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Anti-discrimination Law under the Second Trump Administration Part 1: The Elimination of DEI

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A defining characteristic of President Trump's first five months has been his widespread use of Executive Orders (EOs). President Trump has issued four EOs with significant impact on employment discrimination law: two focus on the elimination of diversity, equity and inclusion (DEI) programs; one focuses on the elimination of the adverse impact theory of discrimination, and one focuses on the recognition of transgender and nonbinary status. This blog post is the first in a three-part series on the ways in which President Trump's EOs affect state and local government employment practices.

Background: What Is an Executive Order?

Executive orders are not mentioned in the U.S. Constitution. Instead, according to the Congressional Research Service, their authority "stems from implied constitutional and statutory authority." Presidential power is derived from Article II of the U.S. Constitution, which states that "the executive power shall be vested in a President of the United States."

Executive orders are generally directed to federal agencies, over which the president has overarching authority with respect to policies and administration. **Executive orders must be consistent with the U.S. Constitution and, generally speaking, with federal law as enacted by Congress.** It is not uncommon for presidents to issue executive orders rescinding or revoking executive orders issued by their predecessors.

How Executive Orders Affect State and Local Governments

Executive Orders directly affect federal government employees. They work in the executive branch and a president has broad authority over executive branch agencies. An EO cannot, however, directly reach the employment practices of state and local governments.

But in setting out preferred legal interpretations and directing the enforcement activities of federal agencies like the Equal Employment Opportunity Commission (EEOC), the U.S. Department of Justice (US DOJ) and the U.S. Department of Labor (US DOL), a president can have a significant impact on the ways in which state and local governments hire, fire and manage their employees.

This first blog post focuses on the EOs that seek to eliminate DEI programs. The second will focus on President Trump's attempt to eliminate the adverse impact theory of employment discrimination. The third will discuss his EO on gender identity and sex discrimination.

EO 14173 and EO 14151: Eliminating DEI

Two of the orders President Trump issued on his first day in office focused on DEI policies and programs, EO 14173, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity* and EO 14151, *Ending Radical Government DEI Programs and Preferencing*. Both EO 14173 and EO 14151 address DEI without defining it. The President calls DEI "illegal," "immoral," and "contrary to the country's civil rights laws," asserting that DEI policies and programs promote "race- and sex-based preferences." The EOs assert that equity-based policies "violate the principle of equal treatment" by introducing "preferences" or "quotas" based on group identity, and undermine merit and fairness.

Because the EOs do not define "diversity, equity and inclusion," it is difficult to understand what state and local government employment practices are permissible and the kinds that are, in the administration's view, unlawful. What specific employment practices does President Trump seek to eliminate both in the federal government and beyond?

What Does "DEI" Mean?

There is no legal definition of DEI, nor is there a source for a generally accepted definition. But we can trace the usage of the terms over time. The combined phrase "diversity, equity and inclusion" or "DEI" first became commonplace in the 2010s, although the roots of DEI go back much further – to the 1960s and 1970s. The concepts first became popular individually and at different times.

The term "diversity" became prominent in the contexts of employment and education following the passage of the Civil Rights Act of 1964 (which includes Title VII) and the establishment of the Equal Employment Opportunity Commission (EEOC) in 1965.

Greater interest developed in *the concept of “inclusion”* in the 1980s and 1990s as the focus moved from representation of diverse groups in the workforce and elsewhere to their participation in all aspects of American life. It was at this time that the Americans with Disabilities Act was enacted with its focus on bringing people with disabilities into the workforce and public life.

“Equity,” a concept different from “equality,” began to show up more frequently in discourse in the early 2010s. Equality focuses on fairness in treatment. Equity concerns itself with fairness in outcomes. Equity focuses on ways to provide financial, educational and other assistance to people who, in practical terms, do not have equal opportunity because of historical, social or individual circumstances.

Equity and equality are not mutually exclusive—but they are different. The difference is important to understanding all four of the EOs that focus on discrimination law.

