Texas Attorney General Declares Public DEI Initiatives Unconstitutional and Warns of Legal Risks from Corporate DEI

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On January 19, 2026, Texas Attorney General Ken Paxton issued Opinion No. KP-0505 entitled "Re: 'Diversity, Equity, and Inclusion' in Texas." In the Opinion, Paxton opines on the legality of two categories of DEI initiatives: public-sector programs operated by the state of Texas, and corporate DEI practices common in the private sector. While this Opinion lacks force of law, in Texas, courts consider opinions of the Attorney General as persuasive authority when interpreting state law.

The 75-page opinion begins with a 25-page recitation of the relevant legal history. The Opinion begins with discussion of founding-era legal principles, then traces development of anti-discrimination law through Reconstruction, the Jim Crow era, and the Civil Rights Act of 1964. It then discusses the rise of demographic-based preferencing in federal programs, related corporate practices, and the Supreme Court doctrine permitting these practices. Finally, it discusses recent actions by the U.S. Supreme Court, the federal government, and Texas that, in the Attorney General's view, make clear that many of the DEI-initiatives permitted under the prior framework can no longer stand. This includes reference to DEI-related guidance published by the EEOC and DOJ, on which we previously reported in March and July of last year. The Opinion then reviews numerous DEI-related policies and programs operated by the Texas state government and prescribes them each as unconstitutional. Finally, the Opinion reviews several common, corporate-DEI initiatives and practices and enumerates the laws which these programs may violate.

Public Sector Programs

The Opinion declares that seven categories of public-sector programs violate both the U.S. and Texas Constitutions. This includes:

1. Texas Historically Underutilized Business (HUB) programs, which are state procurement and contracting schemes that, among other things, sets goals for spending with businesses "at least 51 percent owned by one or more persons who are economically disadvantaged due to their identification as members of certain groups," including Black Americans, Hispanic Americans, Asian Pacific Americans, Native Americans, and women.

2. The Texas Disadvantaged Business Enterprise (DBE) programs, which regulate transportation contracting across state, regional, and local governments and awards contracts to "disadvantaged business[es]," defined as businesses owned by "socially and economically disadvantaged" individuals or "socially disadvantaged" persons.

3. Other contracting schemes dictated by Texas statute that purportedly give preference to minority- and women-owned businesses, including Texas Transportation Code Section 451.253(a), which aims "to increase the participation of minority and women-owned businesses in public contracts," and the Texas Occupational Code Section 2026.152, which directs the Texas Racing Commission to do business with minority-owned businesses.

4. Consideration of race and gender in appointments to state boards, commissions, committees, and advisory bodies.

5. Race- and sex-conscious higher-education programs, such as Texas Education Code Section 51.810, which requires targeted enrollment plans for Hispanic students and African American male students, as well as accounting scholarships and internships that favor applicants based on minority status.

6. Race- and sex-based preferences in park funding, which prioritize funding for "underserved populations," a term statutorily defined with respect to race and sex.

7. Consideration of race in designation for special projects, such as the Texas Enterprise Zone Act, which establishes an extensive economic development program aimed at encouraging private investment and job creation in areas suffering from severe economic distress.

Underpinning the Attorney General's conclusion as to each of these programs is a presumption that the programs are subject to strict scrutiny because they effectively mandate that similarly situated groups be treated differently in the allocation of government benefits on the basis of race and sex. The Opinion asserts that none of these programs satisfy strict scrutiny because they are not narrowly tailored to serve a compelling governmental interest. According to the Attorney General, many of the programs rely on generalized assertions of industry-wide or societal discrimination rather than specific, identified instances of government-sponsored discrimination, and lack reasonable durational limits essential for remedial purposes. They Attorney General

asserts that some of these programs are overinclusive because they extend preferences to all minorities, not just those essential to any purported remediation. Other programs, the Attorney General argues, are underinclusive, and therefore cannot possibly serve to remediate specific instances of past discrimination. The Opinion also notes that the Constitution "forbids the punishment of [one] generation for the wrongs of the last."

