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Trump DEI Executive Orders Back in Effect Following Temporary Injunction

On January 20 and 21, 2025, President Trump signed three Executive Orders, "Ending Radical and Wasteful Government DEI Programs and Preferencing," "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," and "Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government," which directed the elimination of Diversity Equity and Inclusion (DEI) programs within the federal government, directed federal contractors and subcontractors to end such programs immediately, and declared that sex be defined as either "male" or "female" in the U.S. These Executive Orders declare DEI programs "illegal" and "discriminatory," and explicitly set forth President Trump's intent to curb "gender ideology" and the use of DEI programs and policies across the private sector in this country[1]. Almost immediately, these Executive Orders began to challenge the way that employers across the private sector address diversity and inclusion in the workplace.

In this Client Alert, we discuss the current and constantly evolving landscape associated with each of these Executive Orders and how they apply to private sector employers, as well as how businesses can ensure compliance in this uncertain and ever-changing legal environment.

A Snapshot of President Trump's DEI Executive Orders

Title	Key Provisions
Ending Radical and Wasteful Government DEI Programs and Preferencing (January 20, 2025)	• Requires the federal Office of Management and Budget (OMB) to "coordinate the termination of all discriminatory programs, including "illegal" DEI and 'diversity, equity, inclusion, and accessibility' (DEIA) mandates, policies, programs, preferences, and activities in the Federal Government, under whatever name they appear." • Terminated all federal contractors providing services to advance DEI programs in federal workplaces, and "equity-related" grants or contracts to federal contractors within 60 days.
Ending Illegal Discrimination and Restoring Merit-Based Opportunity (January 21, 2025)	• Instructs all federal agencies to "take all appropriate action with respect to the operations of their agencies to advance in the private sector the policy of individual initiative, excellence, and hard work." • Directs the U.S. Attorney General to "take all appropriate action to . . . encourage the private sector to end illegal DEI discrimination," and issue a report within 120 days of the order recommending methods for doing so. • Directs the U.S. Attorney General to ensure DEI program deterrence in the private sector by identifying publicly-traded corporations, large non-profit entities, and foundations with assets of $500 million or more, state and local bar

[1] *See Ending Illegal Discrimination and Restoring Merit-Based Opportunity*, Sec. 4 ("Encouraging the Private Sector to End Illegal DEI Discrimination and Preferences").

	and medical associations, and institutions of higher education with endowments over $1 billion, in federal civil compliance investigations. • Officially rescinded Executive Order 11246 (1965), which required federal contractors to implement affirmative action programs based on race and gender within 90 days of EO 11246's effective date.
Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government (January 20, 2025)	• Establishes "the policy of the United States to recognize two sexes, male and female" with respect to "all Executive interpretation of and application of Federal law and administration policy." • Requires federal agencies to "enforce laws governing sex-based rights, protections, opportunities, and accommodations to protect men and women as biologically distinct sexes" and "remove all statements, policies, regulations, forms, communications, or other internal and external messages that promote or otherwise inculcate gender ideology." • Declares that Title VII of the Civil Rights Act of 1964, does not "require[] gender identity-based access to single-sex spaces." • Directs the Attorney General to "issue guidance to ensure the freedom to express the binary nature of sex and the right to single-sex spaces in workplaces and federally funded entities," and for agencies to ensure that documents and forms use the term "sex," not "gender." • Directs federal agencies to rescind any "guidance documents" inconsistent with the Order, including the EEOC's April 2024 Enforcement Guidance on Harassment in the Workplace.

The Current Legal Landscape

On March 14, 2025, the U.S. Court of Appeals for the Fourth Circuit lifted a preliminary injunction previously issued by a Maryland federal district court, which temporarily blocked the Trump administration from implementing the "Ending Radical and Wasteful Government DEI Programs and Preferencing" and "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" Executive Orders. This included President Trump's directive that the U.S. Attorney General "take all appropriate action to . . . encourage the private sector to end illegal DEI discrimination" and ensure deterrence by targeting employers across various sectors in federal civil compliance investigations. The Maryland-based federal district court initially held that the Executive Orders were unconstitutional and violated the First Amendment's right to free speech.

While the Fourth Circuit includes Maryland, North Carolina, South Carolina, Virginia and West Virginia, the Court's stay applies nationwide. The stay remains in effect pending a decision on the appeal of the Maryland district court's prior order, absent the preliminary injunction, which means employers nationwide must comply with the DEI Executive Orders until further notice.

