



DEI Micro-Webinar Series:

# The State of DEI

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**Seyfarth Shaw LLP**

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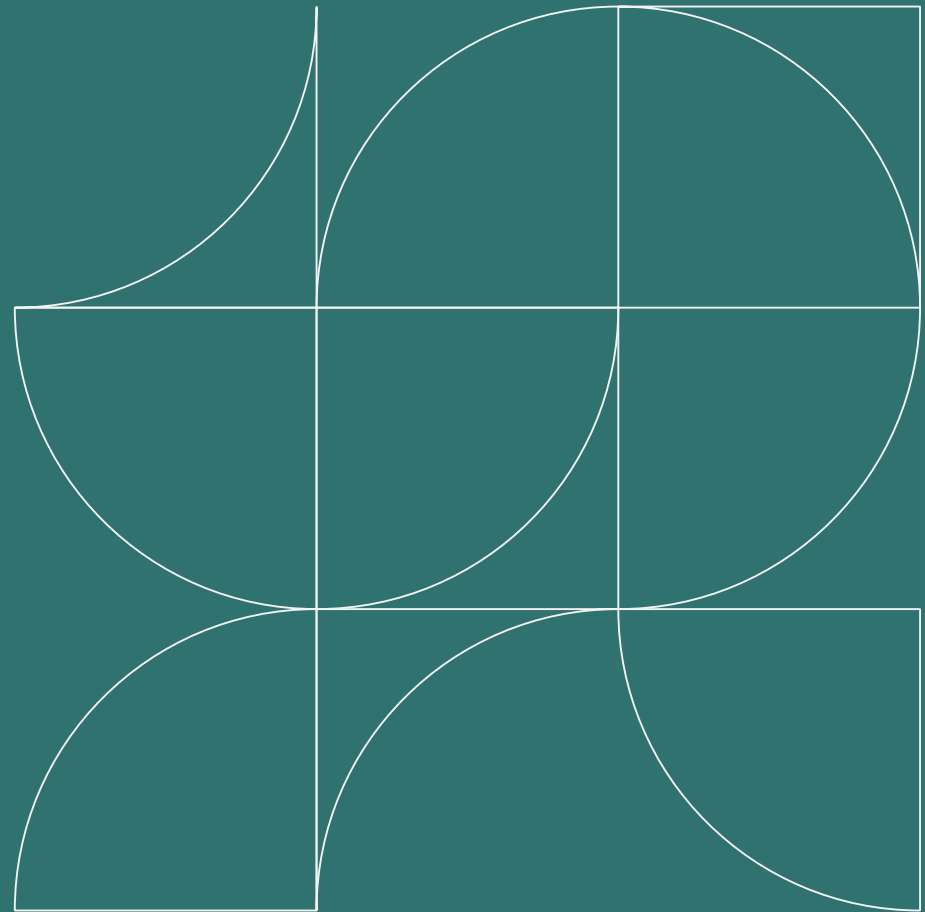


## Agenda

- 1 | Introductions and Description of Series
- 2 | Recent Litigation Impacting DEIB
- 3 | Current Challenges
- 4 | Practical Advice for Employers
- 5 | Conclusion and Upcoming Sessions