The Rise of DEI as a Combined Term

The use of the combined terms “diversity, equity and inclusion” and “DEI” became widespread during the late 2010s and early 2020s. The transition from print and broadcast journalism into digital news forms (including social media), where discussions about these concepts took place in real time, facilitated the terms’ increased use. So did the formal adoption of policies by some companies, organizations and schools to address diversity, equity and inclusion among employees and students.

The Broader Policy Context

The two EOs that seek to eliminate DEI might be seen as a policy declaration that a focus on equity is not an appropriate or constitutional goal for government policymaking. The EOs declare that the appropriate goal for government policy is that all Americans have equality of opportunity.

However individual local governments view their commitments to equality and equity, they must all understand how the two EOs have changed what employers can do without incurring legal risk.

What Do EO 14173 and EO 14151 Actually Order?

The two EOs direct federal agencies to emphasize “individual merit,” rather than group-based outcomes. To this end, President Trump has directed federal agencies, federal contractors, and federal grantees to “end DEI programs” that consider race, sex, or other protected characteristics in

hiring, promotion, or training.

EO 14173 is the more detailed order. In section 2, the EO says,

“I therefore order all executive departments and agencies . . . to terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements. I further order all agencies to enforce our longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities.”

The Equal Employment Opportunity Commission (EEOC) is the federal agency charged with enforcement of the country’s civil rights laws, including Title VII and the ADA. The President is therefore ordering the EEOC (like all other federal agencies) to eliminate any DEI initiatives within the EEOC itself, and, much more broadly, to use its powers to eliminate DEI policies and programs in employment generally.

EEOC Response to the DEI Executive Orders

President Trump has appointed EEOC Commissioner Andrea Lucas to be the Chairman of the EEOC. As of yet, the EEOC has neither rescinded any existing regulations nor issued any new regulations as it does not presently have the quorum needed to do so. But that is likely to change as soon as President Trump’s nomination of Brittany Panuccio to be an EEOC commissioner is confirmed.

Nevertheless, the EEOC’s new priorities may be found in statements issued by Chairman Lucas. In a press release the EEOC issued upon her appointment, Lucas is quoted as saying,

“Consistent with the president’s executive orders and priorities, my priorities will include rooting out unlawful DEI-motivated race and sex discrimination; protecting American workers from anti-American national origin discrimination; defending the biological and binary reality of sex and related rights, including women’s rights to single-sex spaces at work; protecting workers from religious bias and harassment, including antisemitism; and remedying other areas of recent under-enforcement.”

Defining Unlawful DEI Practices

Together with the United States Department of Justice (US DOJ), the EEOC has issued a one-page

guidance document, *What to Do if You Experience Discrimination Related to DEI at Work* (“the DEI Guidance”). The DEI Guidance is useful for employers as insight into what the administration considers to be an unlawful DEI practice.

Clear Violations: Quotas and Workforce “Balancing”

The DEI Guidance first identifies the use of quotas or ‘otherwise “balancing” a workforce by race, sex, or other protected traits’ as the most obvious discriminatory practices. This is consistent with United States Supreme Court precedent which has long made clear that quotas and workforce balancing efforts based on applicant or employee protected class status are unlawful.

Other “DEI-Related” Discriminatory Examples

The DEI Guidance then enumerates other examples of what it terms “DEI-related” discrimination, including:

- **Excluding an employee from training, mentoring or sponsorship programs or fellowships** because of the employee’s race, sex or national origin (another way of saying this would be that limiting training, mentoring or fellowships to persons of particular racial or ethnic groups or to one sex is discriminatory);
- **Using candidate interview slates that require a certain number of applicants** from a racial or ethnic group or of one sex or another to be interviewed;
- **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, even if the separate groups receive the same programming content or the same amount of employer resources.

DEI Training as Potentially Part of a Hostile Workplace Environment

The DEI Guidance goes to say that DEI training itself may in some cases form the basis of a hostile work environment claim. And it says that an employee’s reasonable opposition to a DEI training may be protected activity for the purposes of a retaliation claim if the employee provides a fact-specific basis for his or her belief that the training itself violates Title VII.

