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Talent Solutions for Better Workplaces

GUIDE

Understanding Legal Boundaries Around Workplace Diversity Data

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Introduction

The advice in this report should be considered advisory only. Please consult your legal counsel to determine the best course of action for your organization.

In today's rapidly changing legal environment, inclusion leaders are struggling to understand how they can continue to use diversity data (i.e., data related to protected employee characteristics) to understand the workplace experiences of their Historically Excluded Talent. This guide reviews the current legal guidance within the United States around both collecting diversity data and using it in corporate decision-making and program development. Next, it shares the results of Seramount's recent listening sessions, in which senior inclusion leaders have shared their organizations' current policies and practices around collecting, analyzing, and sharing employee data. Finally, it concludes with recommendations about how to approach diversity data in the current climate.

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What Does U.S. Law Say About Collecting Diversity Data?

The Equal Employment Opportunity Commission (EEOC) requires private employers with 100 or more employees and federal contractors with 50 or more employees to submit annual workforce demographic data via the EEO-1 Component 1 Report, also known as the Employer Information Report. This includes data by job category and diversity characteristics such as sex and race/ethnicity.

Despite attacks by the federal government on DEI, the EEOC's data collection requirements are still in effect. Under current EEOC regulations, eligible private employers were required to submit the 2024 EEO-1 Component 1 this June, detailing the number of individuals they employ by job category and by sex and race or ethnicity. In her additional guidance around the requirement, EEOC Chair Andrea Lucas stated that employers are *not* allowed "to take any employment actions based on, or motivated in whole or in part by, an employee's race, sex, or other protected characteristics."

These EEOC requirements suggest that despite anti-DEI efforts, organizations should still collect self-ID data on key demographic characteristics such as sex and race/ethnicity. There is no legal risk whatsoever to collecting this data; rather, the legal risk emerges when actions are taken based on this data.

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What Does U.S. Law Say About Using Diversity Data?

While the collection of diversity data remains not only legally acceptable but actively encouraged by the EEOC, using diversity data to improve outcomes for Historically Excluded Talent is more challenging. Chair Andrea Lucas states that employers are *not* allowed "to take any employment actions based on, or motivated in whole or in part by, an employee's race, sex, or other protected characteristics."

Legal advisors have designated the following components of DEI programming as "high risk" and likely to result in litigation:

- Mandatory DEI trainings
- Mentorship, sponsorship, and other career development programs with membership or selection criteria based on specific protected characteristics
- Recruitment, targeted outreach, or other programs with selection criteria based on specific protected characteristics
- Specific numerical goals or quotas around representation
- Tying representation goals or other DEI goals to compensation of employees and leadership
- Embedding preference for certain demographics in job candidate selection criteria

These programs are likely to be characterized by the current U.S. presidential administration as "illegal DEI."

EEOC Guidance

In March 2025, the EEOC released two documents on their website related to claims of "unlawful DEI-related discrimination," including a Q&A on "What You Should Know About DEI-Related Discrimination at Work" and a one-pager titled "What To Do If You Experience Discrimination Related to DEI at Work." The first document begins with these words: "Diversity, Equity and Inclusion (DEI) is a broad term that is not defined in Title VII of the Civil Rights Act of 1964 (Title VII). Title VII prohibits employment discrimination based on protected characteristics such as race and sex. Under Title VII, DEI initiatives, policies, programs, or practices may be unlawful if they involve an employer or other covered entity taking an employment action motivated—in whole or in part—by an employee's or applicant's race, sex, or another protected characteristic." The details of the document include:

- Incorporating "DEI-related disparate treatment" into Title VII's prohibition against disparate treatment in the workplace and specifying that this includes disparate treatment in:
  - Hiring
  - Firing
  - Promotion
  - Demotion
  - Compensation
  - Fringe benefits
  - Access to or exclusion from training (including training characterized as leadership development programs)
  - Access to mentoring, sponsorship, or workplace networking/networks

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  - Internships (including internships labeled as "fellowships" or "summer associate" programs)
  - Selection for interviews, including placement or exclusion from a candidate "slate" or pool
  - Job duties or work assignments
- Affirming the EEOC's position that "there is no such thing as 'reverse' discrimination; there is only discrimination" and clarifying that the EEOC does not require a higher showing of proof for reverse discrimination claims.
- Specifying that not only employees, but also applicants and training or apprenticeship program participants, are eligible to file EEOC complaints regarding DEI-related discrimination under Title VII.
- Asserting that DEI training can create a hostile work environment: "Depending on the facts, an employee may be able to plausibly allege or prove that a diversity or other DEI-related training created a hostile work environment by pleading or showing that the training was discriminatory in content, application, or context."

