ALERT MEMORANDUM

# DEI Developments: Executive Order Litigation and the Administration's Latest Announcements

*March 24, 2025*

As discussed in our previous alert memorandum, the Trump Administration has released a series of new directives targeting the use of diversity, equity, and inclusion ("DEI") policies and programs, starting with the issuance of Executive Orders 14151 and 14173. Since that time, two significant developments inform the likely staying power of these initiatives: (1) the issuance and then stay of a preliminary injunction halting implementation of the Executive Orders, and (2) updates from the Administration, including guidance from the Equal Employment Opportunity Commission ("EEOC") and Department of Justice ("DOJ") and public remarks from the Chairman of the Federal Communications Commission.

Federal contractors and subcontractors should prepare to respond to requests from the federal government for the DEI certifications required under the Executive Orders that are no longer stayed. To prepare, contractors should: (1) undertake an inventory of their DEI policies and programs to ensure they comply with anti-discrimination laws, in coordination with counsel; (2) plan responses to agency requests for certifications, including considering requesting additional information from the agency, such as their interpretation of the certification; (3) consider outreach to the contracting agency and the Office of Federal Contract Compliance Programs ("OFCCP") for additional guidance regarding certifications; (4) have a plan for sub-certifications from subcontractors; and (5) determine who will sign such certifications.

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Companies that are not federal contractors or subcontractors should nonetheless consider conducting a DEI inventory and making strategic, risk-based decisions regarding implementation of DEI policies and programs that account for the DOJ and EEOC guidance.

## I. Preliminary Injunction

On February 21, 2025, a federal district court in Maryland granted in part a preliminary nationwide injunction related to Executive Order 14151 "Ending Radical and Wasteful Government DEI Programs and Preferencing" and Executive Order 14173 "Ending Illegal Discrimination and Restoring Merit-Based Opportunity." The court found that the plaintiffs challenging the executive orders were likely to succeed on the merits that certain portions of the orders (1) are void for vagueness under the Fifth Amendment; (2) constitute a content-based restriction in violation of the First Amendment; (3) are unlawful viewpoint-based restrictions in violation of the First Amendment; and (4) violate the due process clause of the Fifth Amendment. The injunction halted the Administration from:

— Requiring federal contractors to certify that (i) they do not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws, and (ii) that such certification is "material" within the meaning of the False Claims Act, as mandated in Executive Order 14173;

— Bringing any False Claims Act enforcement action or other enforcement action pursuant to the civil compliance investigations referenced in Executive Order 14173, including but not limited to any action based on these contractor certifications; and

— Interrupting or modifying any current contract or obligation under the anti-DEI provisions of Executive Order 14151.

The United States Court of Appeals for the Fourth Circuit stayed the injunction, effectively allowing implementation of the Executive Orders pending appeal. The three-judge panel issued three different opinions in support of the very short order, but indicated a significant chance that the government prevails in getting the preliminary injunction vacated. As a result, no court order currently prohibits the Administration from requiring government contractors to make the certifications outlined above. However, in addition to this litigation, there are at least three separate pending legal challenges to these Executive Orders.

## II. EEOC and DOJ Technical Assistance Documents & FCC Merger Remarks

On March 19, 2025, the EEOC and DOJ released two technical assistance documents that "focus[] on educating the public about unlawful discrimination related to" DEI in the workplace. The first is a joint one-page technical assistance document, "What To Do If You Experience Discrimination Related to DEI at Work." The second is a longer question-and-answer technical assistance document, "What You Should Know About DEI-Related Discrimination at Work," issued by the EEOC.

These are the first documents from the Administration identifying specifically which DEI-related policies they consider to be unlawful. EEOC states that these documents are based on Title VII, existing EEOC policy guidance and technical assistance documents, and Supreme Court precedent.

