UNDERSTANDING AND NAVIGATING COMPLIANCE WITH NIH GRANT DEI POLICIES

On April 21, 2025, the National Institutes of Health (NIH) issued a notice regarding its policy to require all US grant recipients to certify that:

1. They do not, and will not during the term of receiving funds from the NIH, operate any programs that advance or promote diversity, equity, and inclusion (DEI); diversity, equity, inclusion, and accessibility (DEIA); or discriminatory equity ideology (collectively, DEI) in violation of federal anti-discrimination law; and

2. They do not engage in, and will not during the term of this award engage in, a discriminatory prohibited boycott.

This document is intended to help NIH grant recipients evaluate where any company policies and practices need to be changed prior to providing the above-referenced certification. But keep in mind that legal challenges are working their way through the federal courts of appeals circuits on whether these certification provisions of the executive orders are enforceable or violate the First and Fifth Amendments of the US Constitution.

1 IS IDENTIFYING AN UNLAWFUL DEI PROGRAM MERELY AN EMPLOYMENT ISSUE?

No. Determining whether an organization conducts an unlawful DEI program requires consideration of up to four primary legal areas: employment, Title IX for educational institutions, Section 1557 of the Affordable Care Act for healthcare providers, and Section 1981/Equal Protection Clause.

2 WHAT IS AN UNLAWFUL DEI PROGRAM FROM AN EMPLOYMENT PERSPECTIVE?

The Equal Employment Opportunity Commission has published a guide as to what is an unlawful DEI practice. Generally speaking, this includes:

- “Set asides,” such as internships, mentorship programs, scholarships, or similar perks that use race, gender, or sexual orientation as an eligibility factor;

- Quotas, which the administration defines to include aspirational goals that are not tethered to the labor market but are tethered to compensation for hiring managers or leadership;

- Affinity groups, except where they are open to all and provided further that if an employer grants any race/gender a group, then all must have the opportunity for a group upon request;

- Client/customer demands or preferences that diverse employees work on their accounts;
- Mandatory minimum slate requirements, (*e.g.,* the Mansfield rule); and
- Discriminatory training, which the administration fails to define.

Grant recipients are encouraged to review their internal programs to confirm that no such programs include any of the above-referenced practices.

3 WHAT RULES EXIST FOR DETERMINING WHETHER A SCHOLARSHIP PROGRAM AT AN EDUCATIONAL INSTITUTION IS AN UNLAWFUL DEI PROGRAM UNDER TITLE IX?

The same rules apply under Title IX as for employment: scholarships using race or gender as eligibility criteria are prohibited.

4 WHAT RULES EXIST FOR DETERMINING IF A HEALTH SERVICE REPRESENTS AN UNLAWFUL DEI PROGRAM?

Healthcare initiatives that market programs in a way that could be perceived as "exclusive" or "exclusionary" based on a protected characteristic are under particular scrutiny by the administration and plaintiffs. For example, there was a complaint filed against an academic medical center for its minority focused care initiatives, purportedly in violation of Title VI of the Civil Rights Act of 1964 and Section 1557 of the Affordable Care Act. Entities should be careful to make sure that programs note that all patients are welcome, notwithstanding the focus of the initiative.

Related, initiatives seeking to address health disparities that use protected classifications as proxies for social determinants of health are also likely to face increased scrutiny.

Interventions that focus on geography (*e.g.,* neighborhood, zip code, city) are less likely to be noncompliant but should still be reviewed to ensure that marketing materials are not viewed as "exclusive" or "exclusionary" based on a protected classification.

Charitable hospitals should also ensure community health needs assessments (CHNAs) conducted pursuant to Internal Revenue Code section 501(r) do not produce implementation strategies that rely on exclusionary criteria to address any health needs identified as part of the CHNA.

5 HOW DOES THE EQUAL PROTECTION CLAUSE AFFECT THE DETERMINATION OF AN UNLAWFUL DEI PROGRAM?

Supplier diversity programs that use race as an eligibility requirement are also impermissible, as are any other "contracts" that provide preferential treatment based upon race.

Local government contracting requirements often require contractors to meet certain quotas or set-asides for any subcontractors. These are permissible only if they pass strict scrutiny under the equal protection clause, which is not satisfied by a general desire to increase representation. Entities facing such contracting requirements may want to qualify their commitment to comply with quota or set-aside obligations with a proviso that the client will do so only to the extent the contracting entity verifies that the program is lawful.

6 WHAT FACTORS SHOULD YOU CONSIDER IN DETERMINING WHETHER AN ILLEGAL BOYCOTT EXISTS?

- The NIH defines a "discriminatory prohibited boycott" as "refusing to deal, cutting commercial relations, or otherwise limiting commercial relations specifically with Israeli companies or with companies doing business in or with Israel or authorized by, licensed by, or organized under the laws of Israel to do business."

- Federal anti-boycott regulations implemented by the US Treasury and Commerce departments already prohibit US persons from agreeing to cooperate with foreign state-sponsored boycotts of Israel (primarily the Arab League boycott of Israel). US persons generally also are required to report any request from counterparties to cooperate with such a boycott, even if the US person does not ultimately agree to the request. These federal anti-boycott regulations, however, only apply to engaging in a boycott of Israel *pursuant to the laws of a foreign state*. Many US states have passed anti-boycott measures that are broader in scope and prohibit state agencies from contracting with companies that engage in a boycott of Israel *for any reason*.

- The NIH language is more similar to US state anti-boycott measures, as it prohibits any boycott of Israeli companies or companies doing business in or with Israel. It therefore captures boycott activities conducted for any reason, not just pursuant to a foreign state's laws. NIH grant recipients, therefore, should carefully consider whether their own activities and policies related to Israel might raise concerns under the new NIH boycott language.

If you have questions or need assistance, please contact the authors or your regular McDermott lawyer.