

# Private Employers and Trump's Executive Order on Diversity, Equity and Inclusion



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The law firm of Tucker Arensberg contributes this quarterly column focused on the legal issues that may impact our readers. Tucker Arensberg is a full-service law firm headquartered in Pittsburgh, Pa., USA. Servicing the legal needs of the iron and steel industry, Tucker Arensberg has also provided legal counsel to the Association for Iron & Steel Technology.

On President Trump's first full day back in the Oval Office, 21 January 2025, he issued an executive order targeting diversity, equity and inclusion (DEI) initiatives and diversity, equity, inclusion and accessibility programs (collectively, "DEI Programs").

## What Is an Executive Order?

An executive order is a written, signed and published directive from the president of the United States. These orders direct federal agencies on how to administer laws and manage governmental operations. While executive orders do not create new laws (that power is reserved for Congress), they instruct federal agencies on how to enforce and interpret existing laws. They are often used to address urgent issues, implement policy changes or manage governmental resources without the need for new legislation.

## What Are DEI Programs?

Diversity, equity and inclusion programs are generally programs in which efforts are undertaken to help people of diverse socioeconomic backgrounds, races and genders. They can take on many different forms. One form is that these programs increase these individuals' access to jobs in the workplace.

## The Origins of DEI

DEI efforts date all the way back to the enactment of the Civil Rights Act of 1964. This act prohibits, among other things, discrimination in employment based on protected classes, such as race, religion, sex, color and national origin. In 1965, President Lyndon B. Johnson issued Executive Order 11246 which barred discrimination in federal employment and required federal contractors to implement and maintain affirmative action programs. Since then, public and private workforces have implemented their own DEI efforts, especially with the help and guidance that has transcended through the decades by way of executive orders, laws and court decisions.

## Trump's Executive Order on DEI

Trump's Executive Order titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" also known as "Trump's Executive Order on DEI" or "EO 14173" sets out a policy directing federal agencies "to terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders and requirements," while encouraging private employers "to promote individual initiative, excellence and hard work."

Section 3 of Trump's Executive Order on DEI revoked Executive Order 11246 of 24 September 1965

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(Equal Employment Opportunity), summarized earlier, along with other executive orders and executive actions that were issued to promote diversity within the federal government and protect federal employees from discrimination, such as:

- Executive Order 12898 of 11 February 1994 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations).
- Executive Order 13583 of 18 August 2011 (Establishing a Coordinated Government-wide Initiative to Promote Diversity and Inclusion in the Federal Workforce).
- Executive Order 13672 of 21 July 2014 (Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity).
- The Presidential Memorandum of 5 October 2016 (Promoting Diversity and Inclusion in the National Security Workforce).

Additionally, Section 3 of Trump's Executive Order on DEI prohibits the Office of Federal Contract Compliance Programs (OFCCP) from promoting diversity. Section 3 further requires all federal government contractors and grant recipients to certify that they do not operate any programs promoting DEI that violate any applicable federal antidiscrimination laws. Lastly, Section 3 directs the Office of Management and Budget (OMB) to excise references to DEI principles from all federal acquisition, contracting, grants, and financial assistance procedures, and to terminate all diversity and equity programs and activities.

## The Effect of Trump's Executive Order on Private Employers?

Section 4 of Trump's Executive Order on DEI applies to private employers. Section 4 of Trump's Executive Order on DEI requires the attorney general and all agency heads to prepare and submit a report that the Trump administration will use to establish new "civil rights" policies against corporate DEI programs (Report).

In this Report, the attorney general and agency heads must advise President Trump of certain measures that would encourage the private sector to "end illegal discrimination and preferences, including DEI." The attorney general and agency heads are also to prepare a proposed strategic enforcement plan in the Report. According to Section 4, this strategic enforcement plan must identify the following data points:

- Key sectors of concern within each agency's jurisdiction.
- The "most egregious and discriminatory DEI practitioners" in each of those sectors.

- A plan of specific steps or measures to deter DEI programs or principles that constitute illegal discrimination or preferences.
- Other strategies to encourage the private sector to end illegal DEI discrimination and preferences and comply with all federal civil rights laws.
- Litigation that would be potentially appropriate for federal lawsuits, intervention or statements of interest.
- Potential regulatory action and subregulatory guidance.

