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President Trump's Executive Orders on DEI and Their Potential Impact on the Private Sector

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Since taking office, President Trump has signed a flurry of executive orders, several of which target diversity, equity, and inclusion (DEI) and diversity, equity, inclusion, and accessibility (DEIA) programs and initiatives. At a high-level, these executive orders seek to end “illegal” DEI programs and affirmative action obligations in the federal workforce, and to “encourage” private-sector employers to do the same. On February 21, 2025, a federal district judge in Maryland entered a nationwide preliminary injunction against enforcement of key provisions in the Executive Orders.

This Memo is intended to provide guidance for navigating DEI programming in the private sector and government contracting in light of the current political and legal landscape. The Memo begins with an overview of the relevant executive orders and related memoranda, discusses the potential implications of these orders on the private sector, summarizes the nationwide preliminary injunction currently in place, and concludes with recommendations for best practices in anticipation of potential inquiry or investigation.

Overview of DEI Executive Orders and Related Memoranda

Of the many executive orders that President Trump has signed since beginning his second term, two are key in furthering his Administration's policy agenda of eliminating all “illegal” DEI programs from the federal government and encouraging employers to discontinue the use of such programs in the private sector. These orders are Executive Order 14151, *Ending Radical and Wasteful Government DEI Programs and Preferencing*,¹ and Executive Order 14173, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*.²

Executive Order 14151, *Ending Radical and Wasteful Government DEI Programs and Preferencing*, addresses DEI programs within or closely linked to the federal government's own initiatives. The Order directs all federal agencies and departments to terminate “illegal” DEI offices, positions, programs, policies, and initiatives, including “equity-related” grants or contracts and “DEI or DEIA performance requirements” for employees, contractors, or grantees.

¹ Full text available at: <https://www.federalregister.gov/d/2025-01953>.

² Full text available at: <https://www.federalregister.gov/d/2025-02097>.

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Executive Order 14173, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*, takes aim at DEI initiatives in federal government contracting and the private sector on asserted grounds that certain industries and institutions “have adopted and actively use dangerous, demeaning, and immoral race- and sex-based preferences under the guise” of DEI.

With respect to government contracting, Executive Order 14173 rescinds prior executive action requiring that every government contract include a statement that “[t]he contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin.” Federal contracts and grant awards must now require the counterparty to certify that it “does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws,” and that its compliance with federal anti-discrimination laws is material to the government’s payment decisions for purposes of the False Claims Act, 31 U.S.C. § 3729(b)(4).

As to the private sector, Executive Order 14173 does not directly mandate any action of private employers. Rather, it directs federal agencies to “tak[e] appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI,” and to identify “[t]he most egregious and discriminatory DEI practitioners” in key “sectors of concern.” Agencies are instructed to submit a “proposed strategic enforcement plan” that, among other things, identifies up to nine potential civil compliance investigations of entities that meet certain criteria, including, but not limited to, publicly traded corporations and large non-profit corporations or associations.

While neither Executive Order 14151 nor Executive Order 14173 provide much clarity as to how their respective directives will be enforced, both the U.S. Office of Personnel Management (OPM) and U.S. Department of Justice (DOJ) have issued memoranda that provide guidance as to how these orders will be interpreted and carried out.

The OPM Memorandum dated February 5, 2025,³ for example, instructs agencies to terminate all “illegal” DEI initiatives that “unlawfully discriminate” in any employment action, including “diverse slate” policies—described as “unlawful diversity requirements for the composition of hiring panels [or] candidate pools”—and Special Emphasis Programs that promote DEIA based on protected characteristics. The Memorandum notes, however, that affinity groups, mentorship programs, and other social and cultural events are permissible so long as the agency does not “draw distinctions” based on any protected characteristic in granting permission to participate in such groups or attend such events.

The DOJ Memorandum, also dated February 5, 2025,⁴ provides that the Civil Rights Division will investigate and penalize “illegal” DEI preferences, mandates, policies, programs, and activities in the private sector and in educational institutions that receive federal funds. According to the Memorandum, “illegal” DEI encompasses “programs, initiatives, or policies that discriminate, exclude, or divide

³ Memorandum from Charles Ezell, Acting Director, U.S. Office of Personnel Management, to Heads and Acting Heads of Departments and Agencies (Feb. 5, 2025), <https://chcoc.gov/sites/OPMMemo.pdf>.

⁴ Memorandum from Pam Bondi, U.S. Attorney General, to All Department Employees (Feb. 5, 2025), <https://www.justice.gov/ag/media/1388501/dl?inline>.

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individuals based on race or sex,” but does *not* extend to educational, cultural, or historical observances that celebrate diversity, recognize historical contributions, and promote awareness, such as Black History Month, International Holocaust Remembrance Day, and similar events.