Together, these documents state that DEI-related discrimination may include:

— Employment actions motivated in whole or in part by race, sex, or another protected characteristic, including in:

- Hiring;
- Firing;
- Promotion;
- Demotion;
- Compensation;

- Fringe benefits;
- Access to or exclusion from training (including training characterized as leadership development programs);
- Access to or exclusion from mentoring, sponsorship, or workplace networking/networks;
- Exclusion from internships, fellowships, or summer associate programs;
- Selection for interviews, including placement or exclusion from a candidate "slate" or pool; and
- Job duties or work assignments.

— "[U]nlawfully using quotas or otherwise 'balancing' a workforce by race, sex, or other protected traits."

— "Limiting membership in workplace groups, such as Employee Resource Groups (ERG) 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, or other privileges of employment, even if the separate groups receive the same programming content or amount of employer resources."

These documents also state that DEI training may give rise to a colorable hostile work environment claim. Specifically, the EEOC-only question-and-answer document states that "[d]epending on the facts, an employee may be able to plausibly allege or prove that a diversity or other DEI-related training created a hostile work environment by pleading or showing that the training was discriminatory in content, application, or context." It notes that there have been cases in which courts have ruled in favor of plaintiffs who present evidence of how such a training was discriminatory.

The EEOC-only question-and-answer document also describes, among other things, how to file a lawsuit alleging a violation of Title VII, who is protected from "DEI-related discrimination" at work, and how employees can be protected from retaliation when they speak out against company DEI policies that violate Title VII. It also states that employers cannot justify taking an employment action "based on race, sex, or another protected characteristic because the employer has a business necessity or interest in 'diversity,' including preferences or requests by the employer's clients or customers."

Finally, on March 21, 2025, the Chairman of the FCC warned in public remarks that the agency may block mergers and acquisitions involving companies that promote "invidious" DEI. Specifically, Chairman Carr was reported to have stated: "Any businesses that are looking for FCC approval, I would encourage them to get busy ending any sort of their invidious forms of DEI discrimination"; "We can only under the statute move forward and approve a transaction if we find that doing so serves the public interest"; and "If there's businesses out there that are still promoting invidious forms of DEI discrimination, I really don't see a path forward where the FCC could reach the conclusion that approving the transaction is going to be in the public interest."

## III. Considerations In Light of These Developments

Federal contractors and subcontractors will likely be asked to sign certifications stating that they do not operate any programs promoting DEI that violate any applicable federal anti-discrimination laws, which opens the possibility for False Claims Act ("FCA") liability. Based on the recent technical assistance documents, contractors now have a better idea of what the Administration views as violating such laws, though it is also important to note that neither the Executive Orders nor related guidance have modified the law. And it is far from clear that courts will adopt the Administration's views about what constitutes "illegal" DEI. Moreover, to succeed on an FCA claim, plaintiffs will have to prove falsity, scienter, and materiality, all of which may present obstacles.

Although there are many hurdles to establishing FCA liability, contractors and subcontractors should prepare with regard to the shifting legal and policy landscape. Among other steps, contractors should: (1) undertake an inventory of their DEI policies and programs to ensure they comply with anti-discrimination laws, in coordination with counsel; (2) plan responses to agency requests for certifications, including considering requesting additional information from the agency, such as their interpretation of the certification; (3) consider outreach to the contracting agency and the OFCCP for additional guidance regarding certifications; (4) have a plan for sub-certifications from subcontractors; and (5) determine who will sign such certifications.

Companies that are not federal contractors or subcontractors should nonetheless consider conducting an inventory of their DEI policies and programs, in coordination with counsel and with an eye toward the company's risk tolerance. In light of the comments from the FCC Chairman, companies considering acquisitions may want to pay particular attention to their DEI policies and programs.

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We continue to recommend that companies examine their policies, programs, and disclosures in light of these legal developments and public pronouncements. We also advise that companies consult counsel in determining how these new court decisions and executive pronouncements affect existing or future programs, policies, and certification and disclosure decisions.

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