Pay Equity After the End of DEI:
The U.S.'s Love/Hate Relationship with DEI

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Introduction

The Trump administration has announced an end to the U.S.'s longstanding relationship between Diversity, Equity and Inclusion (DEI) programs and the federal government, its contractors, subcontractors and grantees. It has also ordered all U.S. government agencies to "combat illegal private-sector DEI preferences, mandates, policies, programs and activities." (Executive Order 14173). Whether your company is grieving this loss, happy to no longer be fulfilling a decreed affirmative action plan, or simply trying to create the most productive work force for your company 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, while at the same time setting your company up for increased productivity, whether DEI is out of your life forever, or there is a reconciliation four years from now. As I'll discuss below, the 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.'s love-hate relationship with DEI (including DEIA)[i] programs is exemplified by the more than a dozen executive orders and presidential memorandums that have been issued over the years supporting diversity, equity and inclusion, which have now been revoked by President Trump through executive orders 14148, 14151 and 14173. Executive order 14148 eliminates 78 previous executive orders, including at least 10 related to protections for various specific demographic groups against discrimination and promoting equity (e.g. Executive Orders 13895, 13988). Executive order 14151 has the goal of eliminating "Equity Action Plans" in Federal agencies and "terminat[ing], to the maximum extent allowed by law, all DEI, DEIA, and 'environmental justice' offices." Executive order 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 Equal Employment Opportunity Commission (EEOC), Andrea Lucas, has committed to "even-handed protections provided to all workers by Title VII's prohibition,"[ii] which would place additional attention on employment and pay discrimination against non-minorities. Some of the now revoked executive orders focused on ensuring that specific racial or ethnic groups received equal protection and access to jobs and compensation in both public services and private markets (e.g.,

14031, 14045, 14050). Others called for affirmative action and/or 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., 11246).

The initial separation from these past policies has been swift, but, as is often the case, this breakup is a messy one. On February 21, 2025, a U.S. Federal Judge in Maryland issued a preliminary injunction against portions of President Trump's Executive Orders 14151 and 14173 (*National Association of Diversity Officers in Higher Education, et al. v. Trump,* Case No. 1:25-cv-00333-ABA (D. Md. Feb. 21, 2025). In addition, some governors and state attorneys general are challenging the breadth of the executive orders through official written "Guidance," at least as they impact admissions policies at educational institutions.[iii]

President 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 in employment. As an example, the Acting Chair of the EEOC stated that her "priorities will include rooting out unlawful DEI-motivated race and sex discrimination; protecting American workers from anti-American national origin discrimination;…"[iv] This active enforcement means that firms previously required by the Office of Federal Contract Compliance Programs (OFCCP) to implement affirmative action programs may not only need to slam the brakes on those programs, but jam them in reverse to undo some of what might now be considered illegal preferential hiring of "protected" groups. Similarly, companies that have proclaimed their DEI and DEIA initiatives and commitments, whether simply by aspirational/motivational statements or actual observable/measurable actions, may become targets of the EEOC or other agencies as exemplified in Executive Order 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;…".[v] Other companies that have been evaluating pay inequity for "protected groups" may now have a heightened concern about claims of reverse discrimination, i.e., discrimination against traditionally advantaged groups. Such claims are not new, but the statements of the Acting Chair of the EEOC and a pending Supreme Court decision in *Ames v. Ohio Department of Youth Services,* which could lower the standards of proof in a "reverse" discrimination case to those required in "direct" discrimination case (those against typically disadvantaged groups[vi]) 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.[vii] This means that statistical tests of discrimination must check for both discrimination against minority groups and discrimination 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 non-discrimination in pay and employment discrimination cases. In *The Economics of Discrimination*,[viii] Nobel Prize winner Gary Becker laid out the foundational concept of discrimination in the labor market: If two demographic groups "are perfect substitutes in production, in the absence of discrimination [the two groups] would have the same wage rates."[ix] A central point of Becker's work, which was his 1957 PhD dissertation,[x] 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. The legacy of this work has generated the type of econometric testing 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 2nd 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.[xi] The second detail that appears to be bedeviling some is how large of a difference is statistically significant.[xii] 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 individual characteristics of the employees relevant for the job. In 1957, this was a radical idea. Today, this is consistent with President Trump's definition of "Merit-Based Opportunity"[xiii] and is either the initial motivation for, or consistent with, how discrimination is defined and tested for in U.S. courts.

Implementing compensation and hiring programs based on these well-tested economic standards also has a valuable corporate benefit, even if collateral to the moral or legal motivations; pay that is discriminatory, controlling for explanatory factors, 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 the shareholders' economic interests, in addition to exposing the firm to elevated litigation risks. Therefore, the end of DEI programs and the stance of the EEOC's "even-handed enforcement" of discrimination laws do not eliminate the economic incentive or the legal requirement to pay employees in traditionally "protected" groups equally

with 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 separation of the U.S. from DEI, as well as those striving for an efficient workforce, it is important to note that there continues to be a non-DEI, non-discriminatory economic incentive to seek the best employees from across the landscape of potential employees. There may be valid economic, non-discriminatory corporate reasons to seek employees who have the tenacity to overcome adversity, who have achieved despite challenging backgrounds, who speak multiple languages, or exhibit some other merit, as called out in the title of Executive Order 14173, "*Ending illegal Discrimination and Restoring Merit-Based Opportunity*."[xiv] People of high merit exist in a diversity of neighborhoods and schools. Allocating your search and compensation equally, controlling for explanatory factors, and including and compensating valuable employees in your workforce with the motivation of improving corporate performance, puts your hiring and compensation practices in that comfortable spot. It ensures that you'll 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 you see the breadth of actions that you can and should take to maximize profitability for your firm, and may help you weather the U.S.'s separation from DEI.

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[i] In this article I use DEI, but recognize that Executive Order 14173 references both DEI and DEIA, adding accessibility.

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

[iii] 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.

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

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

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

[vii] 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.

[viii] 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.

[ix] 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.

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

[xi] See *Eisenhauer V. Culinary Institute ff 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/.

[xii] D.S. Levy *Op. Cit.* xi.

[xiii] *Ending illegal Discrimination and Restoring Merit-Based Opportunity*, Executive Order 14173, January 21, 2025.
[xiv] *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*, Executive Order 14173, January 21, 2025.