

# DIVERSITY AND INCLUSION: YOUR LAW OFFICE, OTHER WORKPLACES, AND MINISTRIES

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## WHAT IS DEI?

- ✔ Diversity, equity, and inclusion initiatives are intended to address inequities against historically marginalized groups.
  - ▶ *Diversity* refers to the representation of people from a variety of backgrounds—*i.e.* race, gender, sexual orientation or gender identity, disability, religion, etc.
  - ▶ *Equity* focuses on fairness and justice: issues such as compensation, promotion and access to success.
  - ▶ *Inclusion* refers to a feeling of belonging and how a person feels valued/seen/heard.
- ✔ In the workplace, DEI initiatives tend to focus on the following three areas: (1) training, (2) organizational policies and practices, and (3) organizational culture.
- ✔ DEI training serves to encourage awareness, whereas policies, practices, and culture address discriminatory practices, wage inequity, etc.

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# DEI FEDERAL LAWS

## A. Then to Now

In the 1960s, the anti-discrimination movement fought for legislation, which compelled companies to comply with anti-discrimination practices.

In addition to laws and policies, social movements and shifts in culture have brought about change.

In 2021, President Biden signed Executive Order 14035, recognizing that the Federal Government should be a place “where all employees are treated with dignity and respect” and establishing that the Administration wishes to “cultivate a workforce that draws from the full diversity of the Nation.”<sup>1</sup> The order offered various directives for employers.

## B. Foundational Anti-Discrimination Laws

1. The Equal Employment Opportunity Commission (EEOC) enforces federal laws that prohibit discrimination against an applicant or employee based on that person’s race, color, religion, sex (including pregnancy, transgender status, and sexual orientation), national origin, age, disability, etc.<sup>2</sup>

- ✔ The laws covered by the EEOC apply to every stage of employment: hiring, firing, promotions, demotions, training, harassment, wages, benefits, etc.

2. The Equal Pay Act of 1963

- ✔ This law protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination, covering all forms of pay.

- ✔ The EPA was amended by the Lilly Ledbetter Fair Pay Act as a response to a Supreme Court decision holding that the statute of limitations for presenting an equal pay lawsuit begins to run on the date the pay was agreed upon, not the date of payment.<sup>3</sup>

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<sup>1</sup> [Executive Order on Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce | The White House](#)

<sup>2</sup> [Overview | U.S. Equal Employment Opportunity Commission \(eoc.gov\)](#)

<sup>3</sup> (*Ledbetter v. Goodyear Tire and Rubber Co.*, 550 U.S. 618 (2007)).

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- ✔ What does a violation of the EPA look like? *EEOC v. Enoch Pratt Free Library*, 509 F. Supp. 3d 467 (D. Md. 2020)
  - ▶ Female branch managers of a public library asserted that their employer violated the EPA when it failed to pay them an equal salary for equal work. Even though there were differences found in the branches such as size, demographics, etc., the manager position for each branch required the same amount of training, experience, qualifications, and duties. Still, the female managers were receiving a salary of \$68,900 less than the male managers. Because the job differences were not significant, the court held that the library’s wage-based discrimination violated the EPA.<sup>4</sup>

### 3. Title VII of the Civil Rights Act of 1964<sup>5</sup>

- ✔ This act prohibits discrimination based on a person’s race, color, religion, national origin, or sex, meaning an employer cannot take an adverse employment action (firing, demoting, etc.) based on any of those listed characteristics.
- ✔ What is an example of a violation of the Title VII of the Civil Rights Act? *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971)
  - ▶ A company violated Title VII by refusing to hire women with pre-school aged children, even though the discrimination also depended on being a parent of young children and the fact that the company favored hiring women over men.<sup>6</sup>
- ✔ *Bostock v. Clayton County*, 590 U.S. \_\_\_ (2020)
  - ▶ After 10 years of employment, a man began participating in a gay softball league. Shortly after, he was criticized and was terminated for “conduct unbecoming of its employees.” This Supreme Court case, which held that the company did violate Title VII, confirmed that “sex” includes “sexual orientation.”<sup>7</sup>

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<sup>4</sup> *EEOC v. Enoch Pratt Free Library*, 509 F. Supp. 3d 467 (D. Md. 2020)

<sup>5</sup> [Title VII of the Civil Rights Act of 1964 | U.S. Equal Employment Opportunity Commission \(eoc.gov\)](#)

<sup>6</sup> *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971)

<sup>7</sup> *Bostock v. Clayton County*, 590 U.S. \_\_\_ (2020) [17-1618 Bostock v. Clayton County \(06/15/2020\) \(justia.com\)](#)

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#### 4. Age Discrimination in Employment Act of 1967 (ADEA)<sup>8</sup>

- ✔ This act prohibits discrimination based on a person's age concerning any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, etc. It also prohibits retaliation against a person for opposing discriminatory practices or for filing a discrimination charge.
- ✔ The ADEA covers private employers with at least 20 employees, state and local governments, employment agencies, labor organizations, and the Federal Government.
- ✔ It applies to employees at least 40 years of age.
- ✔ In order to have a successful claim under the age discrimination act, there must be proof that the action would not have happened "but for" the employer's age bias.