# 1

## Introductions & Description of DEI Micro- Webinar Series

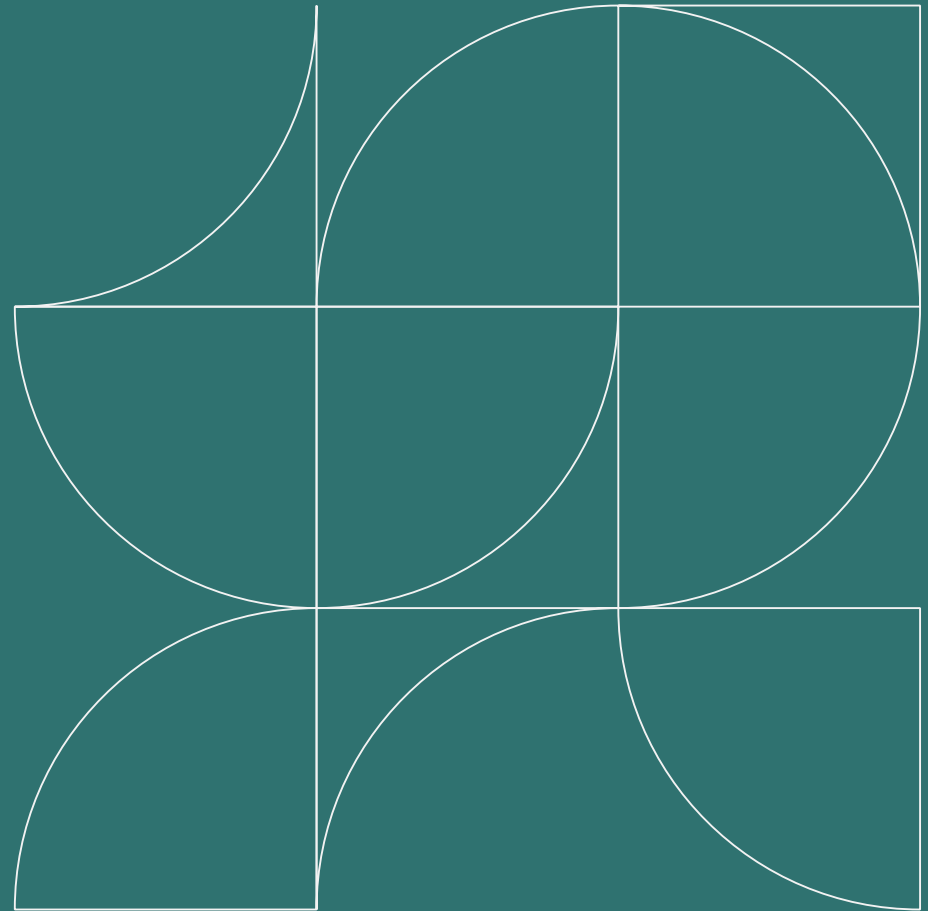


## Upcoming Sessions

- State of DEI (today!)
- The Importance of DEIB Audits – June 6, 2024
- An Overview of Common DEI Programs – June 19, 2024
- Exploring and Mitigating Risks in DEIB Initiatives – July 9, 2024
- Exploring Voluntary Affirmative Action and “Manifest Imbalance” Showing – *to be announced*
- Using Artificial Intelligence to Support in DEIB Efforts – *to be announced*
- Leveraging ERGs to Support DEIB Efforts – *to be announced*
- Supporting Faith-Based ERGs – *to be announced*
- Global Self-Identification in support of DEIB – *to be announced*

# 2

## Recent Litigation With Potential Impact on DEIB Issues



## *Muldrow v. City of St. Louis*

Issue before the Court:

Does Title VII prohibit discrimination in transfer decisions absent a separate determination that the transfer decision caused a significant disadvantage?

- Plaintiff-police sergeant laterally transferred to supervisory position in another department. Transfer resulted in changes to her schedule, uniform, vehicle and included more administrative responsibilities.
- No claim that the changes themselves caused her a significant disadvantage. But alleged the transfer was motivated by sex discrimination.

SCOTUS Opinion Issued April 17, 2024:

- Unanimous decision Majority Opinion (Kagan); Concurring opinions (Thomas, Alito, Kavanaugh)
  - Title VII requires a plaintiff to “show some harm from a forced transfer” to prevail
  - Expressly rejected that harm must be “significant or otherwise exceeded some heightened bar.”
    - First Circuit, Second Circuit, Fourth Circuit, Seventh Circuit, Eighth Circuit, Tenth Circuit
  - Vacated and remanded
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## *Muldrow v. City of St. Louis*

