

DEI on the Defensive—Predictions for 2025

Client Alerts

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While much uncertainty lies ahead as we enter 2025, the coming year is sure to see further attacks on corporate DEI efforts nationwide. With President Trump returning to the White House, the federal government is set to take aim at DEI programs. Meanwhile, emboldened by these developments at the federal level, activists and private litigants will likely ramp up their anti-DEI efforts in the courtroom, the legislatures, and the public arena. In this article, we preview what corporations with DEI programs and commitments should prepare for in 2025.

An Anti-DEI Federal Government

As Republicans take control of the federal government this month, we can expect to witness a sea change as we transition to a staunchly anti-DEI administration. The federal government has various tools at its disposal to undermine DEI programs. We anticipate the federal government's anti-corporate DEI push to manifest itself in the following ways in 2025:

- ***Anti-DEI Executive Leadership.*** Trump's nominations and staff appointments provide a glimpse into the new administration's priorities. In the White House, Trump has selected Stephen Miller as his Deputy Chief of Staff for Policy.^[1] Since 2021, Miller has served as the President of America First Legal Foundation, which has filed numerous challenges to corporate DEI programs.^[2] Trump also announced that he intends to name Harmeet Dhillon as Assistant Attorney General for the Civil Rights Division, specifically praising her for her experience "suing corporations who use woke policies to discriminate against their workers."^[3] These selections, among others, bring the DEI backlash levied against corporations over the last few years directly into the Executive Branch.
- ***Restrictions on Federal Funding Recipients.*** In 2020, President Trump signed Executive Order 13950, which prohibited federal contractors and federal funding recipients from promoting what the order termed "divisive concepts."^[4] In 2025, we may see this order revived and potentially expanded.^[5] That could, for example, present new roadblocks to covered entities' ability to require their employees to complete DEI or implicit bias training. However, as in 2020, we can expect those entities to challenge the Order's validity in court on First Amendment and other grounds.^[6]

- ***Scaling Back Federal Contractor Affirmative Action Obligations.*** Stephen Miller’s America First Legal has filed anti-DEI complaints before various federal agencies, including the Department of Labor’s Office of Federal Contract Compliance Programs.^[7] Not only will that Office be more receptive to such complaints, but it also has the authority to conduct its own compliance evaluations. We may see the Office utilize compliance evaluations as an opportunity to go after corporate DEI programs for allegedly violating the longstanding nondiscrimination mandate of Executive Order 11246, which applies to federal contractors.^[8] The Trump administration also could go a step further and attempt to eliminate the longstanding affirmative action obligations that remain in effect for federal contractors.
- ***Potential Anti-DEI Amicus Positions.*** Under the direction of Attorney General Pam Bondi and Assistant Attorney General Dhillon, the DOJ will likely take amicus positions actively hostile to DEI—as it did during the first Trump Administration when the DOJ filed a brief supporting Students for Fair Admissions in its litigation challenging race-conscious admissions programs at colleges and universities.^[9] In the current environment, there are many more anti-DEI cases, including those specifically targeting corporate programs, that the DOJ may throw its weight behind.
- ***Congressional Investigations and Legislation.*** In addition to Executive Branch activity, we can expect to see similarly heightened anti-DEI efforts in Congress, now under unified GOP control. This could take the form of congressional investigations^[10] as well as anti-DEI legislation targeting the private sector.^[11]

Emboldened Anti-DEI Activists and Litigants

The anti-DEI stance of the incoming administration will provide activists and organizations with additional momentum, both inside and outside of the courts, where high-impact cases on topics like reverse discrimination are already pending. Examples include:

- ***Social Media Activism.*** Prominent conservative activist Robby Starbuck has used his social media following to mount public pressure campaigns against big-name brands like Jack Daniel’s and Ford, convincing them to drop DEI initiatives under the threat of boycotts.^[12] Trump’s support will create fertile ground for ramping up this sort of public pressure.
- ***Shareholder Consequences.*** The Alliance Defending Freedom has already doubled down on its call for Fortune 1000 companies to heed the “mounting legal and reputational risk of divisive DEI policies” and to reject DEI policies in the name of protecting shareholder interests.^[13] This threat is not an idle one: a federal judge recently allowed a shareholder suit to move forward against Target related to its Pride Month campaign and merchandise, which had caused public backlash like that stirred by Robby Starbuck.^[14]