State Attorneys General in at least 11 states, public interest groups, and private sector employers have issued public opposition to the DEI Executive Orders, however it remains unclear how or when those cases will get resolved, and what the Trump Administration's enforcement efforts will look like in the interim.

How Private Sector Employers Can Ensure Compliance

The overarching goal of each of President Trump's Executive Orders is to advance only those workplace programs that are merit-based, and end diversity and inclusion initiatives to the extent that they provide special opportunities or preferential treatment based on race, sex and other protected characteristics, excluding veteran's status.[2]

[2] The January 20th and 21st DEI Orders do not expressly address the interaction of those Orders with other federal statutes requiring affirmative action, including the Vietnam Era Veterans' Readjustment Assistance Act (requiring federal contractors to take affirmative action with respect to veterans) or Section 503 of the Rehabilitation Act of 1973 (requiring certain federal contractors to take affirmative action with respect to certain individuals with disabilities). The absence of express reference

Given these intended policy goals, employers in all parts of the private sector should engage in a holistic review of any existing DEI programs and initiatives to assess whether they meet the letter of the law, and more importantly, the spirit of the Executive Orders' policy goal of eliminating non-merit-based opportunities to employees and candidates for employment. Specifically, until further guidance, employers should consider:

- **Modifying any existing DEI programs to ensure that they satisfy new legal requirements while still serving the business need to attract the most qualified workers and promote an inclusive workplace environment.** This may mean adjusting mission statements which have promoted "diversity" to focus on language emphasizing merit-based opportunities and considerations;

- **Reviewing all recruiting, hiring, training, promotion, and compensation practices to ensure that they are applied equally irrespective of one's protected class(es).** The Executive Orders prohibit so-called "workforce balancing" based on race, color, sex, sexual preference, religion or national origin;

- **Eliminating diversity and affirmative action quotas in place.** These quotas can be replaced by traditional factors, such as whether candidates meet educational requirements, obtained degrees from highly respected or ranked colleges/universities, prior employment history with prestigious employers (without considering salary, as doing so remains prohibited in certain states and municipalities), and unique talents and personality traits that would make the candidate a good fit for employment. This could also mean expanding hiring efforts beyond events targeted only at certain groups of people based on background (*e.g.*, exclusively recruiting at women's-only college employment fairs); Removing from employment applications any language indicating that candidates from specific racial or ethnic backgrounds are given preference or afforded certain advantages in the application process. Employers should also confirm that any Professional Employer Organizations ("PEOs") and third-party Human Resources providers the business engages have adjusted their practices and programs, and review any documents applicable to hiring practices to ensure that they comply with the Executive Orders;

- **Removing from employment applications any language indicating that candidates from specific racial or ethnic backgrounds are given preference or afforded certain advantages in the application process.** Employers should also confirm that any Professional Employer Organizations ("PEOs") and third-party Human Resources providers the business engages have adjusted their practices and programs, and review any documents applicable to hiring practices to ensure that they comply with the Executive Orders;

- **Revising or eliminating formal DEI policy language and any informal practices that could give the appearance that certain groups of employees, employment candidates or individuals are afforded preferential treatment based on identity.** For example, workplace policies intended to provide special recognition and opportunities to candidates and employees who identify as Black, Indigenous, or a Person of Color ("BIPOC") should be examined;

- **Replacing former DEI policy language with language that emphasizes an inclusive work culture built on fairness, qualifications** and respect for all, regardless of background;

- **Documenting changes to DEI programs, and distributing updated policy and program statements to *all* employees.** An employer's well-intentioned efforts to modify its practices may be undermined by old written policies that contain elements contrary to the law, thus exposing the employer to risk;

- **Communicating DEI program changes to the business's officers, directors, executives, management, and supervisory employees.** Some employers may find it beneficial to hold these discussions with management-

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to these statutes suggests a certain limbo for their continuing enforcement, but there is no specific basis on which to refrain from such continuing implementation and enforcement at present.

level staff who are responsible for implementing or enforcing the changed elements of the employer's DEI program; and

- **Discussing with, and obtaining any necessary approvals from, business partners, franchisees, shareholders, and Boards of Directors, concerning DEI program changes.**

Following New EEOC Guidance and Avoiding Overcorrections

Employers should note that the DEI Executive Orders are not retroactive, so employers need not revise prior employment actions (*e.g.*, hiring, promotions, and bonus decisions) made under DEI programs and initiatives in place prior to January 20, 2025.

