

Week One's DEI Executive Orders: What Higher Education Institutions Need to Know

The First 100 Days: Higher Education

Client Alerts

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As anticipated, the second Trump Administration began with the release of numerous executive orders. In this client alert, part of Jenner & Block's "First 100 Days" series, we unpack three orders that target diversity, equity, and inclusion (DEI) programs across American society—including in higher education. We summarize the key provisions for colleges and universities, discuss what likely comes next, and suggest steps to take now. As we explain below, how the federal government will implement these broad directives remains to be seen. And those implementation efforts may be vulnerable to legal challenge as they take shape.

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 thus far, this has the clearest and most immediate implications for higher education.

Key Provisions on Contracting and Grants

In this order, President Trump rescinded Executive Order 11246, which dates back to 1965 and has provided the legal basis for requiring federal contractors to maintain affirmative action programs.^[1] Many colleges and universities have the types of federal contracts, including research contracts, that made them subject to Executive Order 11246. According to the order, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) is to "immediately cease" enforcement of the longstanding "affirmative action" requirement.^[2] OFCCP also must halt any promotion of "diversity," and it can no longer allow or encourage "workforce balancing based on race, color, sex, sexual preference, religion, or national origin."^[3]

Under the order, every federal contract and grant award must now include the following:

1. A certification that the contractor or 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 (FCA)—laying the groundwork to pursue FCA claims against entities that engage in DEI programs that are deemed unlawful.^[4]

Key Provisions on Enforcement

The order directs agencies to enforce civil-rights laws to combat “illegal private-sector DEI preferences, mandates, policies, programs, and activities.”^[5] 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 each agency’s identification of “up to nine potential civil compliance investigations of,” among other organizations, “institutions of higher education with endowments over 1 billion dollars”;
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.^[6]

Finally, the order gives the Attorney General and Secretary of Education 120 days to jointly issue guidance “regarding the measures and practices required to comply with” the Supreme Court’s decision in *Students for Fair Admissions*.^[7]

Perhaps anticipating potential legal challenges, the order states that it protects the First Amendment rights of institutions and their flexibility with respect to academic instruction and curriculum.^[8]

What Comes Next

As regards federal contracting and grant requirements, certain changes at OFCCP related to diversity at organizations with federal contracts are immediate. It is less clear when and how changes to the terms and conditions of federal grants and contracts will be operationalized—including whether the order requires that previously entered agreements be revised to include new terms, or whether those terms will only be required moving forward. We anticipate that implementing agencies will issue clarifying interpretations soon.

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 question central to enforcement unanswered: Which DEI

programs and practices amount to violations of federal civil rights laws? The order repeatedly uses 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. But we predict they will take a broad approach and attempt to widen the application of the Supreme Court’s *Students for Fair Admissions* decision far beyond its specific context of considering race in admission decisions.

As institutions await further action to implement this order, they should review any existing affirmative action programs and employment policies more generally; audit their DEI programs for potential legal and political risk; and consider whether and how forthcoming federal requirements for grants and contracts may conflict with state-law obligations.

Executive Order Targeting Gender-Inclusive Policies

On Inauguration Day, President Trump issued an order titled “Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government.” 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.” While the order will immediately and primarily impact federal agencies, it also has important implications for higher education, particularly for gender-related initiatives, programs, and offices.

Key Provisions on Interpretation of Title IX

The order rejects the Biden Administration’s understanding that Title IX proscribes discrimination not only based on “sex” but also based on gender identity and sexual orientation, an interpretation grounded in the Supreme Court’s decision in *Bostock v. Clayton County* interpreting Title VII’s similar prohibition on sex-based discrimination.^[10] The order thereby rescinds Biden-era executive orders on gender identity and sexual orientation^[11] and instructs federal agency heads to unwind any guidance documents inconsistent with the new order.