#### 5. Americans with Disabilities Act of 1990<sup>9</sup>

- ✔ This act prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities throughout the entire process from recruiting to employment.
- ✔ The ADA covers employers with at least 15 employees.
- ✔ The EEOC defines a person with a disability as having a physical or mental impairment that substantially limits one or more major life activities, having a record of such an impairment, or being regarded as having such an impairment.

## ARE DEI INITIATIVES LEGAL?

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<sup>8</sup> [The Age Discrimination in Employment Act of 1967 | U.S. Equal Employment Opportunity Commission \(eeoc.gov\)](https://www.eeoc.gov)

<sup>9</sup> [Americans with Disabilities Act of 1990, As Amended | ADA.gov](https://www.ada.gov)

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1. Some have called into question the legality of DEI initiatives on the grounds that they favor certain demographic groups. So far, they have survived challenges. However, not all diversity initiatives would be permissible. For example, it would not be legal for a company to set a quota to hire a certain number or percentage of women or minorities.<sup>10</sup>
2.
  1. There is some guidance on what companies may do. These laws concern topics like:
    - ✔ Collection and processing of employee data is controlled by privacy laws and also must be done carefully not to violate DEI concerns;
    - ✔ Comprehensive DEI practices require extensive, accurate data about the workforce. However, some laws restrict what information may be gathered on job applicants and employees;<sup>11</sup>
    - ✔ Other laws require data collection and reporting but do not specify what else employers may do with the information;<sup>12</sup>
    - ✔ Employer should be careful how they consider factors such as race and gender in employment decisions.
  2. The concept of reverse discrimination must be taken into account as well.
    - ✔ Reverse discrimination may occur as a result of an employer unintentionally violating EEO laws as it seeks to diversify the workplace.<sup>13</sup>
  3. Targets vs. quotas
    - ✔ Anti-discrimination laws allow employers to take affirmative action to advance equal opportunities in the workplace. Employers may have goals or numerical targets, but quotas are impermissible under U.S. federal law.<sup>14</sup>
  4. Question:

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<sup>10</sup> [To Drive Diversity Efforts, Don't Tiptoe Around Your Legal Risk \(hbr.org\)](https://www.hbr.org/2019/07/to-drive-diversity-efforts-dont-tiptoe-around-your-legal-risk)

<sup>11</sup> [California Consumer Privacy Act, California Privacy Rights Act FAQs for Covered Businesses | Jackson Lewis](https://www.jacksonlewis.com/insights/california-consumer-privacy-act-california-privacy-rights-act-faqs-for-covered-businesses)

<sup>12</sup> [EEO-1 Data Collection | U.S. Equal Employment Opportunity Commission \(eoc.gov\)](https://www.eeoc.gov/eo-120681/eo-120681-data-collection)

<sup>13</sup> [3 Ways DE&I Programs Can Run Afoul of Employment Laws \(shrm.org\)](https://www.shrm.org/employee-development/learning-and-development/articles/2019/03/ways-de-i-programs-can-run-afoul-of-employment-laws)

<sup>14</sup> [Federal Laws Prohibiting Job Discrimination Questions And Answers | U.S. Equal Employment Opportunity Commission \(eoc.gov\)](https://www.eeoc.gov/federal-laws-prohibiting-job-discrimination-questions-and-answers)

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- ✔ A state passes legislation requiring employers to have a member on their board of directors from an “underrepresented community” by the end of the year. After pushback from a group of companies, the law is before a judge who will decide whether to uphold or strike it down. What does the judge rule?

5. Answer: The judge strikes down the law.

- ✔ This occurred in California in 2022. The judge struck the law down because the definition of “underrepresented community” was “arbitrary” and essentially “a quota by any other name.”<sup>15</sup>

6. As laws related to diversity, equity and inclusion continue to be proposed, discussed, and passed, it is important to remain aware of new laws and compliance requirements.

