

President Trump’s Executive Order “*Ending Illegal Discrimination and Restoring Merit-Based Opportunity*” Takes Aim At DEI Initiatives

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President Trump recently signed several executive orders that take aim at diversity, equity, and inclusion (“DEI”) programs and policies. While these orders are largely directed at the federal government, one of them – titled “*Ending Illegal Discrimination and Restoring Merit-Based Opportunity*” (the “EO”) – targets federal contractors and the private sector more broadly, as well as educational institutions. Although this EO does not change federal anti-discrimination law, it signals that the Trump administration is committed to using its enforcement powers to challenge DEI initiatives and other employment practices that it believes constitute “illegal discrimination and preferences” in employment and education across the country. Below we briefly summarize key aspects of the EO as it pertains to federal contractors, private employers, and educational institutions and then provide considerations and recommendations.

Federal Contractors

Under the EO, all federal contractors and subcontractors must abandon their affirmative action programs by April 21, 2025, and they must not consider race, color, sex, sexual preference, religion, or national origin in their employment, procurement, or contracting practices. Moreover, each federal agency must include in every contract or grant award (i) "a term requiring the contractual counterparty or grant recipient to agree that its compliance in all respects with all applicable Federal anti-discrimination laws is material to the government's payment decisions for purposes of" the False Claims Act; and (ii) "a term requiring such counterparty or recipient to certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws."

Private Employers

By May 21, 2025, the Attorney General, in consultation with the heads of "relevant agencies," and in coordination with the Director of the Office of Management and Budget, must "submit a report to the Assistant to the President for Domestic Policy containing 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 report must contain a "proposed strategic enforcement plan" that identifies:

- (i) "Key sectors of concern within each agency's jurisdiction;
- (ii) The most egregious and discriminatory DEI practitioners in each sector of concern;
- (iii) A plan of specific steps or measures to deter DEI programs or principles (whether specifically denominated "DEI" or otherwise) that constitute illegal discrimination or preferences. As a part of this plan, each agency shall identify up to nine potential civil compliance investigations of publicly traded corporations, large non-profit corporations or associations, foundations with assets of 500 million dollars or more, State and local bar and medical associations, and institutions of higher education with endowments over 1 billion dollars;
- (iv) Other strategies to encourage the private sector to end illegal DEI discrimination and preferences and comply with all Federal civil-rights laws;
- (v) Litigation that would be potentially appropriate for Federal lawsuits, intervention, or statements of interest; and
- (vi) Potential regulatory action and sub-regulatory guidance."

Educational Institutions

By May 21, 2025, the Attorney General and the Secretary of Education must jointly issue guidance to educational agencies and institutions that receive federal funds or participate in student loan assistance programs regarding the "measures and practices required to comply" with the Supreme Court's decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023), which effectively banned affirmative action in higher education.

Considerations & Recommendations

While the EO may well face legal challenges, federal contractors and subcontractors should prepare to end their affirmative action programs by the April 21, 2025 deadline. They should also be prepared to certify that they are compliant with all federal anti-discrimination laws. We recommend that federal contractors and subcontractors consult with legal counsel to ensure they are in compliance with the EO and are prepared for potential scrutiny of their practices and policies. Given the EO's direction that the False Claims Act can be used to target illegal DEI initiatives, this scrutiny may even come from a contractor's own personnel as potential *qui tam* relators. Ensuring that all personnel receive regular training and understand the contractor's compliance program may help avoid such outcomes.

As for private employers, there is no one-size-fits-all response to this EO. As your organization considers what, if any, action to take as a result of this EO, keep the following in mind:

- The EO does not change existing anti-discrimination laws. It has been and remains generally unlawful for employers to consider race, gender and other protected characteristics in hiring and other employment-related decisions.
- Neither this EO nor federal anti-discrimination law defines what constitutes a DEI program or policy, and DEI can mean different things in different contexts. Moreover, the EO does not ban all DEI programs and policies, nor is it limited to only DEI initiatives. Rather, the EO is focused on ending "illegal discrimination and preferences," whether labeled DEI or not. Therefore, the critical question from a compliance perspective is whether an organization's programs or policies violate existing anti-discrimination laws, not simply whether a program or policy is considered "DEI."
- We may learn more about the Trump administration's enforcement priorities after the Attorney General submits the required report by May 21, 2025. While it is unclear whether the report itself will become public, agencies charged with enforcing federal anti-discrimination laws, such as the U.S. Department of Labor, the Equal Employment Opportunity Commission and the Civil Rights Division of the Department of Justice, may take regulatory action or issue guidance that will clarify what specific types of DEI programs and policies the administration will target; as of now, all we know is that it plans to target "illegal" DEI initiatives.

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- Even though this EO does not impose new requirements on non-federal contracting private employers, it would be prudent for all employers to consider evaluating their DEI initiatives, and their hiring, promotion and compensation practices, for compliance with existing anti-discrimination laws. In deciding whether to conduct such a review, employers should consider (i) how recently they have done a similar review (for example, many employers assessed their DEI and hiring practices in 2023 after the Supreme Court's *Students for Fair Admissions* decision); (ii) whether their organization has policies or practices that could be particularly susceptible to legal challenges, such as race or sex quotas in hiring; (iii) the extent to which their organization may be an attractive target for the Trump administration based on a reputation for embracing DEI, for political reasons or otherwise; and (iv) resource constraints, risk tolerance, and other compliance priorities.

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