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# A Coalition of State Attorneys General Issues DEI Guidance in Response to Executive Order

BY Robert M. Hale Christina Lewis Jennifer Merrigan Fay

On February 13, 2025, a coalition of 16 state attorneys general[1] issued Multi-State Guidance Concerning Diversity, Equity, Inclusion, and Accessibility Employment Initiatives (the "Multi-State AG Guidance"). The Multi-State AG Guidance responds to President Trump's January 21, 2025 executive order entitled Ending Illegal Discrimination and Restoring Merit-Based Opportunity (the "Executive Order"). As addressed in an earlier Goodwin client alert, the Executive Order revoked, among other previous executive orders, the 1965 executive order requiring certain federal contractors to develop and maintain affirmative action programs. The Executive Order also focused on diversity, equity, and inclusion (DEI) and diversity, equity, inclusion, and accessibility (DEIA) initiatives by employers, instructing the US Attorney General to take steps "to encourage the private sector to end illegal discrimination and preferences, including DEI." The Multi-State AG Guidance responds to the Executive Order by stating that DEI efforts promote non-discrimination and are advantageous for employers. The Multi-State AG Guidance also identifies recommended DEI "best practices" that are encouraged in the jurisdictions they oversee and, in their view, do not violate existing federal anti-discrimination laws.

## Promotion of DEI as a Tool to Prevent Discrimination

The Multi-State AG Guidance readily acknowledges that employment discrimination is unlawful, including discrimination in the form of preferences, regardless of whether those preferences are intended to address systemic disadvantages or discrimination against members of historically marginalized groups. It criticizes the Executive Order for "conflat[ing] unlawful preferences in hiring and promotion with sound and lawful best practices for promoting diversity, equity, inclusion, and accessibility in the workforce." The Multi-State AG Guidance states that utilizing DEI best practices helps to promote non-discrimination and reduce litigation risks by "affirmatively protecting against discriminatory conduct that violates the law." It makes an express appeal to employers in their respective states to maintain legal DEI programs, stating that "[c]ompanies should be fully confident that they can continue to implement [DEI and DEIA] policies and programs to advance their business objectives and help ensure they remain compliant with state and federal civil rights laws."

In many states, the offices of attorneys general are responsible for state-level enforcement of employment discrimination laws. The Multi-State AG Guidance notes that not implementing "adequate non-discrimination and fair employment policies, procedures, and trainings may be used by our offices or courts to assess culpability and liability for discriminatory conduct." The Multi-State AG Guidance treats implementing DEI best practices as a step for employers to take to promote non-discrimination. It also argues that lawful DEI practices reduce biases, boost workplace morale, foster collaboration, and create opportunities for

all employees, all of which are good for business. As support for this argument, the AG Guidance points to, among other things, a McKinsey & Company study finding that “companies in the top quartile for diversity were 35% more likely to have financial gains above their respective industry median.”

## Identification of DEI Best Practices

The Multi-State AG Guidance recommends that employers utilize lawful DEI best practices in recruitment, hiring, professional development and retention and assessment and integration. Specifically, those recommended best practices include, among others, the following:

**Recruitment and Hiring**

- Prioritize “widescale recruitment efforts to attract a larger pool of applicants from a variety of backgrounds.”
- Involve multiple people in hiring and promotion recommendations.
- Establish standardized criteria for assessing candidates and employees.
- Ensure accessible recruitment and hiring practices, including reasonable accommodations.

**Professional Development and Retention**

- Establish inclusive employee resource groups for employees of particular backgrounds or common experiences where they feel valued and heard.
- Conduct training, including on “unconscious bias, inclusive leadership and disability awareness,” not to encourage preferences but, instead, to improve employee confidence and create a shared understanding around cultural norms.

**Assessment and Integration**

- Monitor the success of policies and practices in attracting and retaining qualified talent, promoting an inclusive and collaborative environment, and meeting “related goals,” which, as noted above, does not mean condoning unlawful preferences.
- Create protocols for reporting discrimination or harassment and provide general avenues for employees to discuss their experiences in the workplace.
- Establish work groups that focus on supporting inclusive behaviors and practices.
- Promote belonging and unity.

## Conclusion

The Multi-State AG Guidance seeks to preserve lawful DEI initiatives in the sixteen states where they are the chief legal officers by distinguishing between unlawful preferences and lawful DEI activities, referencing data that support the advantages of pursuing DEI efforts in advancing the principles of non-discrimination, and identifying certain DEI best practices that may be developed or maintained without running afoul of existing anti-discrimination laws. The Multi-State AG Guidance is a powerful tool, particularly for an employer in one of the sixteen states if it faces legal challenges for maintaining a robust DEI program. However, the Multi-State AG Guidance does not have the force of law. Employers should expect that federal enforcement authorities as well as those in the states that did not elect to join the effort will continue to scrutinize DEI programs.

Goodwin’s  Employment Practice has deep experience in working with clients to distinguish between lawful and unlawful initiatives and to advise on potential avenues for promoting employers’ lawful employment objectives.

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[1] The AG Guidance was submitted by the Attorneys General of Massachusetts, Illinois, Arizona, California, Connecticut, Delaware, Hawaii, Maine, Maryland, Minnesota, Nevada, New Jersey, New York, Oregon, Rhode Island, and Vermont.

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## CONTACTS

### Robert M. Hale
Partner
Chair, Employment

rhale@goodwinlaw.com
Boston | +1 617 570 1252

### Christina Lewis
Partner

christinalewis@goodwinlaw.com
Boston | +1 617 570 1565

### Jennifer Merrigan Fay
Partner

jfay@goodwinlaw.com
Boston | +1 617 570 1943