

Week One's DEI Executive Orders: What the Private Sector Needs to Know

Client Alerts

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In this client alert, we discuss three week-one executive orders that reflect promises President Trump made on the campaign trail to attack DEI. Below, we summarize the key provisions for the private sector, discuss what likely comes next, and suggest steps to take now, in response.

Executive Order Targeting DEI Programs of Federal Contractors and Grant Recipients

On January 21, 2025, President Trump issued an executive order, titled “Ending Illegal Discrimination and Enforcing Merit-Based Opportunity.” Of the orders issued so far, this one is the most relevant with respect to private sector DEI and employment practices, especially for those who contract with the federal government or receive federal grant funds.

Key Provisions on Contracting and Grants

In this executive order, President Trump rescinded prior executive orders including Executive Order 11246, which has served as a basis for requiring federal contractors to maintain affirmative action programs since 1965, and forecasted a number of changes to federal contracts in the DEI area.^[1] It orders the executive branch to immediately change course, directing the Department of Labor’s Office of Federal Contract Compliance Programs to “immediately cease” several actions.^[2] Those include “Promoting ‘diversity’”; “Holding federal contractors and subcontractors responsible for taking ‘affirmative action’”; and “Allowing or encouraging federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin.”^[3]

The executive order directs awarding agencies to include in every federal contract and grant award:

1. A certification that the contractor or funding recipient “does not operate any programs promoting DEI that violate any applicable federal anti-discrimination laws”; and
2. A term specifying that compliance with federal anti-discrimination laws is “material to the government’s payment decisions” under the False Claims Act—laying the groundwork for the

government or private parties to pursue FCA claims against entities that engage in DEI programs that are deemed unlawful.^[4]

That is where the clarity ends: executive orders traditionally direct an executive branch agency to begin a regulatory process that, in turn, develops regulations and contract clauses applicable to (and legally binding on) contractors. But this executive order is not clear about the process and leaves open many questions of exactly what will change for federal contractors and when. For now, even by its own terms, it allows contractors time to catch their breath: for 90 days from the date of the executive order, federal contractors “may continue to comply with the regulatory scheme in effect on January 20, 2025.”^[5]

Key Provisions on Enforcement

Broadly speaking, the Order directs agencies to enforce civil rights laws to combat “illegal private-sector DEI preferences, mandates, policies, programs, and activities.”^[6] It also requires the Attorney General to provide a report that will serve as a roadmap for those enforcement efforts. Within 120 days, i.e., by May 21, 2025, the Attorney General will:

1. Report on the “most egregious and discriminatory DEI practitioners” in sectors deemed “of concern” in consultation with agency heads;
2. Formulate “specific steps or measures to deter DEI programs or principles (whether specifically denominated ‘DEI’ or otherwise),” including the identification of “up to nine potential civil compliance investigations” per agency of, among other entities, “publicly traded corporations, large non-profit corporations or associations, [and] foundations with assets of 500 million dollars or more”;
3. Identify possible bases for “lawsuits, intervention, or statements of interest”; and
4. Assess potential “regulatory action and sub-regulatory guidance” to assist in deterring unlawful DEI practices.^[7]

Anticipating legal challenges, the Order states that it protects the First Amendment rights of entities including federal contractors.^[8]

What Comes Next

Additional guidance can be expected from the federal government about the timeline for implementation and details regarding the reach of the executive order into the operations of federal contractors and grant recipients. For example, buying agencies may issue Federal Acquisition Regulation class deviations or other guidance for how to include certifications within new contracts and grants; whether and how existing contracts and grants will be modified to include these

requirements; and whether the Order extends beyond human resources and human capital development into myriad areas of government contracting that are influenced by socio-economic preferencing.

