

It's the End of Diversity, Equity and Inclusion (DEI) Programs as We Know It?

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Posted By: Mark S. Kapocius

Practice Area: Labor and Employment

As promised in his campaign for the presidency of the United States, on January 21, 2025, President Trump issued Executive Order 14172 "Ending **illegal** Discrimination and Restoring Merit-Based Opportunity." (Emphasis added).

The President's Executive Order states that **illegal** diversity, equity and inclusion ("DEI") policies violate the text and spirit of federal civil-rights laws.

Accordingly, the President ordered all federal agencies to enforce civil rights laws and to "combat **illegal** private-sector DEI preferences, mandates, policies, programs, and activities." The President further ordered the Attorney General to submit a report 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."

Additionally, the President revoked Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity). Executive Order 11246 prohibited discrimination and required affirmative action be taken by federal contractors.

There have been several federal court challenges to these Executive Orders. On February 5, 2025, an employer group filed a constitutional challenge to portions of Executive Order 14172. Most recently, on March 6, 2025, the American Civil Liberties Union (ACLU) of Rhode Island filed a lawsuit on behalf of an employer seeking a preliminary injunction regarding the government contractor portions of these Executive Orders. For now, however, these Executive Orders are in place, with challenges pending.

Enforcement of the President's Executive Order

On February 5, 2025, Attorney General Pam Bondi issued a memorandum to all Department of Justice employees with the subject heading: "Ending **illegal** DEI and DEIA Discrimination and Preferences."

In the memorandum, the Attorney General wrote "[a]s the United States Supreme Court recently stated, "[e]liminating racial discrimination means eliminating all of it." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206 (2023). The Attorney General also stated,

"[t]o fulfill the Nation's promise of equality for all Americans, the Department of Justice's Civil Rights Division will investigate, eliminate, and penalize **illegal** DEI and DEIA preferences, mandates, policies, programs, and activities in the private sector and in educational institutions that receive federal funds."

Notably, the Attorney General's memorandum includes a footnote that states that it "does not prohibit educational, cultural, or historical observances—such as Black History Month, International Holocaust Remembrance Day, or similar events—that celebrate diversity, recognize historical contributions, and promote awareness without engaging in exclusion or discrimination."

So, What is "Illegal" DEI? The EEOC Speaks on March 19, 2025

Note that all of the above statements include the word "illegal" when referencing the ending of DEI. The fact is that racial- and gender-based preferences in hiring and promotion have been unlawful for decades. However, the EEOC has been tasked with focusing on what they are calling "DEI-related discrimination" and has issued a technical assistance document setting forth explaining how DEI programs can run afoul of Title VII. The guidance states that "unlawful discrimination includes any consideration of race, sex or any other protected characteristic under Title VII." According to EEOC, "[a]n employment action still is unlawful even if race, sex, or another Title VII protected characteristic was just one factor among other factors contributing to the employer's decision or action."

EEOC stated, "Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employment discrimination based on protected characteristics such as race and sex." Therefore, "under Title VII, DEI initiatives, policies, programs, or practices may be unlawful if they involve an employer or other covered entity taking an employment action motivated—in whole or in part—by an employee's or applicant's race, sex, or another protected characteristic."

Further, "Title VII also prohibits employers from limiting, segregating, or classifying employees or applicants based on race, sex, or other protected characteristics in a way that affects their status or deprives them of employment opportunities. In the context of DEI programs, unlawful segregation can include limiting membership in workplace groups, or other employee affinity groups, to certain protected groups."

EEOC gave direction to employers by stating employers should instead provide "training and mentoring that provides workers of all backgrounds the opportunity, skill, experience, and information necessary to perform well, and to ascend to upper-level jobs." Employers also should ensure that "employees of all backgrounds ... have equal access to workplace networks."

Coupled with the prohibition on DEI programs, EEOC also issued guidance on their position involving "reverse" discrimination claims. There is not a requirement of a higher showing of proof in reverse discrimination claims, as there is only discrimination. The EEOC applies the same standard of proof to all race discrimination claims, regardless of the victim's race.

What Should Employers Do Now?

- **Recognize that DEI is not in and of itself illegal.** With thoughtfulness, employers can still promote an inclusive and supportive workplace with various initiatives and programs without them being labeled by the federal government as problematic. For example, inclusive programs making mentoring available to all employees regardless of protected status can be effective to foster diversity and inclusivity.
- **Review Programs and Policies.** Employers should review their employment practices to determine if there are any initiatives, policies, programs, or practices that could be considered “illegal” DEI pursuant to the EEOC guidance. For example, hiring program elements with preferences or quotas based on protected status should be analyzed to avoid disparate treatment based on protected status. However, key features of most DEI programs have been and continue to be legal. For example, using interview panels to help reduce bias in the interview process; ensuring that hiring criteria is standardized and focuses on skills, and fine-tuning recruitment efforts to attract a larger pool of candidates and varying backgrounds are all acceptable program features. Employee resource groups also continue to be legal, but like before, they cannot exclude membership based on race or gender or other protected class. It is also permissible to focus on ensuring that interview processes accommodate individuals with disabilities.
- **Act Methodically.** Not everything that employers are doing to encourage a diverse, equitable, or inclusive workplace culture will be considered illegal. As the Attorney General noted, there are educational, cultural, or historical observances, or similar events that celebrate diversity, recognize historical contributions, and promote awareness without engaging in exclusion or discrimination. Because “diversity, equity, and inclusion” have become controversial buzzwords, focusing on programs that promote “access” and “opportunity” may be helpful.
- **Educate Supervisors.** Ensure supervisors understand EEOC’s guidance and reaffirm organizational commitments to legal compliance with anti-discrimination laws.
- **Monitor Developments.** Without a doubt, the federal government is transforming very quickly. Judicial involvement in the executive action affects this transformation. Employers should continue monitoring legal developments and remain flexible and nimble to address this changing environment.

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