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.”^[12] The order does not make any reference to the First Amendment rights of institutions of higher education in this context. It also calls for proposed bill text to codify “the definitions in this order,” signaling an intent to enshrine at least some parts of the order in statute.^[13]

Key Provisions on Gender-Related DEI

The order announces that federal funds “shall not be used to promote gender ideology,” defined as including the “concept of self-assessed gender identity” and “the idea that there is a vast spectrum of genders that are disconnected from one’s sex.”^[14] Federal agencies may therefore “take all necessary steps, as permitted by law, to end the Federal funding of gender ideology.”^[15] The order specifically instructs agencies to “assess grant conditions and grantee preferences and ensure grant funds do not promote gender ideology”^[16] and consider “agency-imposed requirements on federally funded entities, including contractors, to achieve the policy of this order.”^[17]

What Comes Next

With respect to enforcement, this order charges several federal agencies with prioritizing investigations and litigation to enforce the “rights and freedoms identified.”^[18] We can therefore expect to see the Attorney General issue guidance on enforcement goals and priorities, potentially addressing interpretations of Title IX and actions against preferred pronoun policies and gender-inclusive spaces. 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.^[19]

In the meantime, higher education institutions should review statements, policies, programs, and offices related to gender, sexual orientation, and gender identity to consider how they may be affected by future guidance.

Executive Order Targeting DEI in the Federal Government and Equity-Related Grants

On January 20, 2025, President Trump issued an order titled “Ending Radical and Wasteful Government DEI Programs and Preferencing.” This order is aimed primarily at reversing the Biden Administration’s DEI initiatives within the federal government itself. However, it also applies to a narrower subset of federal grants and contracts.

Key Provisions

The order calls on agency heads to, within 60 days:

1. Terminate “to the maximum extent allowed by law” all “equity-related” grants or contracts with the federal government, as well as “equity-related” actions and initiatives within the federal government;^[20]
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;^[21] and
3. “Hear reports on the prevalence and the economic and social costs of DEI . . . in agency or department . . . contracts (including set-asides) [and] grants.”^[22]

What Comes Next

The order is targeted at federal contractors and grantees that provide DEI training or education programs to the federal government or otherwise receive “equity-related” grants.^[23] It leaves substantial discretion to agency heads in terms of how they will effectuate the order.

Notably, the order will reverse equity-related plans or actions by nearly every agency in the federal government. This includes the Department of Education, whose latest Equity Action Plan committed to increase funding of Pell Grants, community colleges, and minority-serving colleges, as well as the use of non-race-based metrics to expand college access for underrepresented students.^[24] Many of these efforts involved coordination with state governments,^[25] so it is unclear whether and how they may continue if states try to take up the mantle.

Jenner & Block has one of the nation’s preeminent higher education practice groups, as well as an industry-leading Organizational Values and Strategy Task Force. We have counseled and represented institutions in numerous areas of the law, including compliance with anti-discrimination laws, protection of government contracts, and challenges to executive and agency action. If you are interested in learning more about our work in this area, please contact practice group Co-Chairs Ishan Bhabha (ibhabha@jenner.com), Lauren Hartz (lhartz@jenner.com), and Terri Mascherin (tmascherin@jenner.com).

Footnotes

[1] 41 CFR § 60-2.10; 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] Ending Illegal Discrimination and Enforcing Merit-Based Opportunity, Sec. 3(b)(ii).

[3] *Id.* Of course, efforts to maintain, rather than attain, workforce balance on the basis of protected characteristics was prohibited even under the prior legal framework.

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

[5] *Id.* Sec. 2.

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

[7] *Id.* Sec. 5.

[8] *Id.* Sec. 7.

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

[10] Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, Sec. 3(f) (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/>.

[11] Relevant executive orders that were rescinded include: E.O. 13988 (Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation); E.O. 14021 (Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity); and E.O. 14075 (Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals).

[12] Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, Sec. 5.

[13] *Id.* Sec. 6.

[14] *Id.* Sec. 3(f), (g).

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

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

[17] *Id.* Sec. 7(a)(ii).

[18] *Id.* Sec. 5.

[19] *Id.* Sec. 5.

[20] 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/>.

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

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

[23] *See, e.g., id.* Sec. 2(b)(iii).

[24] U.S. Dep't. Ed., Equity Action Plan Update 13–14 (2023).

[25] *Id.*

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