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CLIENT ALERT

Nationwide Injunction Pauses Enforcement of Trump Anti-DEI Executive Orders

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On February 21, 2025, a federal judge issued a preliminary injunction halting nationwide enforcement of President Trump's executive orders aimed at dismantling diversity, equity, and inclusion ("DEI") efforts and programming (the "Orders"). The trial court's order imposing the injunction credits some of the legal arguments raised by Plaintiffs, which may ultimately trim the scope of the Orders. The opinion has both short-term and long-term consequences for universities and should be required reading for all who are trying to navigate the shifting rules surrounding DEI programs.

A group of plaintiffs that includes the American Association of University Professors and the National Association for Diversity Officers in Higher Education (the "Plaintiffs") sued President Trump challenging the Orders on First and Fifth Amendment constitutional violations, including freedom of speech and vagueness principles. Specifically, the Orders directed all executive agencies to "terminate . . . 'equity-related' grants or contracts" (the "Termination Provision").[1] The Orders also required that all government contracts include a certification that the contractor "does

[1] Ending Radical And Wasteful Government DEI Programs And Preferencing, Executive Order (Jan. 20, 2025) https://www.whitehouse.gov/presidential-actions/2025/01/ending-radical-and-wasteful-government-dei-programs-and-preferencing/.

not operate any programs *promoting DEI* that violate any applicable Federal anti-discrimination laws" (the "Certification Provision").[2] Finally, the Orders charged the Attorney General with taking "appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI," including conducting civil compliance investigations (the "Enforcement Threat Provision").[3] Plaintiffs challenged these three provisions within the Orders: the Termination Provision, the Certification Provision, and the Enforcement Threat Provision. The trial court found that each of these three provisions is likely unconstitutional and enjoined their enforcement as the case proceeds.

Plaintiffs' Legal Challenges to Anti-DEI Orders

A. The Termination Provision Is Likely to Be Unconstitutionally Vague

The Termination Provision targets government contractors and grantees by calling for an end to all "'equity-related' grants and contracts."[4] Plaintiffs allege that the Termination Provision is unconstitutionally vague because it would "invite[] arbitrary and discriminatory enforcement" and does not provide sufficient notice to current contractors and grant holders about how they can avoid termination of their current arrangements. The Orders contain no definition of what qualifies as an "equity-related" grant or contract. Accordingly, the court agreed with the Plaintiffs that the Termination Provision presented a "very real possibility of arbitrary and discriminatory enforcement." The court also agreed that the Termination Provision did not tell current grant and contract holders what the entities could do to ensure compliance with the law. The court considered the example of whether a university grant that funded the salary for a staff member to teach about sexual harassment and consent would be stripped as "equity-related" under the provision. The Termination Provision leaves questions like this open, and impermissibly fails to provide university grantees and contractors information about what is prohibited so they can act accordingly.

B. The Certification Provision Is Likely a Content-Based Speech Restriction

Plaintiffs also argued that the Certification Provision of the Orders violates the First Amendment by implementing a content-based restriction on the speech rights of contractors and grant holders. The Certification Provision requires federal contractors to certify that the contractor or grant holder does not promote DEI activities in *any* program the entity operates in, whether or not funded by government contract or grant. The Court credited Plaintiffs' argument that the attempt to proscribe DEI endeavors beyond those funded by federal grants is likely an overbroad restriction on speech. The court noted during oral argument that, "the government refused to even attempt to clarify what the Certification Provisions means," and "merely reiterated that promoting DEI can be unlawful." Explaining that, because "even the government does not know what constitutes DEI-related speech that violates federal anti-discrimination laws," Plaintiffs had demonstrated a likelihood of success on this argument.

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[2] Ending Illegal Discrimination and Restoring Merit-Based Opportunity, Executive Order (Jan. 21, 2025) https://www.whitehouse.gov/presidential-actions/2025/01/ending-illegal-discrimination-and-restoring-merit-based-opportunity/.

[3] *Id.*

[4] *See supra* note 1.

C. *The Enforcement Threat Provision Likely Violates Free Speech as a Content-Based Restriction on Speech and Is Unconstitutionally Vague*

Finally, Plaintiffs claimed that the Enforcement Threat Provision violates free speech because it threatens legal actions against private sector actors for engaging in protected speech and violates the Fifth Amendment for its facial vagueness. Plaintiffs have raised several concerns unique to university contractors and grantees. Some individuals fear they will be targeted due to their work at institutions with billion-dollar endowments, which will lead to adverse employment consequences. Others have raised that, as the Orders currently stand, universities will be forced to abandon lawful DEI efforts so as not to lose federal funding for other unrelated programing.

The court acknowledged that the Enforcement Threat Provision would constitute "textbook viewpoint-based discrimination" because of how the provision targets the expression of views supportive of DEI. Depending upon its specific content, diversity programming may reflect protected speech which cannot be unilaterally restricted without violating the First Amendment. As the Orders risk doing just that, the trial court found that Plaintiffs successfully demonstrated a likelihood of success on the speech claim.

The Enforcement Threat Provision also presents a vagueness issue because the government has not issued guidance on what constitutes "illegal DEI discrimination and preferences," how an entity "[p]romot[es] 'diversity,'" and what "DEI programs or principles" are "illegal."[5] Again, this had already led to confusion on campuses as universities have been forced to consider eliminating all DEI programming for fear that their activities will be deemed illegal under the Orders. Because the Fifth Amendment requires restrictions on conduct to be "clearly defined," Plaintiffs also demonstrated a likelihood of success on the vagueness argument.

Next Steps and Recommendations

Because the Trump Administration will certainly appeal the trial court's ruling in this case, the preliminary injunction provides only temporary relief from enforcement of the Orders. In the short term, the injunction prevents enforcement of the Orders and stays the deadlines imposed therein. Universities can continue their DEI programs provided that they do not run afoul of equal protection or other provisions of law that predate the Orders. No enforcement action will occur by the Departments of Education or Justice during the pendency of the injunction. Given the strength of the court's ruling, there is a chance that the free speech, vagueness and due process arguments raised by Plaintiffs will prevail and the Orders will be consequently limited in their scope. That outcome is of course uncertain, so the relief provided by this injunction is limited.

While the courts determine the constitutionality of the Orders, educational institutions should continue the process of evaluating their DEI programs, keeping in mind the preexisting constitutional and statutory framework that has been applied to these programs prior to the Orders. As the Supreme Court held in *Students for Fair Admissions, Inc. (SFFA) v. President & Fellows of Harvard College (2014)*, only categorical preferences and quotas are

[5] *Id.*

prohibited. Consideration of race and efforts to promote diversity have not been held to violate the equal protection clause to date. Moreover, 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 practices required to comply with *SFFA*. This additional guidance will ideally reflect the arguments recognized by the trial court and provide clarity for ensuring compliance with federal law. As this case and the Departmental guidance moves along, schools should review any programs which fall within the broad (and vague) category of DEI and attempt to ensure compliance with pre-existing law. Wholesale abandonment of DEI programs and priorities would be premature as these constitutional issues are adjudicated. We believe that these important constitutional questions are likely to end up before the Supreme Court.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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