether an employment decision was based on a protected characteristic, not an added burden.

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THE COURT’S UNANIMOUS HOLDING AND REASONING

The Court held that the “background circumstances” rule cannot be squared with either the text of Title VII or the Supreme Court’s precedents.

Title VII’s plain text prohibits discrimination against “any individual” because of a protected characteristic and does not authorize different standards.

The background circumstances requirement also ignores the Court’s instruction to “avoid inflexible applications” of *McDonnell Douglas*’ first prong.

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JUSTICE THOMAS’ CONCURRING OPINION

Justice Thomas questions whether the *McDonnell Douglas* framework should remain in Title VII cases.

Like the “background circumstances” test, Thomas criticizes *McDonnell-Douglas* as a judge-made, atextual doctrine not found in Title VII’s language.

Is the *McDonnell Douglas* test the next to go?

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TEXTUAL V. ATEXTUAL

Textualism—interpreting law focused on the actual words used in a statute.

Atextual approach—interpretations or argument not based on the plain text of a statute or legal authority. Justice Thomas used term “judge-made” rule in the *Ames* concurring opinion.

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WHAT *AMES* MEANS FOR EMPLOYERS

Uniform Standard: All Title VII discrimination cases now proceed under a single, consistent legal framework nationwide.

Increased Litigation Risk: Expect more “reverse discrimination” claims to be filed and to survive dismissal attempts.

Heightened Scrutiny: DEI, affirmative action, and diversity-related employment practices will face more legal and regulatory review.

Practical Impact: More claims may reach trial, requiring robust documentation and neutral, well-justified employment decisions.

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EEOC Enforcement Priorities and the Current Administration

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STATEMENT FROM EEOC ACTING CHAIR ANDREA LUCAS

Andrea Lucas, EEOC Acting Chair released a statement "applauding" the U.S. Supreme Court.

Lucas noted that the Supreme Court "resoundingly dispelled the common misnomer of 'reverse' discrimination, making clear that discrimination on the basis of a protected characteristic is unlawful 'discrimination,' no matter the identity of who engaged in the discrimination or which workers were harmed or benefitted."

She further noted that "the EEOC has taken this colorblind, group-neutral position for *at least 50 years*."

https://www.eeoc.gov/wysk/statement-eeoc-acting-chair-andrea-lucas-celebrating-supreme-courts-unanimous-ruling-ames

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STATEMENT FROM EEOC ACTING CHAIR ANDREA LUCAS

Lucas also characterized the "background circumstances" test as "nonsensical" because it "assume[d] that only an 'unusual employer' would discriminate against those it perceives to be in the majority."

"But, a number of this Nation's largest and most prestigious employers have overtly discriminated against those they deem members of so-called majority groups. American employers have long been 'obsessed' with 'diversity, equity, and inclusion' initiatives and affirmative action plans. Initiatives of this kind have often led to overt discrimination against those perceived to be in the majority."

"Under my leadership, the EEOC is committed to dismantling identity politics that have plagued our employment civil rights laws, by dispelling the notion that only the 'right sort of' plaintiff is protected by Title VII. In the wake of *Ames* there can be no more confusion."

https://www.eeoc.gov/wysk/statement-eeoc-acting-chair-andrea-lucas-celebrating-supreme-courts-unanimous-ruling-ames

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STATEMENT FROM EEOC ACTING CHAIR ANDREA LUCAS

"Following this week's decision, the flawed "background circumstances" test no longer shields employers—including "our Nation's largest and most prestigious"—in any jurisdiction nationwide from any race or sex discrimination that may arise from those employers' DEI initiatives."

In closing, Lucas stated:

"Thoughtful employers will take note and review their policies to ensure compliance with Title VII. Likewise, employees who have experienced DEI-discrimination at work should be encouraged by the Court's ruling. The EEOC stands ready to help employers comply with their obligations not to discriminate. But, where necessary, the agency also is prepared to root out discrimination where it remains entrenched."

https://www.eeoc.gov/wysk/statement-eeoc-acting-chair-andrea-lucas-celebrating-supreme-courts-unanimous-ruling-ames

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CONNECTION TO ADMINISTRATION'S AGENDA

While *Ames* is not a Trump Administration case, the administration supported the outcome as part of its broader push to "colorblind" enforcement of civil rights laws.