Additionally, as part of this plan, the head of every agency is to identify up to nine potential civil compliance investigations of publicly traded corporations, large nonprofit corporations or associations, foundations with assets of US\$500 million or more, state and local bar and medical associations, and institutions of higher education with endowments over US\$1 billion.

## Recent Agency Development Post-Issuance of Trump's Executive Order on DEI

On 29 July 2025, Attorney General Pam Bondi (AG Bondi) and the Department of Justice (DOJ) issued a memorandum, titled "Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination," on the application of federal civil rights laws to entities receiving federal funding. This memorandum highlights what DEI practices the DOJ views as unlawful, the DOJ's motivations for eliminating these DEI practices, and the potential civil penalties private sector entities may face if they continue to employ such DEI practices it views as unlawful.

Trump's Executive Order on DEI required AG Bondi to submit a report by no later than 21 May 2025, outlining a strategic enforcement plan for eliminating DEI in the private sector, including recommendations for civil enforcement investigations against "the most egregious DEI practitioners." That date came and went without that guidance being made public. This recent memorandum dated 29 July 2025 is not that, but something different.

Instead, this memorandum offers examples of DEI programs, policies, and initiatives that the DOJ has determined violate federal antidiscrimination laws and identifies "Best Practices" as nonbinding recommendations for employers to comply with federal antidiscrimination laws with respect to specific DEI practices. The DOJ warns that these DEI programs, policies and initiatives could result in the revocation of federal funding. Even though the examples in the memorandum dated 29 July 2025 focus on educational institutions, this memorandum is also addressed to "state and local governments, and public and private employers." Through the memorandum, the DOJ takes the position that "[f]ederal

funding recipients may also be liable for discrimination if they knowingly fund the unlawful practices of contractors, grantees and other third parties.”

In summary, the memorandum lists five ways DEI programs, policies and initiatives may result in unlawful discrimination. It also provides federal funding recipients, state and local governments, and public and private employers with a list of best practices as nonbinding recommendations that they should employ to avoid unlawful practices. These five types of unlawful discrimination and best practices recommendations are summarized in the following paragraphs.

### 1. Unlawful Preferential Treatment

The memorandum states that preferential treatment occurs when recipients of federal funding provide “opportunities, benefits or advantages” to individuals or groups based on protected characteristics, thereby disadvantaging similarly qualified individuals. This memorandum declares such practices as generally unlawful unless they meet narrow exceptions.

According to the memorandum, examples of preferential treatment include:

- Race-based scholarships or programs, internships, mentorship programs, or leadership initiatives that reserve spots for specific racial groups regardless of intent to promote diversity (e.g., scholarship funding available only to students of a certain race).
- Hiring or promotion practices that prioritize candidates from “underrepresented groups” instead of equally qualified candidates, for admission, hiring, or promotion “where the preferred ‘underrepresented groups’ are determined on the basis of a protected characteristic like race.”
- Restricting access to facilities or resources based on race or ethnicity (e.g., designating “safe spaces” or lounges exclusively for a specific race or ethnic group).

### 2. The Prohibited Use of Proxies for Protected Characteristics

The memorandum addresses the use of “unlawful proxies,” which it defines as the intentional use of “ostensibly neutral criteria that function as substitutes for explicit consideration of” protected characteristics. The memorandum provides that these practices are deemed unlawful when facially neutral criteria are “selected because they correlate with, replicate, or are used as substitutes for protected characteristics” or are “implemented with the intent to advantage or disadvantage individuals based on protected characteristics.”

According to the memorandum, examples of unlawful proxies include:

- Using “cultural competence” requirements, such as requiring applicants to demonstrate “lived experience” or “cross-cultural skills” in ways that, in effect, evaluate an applicant’s racial or ethnic backgrounds, rather than objective qualifications, or using selection criteria that advantage candidates who have experiences the employer associates with certain racial groups.
- Geographic or institutional targeting, such as recruitment strategies targeting specific geographic areas, institutions, or organizations because of their racial or ethnic composition rather than other legitimate factors.
- Narratives or “diversity statements,” such as requiring applicants to describe obstacles they have overcome, when such statements are used as a proxy for providing advantages based on protected characteristics.

