Federal Court Halts Enforcement of DEI Executive Orders: What Employers Need to Know + 5 Steps to Take Next

Insights
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President Trump issued two anti-DEI executive orders at the start of his second term that shook up the workplace and left federal contractors and private employers wondering how to comply. Employers grappled with understanding what was meant by "illegal DEI" programs that could lead to a loss of federal funding or future enforcement activities. A recent lawsuit filed in Maryland federal court argued that the orders were vague and that the key terms were undefined – and the court agreed. The judge issued an order on February 21 temporarily blocking enforcement of the executive orders while the lawsuit plays out. What does this mean for employers' diversity, equity, inclusion, and accessibility (DEIA) programs? Here's what federal contractors and other private employers need to know about this development and five steps you should consider taking next. **[Update: The 4th U.S. Circuit Court of Appeals lifted the ban on March 14, giving the administration the green light to proceed with its direction while the lawsuit plays out.]**

How Did We Get Here?

During the first two days of the new administration, President Trump issued two executive orders aimed at curtailing "illegal DEI" in the federal government, as well as with federal contractors, federal grant recipients, and private employers. The executive orders contained three main provisions, which the Maryland court summarized as follows:

- **The Termination Provision** directed all executive agencies to terminate "equity related grants or contracts."
- **The Certification Provision** directed all executive agencies to "include in every contract or grant award a certification, enforceable through the False Claims Act, that the contractor grantee does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws."
- **The Enforcement Threat Provision** directed the Attorney General to take appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI, to "deter" such "programs or principles" and to identify "potential civil compliance investigations" to accomplish such "deterrence."

Based on these orders, federal agencies took early steps to comply, including advising contractors and grantees that there would be an evaluation and subsequent termination of contracts and grants.

Additionally, the Attorney General issued a memo stating that the government intended to begin its evaluation of enforcement mechanisms against private sector companies engaging in "Illegal DEI."

Federal contractors, federal grantees, and private-sector employers scrambled to "read the tea leaves" regarding the compliance requirements under the vague new policy objectives for equal employment opportunity and DEI initiatives outside of the federal government. This became more daunting as the executive branch appeared to take inconsistent positions regarding "illegal DEI".

Continued uncertainty prompted the National Association of Diversity Officers in Higher Education and other groups to challenge the constitutionality of the executive orders in a lawsuit filed on Feb. 3 in a Maryland federal court. The plaintiffs also argued that DEIA principles are critical to their missions, programs, and work in service of students, research and academic inquiry, restaurant workers, and everyday citizens. The outcome is a nationwide injunction for specific parts of the executive orders.

What Did the Court Say?

The Maryland federal district court agreed with the plaintiffs that certain parts of the executive orders were unconstitutional, and they were ultimately likely to succeed on the merits of their claims. Here are some of the court's key findings:

- **Termination Provision:** The plaintiffs argued that the termination provision violates the Spending Clause and the President cannot unilaterally terminate contracts. The court agreed. Additionally, the court said the phrases "DEIA," "equity," and "equity-related" were unconstitutionally vague because the term "equity-related contracts or grants" can lead to arbitrary and discriminatory enforcement. Moreover, the court said there was insufficient notice to current grantees about whether and how they can adapt their conduct to avoid termination of their contracts and grants. Further, the court noted, "equity" often transcends issues of diversity, inclusion, and accessibility, and extends beyond areas of anti-discrimination efforts and civil rights laws.
- **Certification Provision:** The plaintiffs argued that the certification provision was unconstitutional viewpoint discrimination because the purpose was to restrict speech related to topics such as equity, inclusion, and diversity. The court agreed, noting that "the express language of the Certification Provision demands that federal contractors and grantees essentially certify that there is no 'DEI' (whatever the executive branch decides that means) in *any* aspect of their functioning, regardless of whether the DEI-related activities occur outside the scope of the federal funding." Under long-standing precedent, the court said, the government can choose to fund one activity or another and define the limits of the government spending program, but it may not punish government contractors and grantees because of their speech on matters of public concern. Further, the court stated the Certification Provision was likely to have the effect of inducing contractors and grantees to apply an over-inclusive definition of "illegal DEI."
- **Enforcement Threat Provision:** The plaintiffs argued that this provision, too, was unconstitutionally vague. The court agreed, noting that contractors were left to guess whether

unconstitutionally vague. The court agreed, noting that contractors were left to guess whether they would be terminated and did not have guidance on how to conform their policies and procedures for compliance. The court observed that the possibilities for the government to deem "equity-related" activities as prohibited "are almost endless, and many are pernicious." The court held that "the government cannot rely on the threat of invoking legal sanctions and other means of coercion to suppress disfavored speech." The court also found that the provisions unconstitutionally curbed freedom of speech.