- **Reverse Discrimination.** The Supreme Court will hear argument in *Ames v. Ohio Department of Youth Services* in February. It is set to decide whether “reverse-discrimination” claimants under Title VII must provide evidence of “background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority.”^[15] Many expect the Court to hold that reverse discrimination claims must be treated on equal terms as claims brought by members of historically disadvantaged groups.^[16] That could make it easier for employees to bring reverse discrimination claims against employers under Title VII.
- **Aggressive Litigation Stances.** Suits brought by anti-DEI groups may also prove harder to shake. For example, in American Alliance for Equal Rights’ suit against Southwest Airlines, the airline sought to dismiss the case as moot following its termination of the at-issue program offering free flights to Hispanic college students. Edward Blum’s group, which has typically not fought moves like this, successfully opposed the motion by arguing that it could continue to litigate the claim for nominal damages.^[17] Blum called the resulting decision “a powerful tool to prevent case-mooting tactics from discriminators nationwide.”^[18] If this approach becomes a new playbook for anti-DEI litigants, corporations could have a harder time managing their litigation risk.

Implications for Corporate Decisionmakers

The coming year will bring additional complexity for the private sector to navigate when it comes to DEI. On the one hand, we can expect to see the federal government and others raise serious threats to DEI programs. On the other, abandoning DEI efforts can not only undermine important institutional values and commitments, but also create its own legal risks including traditional discrimination claims and pro-DEI shareholder litigation. For instance, a recently filed derivative suit alleged that Lululemon’s stock price declined after the company failed to meaningfully implement its DEI policies.^[19] However, there is no doubt that in the wake of the 2024 election, the landscape is changing in fundamental ways. This makes it more important than ever for corporate leaders to carefully assess whether risk-mitigation steps are warranted now.

The coming year will be challenging, but we are here to help. Jenner & Block’s Organizational Values and Strategy Task Force—composed of leading lawyers serving a wide variety of industries—is uniquely qualified to develop creative, strategic, and tailored solutions for clients across industries to accomplish their DEI goals while minimizing legal risk. We are currently working with clients, including institutions of higher education and corporations, on ways to maintain diversity in the evolving legal landscape. If you are interested in learning more about our work in this area, please contact Task Force Co-Chairs Ishan Bhabha (ibhabha@jenner.com), Lauren Hartz (lhartz@jenner.com), Marcus Childress (mchildress@jenner.com), Katie Wynbrandt (kwynbrandt@jenner.com), or Erica Turret (eturret@jenner.com).

Footnotes

[1] Thomas Beaumont & Darlene Superville, *Trump's Picks for Key Positions in His Second Administration*, AP (Nov. 15, 2024, 4:11 PM), <https://apnews.com/article/trump-staff-picks-stefanik-wiles-stephen-miller-tom-homan-243d73610b03a3ee18c4d5f68756af7c>.

[2] Robert Draper, *America First Legal, a Trump-Aligned Group, Is Spoiling for a Fight*, N.Y. Times (Mar. 21, 2024), <https://www.nytimes.com/2024/03/21/us/politics/stephen-miller-america-first-legal.html>.

[3] Rachel Leingang, *Trump Picks Maga Darling Harmeet Dhillon to Lead Civil Rights Cases at DoJ*, The Guardian (Dec. 10, 2024, 2:55 PM), <https://www.theguardian.com/us-news/2024/dec/10/trump-harmeet-dhillon-justice-department-civil-rights>.

[4] See Exec. Order 135290 (Sept. 22, 2020), <https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-combating-race-sex-stereotyping>.

[5] Douglas Belkin, *Christopher Rufo Has Trump's Ear and Wants to End DEI for Good*, Wall Street Journal (Nov. 25, 2024, 5:30 AM), <https://www.wsj.com/us-news/education/christopher-rufo-education-trump-dei-bb9e7178>.

[6] See, e.g., Press Release, *VICTORY! Judge Halts Implementation of Ban on Speech About Systemic Racism, Sexism, and Implicit Bias*, Lambda Legal (Dec. 23, 2020), https://legacy.lambdalegal.org/blog/20201223_victory-judge-halts-ban-speech-about-systemic-racism.