## STATE LAWS

There are also state and local laws and guidelines. These laws may address DEI in the workplace and may provide more protections for employees than federal law. Every state in the U.S. except Mississippi has a law prohibiting employers from discriminating based on: age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion, disability.<sup>16</sup>

## SPECIAL APPLICATION TO LAW FIRMS AND ATTORNEYS

### A. CLE credits related to DEI

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<sup>15</sup> [California’s Board Diversity Law Tossed by Judge; Other Board Diversity Efforts Continue - Lexology](#)

<sup>16</sup> [The Pay Equity Project - Fifty-State Pay Equity Law Summary \(uci.edu\)](#)

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## 1. Colorado

- ✔ Colorado requires two credits in a 3-year period. The MCLE defines this type of CLE as “an activity or portion of an activity that addresses equal access to the legal system; competent representation of diverse populations; or the recognition, mitigation, or elimination of bias in the legal profession or the legal system.”<sup>17</sup>

## 2. California

- ✔ The California State Bar is currently implementing a 5 year Strategic Plan (2022-2027) which includes several steps for diversifying the legal profession in the state.<sup>18</sup> The part of the plan related to DEI includes plans to publish an annual report card on diversity and retention trends, increase numbers of diverse attorneys, engage DEI leaders and other stakeholders to encourage utilization of the State Bar Diversity Leadership Seal Program, provide implicit bias trainings for bar exam proctors and graders, and more.
- ✔ The California Lawyers Association is taking it upon itself to implement various programs and endeavors rather than relying on laws or policies.<sup>19</sup> It requires two credits on DEI in a three-year reporting period.

## 3. Illinois

- ✔ Illinois requires one DEI credit in a two-year reporting period.

## 4. Maine

- ✔ Maine requires one credit in a one-year reporting period.

## 5. Minnesota

- ✔ Minnesota requires one credit in a two-year reporting period.

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<sup>17</sup> [Lawyers - Attorney Regulation Counsel \(coloradosupremecourt.com\)](https://www.coloradosupremecourt.com/attorney-regulation-council)

<sup>18</sup> [State Bar of CA 2022-2027 Goals - State Bar of CA Strategic Plan 2022-2027](#)

<sup>19</sup> [Diversity, Equity, and Inclusion \(DEI\) - California Lawyers Association \(calawyers.org\)](https://www.calawyers.org/diversity-equity-and-inclusion)

6. Missouri

- ✔ Missouri requires one credit in a two-year reporting period.

7. New York

- ✔ New York requires one credit in a two-year reporting period.

8. Oregon

- ✔ Oregon requires three credits in a three-year reporting period.

## **B. Law Firms are Employers**

Law firms must be careful to keep the laws as mandated for all employers (of their size).

## **C. Ethical Rule re Anti-Discrimination**

1. ABA Model Rule 8.4(g) (and state equivalents) also applies to DEI.

- ✔ “. . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.”
- ✔ “This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.”

2. This rule may be subject to constitutional challenges.

## **D. Lack of Diversity**

1. The legal field remains one of the least diverse professions.

- ✔ One area that showcases the disparity is gender.
- ✔ The American Bar Association’s National Lawyer Population Survey reported that in 2007, women made up only 30% of the legal profession; in 2017, women made up 35% of the legal profession.

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- ✔ Women make up about 45% of associates in private practice, but only 20% of partners and only 18% of equity partners.<sup>20</sup>
2. Law firms must abide by all federal anti-discrimination laws as well as respective state and local policies.

## PRACTICAL STEPS FOR EMPLOYERS

1. There are various tips and steps for employers/hiring managers and supervisors to consider in light of DEI requirements and recommendations. These include:
  - ✔ Complete required DEI training;
  - ✔ Be welcoming;
  - ✔ Be aware of the barriers that might lead to discrimination;
  - ✔ Recruit for jobs in underrepresented populations;
  - ✔ Identify disparities in hiring and retention;
  - ✔ When hiring, list only the minimum qualifications;
  - ✔ Offer equitable and inclusive access to continuing education and other opportunities;
  - ✔ Foster an environment conducive to DEI; and
  - ✔ Take action against discrimination/harassment.
2. While there is not yet a legal requirement to implement a DEI program, employers who do have one must follow guidelines.
  - ✔ According to the Equal Employment Opportunity Commission, an employer may adopt programs with defined metrics when it “identifies imbalance in traditionally segregated job categories.”<sup>21</sup>
3. The plan:

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<sup>20</sup> [Diversity and Inclusion in the Law: Challenges and Initiatives \(americanbar.org\)](https://www.americanbar.org/publications/white_papers/2018/07/2018-07-20-diversity-and-inclusion-in-the-law-challenges-and-initiatives/)

