

**PBPA Podcast Transcript**  
**Should We Say That? Mission, Messaging, and Executive Orders**  
**(33:16 minutes)**



Sireesha ([00:03](#)):

For organizations whose missions are rooted in uplifting, marginalized communities, the language of DEI isn't just branding. It's a reflection of their values and history. But as recent executive orders from the federal government explicitly target DEI language, some nonprofits are wondering, should we revise our messaging? Could certain language expose us to legal or funding risk? And how do we minimize organizational risk while staying aligned with our mission? In this episode of the PBPA podcast, Kristina Griffin will be sharing her insight and expertise to help nonprofits navigate these important questions and more.

Sireesha ([00:55](#)):

Hello and welcome to the PBPA Podcast. In each episode of the PBPA Podcast, we explore legal questions relevant to Georgia nonprofits. I'm your host Sireesha Ghanta, Counsel and Education Director at the Pro Bono Partnership of Atlanta. PBPA strengthens our community by engaging volunteer attorneys to provide nonprofits with free business legal services. We provide numerous free resources via our website, including articles and webcasts specific to Georgia nonprofits and their business legal concerns. We also provide direct legal services to our clients. For more information on client eligibility requirements, to apply to be a client or to access our vast learning center, visit our website at [pbpatl.org](http://pbpatl.org). Before we jump into this episode's topic, keep in mind that this podcast is general information, not legal counsel, contact your attorney for guidance on your nonprofits' specific situation.

Sireesha ([02:04](#)):

Kristina Griffin is an associate at Hall, Gilligan, Roberts and Shanlever in Atlanta. Kristina's legal practice is focused on handling employment and business matters for companies and organizations. She's also a dedicated PBPA volunteer who has advised numerous nonprofit clients and spoken to nonprofits on a variety of employment matters. And we can now include this podcast episode to her long list of invaluable guidance that she has shared with Georgia nonprofits. Kristina, thank you so much for being here to speak with us today.

Kristina ([02:39](#)):

Thank you. I'm happy to be here.

Sireesha ([02:42](#)):

So can we start by setting the stage with a brief overview? Tell us a little bit about what was the prior legal landscape relating to DEI efforts and programs before President Trump's executive orders?

Kristina ([02:59](#)):

Well, because we all recognize the value and benefit that DEI programs have, there was a lot of leeway given to these programs and everyone really encouraged them. Companies encouraged them, the public encouraged and looked for them and continues to do those things. Now, of course, underlying those good programs and the goals of DEI programs, there is a general framework of anti-discrimination law. Now, those laws aren't one-sided. They generally say decisions in employment and decisions in contracting can't be based on race and employment certainly can't be based on national origin, color,

race, sex, religion, age, and those are the main protected characteristics. And so the framework of the underlying law hasn't changed, and DEI programs can fit very easily and lawfully within the general legal framework. Now, I will say that sometimes just because of the scope and range of missions that DEI programs have, and maybe because not everyone knows the correct legal language to use, maybe sometimes there were missteps in the way that these programs were talked about or maybe, sometimes people didn't know how to carry these out in the best possible way.

Kristina ([04:33](#)):

And so it's concerning now because these DEI executive orders from President Trump's administration really target any kind of misstep setting aside the really valuable goals and missions of the programs, the DEI orders say any potential violation of the law, however construed, um, will potentially be pursued. And that's sort of the framework that we're working in. It's uncertain and it's intimidating and it's is something difficult to deal with when you don't know how to continue with these really valid goals and continue with using the kinds of language that is permissible in the law. But what we'll talk about today is some of my best guesses, and it is guesses because this area is so new and developing, but there are still valid ways of going about DEI programs and nonprofits pursuing the missions that they have always pursued. It's just that to avoid being a target and to try to position your organization in the best possible way to continue receiving funding and to not have issues with funding sources and that kind of thing, is to be conscious of your language and be potentially more careful than you may have been in the past when this area wasn't such a big focus and, and the specific language used wasn't so emphasized because of just the general recognition of the value of the programs and the beneficial goals that we're trying to be achieved, even if potentially there was a misstep or potentially the, the program wasn't running in the best possible way, there was just a general recognition that the approach was good and that the goals were good. And now, you know, any sort of misstep does potentially make your organization more of a target or create new risks.

Sireesha ([06:52](#)):

Let's talk about those risks now, Kristina. What are those legal risks that are involved in continuing to use DEI related language or framework, whether it's in a nonprofit's mission, program or grant application.