Private Sector Programs

The Attorney General's Opinion then addresses private sector DEI initiatives, including:

1. Demographically-based workforce representation goals;
2. Diverse slate policies;
3. Diversity fellowships or other race- or gender-based hiring programs;
4. Tying compensation to DEI-related metrics;
5. Identity-based employee resource groups, mentoring, and training;
6. Supplier diversity programs; and
7. Diversity-related governance, including Chief Diversity Officers, Diversity offices, and Board committees overseeing DEI programs.

The Attorney General's Opinion does not characterize these programs as categorically unlawful and notes that "the mere existence of a DEI policy, in isolation, may not impose liability under Title VII." Nonetheless, the Attorney General states that these DEI practices "beg discussion of four broad categories of liability."

First, the Opinion discusses ways in which DEI practices may violate Title VII or the Texas Commission on Human Rights Act (TCHRA). The Opinion states that these laws prohibit not only demographically based decision-making with respect to "terms, conditions, or privileges of employment"—such as hiring decisions, termination decisions, and compensation determinations—but also policies and programs that "limit[], segregate[], or classif[y] an employee or applicant" in a manner that would "deprive or tend to deprive" them "of any employment opportunity or adversely affect" their status "in any other manner." The Opinion also notes that even where segregation is the result of "self-segregation" by employees, it may violate federal and state anti-discrimination law. According to the Attorney General, policies that may run afoul of these laws include demographic hiring goals, policies that "require a minimum number of female or minority directors on governing boards," policies requiring "interview panels or candidate pools include specific demographic groups," the tailoring of "job descriptions and recruiting materials to appeal to individuals of specific demographics," and the establishment of "compensation incentives tied to representation goals, DEI metrics in performance reviews, and promotion criteria with DEI targets." The Opinion also states that "structured interview requirements, internships, fellowships, pipeline programs, and targeted recruitment—may also constitute unlawful employment actions under Title VII" if they "openly discriminate based on race or sex."

Second, the Opinion discusses ways in which DEI training programs might create a hostile work environment. Specifically, the Attorney General writes that when "'official policy is combined with ongoing stereotyping and explicit or implicit expectations of discriminatory treatment'" and "any race is spoken of 'with a constant drumbeat of essentialist, deterministic, and negative language,'" trainings may rise to the level of a Title VII or TCHRA violation.

Third, the Opinion states that policies that limit contracting opportunities on the basis of race may violate Section 1981. Specifically, the Attorney General states that liability may arise when race-based eligibility criteria categorically exclude applicants from contracts or contract-like opportunities. The Opinion gives the example of a venture fund competition open only to businesses owned by Black women, which the Attorney General says violates Section 1981. Further, the Opinion states that liability can be "triggered anytime an applicant is denied a job, internship, fellowship, or promotion based on race in addition to situations when an individual is treated unequally based on race in the 'benefits, privileges, terms, and conditions of the contractual relationship.'"

Fourth, the Opinion notes that DEI initiatives may run afoul of federal and state securities laws "where risk of antidiscrimination lawsuits and customer backlash are not acknowledged to investors." According to the Attorney General, this may occur when a company promotes or implements DEI initiatives such as DEI-linked marketing campaigns, while failing to disclose the associated risks of litigation, boycotts, customer backlash, lower sales, or stock-price declines. This may also occur when a company makes only general risk disclosures to its shareholders that are not tailored to the specific DEI-related risks the company may face.

Gibson Dunn's State AG Task Force has deep experience representing clients in investigations and enforcement actions brought by state attorneys general nationwide, including regular engagements with the Texas Attorney General's Office. Our team advises companies facing inquiries from state AGs involving DEI- and ESG related practices, as well as consumer protection, data privacy, antitrust, and other high priority areas. We assist clients in assessing risk, responding to civil investigative demands, and defending enforcement actions, and we are well positioned to counsel on potential follow on activity stemming from this Opinion.

Gibson Dunn's Workplace DEI Task Force aims to help our clients navigate the evolving legal and policy landscape following recent Executive Branch actions and the Supreme Court's decision in *SFFA v. Harvard*. Prior issues of our DEI Task Force Update can be found in our DEI Resource Center.

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