### 3. Unlawful Segregation Based on Protected Characteristics

The memorandum provides that segregation based on protected characteristics occurs when a federally funded entity organizes programs, activities or resources — such as training sessions — in a way that separates or restricts access based on race, sex or other protected characteristics unless they meet narrow exceptions.

According to the memorandum, examples of unlawful segregation include:

- Race-based training, such as when a DEI training session separates participants by race.
- Segregation in facilities or resources based on protected characteristics, even if done with the intention to create “safe spaces” (e.g., university study areas intended only for members of particular racial or ethnic communities).
- Programs that exclude qualified participants based on protected characteristics.

### 4. The Prohibited Use of Protected Characteristics in Candidate Selection

The memorandum states that using protected characteristics, such as race or sex, to select candidates for employment, for awarding contracts or for program participation (e.g. internships, admissions, scholarships, training) is unlawful.

According to the memorandum, examples of unlawful candidate selection include:

- “Diverse slate” requirements, including mandating a minimum number of candidates from specific racial groups, setting demographic benchmarks or requiring representation in candidate pools.

- Prioritizing contracts for women- or minority-owned businesses or using sex or race as a primary selection factor.
- Internships, scholarships, fellowships, or leadership programs that use race, sex, or other protected traits as selection criteria.

## 5. Unlawful DEI Training Programs

The memorandum defines unlawful DEI training programs as “those that — through their content, structure or implementation — stereotype, exclude or disadvantage individuals based on protected characteristics or create a hostile environment.”

According to the memorandum, unlawful DEI training programs include:

- Trainings that exclude or penalize individuals based on protected characteristics.
- Trainings that create an objectively hostile environment through severe or pervasive use of presentations, videos, and other workplace training materials that single out, demean, or stereotype individuals based on protected characteristics.

## Recommendations on Best Practices

The memorandum provides a list titled, “Recommendations on Best Practices.” This list does not contain mandatory requirements for federal funding recipients, state and local governments, and public and private employers to follow but rather provides recommendations they can employ to minimize the risk of violations when they implement their programming and practices that are subject to the federal antidiscrimination laws. Those recommendations include:

- Ensuring inclusive access.
- Focusing on skills and qualifications.
- Prohibiting demographic-driven criteria.
- Documenting legitimate rationales.
- Scrutinizing neutral criteria for proxy effects.
- Eliminating diversity quotas.
- Avoiding exclusionary training programs.
- Including nondiscrimination clauses in contracts to third parties and monitoring compliance.
- Establishing clear antiretaliation procedures and creating safe reporting mechanisms.

## Other Noteworthy Developments in Response to Trump’s Executive Order on DEI

Out of the many cases filed challenging the constitutionality of Trump’s Executive Order on DEI, one case out of the U.S. District Court of Maryland is noteworthy. In

*National Association of Diversity Officers in Higher Education, et al. v. Trump, et al.*, 767 F. Supp. 3d 243, 259 (D. Md. 2025), the plaintiffs argued that the orders violated the First and Fifth Amendments by imposing vague and overbroad restrictions on speech and association and by chilling lawful DEI-related activities. *Id.* On 21 February 2025, a federal judge issued a nationwide preliminary injunction enjoining federal agencies from enforcing the Termination, Certification, and Enforcement Threat Provisions of the executive orders. However, on 14 March 2025, the U.S. Court of Appeals for the Fourth Circuit granted the government’s motion to stay the preliminary injunction, effectively restoring full enforcement of Executive Orders 14151 and 14173 (Trump’s Executive Order on DEI) pending appeal. The court’s ruling on 14 March 2025 means that the Trump administration may implement the executive orders, as the orders are no longer subject to a preliminary injunction. While the stay allows the executive orders to remain in effect during the appeal, the legality of these executive orders, especially Trump’s Executive Order on DEI, remains unresolved and could ultimately undergo determination by the U.S. Supreme Court. As of August 2025, this case remains ongoing.