Mentorship, sponsorship, or other career development programs that are open to all employees and recruitment, outreach, or other programs that are open to all individuals remain low-risk from a legal perspective. Furthermore, the EEOC's guidance suggests that analyzing data in order to understand workplace gaps also remains legally permissible, as long as organizations do not act on that data.

Department of Justice Guidance

In July 2025, the Department of Justice issued a memo to all recipients of federal funding declaring that DEI practices are unlawful and "discriminatory." These requirements affect federal contractors, colleges and universities, and other entities that receive federal funding. Many of the new policies undermine practices that have been introduced to advance Historically Excluded Talent since the Supreme Court banned affirmative action in colleges and universities in 2023.

The memo goes even further than the previous guidance issued by the EEOC. Its assertions include:

- Allowing transgender individuals to use the "intimate space" associated with the gender with which they identify "would typically be unlawful."
- Emphasizing *cultural competence* or *lived experience* or geographically targeting individuals "function as proxies for protected characteristics." Therefore, these practices violate federal law.
  - The memo defines unlawful proxies as ostensibly neutral criteria that are selected because they correlate with, replicate, or are used as substitutes for protected characteristics and are implemented with the intent to advantage or disadvantage individuals based on protected characteristics.
  - In a university context, these can include "diversity statements" required by students or job applicants or scholarship programs that favor underserved geographic areas or first-generation students.
- Individuals cannot be penalized for objecting to or refusing to participate in "discriminatory programs, trainings, or policies."

The memo goes on to list the following examples of "unlawful practices":

- Race-based scholarships or programs

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- Preferential hiring or promotion practices
- Access to facilities or resources based on race or ethnicity, including designated "safe spaces"
- Race-based diverse slates policies in hiring
- Sex-based selection for contracts (e.g., supplier diversity programs prioritizing women-owned businesses)
- Race- or sex-based program participation
- Training programs that promote discrimination or hostile environments (e.g., workplace trainings that address concepts such as White privilege or toxic masculinity)

The memo concludes with the following best-practice recommendations:

- Ensure inclusive access.
- Focus on skills and qualifications.
- Prohibit demographic-driven criteria.
- Document legitimate rationales.
- Scrutinize neutral criteria for proxy effects.
- Eliminate diversity quotas.
- Avoid exclusionary training programs.
- Include nondiscrimination clauses in contracts to third parties and monitor compliance.
- Establish clear anti-retaliation procedures, and create safe reporting mechanisms.

Employment law firm Fisher Phillips recommends that in light of the new guidance, employers consider reaching out to experienced legal counsel to review and potentially revise employee programs, hiring practices, trainings, and other related policies.

Alyesha Asghar, co-chair of the equal employment opportunity and inclusion practice at Littler, says the guidance suggesting that employers should not be allowed to have organized resources or facilities based on protected characteristics "is implicitly talking about employee resource groups." She warns, "Employers need to be very vigilant … in the continuous good shepherding of the ERG."

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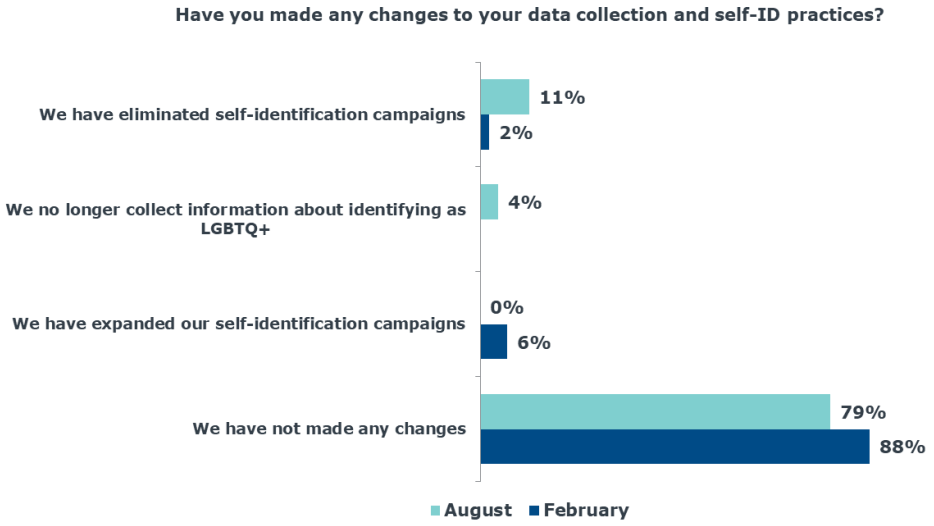
What Are Other Organizations Doing?