Ames aligns with the Executive Order rescinding affirmative action requirements and targeting "illegal" DEI practices.

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EEOC CHARGE OF DISCRIMINATION REQUIREMENTS

All of the laws enforced by the EEOC, except for the Equal Pay Act, require that a Charge of Discrimination be filed with the EEOC prior to filing suit against an employer.

- A Charge of Discrimination may be filed through the EEOC Public Portal.

Many states and local jurisdictions have their own anti-discrimination laws, and agencies response for enforcing those laws (Fair Employment Practices Agencies of FEPAs).

- If a Charge is filed with a FEPA, it will be automatically “dual-filed” with the EEOC if federal laws apply.

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The Current EEOC Landscape

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CURRENT LANDSCAPE

Acting Chair Andrea Lucas’s priorities:

combating religious and anti-American discrimination, scrutinizing DEI, scaling back LGBTQ+ protections.

Pending Republican EEOC nominee: Brittany Panuccio (Florida Assistant US Attorney) nominated to fill one of 3 vacant EEOC commission seats.

Executive Orders issued declaring the recognition of just two “immutable sexes” and directing federal agencies to stop using the disparate impact theory “in all contexts to the maximum degree possible.”

Agency actions: dropping transgender discrimination cases, removing AI guidance, pausing or reversing Biden-era initiatives.

Increased focus on “reverse discrimination”.

Possible uptick in EEOC litigation and amicus briefs once quorum is restored (at present, EEOC does not have a quorum and has limited ability to take formal action).

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EEOC Lawsuits First Half of 2025

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EEOC LAWSUITS “PLUMMETED” IN FIRST HALF OF 2025

According to Law 360, the EEOC filed 20 fewer lawsuits in the first 5 months of the Trump Administration than it did during the same time period in 2024.

Potential side effect to EEOC pulling back on its own litigation is that workers are receiving their right-to-sue letters much more quickly—sometimes within a week.

EEOC lawsuits in first 5 months of Trump Administration:

- 6 Sexual Harassment Lawsuits
- 3 Religious Discrimination Lawsuits
- 3 Disability Discrimination Lawsuits
- 2 Pregnancy Discrimination Lawsuits
- 1 Age Discrimination Lawsuit
- 1 National Origin Discrimination Lawsuit

Ottaway, Amanda, 2025-06-24, New EEOC Suits Plummeted in the 1st Half of 2025, Law360.

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Executive Orders of the Trump Administration

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January 20, 2025

EO 14151 –

Ending Radical and Wasteful Government DEI Programs and Preferencing

- Terminates virtually all federal diversity, equity, and inclusion (DEI) programs and offices across government.
- It directs the U.S. Office of Personnel Management (OPM) and U.S. Office of Management and Budget (OMB) to eliminate “illegal DRI” mandates, rescinds prior orders (ie President Biden’s EO 13985 on “Advancing Racial Equity”), and
- Bans practices like listing pronouns in communications.
- This EO essentially ends agency equity action plans and affirmative action initiative within the federal workforce, halting race- or gender-based preferences in government programs.

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January 20, 2025

EO 14170 –

Reforming the Federal Hiring Process and Restoring Merit to Government Service

- Overhauls federal hiring to a strictly merit-based system, barring any consideration of demographic “preferences.”
- It prohibits using factors like an applicant’s commitment to DEI or gender identity beliefs in hiring decisions.
- In practice, this EO eliminates diversity recruitment efforts or any race/sex-conscious hiring, mandating that federal jobs be filled without regard to race, sex, or other identity attributes. Expressed as “restoring merit.”

