
Since we published our prior client alert on state efforts to dismantle diversity, equity, and inclusion (DEI) initiatives, state-level anti-DEI efforts have gained significant momentum. Several new anti-DEI legislative measures were introduced in March 2023 alone, and previously introduced measures have advanced in state legislatures.[1] The most expansive of these legislative efforts is Florida’s House Bill 999, which would prohibit public colleges from funding projects that “espouse diversity, equity, and inclusion,” among other measures.[2] As a result of these legislative efforts—and similar actions by state governors and executive agencies—a number of universities have curtailed their DEI policies and programming. For instance, after Texas Governor Greg Abbott ordered state agencies to stop considering diversity in their hiring practices, the Texas A&M, Texas State, and University of Houston systems ended the use of diversity statements in hiring processes.[3]

But the federal government and some states have been pushing back. The Biden Administration continues to expand DEI initiatives in federal agencies and departments, while incorporating DEI goals into economic policy. Meanwhile, certain states and localities continue to enact initiatives promoting DEI in the public and private sectors.

Pro-DEI Initiatives at the Federal Level

Last month, President Biden issued an Executive Order ("Further Advancing Racial Equity and Support for Underserved Communities through the Federal Government") calling for expanded DEI efforts across federal agencies. This Order follows a 2021 Executive Order, signed on President Biden’s first day in office, directing federal agencies to conduct equity assessments of their policies and programs. The latest Order builds on those efforts, requiring each government agency to establish equity teams and calling for the creation of a Steering Committee on Equity to oversee those teams. On an annual basis, agency heads will be required to submit an Equity Action Plan to the Steering Committee describing agency efforts to advance equity and providing performance measures. The Order also compels agencies to “create more flexibilities, incentives, and guidelines
for recipients of Federal funding and permits to proactively engage with underserved communities as projects are designed and implemented."\[4\]

In addition to its recent executive orders, the Biden Administration has also sought to incorporate DEI initiatives within its broader economic policymaking efforts. For example, the Biden Administration has made federal subsidies for private corporations contingent on the implementation of equity-related initiatives. Earlier this month, the Department of Labor announced the launch of its “Mega Construction Project Program,” which will provide assistance to private contractors and subcontractors involved in large federal construction projects to increase recruitment from underrepresented communities into the construction workforce.\[5\] In addition, the Commerce Department recently announced that any semiconductor manufacturer seeking new federal subsidies available under the CHIPS Act will be required to guarantee affordable and high-quality childcare for workers. The Administration has promoted the childcare requirement as an effort to create a more inclusive workforce.\[6\] In addition, President Biden’s proposed budget for the 2024 fiscal year requests billions in investment in DEI initiatives across departments—including $54 million for the Department of Energy’s Office of Economic Impact and Diversity to implement the Department’s equity action plan,\[7\] and $471 million for the Department of Health and Human Services to, among other things, “implement implicit bias training for healthcare providers” and “address the highest rates of perinatal health disparities.”\[8\]

In these ways and others, the Biden Administration continues to leverage available administrative and economic tools to promote DEI goals.

**Pro-DEI Initiatives at the State Level**

Some states are moving in the pro-DEI direction as well. In Michigan, for instance, Governor Gretchen Whitmer pushed back against local efforts to dismantle DEI programs by including a provision in her 2024 budget proposal that prohibits state funds from being used to “restrict or interfere with actions related to diversity, equity, and inclusion (DEI)” or “to restrict or impede marginalized community’s access to government resources, programs, or facilities.” The budget also includes funding for other DEI-related efforts, such as the Michigan Department of Civil Rights’ “Diversity, Equity, and Inclusion Summit.”

Over the past year, many state and local DEI initiatives, like Governor Whitmer’s budget proposal, have targeted the public sector. For instance, a New Jersey bill introduced in February 2022 would require public colleges to develop faculty and student diversity plans, including specific goals to increase the recruitment and retention of students, faculty, and staff. In November 2022, New York City enacted a package of legislation aimed to improve diversity within the New York City Fire Department.\[9\] And in September 2022, California Governor Gavin Newsom signed an executive order establishing the state’s first Racial Equity Commission and directing state agencies and
departments to take additional actions to embed DEI analysis and considerations in their mission, policies, and practices.

But other pro-DEI efforts have targeted the private sector as well. For instance, a Maryland corporate diversity statute—House Bill 1210—went into effect in July 2022. The measure conditions the corporate receipt of state grants, tax credits, or contracts in excess of $1 million per year on demonstrated membership of underrepresented communities in a business’s board or executive leadership, or on demonstrated support for underrepresented communities in its mission.\(^{10}\) Additional states have imposed similar board diversity measures, though (as we have described in a prior client alert) they have faced growing legal scrutiny.

**Key Takeaways**

Although attacks on DEI initiatives tend to receive greater public attention, pro-DEI efforts at the federal and state levels persist. Here are actions we encourage organizations to take in this shifting landscape:

First, examine ties to federal sources of funding and determine whether pro-DEI provisions apply. Organizations should continue to monitor whether and how federal agency funding is impacted by evolving DEI directives. For example, as the Department of Labor rolls out its Mega Construction Project Program, private contractors involved in megaprojects should review the applicable nondiscrimination and equal opportunity obligations set out by the Office of Federal Contract Compliance Programs.\(^{11}\) The Biden Administration’s latest Executive Order directing federal agencies to work with recipients of federal funding to engage with underserved communities suggests that there will be important future developments in this space.

Second, carefully consider the reach of state-level initiatives and whether they affect your organization’s operations. Institutions that receive (or seek to receive) state funding should survey the applicable laws and regulations to understand the obligations they impose and any funding opportunities they present.

Finally, although organizations should be attuned to the legal vulnerabilities and risks associated with growing anti-DEI efforts, the countervailing efforts at the federal and state levels serve as a reminder of the ongoing importance of DEI initiatives. For example, in announcing the Commerce Department’s childcare requirement under the CHIPS Act, Secretary of Commerce Gina Raimondo emphasized the ways in which DEI and business goals dovetail: “You will not be successful unless you find a way to attract, train, put to work and retain women, and you won’t do that without child care.”\(^{12}\) This initiative and others confirm that now is not the time for educational institutions and companies to abandon their commitment to DEI objectives.

Jenner & Block has a deep commitment to diversity, equity, and inclusion as well as extensive experience supporting our clients’ DEI efforts through litigation, investigations, and strategic
counseling. In light of this commitment and experience, the firm has launched a task force—composed of leading lawyers serving a wide variety of industries—to develop creative, strategic, and tailored solutions for clients across industries to accomplish their DEI goals while minimizing legal risk. If you are interested in learning more about our work in this area, please contact Task Force Co-Chairs Ishan Bhabha (ibhabha@jenner.com), Lauren Hartz (lhartz@jenner.com), Marcus Childress (mchildress@jenner.com), Katie Wynbrandt (kwynbrandt@jenner.com), or Erica Turret (eturret@jenner.com).

Footnotes


[8] Id. at 79.


Related Capabilities

DEI Protection Task Force

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