With respect to enforcement, the Attorney General will issue the required reports and guidance, including recommendations for specific enforcement targets. While the Order is clear on what steps agencies must take next, it leaves a central question unanswered: which DEI programs and practices, in the administration's view, violate federal civil rights laws? The Order repeatedly uses vague language such as "DEI programs or principles ... that constitute illegal discrimination" when referring to the types of programs that fall within the Order's ambit.^[9] However, there is limited legal precedent addressing the legality of DEI programs, which come in many varieties. We can expect future agency guidance on what initiatives within the general category of DEI, in the administration's view, run afoul of federal anti-discrimination law.

The impact on state and local contractors receiving federal funds as part of their payment for public procurement projects is less clear. States and municipalities often have significant social preferencing programs in place, as well as requirements in their contracts to comply with all relevant laws and regulations. Depending on how the executive order is implemented, state and municipal contractors may face divergent requirements within the same contract.

Steps for the Private Sector

The private sector can take steps now to prepare for the Trump administration's implementation of this Order and the forthcoming agency action it foreshadows. Corporations should at a minimum review any existing affirmative action programs, their codes of ethics and compliance, and employment policies more generally. They should also carefully review publicly available materials, including website content, to mitigate risk of civil compliance investigations. In addition, to avoid a scramble later, companies should consider developing mitigation plans now to set the stage for swift organizational changes in response to further guidance on the administration's interpretation of federal civil rights law. During this process, companies should ensure that staff are trained to alert in-house counsel or another appropriate centralized point of contact if they receive any government inquiry on this issue.

Finally, as noted above, the changes concerning contract and grant requirements may give rise to conflicts between state and federal law. Private sector organizations should be aware of their state-law obligations and prepare to carefully navigate tensions between the various requirements with which they comply.

Executive Order Targeting DEI in the Federal Government

On January 20, 2025, President Trump issued an executive order titled "Ending Radical and Wasteful Government DEI Programs and Preferencing." This Order is less focused on the private sector than the Order discussed above, as it is aimed primarily at reversing the Biden

administration's DEI initiatives within the federal government. However, it does also apply to certain federal grants and contracts.

Key Provisions for the Private Sector

The Order calls on agency heads to, within sixty days:

1. Terminate “to the maximum extent allowed by law” all “‘equity-related’ grants or contracts,” as well as “‘equity’ actions [or] initiatives”;^[10]
2. Recommend actions to align agency contracts (including set-asides) and grants with the “policy of equal dignity and respect identified in section 1,” which excludes DEI principles;^[11] and
3. “[H]ear reports on the prevalence and the economic and social costs of DEI ... in agency or department ... contracts (including set-asides) [and] grants.”^[12]

What Comes Next

The bulk of the Order's implementation with respect to contractors and grantees will fall to the agency heads, as these provisions leave them with discretion as to how agencies will alter funding to private recipients. Moreover, this portion of the Order is focused on federal contractors and grantees that provide DEI training or education programs, as well as the vaguely worded “equity-related” grants.^[13] This may provide a mechanism for agencies to curb DEI through restrictions on contracts and grants even if legal challenges to the broader Order prevail.

Steps for the Private Sector

In keeping with the above recommendations, private sector entities should take inventory of their federal grants and contracts and decide which are most at risk, based both on the degree of explicit DEI-focused language and the contract's or grant's existing provisions related to modification and termination. Corporations should remain sensitive to the fact that DEI is again left undefined, what it means to be an “equity-related” grant is unclear, and federal agencies may seek to broaden the Order's reach to capture DEI programs “under whatever name they appear.”^[14] And if impacts to ongoing contracts or grants occur, corporations and non-profits should seek the advice of capable legal counsel to maximize their recovery on terminated programs.

Executive Orders Targeting Gender-Inclusive Policies

Also on January 20, 2025, President Trump issued an executive order titled “Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government.”^[15] The executive order adopts a government-wide definition of “sex” as “an individual's immutable biological classification as either male or female” that is defined “at conception.”^[16] The

Order primarily impacts federal agencies, but it has some implications related to the private sector, including for gender-related DEI programs funded with federal dollars.