In August 2025, Seramount held a listening session with senior inclusion leaders to give them an opportunity to share their experiences with addressing President Donald Trump's anti-DEI executive orders and other policy changes. The session identified several changes related to diversity data collection and reporting since early 2025, including changes related to data collection, data analysis, and data sharing.

Changes to Data Collection

Changes to data collection can be seen across two areas: self-ID programs and employee listening efforts. While both of these areas are still relatively "safe" from a legal perspective, some organizations have made changes to their programs in order to mitigate their legal risk.

In terms of self-ID, 79 percent of participants in August shared that they had *not* made any changes to their self-ID practices. However, 11 percent shared that they had eliminated their self-identification campaigns altogether, up from 2 percent in February, and 4 percent shared that they no longer collected information about identifying as LGBTQ+.



The vast majority of organizations are still actively engaging in employee listening, most commonly in the form of annual engagement surveys.

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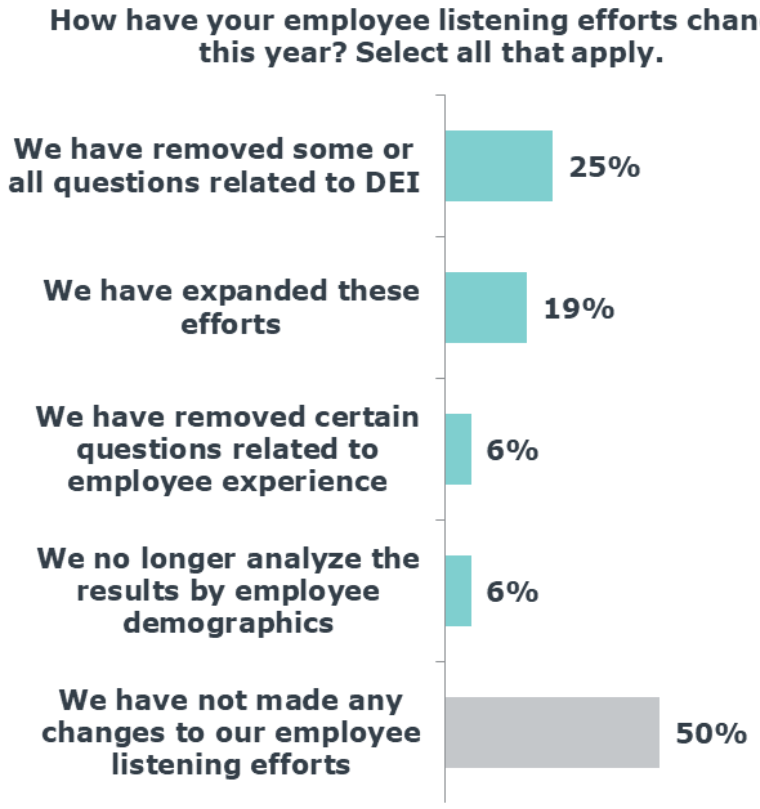
However, one in four have removed some or all questions related to DEI from their employee listening efforts.



Questions that are likely to be revised or even removed from employee engagement surveys typically reference specific protected groups. For example, "Do you feel

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valued for the work you complete, regardless of your sexual identity, race, disability, or nationality?" may be revised to simply "Do you feel valued for the work you complete?" Questions using the language of equity (e.g., "Does our company's career progression system offer equitable opportunities for career growth among all employees?") are also being removed.

By contrast, broader inclusion and belonging questions are generally still acceptable to ask. These include questions such as "I feel like I belong at the company" and "I see opportunities for career growth at the company."

Changes to Data Analysis

Despite legal guidance indicating that it is still acceptable to analyze data based on protected characteristics, many organizations are increasingly cautious about doing so. As the above chart shows, 6 percent of organizations shared with Seramount that they no longer analyze the results of their annual engagement survey and other listening strategies by employee demographics. However, no organizations shared that they have stopped analyzing employee data based on protected characteristics altogether. Greater than half (59 percent) shared that they continue to analyze employee data based on protected characteristics, and 24 percent indicated that they have limited the number of acceptable use cases for analyzing employee data.

Participants shared more information about their evolving approaches in comments:

- "We are limiting access to demographic/protected class data (who can see it) but we will continue to track and analyze it and then ask for a formal review under legal privilege."
- "We look at this through the lens of protected characteristics to learn and drive insights that help our business outcomes."