Kristina ([07:11](#)):

So it's a little bit tricky navigating these new executive orders relating to DEI because it's not even very clear to legal scholars or attorneys or certainly nonprofits and companies and organizations. What we're even really talking about? This is sort of new terrain because the administration, the Trump administration uses reference to illegal DEI programs. But what that is is not clear. Obviously there's not been a definition of DEI, but it's been used in public language and the language of organizations. But different organizations and companies will define and apply it differently. And it's obviously even different in the corporate context than it is in the nonprofit sphere. So DEI is a concept but has no specific legal definition. And underlying all of that is certain laws that also have their own scope and limitations and definitions, but may not be consistent.

Kristina ([08:28](#)):

And so what we're talking about here throughout this conversation is different depending on the company organization applying it and then also different depending on the specific context that you're talking about. Whether you're talking about a internal policy or procedure that applies to your

employees and your staff, or whether you're talking about your programming or some external facing function that your organization is doing. Different laws may apply in those different contexts. So it's difficult when you're, when the Trump administration uses language like "illegal DEI" to know what that means because whether you're in compliance with the law or not will depend on a lot of different factors. And, and without these terms and language being defined, it's really uncertain territory.

Kristina ([09:26](#)):

The biggest risk areas are going to be when an organization is talking about its mission and its programs in language that specifically and explicitly references sex, gender, or race. Those are going to be the, the biggest areas of concern. But like I said, any of the protected characteristics - national origin, color, race, sex, gender, religion or age - would be potential risk areas. And so organizations listening to this podcast can, as a starting point, assess your mission and goals. For some of you, it's not going to be hard to discuss your mission values and programs without reference to sex, gender, or race because perhaps you focus on providing services to a population of people in a certain income range or facing a disability or facing certain circumstances. And all of that is still okay and has always been okay. And again, these executive orders don't change the state of the law, but they do emphasize enforcement priorities and emphasize attention that's going to be paid to how programs are discussed and talked about.

Sireesha ([10:53](#)):

So for some organizations, avoiding some of the more treacherous areas of complying with the executive orders will be more natural. It's already consistent with your programming and language for other organizations and for others listening to this podcast where your prior language on about your programs and your mission did or still does reference sex, gender, or race, then you'll need to take another step. You'll need to assess, can you refrain, reframe this? Can you focus the way that you're discussing your current and existing programs and mission to focus more on what you provide, what kinds of services you share with the community? And can you be more inclusive in your language? So instead of saying we provide services for X, Y, Z groups, which may reference those categories that I talked about - sex, gender, or race - could you instead say, we provide these services, talk more about the services and say that something along the lines of that you fairly provide these services and aim to promote inclusivity and leave out reference to those specific groups that you primarily work with.

Kristina ([12:13](#)):

The concern is not that you can't reference or continue servicing those groups, but that specifically referencing some groups that you service could be misconstrued as excluding others. And my guess is that in a lot of cases you are an inclusive organization and, and perhaps you don't service every person out there. Um, but ask yourself, if someone came to you from another demographic that's outside your target demographic, would you still try to help them? And if so, make that, keep that at the forefront of your mind, emphasize that in your communications and make sure it's acknowledged that, that you do have a broad range of services. If none of those sort of generally applicable guidance fits your organization or your thinking to yourself, "this is not consistent with what our organization" is or "that's just not, doesn't seem feasible for me", then that's certainly an area where you'll likely need more specific legal guidance to help you comply. But generally speaking, those are a good first steps for organizations to begin internally considering and talking about.

Sireesha ([13:35](#)):

So now my next question is going to be related to programming. And you did talk about this a little bit, but how can nonprofit structure its programs to serve marginalized communities without being perceived as discriminatory under these new enforcement priorities?

Kristina ([13:56](#)):

It's tough, right? Because as an organization you've created your mission and services and goals with a particular focus in mind. You've developed your programming and, and you likely have a target audience or a target population that, that you primarily work with. Certainly there may be some organizations that should consider or may want to consider as a method of reducing risk, whether your actual programming should or could change or if you could offer a broader range of services, but that won't be necessarily needed in all cases. In some cases likely some changes about how you're thinking about being inclusive and again, using language that doesn't specifically reference a particular gender or race, but acknowledges that you're open to providing services to others in need as well may be enough to be the right approach and strike the right balance that is lawful. Again, just depending on what your organization does and certain other risk factors, like whether you're being asked to sign a certification or not, you may need very specific legal guidance from an attorney that can look at what your specific organization is doing. But for, for some organizations that are just assessing whether you're doing the right thing at this stage and whether you can try to best position yourself to ensure that you're complying with the law, then making these adjustments to the language that you're using about your programming to emphasize that you're an inclusive organization and that you're not intending to exclude any particular group and that even individuals perhaps outside your target focus would be eligible to receive services or would be considered for services. Again, that's a good, a good first step.

Sireesha ([16:14](#)):

So even though the programs generally serve a certain community and historically have drawn from that community, they should still be open to anybody who is interested and meets the qualification requirements that are outside those protected categories.