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January 21, 2025

EO 14173 –

Ending Illegal Discrimination and Restoring Merit-Based Opportunity

- Targets DEI initiatives in both government and the private sector.
- It directs the Attorney General to identify and pursue “egregious and discriminatory” DEI practices in companies.
- The order revokes Executive Order 11246 (1965), which required affirmative action by federal contractors for using race, sex, or other identity factors in employment or contracting decisions.
- It thus establishes a policy of colorblind, sex-neutral “merit-based” treatment, characterizing many DEI or affirmative action programs as unlawful discrimination.

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April 23, 2025

EO 14278 –

Restoring Equality of Opportunity and Meritocracy

- Eliminates the use of “disparate impact” liability in federal civil-rights enforcement, meaning agencies will no longer treat neutral policies that yield statistical disparities as proof of discrimination absent intentional bias.
- It directs all agencies to deprioritize or rescind any rules and investigations based on disparate-impact theories—for example, it revokes prior regulations and instructs the Attorney General to repeal Title VI rules that prohibited practices with merely discriminatory effects.

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April 23, 2025

EO 14278 –

Restoring Equality of Opportunity and Meritocracy

- Eliminates the use of “disparate impact” liability in federal civil-rights enforcement, meaning agencies will no longer treat neutral policies that yield statistical disparities as proof of discrimination absent intentional bias.
- It directs all agencies to deprioritize or rescind any rules and investigations based on disparate-impact theories—for example, it revokes prior regulations and instructs the Attorney General to repeal Title VI rules that prohibited practices with merely discriminatory effects.

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The Aftermath

- There have been lawsuits and challenges to many of the recent Executive Orders.
- Congress may invalidate an Executive Order through legislation, but the President still retains veto power. It take a two-thirds “supermajority” vote to override a veto.

Courts have the power of judicial review. Courts may strike down Executive Orders not only on the grounds that the President lacked authority, but also in cases where the Order is found to unconstitutional.

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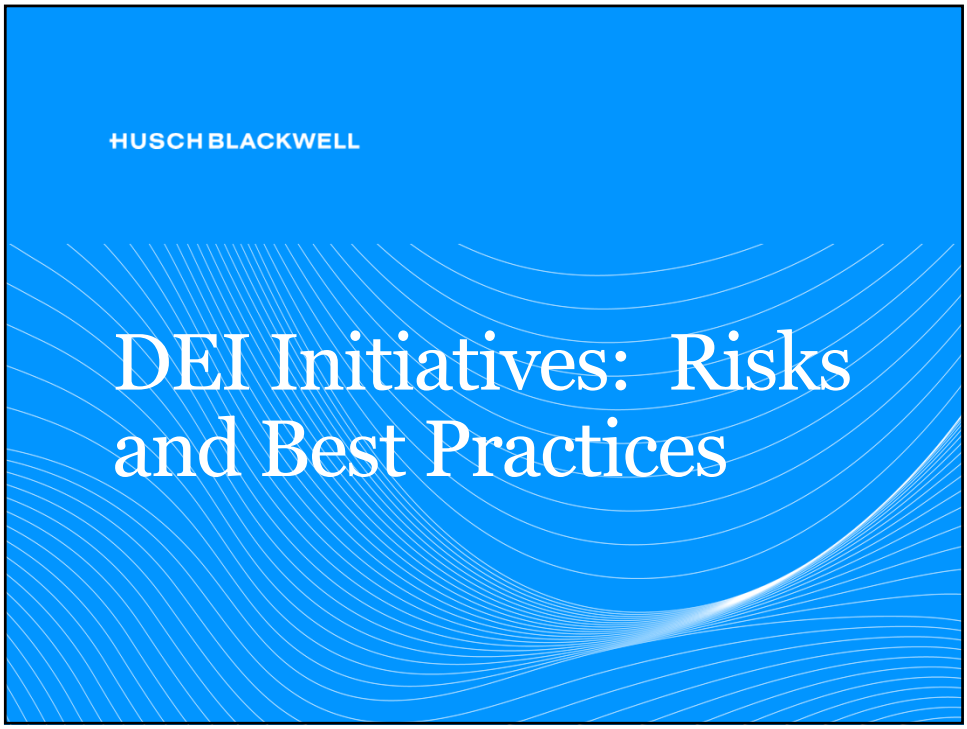

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EEOC GUIDANCE ON DEI

DEI is not defined in Title VII.
Unlawful if it motivates employment decisions based on protected characteristics.