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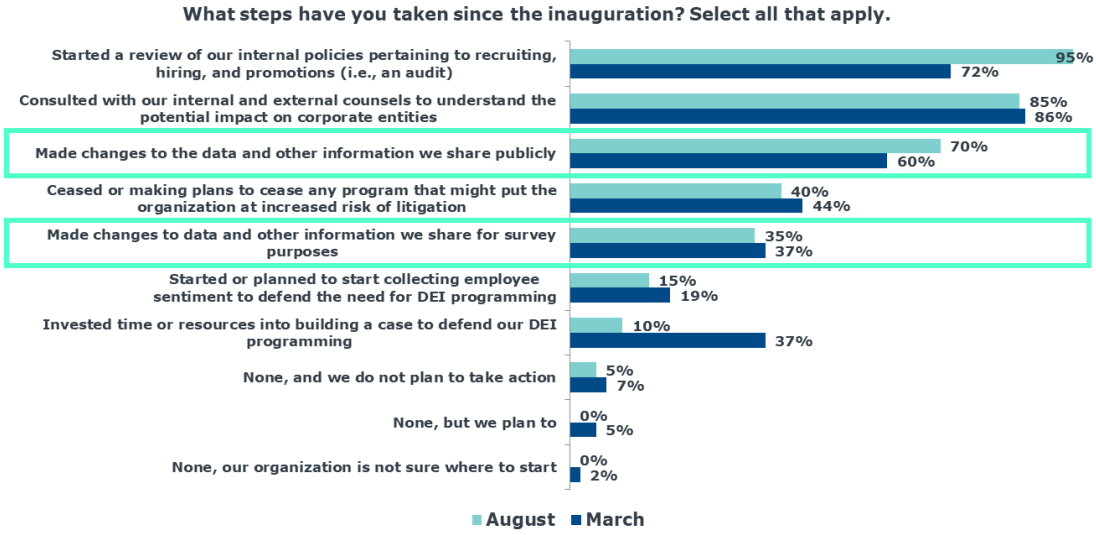
- "Per legal, demographic data (race and gender) are no longer used as a part of any decision making and can only be viewed after decisions are made."

Changes to Data Sharing

Since the beginning of President Trump's second term, organizations have taken many steps to mitigate their legal risk and safeguard their inclusion programming. Two of these steps are (1) making changes to the information they share publicly (e.g., by removing information about their inclusion programming from their websites) and (2) making changes to data and other information they share for survey or benchmarking purposes. The percentage of organizations that had made changes to data and other information they share publicly increased between March and August. In August, 70 percent of leaders indicated that their organization had made changes to the data they share publicly, compared to 60 percent in March. Meanwhile, greater than one-third (35 percent) of organizations have made changes to the data and other information they share for survey purposes.



In both sessions, the vast majority of organizations that had made changes to the data they shared had scaled back on the quantity and level of detail of data they were sharing. In qualitative comments, several participants reported "scrubbing" DEI data from their websites, and many shared that they were being more cautious in their internal and public-facing communications. Comments included these: "We are making sure that language in ERG missions and goals don't use 'risky' words" and "We are monitoring language a bit more (example: not using 'equity')."

Seramount also asked leaders about their own organization's policies around sharing data for benchmarking purposes. Most responded that they share data externally on a case-by-case basis, and only 17 percent indicated that they do not share information with any external surveys. Participants shared more details in comments:

- "Only participating in external surveys related to disability or veterans."
- "We only share information with surveys that we also share externally broadly. More specifically total employee numbers."
- "Depending on the external survey, we share at the aggregate level."

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What Should Federal Contractors Know?

Currently, federal contractors are largely subject to the same EEOC requirements regarding data collection and use as are other U.S. organizations. Seramount's recent listening sessions have identified more similarities than differences in terms of how federal contractors and organizations that do not contract with the federal government are approaching compliance with the changing federal requirements. Specifically, the majority of Seramount's partners that contract with the federal government continue to collect demographic data, although they may be more cautious than other organizations about sharing that data either internally or externally.

However, there are several additional caveats for federal contractors to be aware of:

- **Federal contractors may be subject to additional required or voluntary requests.** For example, on June 27, 2025, the Department of Labor and the Office of Federal Contract Compliance Programs (OFCCP) sent a letter to all federal contractors stating that in lieu of affirmative action plans, federal contractors now "may wish to provide information demonstrating that they have discontinued" or are in the process of discontinuing, affirmative action and any related DEI practices explicitly designed to advance Historically Excluded Talent groups. Your legal counsel is best positioned to advise you on how to respond to any additional requests.
- **Organizations that contract with both federal and state or local agencies may face conflicting requirements.** While there may be a relationship between state and federal affirmative action requirements, federal requirements do not control state mandates. States have the right to create and implement their own standards and responsibilities. Actions such as the revocation of Executive Order 11246 do not absolve employers of affirmative action obligations they have when they are state contractors. Holding a contract with a state government can trigger a separate set of affirmative action obligations, distinct from, and sometimes in addition to, those mandated by federal law. States with affirmative action requirements include California, Connecticut, Illinois, Kentucky, Maine, Minnesota, New Jersey, New York, Ohio, Rhode Island, and Wisconsin. Further complicating matters, some cities and localities also have affirmative action mandates. Your legal counsel is best positioned to advise you on how to navigate conflicting requirements.