Kristina ([16:31](#)):

That's right. It's still certainly permissible and always has been permissible to have income requirements, for example, and other requirements. But basing services or eligibility for services on race or sex or age is potentially a violation of law. Again, the specific circumstances matter, but that's certainly a concern and likely to be a potential violation of the law. So for example, you've seen some organizations, and these are large organizations that may be more of a target than, than a smaller local organization, but you've seen them expand their language from having race-based eligibility requirements to having a purely financial based ones or purely some other requirement. That's not a fail proof method. If it were subject to a challenge and were determined that it was not truthfully based on other characteristics, but used as a proxy for race, you could still have some concerns. But steering away from explicitly race-based requirements or sex-based requirements for eligibility is preferable. And you've seen some large organizations doing that so that they can essentially continue carrying out the missions that they've always had but potentially be using more inclusive eligibility standards and more inclusive language as they're discussing those things.

Sireesha ([18:13](#)):

So should a nonprofit that works in these areas of we'll call them "heightened scrutiny", revise their public facing materials, uh, such as their website or socials to reduce potential legal exposure,

Kristina ([18:30](#)):

I think you should consider it. And if you think that that's needed, I think it would be a good idea to seek legal advice on how and what language you should be using or just get some more guidance because I realize this is a really unfamiliar and intimidating area, and it's hard to know what kind of language is okay without completely eliminating your message altogether, which you certainly don't want to do. I think for most organizations there is a way to communicate what the organization's mission and goals and values are. But it's tricky to navigate. But because part of what Trump's executive orders do is they implement a certification requirement, and that certification requirement has been challenged and is a little bit uncertain, but basically what it requires is that an organization to receive federal funding will have to certify that they're not violating any laws and that they're not advancing DEI programs.

Kristina ([19:39](#)):

And, again, the state of that certification is a bit uncertain, but the administration and the Department of Justice have said they're moving forward with that. And part of what that certification allows is it makes available certain remedies under a law called the False Claims Act. And the False Claims Act allows private individuals or private groups to challenge organizations on this issue. And so I do think that having focus on your public facing materials and social media is important. I think that's probably one of the highest risk areas. Obviously funding has a lot of focus and, and grant proposals and that kind of thing is also important, but the public facing materials is where a lot of the risk could come from with being challenged on the very specific language that you're using and tvery specific approach that you have to things like eligibility determinations or running your programming,

Sireesha ([21:00](#)):

Reviewing your public facing materials, should be a high priority for nonprofits. Especially, it depends on your level of risk that you want to take. Maybe if you're more, if you're a little more risk averse, you might want to review your public facing materials. Let's talk a little bit about funding. Is do you have any recommendations for language nonprofit should avoid or include in grant proposals?

Kristina ([21:30](#)):

So I know there's a list out there of language not to use or language not allowed in the government. I think that a lot of what you'll be dealing with in grant proposals or funding requests will be dependent on the risk tolerance of other organizations. Or if you're seeking a grant directly from the government, then perhaps you'll need to be more cautious in the language that you are using or perhaps adjust more than you may have in the past when you're seeking grants or money from other organizations. I think it will also depend on their risk tolerance. So some organizations I expect will direct a more cautious approach and find certain kinds of language more intolerable while others will allow more leeway and perhaps only have very limited guidance that you shouldn't be explicit limiting your programs or services to people based on race, age, or gender. But otherwise, almost any language is okay.

Kristina ([22:45](#)):

It's hard to determine exactly what the right balance is there. And like you said, a lot of it is risk tolerance and I think that explicit references to race, sex, or age and the other protected characteristics I've mentioned are going to be the most difficult. An organization continuing to use explicit references to race in the current landscape will put you at the greatest risk because if challenged, you'll be in the most difficult position to defend. And that's not to say that you wouldn't have defenses or that you couldn't justify it as being legitimate, but, but it would be the most challenging just giving the entire

legal framework. And then anything short of that potentially just gives an organization and their attorneys, if ever challenged more arguments and more basis for pushing back and saying that what we are doing is not only good and for a well-intentioned purpose, but also lawful and also correct under every aspect of the law.

Sireesha ([23:58](#)):

And I know for some organizations out there, Kristina, their mission, their programming, their services have historically always been race-based and they cannot envision a way that they can continue without continuing to be race-based.

Kristina ([24:16](#)):

I think that's right, and organizations like that too can look at larger organizations that do something similar to what they do and see how they're navigating the issue. I found that really insightful to, to look at some of these larger organizations that have their own legal counsel and certainly it be beneficial to have your own legal counsel too as you're assessing that question of what is your legal tolerance and, and can you continue with doing things exactly as you always have or are there adjustments that make sense even if this is not language that you can or are willing to change, or even if you feel like any compliance would fundamentally alter your mission. And that's not something that's tolerable. Having legal counsel to navigate that and whether there are tolerable changes would make a lot of sense

Sireesha ([25:14](#)):

And very true. Kristina. I know peer groups have been relying on each other a lot the past few months and trying to navigate and figure out all these changes together.