Providing some much-needed clarity to employers, on March 19, 2025, the EEOC and the U.S. Department of Justice (DOJ) jointly issued two Technical Assistance Documents concerning "DEI-related discrimination." The first document, "What To Do If You Experience Discrimination Related to DEI at Work" is a one-pager that advises employees how to recognize, and file complaints based on, perceived DEI-related discrimination. It generally explains that Title VII prohibits discrimination, harassment and retaliation affirmatively based on one's protected classes, including race and sex, and explains that employer conduct such as excluding employees from interviews, fellowships, and membership in workplace groups (*e.g.,* Employee Resource Groups) or affinity groups based on their protected classes may constitute DEI-related discrimination. Notably, the document warns that separating employees based on their protected classes "in a way that affects their status or deprives them of employment opportunities," including for DEI or other trainings, may constitute discrimination, and to that end, DEI training itself "may give rise to a colorable hostile work environment claim."

The second document, "What You Should Know About DEI-Related Discrimination at Work," is a longer FAQ summary, generally reiterating the content of the above-referenced one-pager, and describing the agency's interpretation of how Title VII applies to DEI programs. The EEOC and DOJ explicitly state that "that there is no such thing as 'reverse' discrimination; there is only discrimination" which, in and of itself, is an interesting pronouncement with as yet unknown consequences. Additionally, the agencies reject that a "business necessity," "interest in diversity," or client/customer preferences or requests are justified reasons for taking employment actions based on one's protected classes, noting that "[n]o general business interests in diversity and equity (including perceived operational benefits or customer/client preference) have ever been found by the Supreme Court or the EEOC to be sufficient to allow race-motivated employment actions." In light of this new guidance, employers should consider which programs and policies could be modified in order to comply with Executive Orders. For example, implicit or unconscious bias training could be considered discriminatory "DEI training" if not adjusted. Employers in states or municipalities that require such training should consider modifying training module contents to remove, for example, portions calling out bias against certain races or encouraging the creation of welcoming work environments for applicants or employees of specific ethnic backgrounds, rather than for all employees.

Finally, while the EEOC's withdrawal of guidance related to workplace sex discrimination may indicate that additional changes in agency interpretation and enforcement of Title VII (and other employment laws) are forthcoming, employers should consult with legal counsel before modifying DEI-related employment policies based on anticipated actions by the federal government.

Additional Considerations Concerning Employee Self-Identification

EEO-1 Reporting

The EEO-1 Component 1 Report (EEO-1) is an annual report that most U.S. employers of 100 employees or more must file, disclosing workforce demographic data by job category, race/ethnicity, and sex. Employers subject to EEO-1 reporting requirements will need prospectively to adjust how they record the sex of certain employees on the EEO-1 because following President Trump's Executive Order declaring that the U.S. will recognize only two sexes ("male" and "female"),

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federal agencies no longer permit individuals to formally identify as anything other than their sex as determined by the biological traits present at birth.

While individuals who self-identify as intersex or transgender still count as employees for purposes of determining whether an employer is large enough to be subject to EEO-1 reporting requirements, employers cannot notate any employee's sex using the marker "X" or other non-binary descriptions that were previously recognized by the federal government, even if reflected on the employee's passport, social security card, or state driver's license. The Executive Order does not change any reporting requirements or exceptions that may exist under state laws.

Employee Restroom Access

At this time, employers are still required to comply with both the President's DEI Executive Orders and applicable state and local anti-discrimination laws. Accordingly, employers in jurisdictions that extend certain rights and protections to individuals who identify as gender non-conforming, intersex, or transgender must continue to provide bathroom access to those employees consistent with their self-identification, unless and until such time as those state laws are repealed, overruled, or otherwise amended.

Key Contacts

The Morrison Cohen Labor & Employment team is available to assist employers with navigating compliance with the above-referenced Executive Orders (and any further actions which may be taken by any of the three branches of the federal government), creating and modifying workplace policies to conform and comply with federal, state and local laws, and to provide guidance related to discrimination and harassment in the workplace.

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