The associations also demonstrated that the executive orders would result in irreparable harm, including loss of funds, uncertainty regarding future operations, loss of reputation, and chilled speech, according to the court. Although enforcement proceedings are enjoined, the court did not stop the Attorney General from preparing a report of investigation targets or engaging in investigations for potential enforcement actions.

The court did not address any of the other provisions of the executive orders, including the revocation of Executive Order 11246, which had been in place since 1965 and mandated certain aspects of the affirmative action requirements.

Notably, the district court's preliminary injunction is not the final decision in the litigation. The case may proceed to trial to determine whether a permanent injunction will be ordered or the government may immediately appeal the injunction order. However, the order blocking the executive orders pending a trial provides some breathing room for federal contractors, federal grantees, and private-sector companies.

You should also note that a group of Democrat state attorneys general issued joint guidance earlier this month reaffirming their position that workplace DEI initiatives remain legal – and important to the modern workplace.

What Are the Top 5 Steps You Can Take Next?

1. **Continue to Evaluate DEI Programs.** It is abundantly clear that the new administration is heavily focused on eradicating "illegal DEI" in the workforce. The administration has made clear that it's not the DEI label that matters, rather it is the content of the programs, policies, or procedures. Employers should continue to conduct privileged audits of their DEI programs and initiatives. While "illegal DEI" is a vague and undefined term, DEI programs and initiatives should never — even before the executive orders — violate Title VII of the Civil Rights Act or any other federal or state anti-discrimination law. Correctly designed DEI programs have never been inherently illegal and remain viable even in the face of recent events – but they must comply with anti-discrimination laws.
2. **Track Developments from the Courts, Executive Branch, and State Attorneys General.** The White House may provide clarifying formal DEI policy guidance in May 2025 or later. In the meantime, various agencies, departments, and offices of the federal government have started to release internal communications applicable to federal employees and guidance for various

sectors on DEI directives. For example, the Office of Personnel Management (OPM) released a memo related to DEI on February 5 that discusses unlawful discrimination practices for hiring, benefits, retention and training. The OPM memo and a Department of Justice memo on the same day also describe permissible DEI activities for events that celebrate diversity and that involve employee resource groups. Additionally, the Department of Education published a "Dear Colleague Letter" on February 14 warning educational institutions against even race-neutral practices. Based on the DOE's interpretation of the Supreme Court's 2023 ruling concerning college admissions decisions, race cannot be used in decisions in any aspect of academic and campus life. You can read more about the SCOTUS decision here.

3. **Recognize that Employees and Job Applicants Can Challenge DEI Programs and Practices.** The court's order applies only to the new administration's executive orders. Employees and job applicants are still permitted to bring administrative actions or private lawsuits if they believe a company's DEI programs violate federal or state anti-discrimination laws. Employers should ensure that their programs remain compliant with existing laws.
4. **Bookmark Our DEI FAQs for the Trump Era.** In order to dispel myths and provide practical answers about your legal risks, we have assembled a series of questions and answers, which you can access here. We will continue to update these FAQs as appropriate, so be sure to bookmark them and check back frequently.
5. **Reach Out to Legal Counsel.** In this time of uncertainty, you should consider reaching out to your attorney to develop a game plan to comply with evolving requirements. Our DEI and Equal Employment Opportunity Compliance Team helps businesses design, administer, and continually evaluate legally sound, effective DEI policies and initiatives that align with federal and state requirements while advancing workplace culture and business objectives.

Conclusion

We will continue to monitor developments that impact your workplace and provide updates when warranted. If you have any questions about these developments or how they may affect your business, please contact your Fisher Phillips attorney, the authors of this Insight, or any member of our DEI and EEO Compliance Team. Visit our New Administration Resource Center for Employers to review all our thought leadership and practical resources, and make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information.

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