Key Provisions on Gender-Related DEI

The Order announces that federal funds “shall not be used to promote gender ideology.”^[17] Federal agencies may therefore “take all necessary steps, as permitted by law, to end the federal funding of gender ideology.”^[18] The Order specifically instructs agencies to “assess grant conditions and grantee preferences and ensure grant funds do not promote gender ideology.”^[19]

Looking forward, the Order tasks the Attorney General with issuing guidance to ensure the “freedom to express the binary nature of sex and the right to single-sex spaces in workplaces and federally funded entities covered by the Civil Rights Act of 1964.”^[20] Therefore, the Order does not limit its impact to federal agencies, funding recipients, and contractors; it also carries implications for private employers subject to Title VII. Moreover, in contrast to expressly protecting that specific type of freedom of expression for individuals in workplaces, the Order does not make any reference to the First Amendment rights of private sector entities.

What Comes Next

With respect to enforcement, this executive order charges several federal agencies to prioritize investigations and litigation to enforce the “rights and freedoms identified.”^[21] We can therefore expect to see the Attorney General issue guidance on enforcement goals and priorities, and we may also see official policy statements from the Secretary of Labor, General Counsel and Chair of the Equal Employment Opportunity Commission, and other agency heads with enforcement responsibilities under the Civil Rights Act.^[22]

Steps for The Private Sector

As federal agencies will likely look to this Order’s directives to inform their assessments of federal funding conditions, preferences, and requirements, organizations with government contracts and grants should review their policies, websites, and publicly available materials, alongside any existing government grant or contract terms. In addition, federal contractors and grant recipients with cost-type agreements should review with their finance department whether indirect rates fund any prohibited activities and be prepared to take immediate steps to segregate those costs. Companies considering federal contracting and grants should explore whether these new conditions might impact corporate culture or performance and weigh those impacts as part of business decision-making.

Jenner & Block has one of the nation’s preeminent legal practices counseling and representing companies on matters involving government contracting and anti-discrimination. If you are interested in learning more about our work in this area, please contact Ishan Bhabha (ibhabha@jenner.com), Lauren Hartz (lhartz@jenner.com), Katie Wynbrandt (kwynbrandt@jenner.com), David Robbins (drobbins@jenner.com), or Matthew Haws (mhaws@jenner.com).

Jenner & Block’s Organizational Values and Strategy Task Force will provide a webinar next Thursday, January 30, 2025, at 9:00–10:00 am ET about what these Orders mean for the private sector, and the firm will make a recording available following the live presentation. You can RSVP through this link.

Footnotes

[1] Ending Illegal Discrimination and Enforcing Merit-Based Opportunity, Sec. 3(a) (Jan. 21, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/ending-illegal-discrimination-and-restoring-merit-based-opportunity>.

[2] *Id.* Sec. 3(b)(i), (ii).

[3] *Id.* Sec. 3(b)(ii).

[4] *Id.* Sec. 3(b)(iv) (citing 34 U.S.C. § 3729).

[5] *Id.* Sec. 3(b)(i).

[6] *Id.* Sec. 2.

[7] *Id.* Sec. 4(b).

[8] *Id.* Sec. 7.

[9] *Id.* Sec. 4(b)(iii).

[10] Ending Radical and Wasteful Government DEI Programs and Preferencing, Sec. 2(b)(i) (Jan 20, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/ending-radical-and-wasteful-government-dei-programs-and-preferencing/>.

[11] *Id.* Sec. 2(b)(iii).

[12] *Id.* Sec. 2(c)(i).

[13] *See, e.g., id.* Sec. 2(b)(i).

[14] *Id.* Sec. 2(a).

[15] Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government (Jan. 20, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/defending-women-from-gender-ideology-extremism-and-restoring-biological-truth-to-the-federal-government>.

restoring-biological-truth-to-the-federal-government/.

[16] *Id.* Sec. 2.

[17] *Id.* Sec. 3(g).

[18] *Id.* Sec. 3(e).

[19] *Id.* Sec. 3(g).

[20] *Id.* Sec. 5.

[21] *Id.* Sec. 5.

[22] *Id.* Sec. 5.

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