WINSTON & STRAWN LLP

CLIENT ALERT

Navigating DEI Under the Trump Administration: Key Considerations for Employers

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Introduction

Almost immediately upon taking office, President Donald Trump issued a series of executive orders that signaled a seismic shift in federal policy on Diversity, Equity, and Inclusion (DEI) and/or Diversity, Equity, Inclusion, and Accessibility (DEIA). These directives aim to significantly alter DEI programs within federal agencies, revoke long-standing affirmative action requirements for federal contractors, and push private employers to reassess their DEI initiatives. For organizations navigating this evolving landscape, understanding these changes is critical to ensuring compliance and minimizing legal risk. This update, current as of **February 27, 2025**, outlines the key developments, potential ramifications, and guidelines to help your business adapt.

Overview of Recent Executive Orders and Related Developments

PRESIDENT TRUMP'S EXECUTIVE ORDERS

- Executive Order (EO) 14148, titled "Initial Rescissions of Harmful Executive Orders and Actions," orders federal agencies to "take immediate steps to end Federal implementation of unlawful and radical DEI ideology" and rescinds numerous previous executive orders to reverse the "injection of 'diversity, equity, and inclusion' into our institutions," including those advancing racial equity (EO 13985) and gender identity protections (EO 13988). [1]

- EO 14151, titled "Ending Radical and Wasteful Government DEI Programs and Preferencing," orders the Office of Management and Budget (OMB) and the Office of Personnel Management (OPM) to coordinate the termination of all "discriminatory programs, including illegal DEI and mandates, policies, programs, preferences, and activities relating to" DEI. [2]

- EO 14168, titled "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government," mandates that federal agencies revise hiring and promotion policies to prioritize merit over diversity considerations, and requires each federal agency to submit a compliance report to the OMB by April 21, 2025. [3]

- EO 14173, titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," mandates, among other things, that federal agencies and contractors eliminate "illegal DEI and DEIA policies" as well as "all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements."[4] For an analysis of its impact on federal contractors and subcontractors, including potential exposure under the federal False Claims Act (FCA), see our previous discussion here.

As discussed below, legal challenges have been launched against certain of these EOs, with some preliminary success.

GUIDANCE FROM FEDERAL AGENCIES

Several federal agencies have since provided guidance regarding the implementation of these EOs. The Department of Transportation's order and memorandum, for example, emphasizes that its funds, grants, and loans should not be used to further "political" objectives or goals "unrelated to a proper Federal interest."

The newly appointed acting chair of the Equal Employment Opportunity Commission (EEOC) stated that her priorities include addressing DEI-related race and sex discrimination, protecting workers from national-origin discrimination, and upholding policies related to sex-based rights, including access to single-sex spaces at work.[5] The EEOC has since removed language promoting gender ideology on the EEOC's internal and external websites and documents, including webpages, statements, social media platforms, forms, trainings, and others.

In a previous blog post, we summarized two related memoranda that U.S. Attorney General (AG) Pam Bondi issued to all Department of Justice (DOJ) employees. These memoranda rely on the Supreme Court's decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023) ("*SFFA*"), which struck down affirmative action programs in higher-education institutions, to call for the abolition of all "illegal" DEI initiatives in the federal government.

On the heels of those DOJ memoranda, the OPM issued specific guidance for how federal agencies should comply with President Trump's directives. Although this memo applies only to federal employees, it provides insight into how the administration defines "unlawful" DEI initiatives and how enforcement may extend to federal contractors and private-sector employers. The OPM memo describes "illegal DEI" to include any action "motivated, in whole or in part, by protected characteristics." The memo notes that the following activities fall under this umbrella:

- Any program or initiative that limits membership or participation to a certain protected class (race, gender, etc.).
- Diversity-related composition requirements of hiring panels.
- Diversity-related composition requirements of candidate pools.
- Employee resource groups that promote unlawful DEI initiatives or advance recruitment, hiring, or preferential benefits (including, but not limited to, training or other career development opportunities).
- Any employee retention goals that are based on protected characteristics.
- Special Emphasis Programs that "promote DEI based on protected characteristics" in employment, including, but not limited to, recruiting, interviewing, hiring, training or other professional development, internships, fellowships, promotion, retention, discipline, and separation.

CHALLENGES TO TRUMP'S EOS

A. February 13, 2025 Multi-State Guidance Concerning DEIA Employment Initiatives

A coalition of AGs from 16 states have issued a joint letter reaffirming their stance on the continued legality of certain DEI initiatives. This guidance asserts that "diversity, equity, inclusion, and accessibility best practices are not illegal," and that Trump's EOs "conflate[] unlawful preferences in hiring and promotion with sound and lawful best practices for promoting" DEI in the workforce. Key DEI best practices outlined in the letter include (1) broadening recruitment efforts; (2) standardizing candidate evaluation criteria; (3) assessing policy effectiveness in hiring and retention; (4)

training on unconscious bias, inclusive leadership, and disability awareness; and (5) establishing clear protocols for reporting discrimination or harassment.

