

ALERTS

President Trump Issues Executive Order Targeting DEI Programs, and Ensuing Legal Developments

February 14, 2025

On Jan. 21, 2025, President Trump issued Executive Order 14173 (“Order”), entitled “Ending Illegal Discrimination And Restoring Merit-Based Opportunity.” This Order will have significant impact on Diversity, Equity and Inclusion (“DEI”) policies, practices and programs implemented by private sector employers as well as within the federal government. Subsequent legal developments concerning the Order may impact the practical effect of the Order.

Specifically, the Order instructs all executive departments and federal agencies to “terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements” and further orders all federal agencies “to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities.” Under Section 3 of the Order, several prior executive orders are revoked, including Executive Order 11246 (1965) — the longstanding order that prohibited discrimination and required the development of affirmative action plans to ensure equal opportunity in federal contracting. The Order directs the Office of Federal Contract Compliance Programs (“OFCCP”) within the Department of Labor to immediately cease (i) promoting diversity, enforcing affirmative action initiatives, and (ii) allowing or encouraging federal contractors and subcontractors to engage in workforce balancing based on protected characteristics. Additionally, the Order instructs agencies to include in all federal contracts or grant awards a provision requiring federal contractors to certify that they do not operate any

programs promoting DEI “that violate any applicable Federal anti-discrimination laws.” Federal contractors may continue to comply with Executive Order 11246 and its existing regulatory framework for 90 days from Jan. 20, 2025. The impact of the Order on pending compliance reviews, complaint investigations or other enforcement activities by the OFCCP is unknown; however, federal contractors should expect to see language implementing this directive in new procurements and modifications to existing contracts.

Section 4 of the Order focuses on DEI programs in the private sector by directing the Attorney General of the United States to submit a report, within 120 days of the Order (i.e., on or about May 21, 2025), with “recommendations for enforcing Federal civil-rights laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI.” The Attorney General’s report must contain a “strategic enforcement plan” identifying:

- Key sectors of concern within each agency’s jurisdiction;
- Private sector companies with the most “egregious and discriminatory” DEI programs;
- A plan to deter DEI programs “that constitute illegal discrimination or preferences.” As part of the plan, agencies are directed to identify up to 9 potential investigations of publicly traded corporations, large non-profit corporations or associations, foundations with assets over \$500M, state and local bar and medical associations, and universities with endowments over \$1B;
- Litigation that would be potentially appropriate for Federal lawsuits, intervention or statements of interest; and
- Potential regulatory action and sub-regulatory guidance.

Legal Action Following the Issuance of President Trump’s Executive Order

On Feb. 3, 2025, a group of plaintiffs, including university diversity officers, college professors, restaurant workers, the City of Baltimore, and Baltimore City Council, filed a complaint in federal court in Maryland challenging the constitutionality of the Order, as well as challenging

Executive Order 14151, entitled “Ending Radical and Wasteful Government DEI Programs and Preferencing.”

The lawsuit, filed in the US District Court for the District of Maryland, alleges that these executive orders are unconstitutional on multiple grounds. The complaint alleges that Sections 3 and 4 of the Order, which impact federal contractors and the private sector, violate the Free Speech Clause of the First Amendment because the “threat of ‘civil compliance investigations’ impermissibly restricts the exercise of [plaintiffs] constitutionally protected speech based on its content and viewpoint.”

Additionally, the plaintiffs claim that the Order is unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment. According to the complaint, the Order fails to provide an ordinary person with fair notice of the prohibited conduct and fails to define material terms, including “DEI,” “illegal DEI,” and “equity-related” that determine whether an entity will be subject to civil investigation or enforcement. The lawsuit seeks preliminary and permanent injunctive relief to enjoin the enforcement of the executive orders.

State Attorney General Actions in Response to the Order

Two days after the issuance of the Order, Texas Attorney General Ken Paxton, joined by nine other Attorneys General (from AL, ID, IN, IA, MT, NE, SC, UT and VA) sent a letter to six major financial institutions challenging their DEI and environmental, social and governance (“ESG”) programs. The letter included requests for information and directed specific questions to the financial institutions regarding their DEI and ESG programs as an “opportunity to avoid a lengthy enforcement action.” The letter further threatened potential legal action against these institutions for alleged violations of federal and/or state law.

Previously, on Jan. 31, 2025, New York Attorney General Letitia James and eleven other state Attorneys General (from CA, CT, DE, IL, HA, MA, MD, MN, NJ, VT and WA) issued a joint statement addressing and opposing President Trump’s recent executive orders pertaining to DEI policies and programs.

The statement criticized the executive orders as “unnecessary and disingenuous,” arguing that the executive orders ineffectively combat

discriminatory practices. According to the January 31st statement: “President Trump’s attack on diversity, equity, inclusion, and accessibility initiatives undermines a simple and unassailable goal: to create fairer workplaces and opportunities for all to succeed.” Further, the statement argues that DEI initiatives help prevent discrimination while promoting respect and understanding of diverse perspectives to ensure fair treatment and equal access to opportunities.

US Attorney General’s Memorandum on DEI

On Feb. 5, 2025, Attorney General Pam Bondi issued a memorandum, entitled “Ending Illegal DEI and DEIA Discrimination and Preferences,” which directs the Department of Justice’s Civil Rights Division (“DOJ Civil Rights Division”) to investigate “illegal DEI and DEIA preferences, mandates, policies, programs, and activities in the private sector and in educational institutions that receive federal funds.” The memorandum directs the DOJ Civil Rights Division and Office of Legal Policy to jointly submit a report to the Associate Attorney General by March 1, 2025, containing recommendations for enforcing federal civil rights laws and “taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences.” Consistent with the requirements of the Order, the report must, among other things, identify specific measures to deter the use of DEI programs that constitute illegal discrimination, “including proposals for criminal investigations and for up to nine potential civil compliance investigations of entities that meet the criteria outlined” in the Order. These entities include publicly traded corporations, large non-profit corporations or associations, foundations with assets of \$500 million or more, state and local bar and medical associations, and institutions of higher education with endowments over \$1 billion.

Notably, the memorandum explicitly states in a footnote that cultural heritage month celebrations and historical observances that promote diversity and awareness without engaging in discriminatory exclusion are not being targeted. Further, the memorandum also previews guidance to the Department of Education on how educational agencies, colleges, and universities are expected to respond to the Order, noting that the DOJ Civil Rights Division will pursue actions against these entities as well.

Implications and Next Steps

In light of these recent developments, including the threat of potential governmental investigations and litigation, employers should evaluate their current DEI-related policies, practices and programs by conducting legally-privileged audits and risk assessments, including to ensure compliance with existing anti-discrimination statutes such as Title VII. Any DEI initiative which uses race, gender or similar classification as an eligibility criterion should be particularly analyzed, including those policies, practices and programs related to recruitment, hiring, workplace affinity and culture, and promotion. DEI-related policies and programs that broaden the applicant pool for recruitment purposes, while not establishing a quota, mandate or use race or gender as an eligibility requirement, should still be acceptable. Care should be taken as well with respect to language used in describing DEI initiatives on websites and other public disclosures. We will continue to monitor developments in this area, and expect further guidance upon the issuance of the Attorney General's report.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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