- Justice Kavanaugh’s Concurrence foreshadows that “harm” may go beyond transfer decisions
    - “The Court's new some-harm requirement appears to be a relatively low bar.”
  - Justice Kavanaugh’s examples of how harm may be “easily” shown are tied to transfers, but there are implications for DEI programs
    - “money, time, satisfaction, schedule, convenience, communicating costs or time, prestige, status, career prospects, interest level, perks, professional relationships, networking opportunities, effects on family obligations, or the like.”
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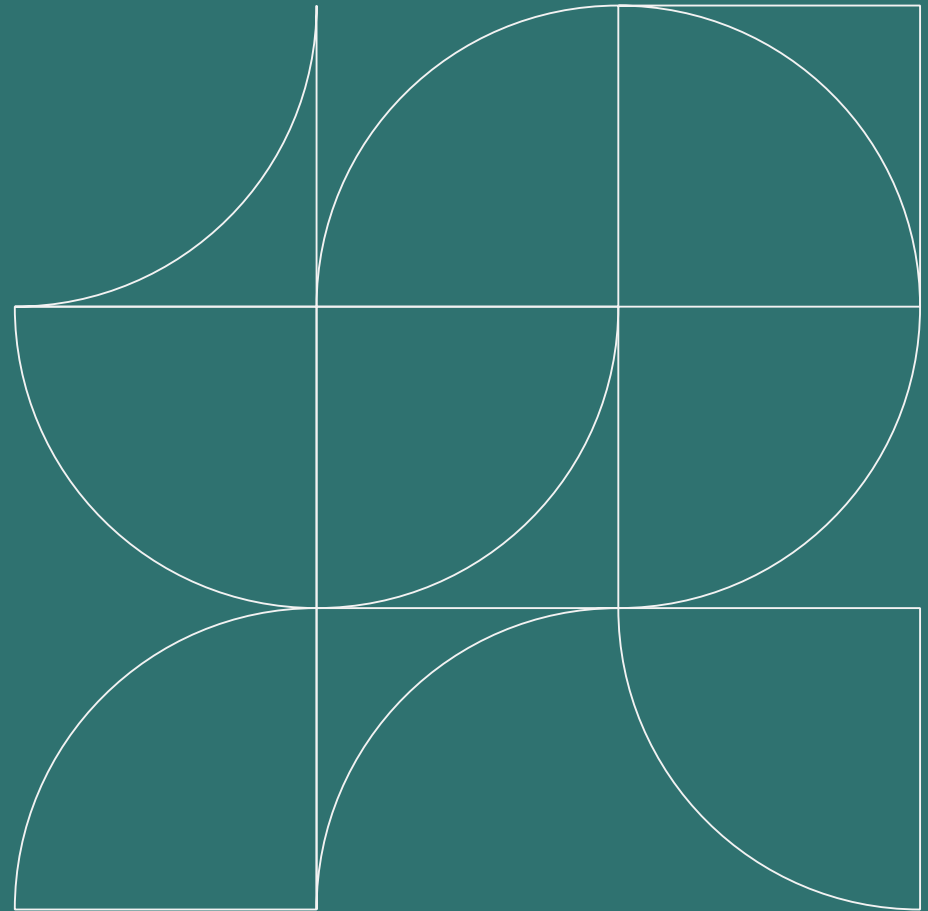
## *Muldrow v. City of St. Louis*

### **What Does This Mean for Employers?**

- Lowers bar to establish adverse employment action
    - increases scope of activity prohibited by Title VII
  - Unlikely to be limited to transfer cases
  - May expose DEIB programming to greater scrutiny
  - Expect challenges on the basis of non-selection or lack of access to DEIB programs
  - Anti-DEI Groups are already using the Muldrow decision to support allegations
  - Employers should continue to assess and reassess their DEIB initiatives
    - Employers should carefully scrutinize DEIB initiatives' application and selection process and any decisions that result from those processes
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# 3

## Current Challenges



Is 2024  
“Do or Die”  
for Corporate  
DEI programs?