B. Judge Issues Nationwide Preliminary Injunction—*National Association of Diversity Officers in Higher Education et al. v. Trump et al.*, District of Maryland, No. 1:25-cv-00471

On February 3, 2025, the mayor and city council of Baltimore, the National Association of Diversity Officers in Higher Education, the American Association of University Professors, and the Restaurant Opportunities Centers United filed a complaint in the District of Maryland challenging EOs 14151 and 14173. The complaint raises several constitutional claims, including that the EOs are unconstitutionally vague, infringe upon First Amendment free speech rights, and represent an overreach of presidential authority.

On February 21, 2025, the district court granted in part the plaintiffs' motion for a preliminary injunction, noting that the provisions of the EOs are unconstitutionally vague and potentially infringe on First Amendment rights by discriminating against certain viewpoints. The injunction specifically:

- blocks federal agencies from canceling existing agreements based on the EOs;
- halts the mandate that federal contractors affirm they do not promote "illegal" DEI initiatives; and
- suspends federal agencies' bringing any enforcement action targeting "DEI programs or principles" (although the district court declined to "enjoin the [AG] from . . . engaging in investigation" of DEI programs).

The preliminary injunction applies nationwide. The Trump administration has asked the court to stay its order or, in the alternative, limit the application of the injunction to the plaintiffs while it pursues an appeal. The court has not yet considered this request.

***C. National Urban League, et al. v. Trump, et al.*, District of Columbia, No. 1:25-cv-00471**

On February 19, 2025, the Legal Defense Fund (LDF) and Lambda Legal filed a lawsuit on behalf of the National Urban League, the National Fair Housing Alliance, and the AIDS Foundation of Chicago challenging Trump's DEI-related EOs. The suit raises several issues, including that (1) the orders unlawfully restrict the speech of organizations that receive federal funding by prohibiting them from discussing or promoting DEIA programs; (2) the government cannot condition funding on an organization's agreement to abandon its constitutional rights; (3) the orders fail to clearly define what conduct or speech is prohibited, making compliance difficult and opening the door to arbitrary enforcement by federal agencies; (4) the orders disproportionately harm marginalized communities, including LGBTQ+ individuals, racial minorities, and people living with HIV, by targeting programs designed to promote their well-being; and (5) the orders lack a rational basis and exceed presidential authority, as they override congressional mandates and federal civil rights laws that require fair housing, nondiscrimination, and healthcare equity efforts.

The plaintiffs have asked the court for a declaration that these EOs are unconstitutional and to enjoin their enforcement.

***D. Chicago Women in Trades v. Trump*, Northern District of Illinois, No. 1:25-cv-02005**

On February 26, 2025, Chicago Women in Trades (CWIT), a nonprofit dedicated to empowering women in skilled trades, launched another lawsuit challenging Trump's DEI-related executive orders. CWIT, which supports underrepresented women—particularly Black and Latina—in trades like carpentry and welding, relies on federal grants now jeopardized by these orders. The lawsuit raises similar issues to those raised in the two cases described above, including that (1) the orders violate the First Amendment by banning DEI advocacy, chilling expression through vague mandates, and conditioning federal funding on the abandonment of DEI advocacy; (2) the orders violate the Fifth Amendment by denying due process with unclear prohibitions and risk arbitrary enforcement; and (3) the orders encroach upon congressional power over spending and grant conditions and exceed presidential authority.

Like the other plaintiffs, CWIT seeks both preliminary and permanent injunctions to prevent the enforcement of these orders.

Guidance for Navigating DEI Under the Trump Administration

The preliminary injunction issued by the federal district court in *National Association of Diversity Officers in Higher Education* temporarily blocks key provisions of Trump's executive orders. At least in the near term, federal agencies are not actively enforcing mandates to terminate DEI initiatives and federal contractors are not (yet) required to affirm that they do not promote "illegal" DEI.

Nonetheless, the administration's efforts to eliminate "illegal" DEI have not stalled. As noted above, the federal district court may choose to stay the injunction or limit its nationwide application pursuant to the government's request. Even if it does not, the court's order leaves room for the AG to investigate DEI programs and/or prepare a report to identify potential targets for investigation. Critical here, per the President's EOs, targets for investigation may include (but are not limited to) publicly traded corporations, large nonprofit corporations or associations, foundations with assets of US$500M or more, state and local bar and medical associations, and institutions of higher education with endowments over US$1B.

The preliminary injunction also does not enjoin private plaintiffs and the EEOC, which has issued a statement that its priorities "will include rooting out unlawful DEI-motivated race and sex discrimination." As such, it remains clear that the Trump administration intends to closely scrutinize the DEI policies and programs of federal contractors and private companies.

In preparation for the increased public and/or government scrutiny, companies should examine their DEI-related programs and policies to assess the risk of exposure and, to the extent necessary, ensure they are consistent with current law.

Companies, however, are advised to avoid a knee-jerk termination of all programs or initiatives thought to touch upon DEI, especially given that many DEI-related initiatives include nondiscrimination and fair-employment policies, procedures, and training programs necessary to stay in compliance with state and federal antidiscrimination laws and equal-employment-opportunity requirements.