EEOC Enforcement Priorities

The EEOC’s focus on these practices may also be seen in the series of letters that EEOC Chairman Lucas sent to twenty prominent law firms in March. In the letters, Lucas asked whether the firms engaged in any of the practices identified in the DEI Guidance. She also asked whether the firms

ever told recruiting committees or legal staffing firms that they were looking for “diverse” candidates and whether any lawyers’ performance evaluation or compensation was tied to their involvement with DEI efforts. The Trump administration also considers practices such as these to be unlawful, discriminatory activity.

The practices set out in the DEI Guidance were also identified as discriminatory by the federal Office of Personnel Management and US DOJ in earlier memos directed at federal employment practices.

New Certification Requirements for Federal Grant Recipients

EO 14173 revokes Executive Order 11246, *Equal Employment Opportunity*, issued by President Lyndon Johnson in 1965, and several other executive orders dealing with discrimination in federal contracting.

Sec. 3 (b)(iv)(B) of the EO says that *any governmental entity that is the recipient of a federal grant will be required to “certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.”* The certification will be required whether a state or local government satisfies the definition of a federal contractor.

To guard against a violation, the EO requires every contractor, contractual counterparty, *or grant recipient* under a federal contract to:

1. Certify that it does not operate DEI programs that violate federal anti-discrimination laws, and
2. Agree to a contract term that, if a violation of this certification is found, could lead to liability under the federal False Claims Act.

(See my colleague Crista Cuccaro’s excellent summary of the effects that EO 14173 will have on contracting with the federal government and the danger of liability under the False Claims Act here: <https://canons.sog.unc.edu/2025/02/executive-order-14173-imposes-new-contract-clauses-and-certification-requirements-for-local-governments/>.)

The role of the False Claims Act in employment discrimination law is new and potentially consequential. On May 19, 2025, the Deputy Attorney General issued a memorandum addressed to the US DOJ Civil Rights Division announcing that he was establishing the Civil Rights Fraud Initiative to use the False Claims Act “to investigate and, as appropriate, pursue claims against *any*

recipient of federal funds that knowingly violates federal civil rights laws” While the memo uses colleges and universities as an example, by its terms, it covers state and local governments, as well.

Citizen Enforcement of the False Claims Act

The memo notes that members of the public can file lawsuits against offending recipients of federal funds, sharing any money that is recovered with the federal government and states, “The Department strongly encourages such lawsuits.” This means that a state or local government employee, client of a state or local government agency or any citizen could bring a lawsuit against a state or local government under the False Claims Act, if that person can demonstrate that that governmental entity is engaging in “DEI” practices despite certifying to the contrary. Successful plaintiffs can recover triple damages.

What Should State and Local Governments Do?

State and local governments are affected by EO 14173 and EO 14151 because 1) they have changed the EEOC’s approach to DEI practices and its enforcement priorities, and 2) because many, if not most, governmental entities receive federal money of some sort, opening up the possibility (previously unknown) of having to defend against lawsuits brought under the False Claims Act.

State and local government employers should:

- **Review any DEI programs or initiatives** to ensure compliance with EEOC and US DOJ guidance. What was considered lawful under previous administrations may no longer be considered lawful under the Trump administration;
- **Reframe personnel policy and recruiting language** about fairness and opportunity to align with the Trump administration’s new standards;
- **Continue to engage in wide-ranging recruitment efforts** to attract a larger pool of applicants from a variety of backgrounds to find the best candidate for the job on the merits;
- **Use panel interviews** to ensure that multiple people are involved in a hiring or promotion recommendation to ensure fair and objective decisions;
- **Continue to use standardized criteria** for evaluating applicants and employees, focusing on skills and experience to ensure that hiring is based on merit; and
- **Ensure accessible recruitment and hiring practice and protocols**, including reasonable accommodations when appropriate, to stay in compliance with the Americans with Disabilities Act.