✓ *Make*

**OR**

*✗ Break*

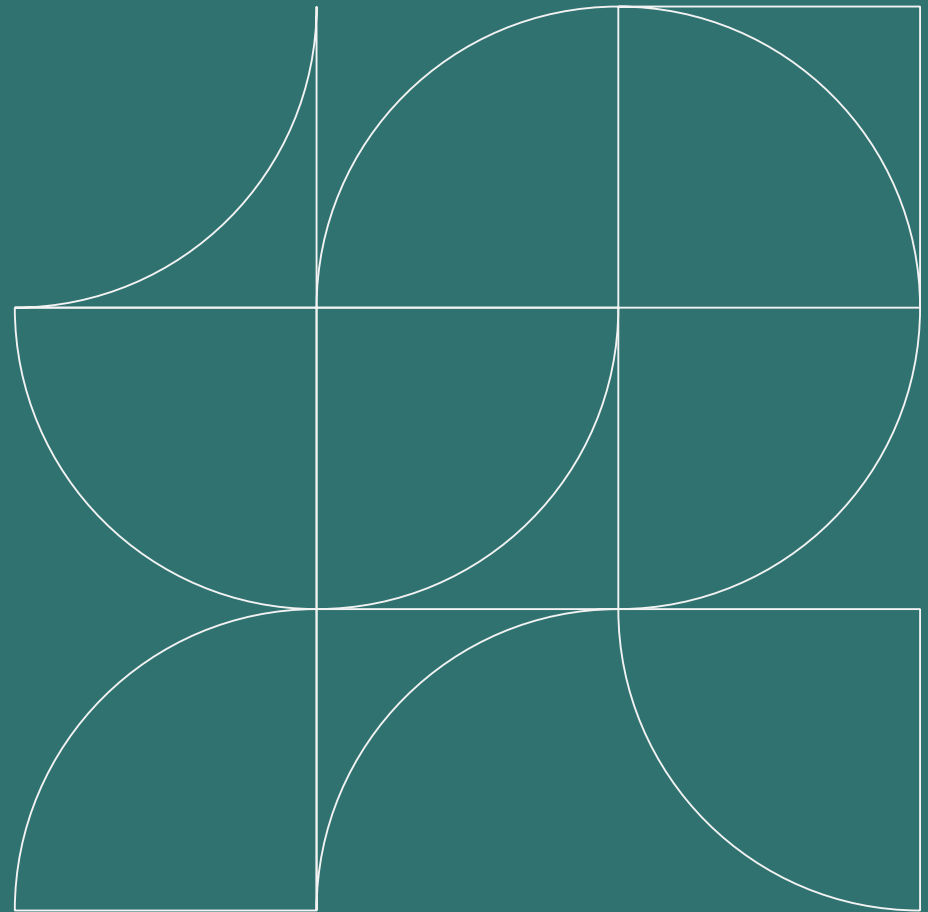
## ONGOING AND FUTURE CHALLENGES

- Several cases are already before district courts
  - Plaintiffs include employees, former employees, “think tanks” and shareholders
  - Challenging different aspects of employer DEIB efforts
    - Distributing employee DEIB data internally to leaders
    - External and internal announcements of specific numerical DEIB goals
    - Failure-to-hire reverse discrimination cases
    - Practices that encourage the promotion of only minorities and/or women
    - Alleged removal of white male(s) to improve diversity
    - Actions geared towards achieving or maintaining racial “balance”
  - *What may be next?*
-



# 4

## Practical Advice for Employers



**Companies are  
Asking:**

**Are my programs  
still legal?**

- While all DEIB programs could bear some relation to protected characteristics such as race or gender, there is (and always has been) a spectrum of legal risks associated with such programs depending on:
    - the type of initiative;
    - how an employer implements that initiative; and
    - how the employer communicates about it.
  - The closer the specific DEIB strategy is to race, gender and other protected characteristics in relation to the specific employment action at issue, the greater the risk—*particularly in the current environment.*
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## Key Risk Management Tool:

## DEI Review or Audit



## Responding to the Increased Scrutiny

- A privileged DEIB audit is key
  - Practices may have become lax with lack of threatened legal enforcement and spotlight
  - Misconceptions about what is “legal”
  - Presents a good opportunity to look under the hood and kick the tires of company’s DEIB programming
  - Highlights potential vulnerabilities in current litigation environment and allows the company to shore those up
  - Provides an opportunity to update and “reset”
-

## What are other companies doing?



- Each employer's DEIB journey is unique
  - Numerous factors to consider
    - Internal and external pressures
    - Past public statements/reports
    - Risk appetite
    - Size of business
    - Industry
    - Geography
  - Companies should consider a review or audit of their DEIB programs at a minimum
  - ***NOTE: Despite speculation (and some news stories) we are NOT seeing employers walk away from their DEIB programs.***
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## Should we continue DEI- and EEO-based training?

- Training claims and criticism bubble to the surface periodically
- No concern over training that takes a positive, inclusive approach
  - Stress the value of diversity
  - The importance of acceptance and inclusion
  - Diversity applies to ALL
- Critical race theory, “blaming,” divisive concepts may create risk and are not effective

**Companies are  
Asking:**

**What do I tell my  
employees?**

- Help! We're "stuck between a rock and hard place"
    - Walking back public DEIB championing can come with reputational risk
    - But, some public statements related to DEIB may create reputational and legal risk
  - Messaging to Consider:
    - A general message to workforce regarding DEIB commitment, and what that means
    - More specific reassurance messaging to DEIB function, ERGs, and other internal stakeholders
    - Public statement?
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SCAN ME