Certain practices taken under the guise of DEI have always been, and will continue to be, "illegal" under federal and state antidiscrimination laws. Using race, sex, or other protected characteristics as a factor in whom to hire, promote, or contract with, or in compensation or other employment or contracting decisions, is generally unlawful under current law. This includes programs or initiatives that establish numerical quotas or set-asides based on race, sex/gender, or other protected characteristics for hiring or promotion or in supplier or vendor contracting.

The meaning and scope of what the current administration will consider "illegal" DEI appears significantly broader, but remains far from clear. Based on guidance available to date, certain DEI-related practices carry a higher risk of scrutiny from the current administration and a higher risk of private-party challenges in the current environment, including:

- Aspirational goal or target programs that seek to maintain or increase the number of employees of a given race, sex/gender, or other protected characteristic in an organization (or levels of an organization).
- Mentoring or leadership programs that limit or preference based on race, sex/gender, or another protected characteristic.
- Diverse hiring or candidate slate programs where a candidate or interview slate is required to have a specified composition or minimum number of diverse candidates or interviewers based on race, sex/gender, or another protected characteristic.
- Scholarship or grant programs where eligibility criteria or award decisions are based (in whole or in part) on race, sex/gender, or another protected characteristic.

- Employee resource or affinity groups open only to employees of a certain race, sex/gender, or other protected characteristic.
- Recruiting practices that have the purpose or effect of excluding or preferencing potential candidates according to race, sex/gender, or another protected characteristic.
- Supplier or vendor diversity programs or requirements.
- Investment programs limiting or preferencing investments based on race, sex/gender, or another protected characteristic.
- Executive-compensation programs or determinations tying bonuses or other compensation to DEI performance or achievement.

According to current guidance from the administration, "educational, cultural, or historical observances—such as Black History Month, International Holocaust Remembrance Day, or similar events—that celebrate diversity, recognize historical contributions, and promote awareness without engaging in exclusion or discrimination" are unlikely to be viewed as "illegal" DEI.

How to Approach DEI in an Uncertain Landscape

- **Perform a Privileged DEI Risk Audit**: Given the administration's expansive stance on what might be deemed "unlawful" DEI, it is important for organizations to systematically evaluate current and planned DEI policies and programs under the protection of attorney–client privilege. This involves scrutinizing all internal documents and outward-facing DEI statements—job descriptions, performance metrics, trainings, job postings, policies, SEC filings, websites, and internal memos—to align them with your company's risk comfort level.
- **Maintain a Balanced Approach**: While employers may want to reframe their DEI programs to focus on equal opportunity and merit-based outcomes, they should resist slashing DEI efforts too aggressively, as this could open the door to conventional discrimination claims. Again, employers must maintain nondiscrimination and fair-employment policies, procedures, and training necessary to stay in compliance with state antidiscrimination laws and ensure equal employment opportunities.
- **Train Managers and HR Teams**: Educate leadership on the evolving legal framework and best practices for handling DEI-related issues, including strategies to address employee concerns without exposing the company to heightened legal risk.
- **Ensure Adequate Recordkeeping for Hiring and Other Employment-Related Decisions**: With heightened scrutiny—and potential FCA lawsuits—on employment actions, ensure records robustly demonstrate that decisions stem from sound business rationale, not protected traits such as race.

We will continue to monitor the developments in this space and update this page accordingly. For additional information or if you would like assistance with reviewing your DEI-related practices to ensure compliance with the current legal landscape, please reach out to your Winston relationship partner.

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[1] https://www.whitehouse.gov/presidential-actions/2025/01/initial-rescissions-of-harmful-executive-orders-and-actions/

[2] https://www.whitehouse.gov/presidential-actions/2025/01/ending-radical-and-wasteful-government-dei-programs-and-preferencing/

[3] https://www.whitehouse.gov/presidential-actions/2025/01/defending-women-from-gender-ideology-extremism-and-restoring-biological-truth-to-the-federal-government/

[4] https://www.whitehouse.gov/presidential-actions/2025/01/ending-illegal-discrimination-and-restoring-merit-based-opportunity/

[5] https://www.eeoc.gov/newsroom/president-appoints-andrea-r-lucas-eeoc-acting-chair

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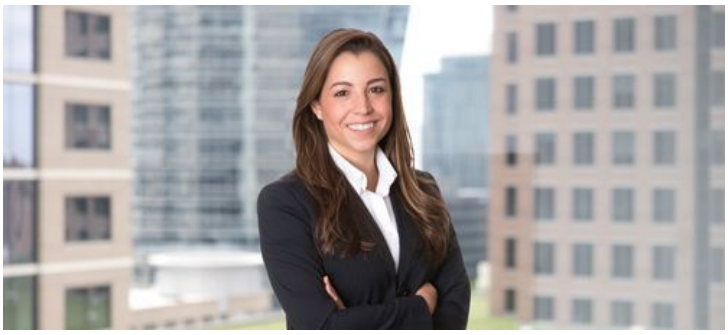

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