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What Does Seramount Recommend?

- **Data related to protected characteristics can still be collected and even analyzed, but it cannot be a factor in any decision-making process in this current environment.** Cautious organizations might consider clearly outlining their own best practices related to identification of which circumstances justify the collection and use of employee data. We recommend organizations seek legal advice and acknowledge that we are not legal counsel.
- **There may be risks of "doing too much" and potentially "over complying."** Keep in mind that some of the guidance detailed here, including the Department of Justice's July 2025 memo, is directed only at organizations that receive federal funding. Again, we recommend organizations seek legal advice and acknowledge that we are not legal counsel.
- **Keep listening.** Employee listening efforts are not just legally safe—they're vital in understanding what your employees want and need from you. In times of rapid change, an annual engagement survey may not be enough to keep pace with employee sentiment.
- **Global organizations should not apply a "U.S.-centric" lens exclusively to this work.** A bias for U.S. centricity runs the risk of ignoring reporting requirements in the United Kingdom, equal pay laws in Brazil, European Union Corporate Sustainability Reporting Directive (CSRD) requirements, and other laws around the world.
- **Consider the risk of "doing too little."** Seramount's research focused on retreating from efforts in DEI may impact your talent, workplace inclusion efforts, and culture, including those of your consumers and investors. Our customers, consumers, investors, suppliers, elected officials, and broader community stakeholders are diverse.

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Additional Seramount Resources

- Effective Communications Strategies During Times of Crisis: The recent anti-DEI executive orders have created considerable confusion regarding their impact on private organizations. When outcomes and impacts remain unclear, it can be difficult to determine when, how, and what to communicate to employees. This guide provides insight into what employees need and how organizations should approach communicating during times of crisis.
- Evaluate Risk Levels in U.S. Organizations: Organizational programming around diversity, equity, and inclusion (DEI) is currently facing a myriad of legal, political, and social threats. This risk assessment matrix is designed to help organizations understand the relative risk of various common programs and practices within corporate America.
- How to Start Listening to Your Employees: Employee Listening Best Practices: Listening to employees is crucial to fostering an inclusive workplace. It allows leaders to understand the challenges their employees may be facing and understand how the experiences of different employees vary across departments, levels, demographics, and other characteristics. Organizations traditionally use two different mechanisms for listening to their employees: surveys and focus groups/listening sessions. This guide describes the pros and cons of each method and suggests best practices for companies that decide to use each one.
- Member Webinar: Mitigating Risk in a Shifting Political Landscape: Organizational programming related to diversity, equity, and inclusion (DEI) currently faces numerous legal threats, including executive orders. In collaboration with law firm Husch Blackwell, Seramount will demonstrate its risk assessment matrix to examine which programs and policies are vulnerable within corporate America.
- Navigating Policy Changes Under President Trump: Early Insights from Seramount's Listening Sessions: Since the 2024 U.S. presidential election, Seramount has been holding regular listening sessions with Chief Diversity Officers (CDOs) and other inclusion leaders to give them an opportunity to share their experiences with addressing President Donald Trump's anti-DEI executive orders and other policy changes.
- Navigating the Intersection of US Law and DEI: Mitigating Legal Risks: Organizational programming around diversity, equity, and inclusion (DEI) is currently facing a myriad of legal, political, and social threats. This report reviews the most pressing of those threats and shares strategies for mitigating them. Specifically, this report begins by discussing the Supreme Court ruling banning affirmative action in higher action and its ramifications for corporate employers and DEI in the United States. The report then provides an overview of how the ruling has opened new avenues for conservative organizations and activists to challenge DEI efforts in the courts. Next, the report outlines best practices for DEI program design that will help companies avoid litigation.
- Tracking Policy Changes During the Trump Administration: What U.S. DEI Leaders Need to Know: President Donald Trump began his second term on January 20, 2025, and quickly followed through with many of his campaign promises. This document will be regularly updated to provide DEI leaders with current information on President Trump's executive orders as well as legislation and policy changes that are relevant to their work.

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