On 13 February 2025, 16 state attorneys general issued a joint five-page letter, titled “Multi-State Guidance Concerning Diversity, Equity, Inclusion, and Accessibility Employment Initiatives,” in response to Trump’s Executive Order on DEI. The letter states that DEI initiatives remain lawful when implemented in compliance with civil rights laws. The letter also distinguishes between lawful DEI efforts and certain hiring preferences that have been found to be unlawful. It clarifies that well-designed DEI initiatives aimed at fostering inclusive workplaces remain legal and can help mitigate legal risk. It also provides that DEI best practices are not illegal and that the federal government does not have the authority to issue an executive order that prohibits lawful employment policies and practices in the private sector or mandates the removal of these policies and practices within private organizations.

On 19 March 2025, the EEOC and the DOJ released joint “technical assistance documents” which identify specific DEI practices that those agencies may consider “illegal” and “discriminatory.” These technical assistance documents answer some but not all the questions about what constitutes “illegal DEI.”

First, the EEOC issued a one-page summary titled “What to Do If You Experience Discrimination Related to DEI at Work” (“EEOC DEI One-Pager”). The EEOC DEI One-Pager recognizes that DEI is a broad term that is not defined by Title VII, but that DEI policies, programs and practices may be unlawful if they involve “an employer . . . taking an employment action motivated — in whole or in part — by an employee’s race, sex or another protected characteristic.” Such conduct that may

constitute DEI-related workplace discrimination pursuant to this EEOC DEI One-Pager is described follows:

- Disparate treatment as to terms, conditions, or privileges of employment, including exclusions from training, exclusion from mentoring or sponsorship programs, exclusion from fellowships, and/or selection for interviews (including placement on candidate slates).
- Limiting membership in workplace groups, such as employee resource groups (ERGs) or other employee affinity groups, to certain protected groups.
- Separating employees into groups based on race, sex, or another protected characteristic when administering DEI or other trainings, or other privileges of employment, even if the separate groups receive the same programming content or amount of employer resources.
- DEI-related harassment, which could include DEI training in certain circumstances.
- DEI-related retaliation based on an employee engaging in a protected activity, such as objecting to or opposing employment discrimination, participating in employer or EEOC investigations, filing an EEOC charge, or reasonable opposition to DEI trainings. Reasonable opposition to DEI training may constitute a protected activity depending on the circumstances.

Second, the EEOC issued a longer FAQ-style document titled “What You Should Know About DEI-Related Discrimination at Work,” which further discusses the topics that are summarized in the EEOC’s DEI One-Pager.

Collectively, these technical assistance documents explain how employers and employees can identify workplace discrimination related to DEI initiatives, clarify existing protections under Title VII of the Civil Rights Act of 1964, and describe what steps employees can take to file a discrimination claim with the EEOC. Although these technical assistance documents are not binding upon employers and do not create new legal rules, they give employers insight into the EEOC’s view on how anti-discrimination laws apply to DEI in their workplaces.

## What Should Private Employers Do Now?

### Review Your DEI Initiatives and Work with Legal Counsel

Trump’s Executive Order on DEI does not have the power to change civil rights laws, such as the Civil Rights Act of 1964. Nor does this executive order have the power to illegalize nondiscriminatory DEI Programs. Do note that Trump’s Executive Order on DEI does not force private employers to end their current DEI efforts. Rather, this executive order was issued to encourage private employers to end their current DEI efforts and put them on notice of this administration’s stance on DEI Programs.

While AG Bondi’s and the DOJ’s memorandum dated 29 July 2025 provides federal funding recipients, state and local governments, and public and private employers with guidance on what specific employment programs, practices, and initiatives the DOJ characterizes as “illegal DEI,” this memorandum is not binding on these entities, especially courts. Courts are not required to adhere to the memorandum’s guidance on what is illegal DEI. Instead, they are free to reach their own conclusions on whether these practices employed by federal funding recipients, public employers and/or private employers are legal. Nevertheless, the examples summarized from that memorandum notify entities, e.g., private employers, regarding the types of programs and activities that could spark an enforcement action by the DOJ, EEOC or other federal agencies.

As the definitions of both “illegal DEI” and other forms of unlawful discrimination will inevitably continue to develop, now would be an ideal time for private employers to review the effectiveness of their DEI Programs and work with counsel to anticipate and plan for any evolving requirements. ♦