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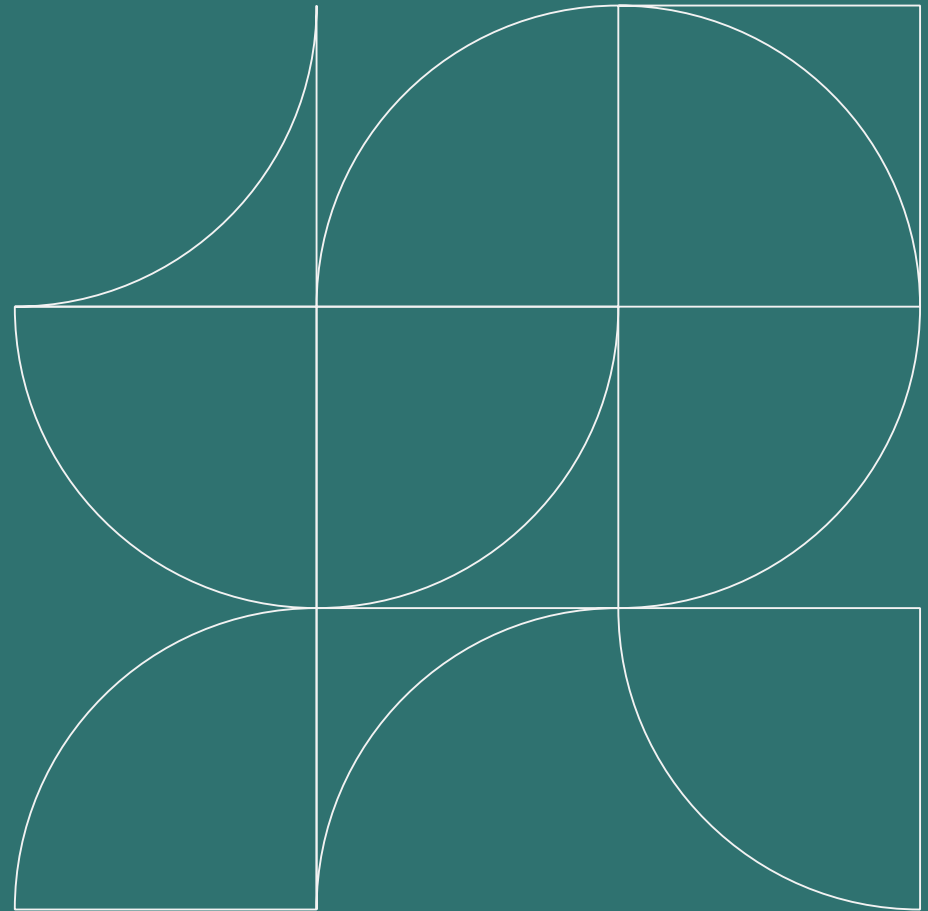
### You will need:

1. **Title:** The State of DEI
2. **Date Viewed:** May 15, 2024
3. **Attendance Verification Code:** SS\_\_\_\_\_

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# 5

## Conclusion and Upcoming Sessions



# DEIB Programs and Non-Discrimination Principles

As a general rule, race/sex can't even be a "motivating factor"—nor a plus factor, tie-breaker, or tipping point.



**Andrea Lucas,**  
Commissioner EEOC



**Jocelyn Samuels,**  
Vice Chair, EEOC

Reducing barriers to equal opportunity is not the same as unfairly putting a thumb on the scale.

- Providing equal employment opportunities does not mean providing advantages, preferences, or special consideration to any applicant or employee because of a protected status.
- Equal employment opportunities = current practices that are inclusive and provide a level playing field for all.

# Key Steps

**Creating an Inclusive  
Culture is  
Effective and Low  
Risk**

## ***Be willing to do the hard work.***

- Examine and understand your workforce.
- Consider all viewpoints.
- Analyze specific, current, representational data to gauge position.
- Use outside professionals if you don't have the needed in-house expertise.
- Find the “why” behind the “what.”
- Institutionalize, and create a true culture of, belonging.
- Avoid hasty actions and reactionary pronouncements.



## Concluding Thoughts

- Nothing is as good or as bad as it seems.....
- Employers continue to have valuable opportunities:
  - to review DEI initiatives
  - to make changes if needed
  - to recommit to DEI values
- Monitor this area of the law closely  
...Change may (or may not?) continue to come

## Join Us for Our Upcoming Series:

### Next Up: The Importance of DEIB Audits: June 6, 2024

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thank  
you

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