The Potential Impact of President Trump’s DEI Executive Orders on the Private Sector

While Executive Orders 14151 and 14173 signal an increased level of scrutiny and potential investigation of DEI programs and initiatives, they *do not* change existing law regarding discrimination in contracting, employment, or otherwise. The Orders and related memoranda make clear that the target of these directives is “illegal” DEI—that is, DEI that constitutes unlawful discrimination or preferences based on protected characteristics. The key consideration is thus whether the DEI program *discriminates* or confers a *preference* based on race or gender.

This interpretation is borne out by the DOJ’s memorandum, which distinguishes programs that “discriminate, exclude, or divide individuals based on race or sex” from those that “celebrate diversity, recognize historical contributions, and promote awareness without engaging in exclusion or discrimination.” Thus, DEI programs and practices that are consistent with existing law (*i.e.*, do not discriminate or maintain preferences based on a protected characteristic) remain permissible (and likely necessary to ensure compliance with those laws) and are unlikely to be affected by the Executive Orders or the related memoranda.

Companies in the private sector and federal contract or grant recipients should nevertheless be aware of the potential for inquiries, investigations, enforcement actions, or litigation regarding their compliance with these directives.

Summary of the Preliminary Injunction Against the DEI Executive Orders

On February 3, 2025, a lawsuit against the Trump Administration was filed in the U.S. District Court for the District of Maryland, *National Ass’n of Diversity Officers in Higher Educ., et al. v. Trump, et al*, No. 1:25-CV-00333-ABA (D. Md.), seeking a declaratory judgment that Executive Orders 14151, and 14173 are unconstitutional and to block their enforcement. On February 21, 2025, U.S. District Judge Adam Abelson granted the plaintiffs’ request for a nationwide preliminary injunction against core provisions of the Executive Orders.

The preliminary injunction enjoins for the present time, on a nationwide basis, the following three aspects of the Executive Orders: (1) the “Termination Provision” that directs federal agencies to terminate all “equity-related” federal grants and contracts; (2) the “Certification Provision” that requires federal contractors and grantees to certify that they do not “operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws”; and (3) the “Enforcement Threat Provision” that threatens private sector companies with “potential civil compliance investigations” to deter DEI programs or principles “that constitute illegal discrimination or preferences.” In granting the preliminary injunction, the court agreed with the plaintiffs that they have a likelihood of success on the merits with

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respect to their arguments that the foregoing provision are unconstitutionally vague under the 5th Amendment and that they violate First Amendment rights to free speech related to diversity, equity, inclusion, and accessibility.

With respect to the Enforcement Threat Provision applicable to the private sector, the court found that it amounts to “textbook viewpoint-based discrimination” and is unconstitutionally vague because the Executive Orders fail to give “guidance on what the administration considers to constitute ‘illegal DEI discrimination and preferences,’ ...or what types of ‘DEI programs or principles’ the new administration considers ‘illegal’ and is seeking to ‘deter’.” (Opinion at pp. 50, 54.)

Recommendations for Best Practices to Ensure Compliance

The Trump Administration is undoubtedly considering its options in the wake of the recent Maryland court’s preliminary injunction. The Administration will likely seek to modify the language of the Executive Orders to address the unconstitutionality found by the court. Thus, while it remains unclear how, exactly, the Administration will ultimately seek to enforce its anti-DEI Executive Orders in the private sector, companies should consider taking the following actions in anticipation of potential inquiry or investigation:

- **Conduct a Risk Assessment of Current DEI Programs**

Companies should proactively assess DEI plans, programs, and policies to understand and assess any potential vulnerabilities in light of the Executive Orders. This assessment should include, but not be limited to, a company’s DEI offices and positions, hiring initiatives, training and career development programs, internships and fellowships, and Employee Resource Groups.

Companies should be aware that DEI initiatives that are legally compliant may nevertheless become the target of an investigation if the messaging surrounding the program suggests otherwise. Companies should therefore consider auditing the language used in public-facing materials, like websites and press releases, to identify legally risky messaging.

- **Review and Refine Public Disclosures in 10-K Statements and Proxy Statements**

Public companies should review their public disclosures, including, but not limited to, 10-K statements, ESG statements, and proxy statements, that touch upon DEI initiatives, programs, policies, or objectives. Companies may be targeted as engaging in “illegal” DEI activity as a result of certain representations in said disclosures.

Public companies may also consider updating their risk factors to address the potential for litigation or other enforcement action as a result of the Executive Orders to avoid potential shareholder suits for alleged misrepresentations.

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- **Audit and Evaluate Government Contracts to Ensure Compliance**

Companies with federal contracts or those that receive federal grants should review their policies to ensure compliance with the new contractual mandates and to avoid disqualification or potential penalties, including under the False Claims Act.

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