FAQS FOR EMPLOYERS AND FEDERAL CONTRACTORS ON NAVIGATING THE DEI LANDSCAPE

On January 21, 2025, President Donald Trump issued several executive orders (EOs) eliminating diversity, equity, and inclusion (DEI) programs within the federal government. One of those orders, "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," outlines the significant policy change:

> It is the policy of the United States to protect the civil rights of all Americans and to promote individual initiative, excellence, and hard work. I therefore order all executive departments and agencies (agencies) to terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements. I further order all agencies to enforce our longstanding civil-rights laws and to combat **illegal private-sector DEI preferences**, mandates, policies, programs, and activities. (emphasis added)

Trump's EO requires every federal contractor to certify that "it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws."

This set of frequently asked questions is intended to help employers and federal contractors evaluate and navigate this EO.

1 DOES THE EO DECLARE DEI IN ANY FORM ILLEGAL?

No, the EO does not declare DEI in *any* form illegal. It recognizes that some – **but not all** – DEI initiatives may violate discrimination laws and instructs federal agencies to submit "specific steps or measures to deter DEI programs or principles (whether specifically denominated 'DEI' or otherwise) that constitute illegal discrimination or preferences." This approach contrasts sharply with Trump's contemporaneous actions regarding the federal government.

2 GIVEN HIRING PREFERENCES AND QUOTAS WERE ALWAYS ILLEGAL, HOW DO WE KNOW WHAT IS OR ISN'T ALLOWED?

Employers can still recruit from a variety of sources to expand their talent pipeline. In addition, employers may consider an individual's personal experiences, including overcoming hardships such as poverty, racism, and sexism, as well as leadership experience and other traits relevant to the role.

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3 WHAT ACTIONS HAS TRUMP TAKEN WITH RESPECT TO THE FEDERAL GOVERNMENT?

Trump has issued several EOs to control and set policies for government employees, which do not necessarily rely on violations of Title VII of the Civil Rights Act of 1964:

- The EO "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government" restricts the use of gender-affirming language or pronouns in the federal government.
- The EO "Ending Radical and Wasteful Government DEI Programs and Preferencing" eliminates all DEI positions and programs within the federal government.
- The EO "Reforming the Federal Hiring Process and Restoring Merit to Government Service" requires a "Federal Hiring Plan" that specifically prevents "the hiring of individuals based on their race, sex, or religion."

4 WHAT IS THE EO'S IMPACT ON THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS (OFCCP)?

The OFCCP has announced that it will immediately cease its work auditing affirmative action plans under EO 11246 and will no longer prosecute noncompliance. Under Trump's EO, federal contractor employers with affirmative action programs are instructed to cease such programs within 90 days (*i.e.*, by April 21, 2025).

5 WILL THERE BE REGULATIONS RELATED TO THE EOS?

Some of the EOs explicitly call for various administrative agencies, such as the US Equal Employment Opportunity Commission (EEOC), to issue guidelines that are consistent with the EOs. Revisions to the Federal Acquisition Regulation (FAR) – which would require notice and opportunity to comment – may also be necessary to implement the specific EO direction that agencies include a DEI-related certification in government contracts, though such rulemaking may face challenges in light of the FAR's general prohibition on the addition of new certification requirements to the FAR unless required by statute or justified in writing by the FAR Council.

6 WHAT SHOULD CONTRACTORS AND GRANTEES EXPECT REGARDING IMPLEMENTATION, INCLUDING POSSIBLE FORTHCOMING REGULATIONS?

Contractors and grantees should watch for agency guidance on implementation of the EO requirements, which may include rulemaking to revise the FAR and/or the Uniform Guidance for Federal Awards, and other changes to existing contracts and grants to remove or revise previously incorporated EO 11246 requirements.

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7 WHAT RISKS COULD THE ADDITIONAL CONTEMPLATED CONTRACT AND GRANT TERMS PRESENT?

The compliance and certification requirements outlined in the EO present potential False Claims Act (FCA) risk. Under the FCA, the federal government – or an individual "relator" – can bring a civil suit against a company that knowingly presents, or causes to be presented, a materially false or fraudulent claim for payment or approval. By requiring contractors and grantees to agree that compliance with "all applicable Federal anti-discrimination laws" is "material to the government's payment decisions for purposes of section 3729(b)(4) of title 31, United States Code," the EO explicitly invokes the FCA, signaling the government's intent to make compliance a basis for an FCA action.