Title VII applies equally to all.

Disparate treatment, limiting/classifying, harassment, and retaliation risks.

DEI policies cannot use quotas, workforce balancing, or preferences based on race/national origin/sex.

Segregating employee resource groups or training by protected trait is risky.

Client/customer preference is not a defense.

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PRACTICAL COMPLIANCE TIPS

Focus DEI efforts on inclusion, equal opportunity, and removing barriers—not on preferences and quotas.

Document legitimate, non-discriminatory reasons for all employment actions.

Review and update DEI, EEO, and affirmative action policies for compliance.

Train managers on the new legal landscape and document best practices.

Conduct privileged audits of DEI and hiring practices.

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IMMEDIATE STEPS TO TAKE

Review all DEI, EEO, and hiring/promotion policies for compliance.

Pause or revise any quota-based or preference-based DEI initiatives.

Audit workplace training programs, ERG membership, scholarships/other work opportunities for compliance.

Be aware of potential for increased Title VII claims from all demography groups.

Ensure documentation and consistency in employment decisions.

Seek legal advice before implementing or revising DEI programs.

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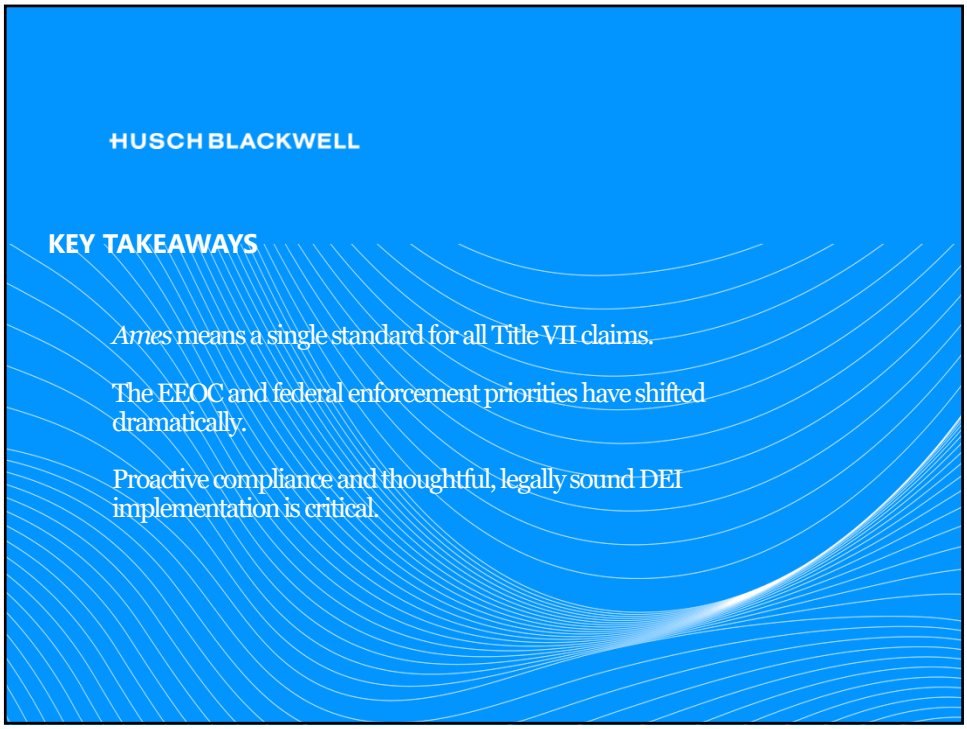

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