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# The backlash against DEI in the U.S. and what it means for Canadian and cross-border companies


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*Torys' Canadian and New York offices will be providing regular briefs on the legal ramifications of the tariffs and other cross-border policy developments on the horizon.*

Diversity, Equity and Inclusion (DEI) programs have come under intense scrutiny in the United States. President Trump has issued executive orders to end federal and private sector DEI programs, the U.S. Supreme Court has struck down affirmative action in college admissions, major U.S. employers have publicly announced the cancellation of DEI programs, and anti-DEI shareholder proposals are on the rise. Most recently, 10 state Attorneys General wrote to six major financial services companies warning they will face reprisals for "unlawfully advance[ing] discriminatory employment quotas".

As the backlash against DEI intensifies in the U.S., many Canadian and cross-border companies are seeking clarity on how these changes affect their operations, strategy, and public disclosure. In this brief, we provide guidance on navigating this changing environment.

## U.S. backlash against DEI

For many years, DEI had been a major focus of U.S. companies. Between 2019 and 2022, chief diversity and inclusion officer roles grew over 160%, pro-DEI shareholder activism rose, and companies were committed to hiring employees from historically underrepresented groups, conducting racial and pay equity audits and achieving greater transparency in hiring and promotions.

However, over the past several months, there has been a significant backlash against DEI in the U.S., fueled by the change in the political landscape.

Political leaders are increasingly questioning the legality and effectiveness of DEI programs, and pressuring U.S. companies to revisit their DEI efforts. This backlash has manifested in various ways, including:

- President Trump's executive order to end federal DEI programs, signaling a broader political push to curtail DEI efforts;

- another executive order from President Trump, calling on the U.S. Attorney General to submit a report on measures to encourage the private sector to end illegal discrimination and preferences, and as part of the report, calling each relevant agency to identify up to nine potential civil compliance investigations of public companies, large non-profits, foundations with assets of $500 million or more, state and local bar and medical associations, and higher education institutions with endowments over $1 billion;
- letter from Attorneys General of 10 states challenging the DEI and ESG programs at six major financial institutions, warning that they will face reprisals if they do not stop "reverse discriminating" on the basis of race;
- the U.S. Supreme Court's decision to strike down affirmative action in college admissions[1], reinforcing a shift away from race-conscious decision-making;
- an uptick in shareholder proposals seeking to scale back or eliminate DEI programs, with investors questioning their legality and associated business and financial risks;
- a rise in "reverse discrimination" lawsuits[2]; and
- major U.S. companies publicly cancelling DEI programs.

In the face of these developments, dozens of U.S. companies have identified DEI as a significant risk in their 2024 10-K reports, and several high-profile companies have publicly abandoned diversity targets, cancelled equity and inclusion training programs, ceased participation in DEI surveys, and phased out the term "diversity, equity and inclusion" in public disclosures.

## Will the DEI backlash affect Canadian companies?

We are not yet seeing a significant backlash against DEI in Canada. In fact, Canadian securities regulators have instead been looking at broadening existing diversity disclosure requirements in response to calls for greater transparency from investors. There has also been a growth of pay transparency legislation in Canada, which reinforces the momentum toward greater equity-focused initiatives. Canada's political landscape is generally less polarized than that of the United States. Further, Canada's legal framework is distinct from the U.S. Unlike the U.S., where affirmative action programs are under scrutiny as being "illegal", Canadian law—including the *Charter*, human rights legislation and pay and employment equity legislation—explicitly supports the creation of such programs aimed at ameliorating the circumstances of disadvantaged individuals or groups, including those who are disadvantaged because of race, gender, or other protected characteristics.

In light of this, there is no legal requirement in Canada to scale back DEI efforts, and Canadian employers remain broadly supportive of DEI programming and initiatives.

However, Canadian companies with U.S. operations are in an increasingly difficult position where enterprise-wide DEI programs may now create legal and business risks in the U.S. The letter from 10 state Attorneys General asserts that they view race- and sex-based quotas as "unlawful" and "discriminatory", and in potential violation of existing federal and/or state law. Further, the political shift in the U.S. could influence how DEI is perceived in Canada, importing some of the current U.S. challenges into Canada. At the same time, Canadian companies should be mindful that scaling back DEI initiatives—particularly if hiring and promotion practices are affected—could create exposure under Canadian human rights laws and increase the risk of employment class actions if the changes result in systemic discrimination.

Although the increasing politicization of DEI may result in changes to disclosure practices, it is still too early to predict what changes Canadian companies will make to their policies and practices on the ground given the very different legal underpinnings of DEI programs in Canada.

## Practical tips for Canadian and cross-border companies

While Canadian organizations are not yet facing the same backlash against DEI as their U.S. counterparts, the evolving landscape is influencing the conversation. Cross-border companies in particular will need to carefully navigate the changing cultural and legal expectations on both sides of the border to ensure legal compliance and mitigate reputational risks. Canadian and cross-border companies may wish to consider the following:

- Closely monitor legal developments and guidance in both the U.S. and Canada, and regularly review policies and practices to ensure full compliance.
- Assess current DEI programs and practices in the U.S., considering the broader context of potentially conflicting state and local laws and enforcement agencies. As part of this assessment, carefully review programs such as quotas, hiring preferences or hiring goals for susceptibility to claims of discrimination and ensure programs continue to be merit-based and are designed to provide equal access to opportunities for all applicants and employees. Given the sensitivity of this analysis and potential for litigation, consider having outside counsel conduct these reviews to ensure the work is privileged.
- Review training for executives, managers, and HR personnel on U.S. DEI practices, and train HR and management to address employee morale and employee relations issues that may arise as a result of changes to DEI practices and the broader cultural shift.
- Review public filings and public statements about enterprise-wide and/or U.S.-specific DEI programs.
- For private equity sponsors and other investment funds with investments in the U.S., consider whether the current DEI landscape might impact their disclosure of risk factors to their investors, and expect greater scrutiny on DEI programs of their portfolio companies during legal due diligence.

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**FOOTNOTES**

*To discuss these issues, please contact the author(s).*