Kristina ([25:26](#)):

This is just my best guess and it's such a developing area that, you know, I have things that I recommend to clients that they do if it's tolerable to best position them for riding out these changes and preparing for what may come next. But it is a very individualized decision and each organization will have things that are just not negotiable for them that they feel like they, it just can't change. And so I do think peer groups and individualized resources are really beneficial in those cases.

Sireesha ([26:05](#)):

And now my next question is related to policies or documentation. What can an organization do internally in terms of policies or documentation to demonstrate its compliance with federal laws or these new enforcement priorities while they continue with their mission?

Kristina ([26:31](#)):

Well, if your organization has employees, I would certainly make sure you have an equal employment opportunity policy and anti-discrimination policy and anti-harassment policy for that applies to your employees. So that would be sort of an internal document then that would be separate from your programming and services and your external facing materials.

Sireesha ([26:56](#)):

And Kristina, you mentioned earlier the federal contractor certification requirements. Can we talk about that? What's the latest going on? You mentioned that there have been recent changes again, and what should nonprofits know? What are the potential risks of responding to those requests for certification?

Kristina ([27:18](#)):

So requests for certification are going to be seen most likely in any contract with the government and potentially for subcontractors as well. Even if you don't have direct agreements with the government, and those certifications will generally require asserting two things that first is that you aren't maintaining any DEI programming or unlawful DEI programming, and also it will state that the agreement with the government say that your certification is a material part of that contract and that any violation, it may not explicitly reference this law, but the implication is that any violation could be pursued and remedies could be pursued under what's called the False Claims Act. The False Claims Act is a pretty stringent law that allows whistleblowers to bring claims and potentially receive money from the penalties that they obtain essentially on behalf of the government. That aspect of law is also being challenged in a little bit uncertain, But it means that what organizations are faced with is not only the potential risk of the federal government or an agency coming in to investigate, but also a whistleblower, as they would be called, or an individual or just an interested person could also potentially either raise an issue with the agency or individually try to remedy a perceived wrong.

Kristina ([29:05](#)):

The False Claims Act also allows really serious damages and penalties and potential criminal exposure. Even so the damages associated could be three times the value of the contract, statutory penalties between \$14,000 to \$28,000 per violation or per, which could be construed even as per invoice. And so it's extremely high penalties potentially of signing this certification improperly or falsely. I think there's a lot of discussion from legal practitioners about what kinds of defenses could be asserted in case of a challenge under the False Claims Act. The DOL has been enjoined from requiring this certification, but other agencies are moving forward with it. And most recently the DOJ announced in May that they have an initiative to prosecute these kinds of issues under the False Claims Act. So generally speaking, it's still subject to challenge, but the certification requirement is mostly moving forward for most agencies.

Sireesha ([30:18](#)):

Wow. Kristina, as you've said many times today, this is an area where there's a lot of movement happening and we can just give our suggestions based on where we are today. And we don't know where we'll be tomorrow as things have been changing so rapidly. Do you have any thoughts on how can nonprofits continue to navigate all of these changes?

Kristina ([30:45](#)):

Well, I think if you are asked to sign a certification, someone knowledgeable needs to advise you or you'd be well served to do some due diligence about whether you can feel comfortable signing the certification. Probably that is some legal guidance, but a minimum, I think before signing certification and organization would want to take some steps to try to ensure that what you're signing and what you're certifying is truthful. Legal guidance would be appropriate in those circumstances. If you're not asked to sign a certification, I'll immediately just continue tracking this area as best as you can. It's challenging and there's a lot of changes happening, continuing to follow, and look to what other larger organizations may be doing, and keeping up with the current state of the law will position you in the best possible way to ride out these changes or to adapt as needed, if you can. And if not, you know,



seeking legal advice about how you will handle a potential challenge if that happens, would a good move?

Sireesha ([32:08](#)):

This is such helpful insight and information that you have provided. Kristina, a big thank you for sharing your time and expertise with us today. These are challenging times for mission-driven organizations, but with the right knowledge and clarity, nonprofits can keep working towards their missions and communicating with care.

Sireesha ([32:34](#)):

We hope that you found this episode of the PBPA Podcast to be informative and helpful. We add new episodes every month with short conversations about general, yet important legal information for Georgia nonprofits. Remember that this is not legal counsel. Talk to your attorney about your organization's specific concerns. Thanks for tuning into the PBPA Podcast. And to all nonprofits listening out there, thank you for all the good work you continue to do in our community.