<sup>21</sup> [Best Practices of Private Sector Employers | U.S. Equal Employment Opportunity Commission \(eoc.gov\)](https://www.eeoc.gov/best-practices-private-sector-employers)

- ✔ May not “unnecessarily trammel the rights of non-targeted groups, usually non-minorities or men.”
- ✔ Must “be designed to break down patterns of segregation and to open employment opportunities for targeted groups, usually minorities, women, or persons with disabilities.”
- ✔ May not require the discharge of non-targeted employees, create an absolute bar to advancement of non-targeted employees, or allow for the express use of quotas, which it defines as the “inflexible reliance solely on numbers that ignore qualifications.”<sup>22</sup>

## HOW DOES DEI APPLY TO MINISTRIES?

### A. Title VII’s Position on Religion

1. Employers are required to accommodate an employee’s sincerely held religious beliefs or practices unless it would impose an undue hardship.<sup>23</sup>
  - ✔ To comply with the Free Exercise Clause of the U.S. Constitution, Title VII includes certain exemptions for religious institutions, which protect ministry leaders when employment decisions are made based on religious beliefs.
  - ✔ The U.S. Supreme Court recognized a ministerial exception that bars ministerial staff from suing their employer in response to religion based employment decisions. This exception grants churches and ministries more autonomy to make employment decisions that maintain the integrity of their organizations. *See Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC.*<sup>24</sup>
    - Hosanna-Tabor involved a teacher who sued her religious school for disability discrimination after she was terminated. The teacher was found to be considered a minister of the church, which means she fell under the ministerial exception.

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<sup>22</sup> Id.

<sup>23</sup> [What You Should Know: Workplace Religious Accommodation | U.S. Equal Employment Opportunity Commission \(eoc.gov\)](#)

<sup>24</sup> [Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC - SCOTUSblog](#)

2. Who is considered ministerial staff?

- ✔ The court considers the following when determining if a person should be considered a minister for purposes of the exception:
  - ▶ Whether the religious institution made its decision to hire the individual based “largely on religious criteria”;
  - ▶ Whether the individual is authorized to perform ceremonies of the church; and
  - ▶ Whether the person engages in ecclesiastical or religious activities and “attends to the religious needs of the faithful” as part of their job function.

3. The Bona Fide Occupational Qualification (BFOQ) defense allows religious employers such as churches, nonprofits, and ministries to hire only people of a certain religion without it being considered discriminatory.

## B. Avoiding Lawsuits

7. Churches and ministries can take steps to protect themselves from non-ministerial lawsuits. Here are a few ways to do this:

- ✔ Including a statement of belief in the organization’s governing documents or bylaws;
- ✔ Having good employment policies;
- ✔ Clearly laying out expectations in the employee handbook; and
- ✔ Being consistent in applying theological positions.

## WHAT ABOUT BATHROOMS?

1. Restrooms in schools and workplaces have been a hot topic due to SOGI issues for years.

- ✔ Some states have passed and enacted legislation requiring bathroom use to be consistent with biological sex. These laws prevent transgender persons from using whichever facilities they choose.

- ✔ The EEOC asserts that employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender identity.
2. A possible solution to the bathroom and gender problem is a shift in design.
- ✔ A designer weighs in on gender-coded spaces in the workplace: “gender-inclusive facilities show a workplace or institution’s commitment to equity, diversity, and inclusion.”
  - ✔ Multi-stall large bathrooms are no longer serving the greater public no matter which end of the spectrum one lands on. Some argue for inclusivity and others for safety; either way, privacy is necessary and deserved.
  - ✔ One obvious way to achieve this is by creating and installing separate, private rooms so people are not sharing restroom space.<sup>25</sup>
3. In *Lusardi v. Dep’t of the Army*, the EEOC held:
- ✔ A federal agency that denied an employee equal access to a common bathroom corresponding to the employee’s gender identity discriminated on the basis of sex.
  - ✔ The agency could not condition this right on the employee undergoing or providing proof of surgery or any other medical procedure.
  - ✔ The agency could not avoid the requirement to provide equal access to a common bathroom by restricting a transgender employee to a single user restroom instead.<sup>26</sup>

## CONCLUSION

Diversity, equity, and inclusion initiatives have changed the workplace. While there are differences in how the laws apply to various situations and in differing locations, the general principles remain the same. Attorneys, for themselves and their clients, must consider these principles.

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<sup>25</sup> [How to Focus on Inclusivity and Equity in Restroom Design - Facilities Management Insights \(facilitiesnet.com\)](#)

<sup>26</sup> *Lusardi v. Dep’t of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Mar. 27, 2015)