[7] Press Release, *American Airlines Agrees to End Illegal Discrimination in Hiring, Recruiting, and Employment Practices Following AFL's Civil Rights Complaint*, America First Legal (Dec. 17, 2024), <https://aflegal.org/victory-american-airlines-agrees-to-end-illegal-discrimination-in-hiring-recruiting-and-employment-practices-following-afls-civil-rights-complaint>. Several complaints have also been brought before the Equal Employment Opportunity Commission, which has jurisdiction over employment discrimination for all employers covered under Title VII, not just those with federal contracts or federal funds. Although the EEOC will retain a Democratic majority until 2026, Trump will have the opportunity to name a new Chair. Commissioner Andrea Lucas, who has publicly criticized DEI initiatives, is a likely contender. See Andrea R. Lucas, *With Supreme Court Affirmative Action Ruling, It's Time for Companies to Take a Hard Look at Their Corporate Diversity Programs*, Reuters (June 29, 2023, 4:35 PM), <https://www.reuters.com/legal/legalindustry/with-supreme-court-affirmative-action-ruling-its-time-companies-take-hard-look-2023-06-29>.

[8] Off. of Fed. Cont. Compliance, *History of Executive Order 11246*, U.S. Dep't of Lab., <https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history>.

[9] Scott Jaschik, *Trump Administration Endorses Appeal of Harvard Ruling*, Inside Higher Ed (Mar. 1, 2020), <https://www.insidehighered.com/admissions/article/2020/03/02/trump-administration-files-brief-backing-appeal-harvard-ruling>.

[10] See, e.g., Republican Staff of H.R. Comm. on Educ. & Workforce, 118th Cong., *Antisemitism on College Campuses Exposed* (2024), https://edworkforce.house.gov/uploadedfiles/10.30.24_committee_on_education_and_the_workforce_republican_staff_report_-_antisemitism_on_college_campuses_exposed.pdf.

[11] Shauneen Miranda, *U.S. House Passes "Anti-Woke" Bill Aimed at Diversity, Equity and Inclusion in Higher Ed*, N.J. Monitor (Sept. 20, 2024, 6:29 AM), <https://newjerseymonitor.com/2024/09/20/u-s-house-passes-anti-woke-bill-aimed-at-diversity-equity->

and-inclusion-in-higher-ed.

[12] David Segal, *The Anti-D.E.I. Agitator That Big Companies Fear Most*, N.Y. Times (Nov. 1, 2024), <https://www.nytimes.com/2024/11/01/business/dei-robbystarbucks.html>.

[13] Press Release, *ADF Calls on Corporations to Ditch DEI Policies in Light of 2024 Election*, All. Defending Freedom (Nov. 15, 2024), <https://adfmedia.org/press-release/adf-calls-corporations-ditch-dei-policies-light-2024-election>.

[14] Mike Scarcella, *Target Must Face Shareholder Lawsuit Over Pride Backlash, US Judge Rules*, Reuters (Dec. 5, 2024, 11:36 AM), <https://www.reuters.com/legal/target-must-face-shareholder-lawsuit-over-pride-backlash-us-judge-rules-2024-12-04>.

[15] Petition for Certiorari, *Ames v. Ohio Dep't of Youth Servs.*, No. 23-1039, at i (filed Mar. 18, 2024).

[16] Michelle Travis, *The Supreme Court Case That Will Fuel the Corporate DEI Debate in 2025*, Forbes (Dec. 22, 2024, 7:45 AM), <https://www.forbes.com/sites/michelletravis/2024/12/22/the-supreme-court-case-that-will-fuel-the-corporate-dei-debate-in-2025>.

[17] *Am. All. for Equal Rts. v. Southwest Airlines Co.*, No. 24-cv-1209, 2024 WL 5012055 (N.D. Tex. Dec. 6, 2024).

[18] Daniel Wiessner, *US Judge Says Southwest Must Face Bias Claims Over Free Flights for Hispanic Students*, Reuters (Dec. 6, 2024, 3:27 PM), <https://www.reuters.com/legal/us-judge-says-southwest-must-face-bias-claims-over-free-flights-hispanic-2024-12-06>.

[19] *See, e.g.*, Emilie Shumway, *DEI Failures Contributed to a Drop in Stock Prices, Lululemon Shareholder Alleges*, HR Dive (Dec. 2, 2024), <https://www.hrdiver.com/news/dei-shareholder-lawsuit-lululemon/734339>.

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