8 ARE EMPLOYEE RESOURCE GROUPS (ERGS) STILL PERMISSIBLE?

Yes, ERGs are still permissible as long as they comply with federal, state, and local laws. Consistent with best practices, ERGs should have clear criteria to be supported by employers (*e.g.*, advancement of the company's interest in operations or substantive excellence), be employee-led, and open to all employees.

9 WHAT LONG-TERM EFFORTS DOES THE EO INDICATE?

This EO appears to be the beginning of a longer-term effort to regulate DEI.

Despite the absence of any definition of "illegal" DEI, the EO mandates all federal agencies to report to the White House within 120 days with "recommendations for … taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEIA." Additionally, it contemplates subsequent investigations and litigations. In that same 120-day window, each agency is ordered to identify up to nine potential civil compliance investigations targeting publicly traded corporations, large nonprofit corporations or associations, foundations with assets exceeding $500 million, state and local bar and medical associations, and higher education institutions with endowments exceeding $1 billion.

10 WHAT SHOULD EMPLOYERS DO MOVING FORWARD?

Employers must reevaluate their current practices and prepare for potential governmental investigations and litigation to advance the administration's goals.

In addition to traditional DEI programs, the administration appears poised to scrutinize all efforts by employers to create more accommodating and equitable workplaces, including anti-bias trainings, affinity group programs, and workplace accommodations. However, employers should not hastily remove DEI measures; rather, they should consider the potential commercial ramifications and litigation risks associated with changes that may be viewed as discriminatory and/or exclusionary. Employers must also reexamine their policies and printed materials for any statements that could be interpreted as reflecting a preference for applicants or promoting employees from certain races and/or ethnicities, genders, or religions.

Employers receiving federal contracts and grants will be early test subjects of the EO. They must examine all areas in which they participate in government programs. Contractors and grantees will need to be prepared to certify that any DEI initiatives comply with federal law. If an employer accepts funds through federal grants or contracts, they should anticipate increased scrutiny of their hiring and employment practices from federal agencies and the administration.

11 WHAT ARE THE KEY TAKEAWAYS FOR EMPLOYERS?

Although the path forward is uncertain, employers must remember that there can be no illegal DEI without legal DEI. The EO presents an opportunity to ensure that DEI practices and policies achieve their proffered goals. Consider each of these DEI components:

- **Representation goals**: Fixed representation goals have been a point of contention even before this EO and will continue to be so. Employers may need to refocus their efforts on factors other than numerical targets to promote lawful DEI. The focus should shift from "do we have enough?" to "do we have the best (and how do we identify who is best)?"

- **Diversity internships**: This aspect of DEI has become a focal point for litigation and will likely face increased scrutiny in light of the EO. Even with noble intentions, a process that relies on labels invites the same legal challenges as those seen in *SFFA v. Harvard* on college admissions.

- **Data transparency, scorecards, and compensation**: Andrea Lucas, now chair of the EEOC, has stated, "If you have a number that is deeply mismatched with your labor market … and you make clear at the corporate level that you will achieve it, and you will incentivize your executives to do so … —that's a quota." Employers should be cautious about implementing such metrics.

- **Diverse hiring slates**: Under the US Supreme Court's decision in *Muldrow v. St. Louis*, "covered employment actions arguably also include selecting applicants for interviews or placing them on a candidate slate, like a diverse slate policy." Employers should scrutinize DEI programs that fall outside of hiring, firing, and compensation decisions, as these may also be covered under Title VII.

- **ERGs, mentorship programs**: Employers should establish clear parameters for ERGs. Mentorship programs that rely on labels of sex, race, ethnicity, or any other protected characteristic are now precarious. Employers should focus on developing neutral mentorship and addressing underrepresentation at the top of the organization.

- **Discussing diversity**: Employers must change the way they talk about diversity. The term "diversity" has become stigmatized, and even the term

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"equity" has drawn sharp criticism when the focus is on equitable outcomes instead of lawful equal opportunity.

Employers must manage the misperception that "diversity" signifies preferential treatment for certain groups and focus more on inclusion and belonging. It will be critical to (1) ensure every employee is included and (2) work to provide equal opportunity for all and favoritism (like the legacy admissions criticized in *SFFA*) for none. For example, studies suggest that personality is more often reported on performance appraisals for women and minorities. Employers should ensure that such evaluations are fair and consistent for all employees.

For more insight into this evolving topic, check out our recent webinar.

If you have questions or need assistance navigating these developments, please contact **Rachel Cowen**, **Stephania Sanon**, **Tara Ward**, or your regular McDermott lawyer.

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