ALERT MEMORANDUM

Executive Orders & Memoranda Targeting Diversity, Equity, and Inclusion

February 10, 2025

The Trump Administration has released a series of new directives targeting the use of diversity, equity, and inclusion ("DEI") policies and programs by government agencies, government contractors, educational institutions, and the private sector. This alert memorandum covers the executive orders and memoranda focused on private sector and government contractor DEI programs, highlighting the significant new risks in this space. In sum:

— The Administration is closely scrutinizing DEI policies and programs of federal contractors and private companies, with a general view that any program or policy that involves considering protected characteristics in employment actions is suspect and potentially unlawful.

— Although the Administration has not defined "illegal DEI" in its flurry of orders, analysis of past public statements from key decisionmakers in the new Administration and members of the judiciary suggests that the riskiest policies would likely include basing compensation or performance reviews on achieving certain diversity targets, making employment-related decisions in part on the basis of protected characteristics, and, to a certain extent, diverse interview slate policies. Less likely to draw the same level of scrutiny would be sponsoring employee resource groups that are open to all, or encouraging wider interview pools to include diversity of background, thought, and experience.

— Companies should align their internal policies and procedures with their disclosures and certifications on such policies and procedures and be prepared for government investigations into their DEI policies and programs.

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I. Two New Executive Orders

In January, President Trump issued two executive orders entitled "Ending Radical and Wasteful Government DEI Programs and Preferencing" and "Ending Illegal Discrimination and Restoring Merit-Based Opportunity."

On January 20, 2025, President Trump issued Executive Order 14151, "Ending Radical and Wasteful Government DEI Programs and Preferencing." It reflects the policy view that "illegal" DEI policies violate federal civil rights laws. The Executive Order directs the Office of Management and Budget ("OMB") along with the Attorney General and the Office of Personnel Management ("OPM") to "coordinate the termination of all discriminatory programs, including illegal DEI and 'diversity, equity, inclusion, and accessibility' (DEIA) mandates, policies, programs, preferences, and activities in the Federal Government, under whatever name they appear."

It further directs agencies, departments, and commission heads to take specific action in accordance with the Executive Order. Such entities are to "terminate, to the maximum extent allowed by law, all DEI, DEIA, and 'environmental justice' offices and positions . . . ; all 'equity action plans,' 'equity' actions, initiatives, or programs, 'equity-related' grants or contracts; and all DEI or DEIA performance requirements for employees, contractors, or grantees." The entities are also directed to "provide the Director of the OMB with a list of all agency or department DEI, DEIA, or 'environmental justice' positions, committees, programs, services, activities, budgets, and expenditures . . . ; [f]ederal contractors who have provided DEI training or DEI training materials to agency or department employees; and [f]ederal grantees who received Federal funding to provide or advance DEI, DEIA, or 'environmental justice' programs, services, or activities."

On January 21, 2025, President Trump issued Executive Order 14173, "Ending Illegal Discrimination and Restoring Merit-Based Opportunity." In respect of federal contractors, this Executive Order rescinded Executive Order 11246, which required contractors to agree not to discriminate "against any employee or applicant for employment because of race, creed, color, or national origin" and required that contractors "take affirmative action to ensure that applicants are employed . . . without regard to their race, creed, color, or national origin." Executive Order 14173 also directs the Office of Federal Contract Compliance Programs ("OFCCP") to cease "[p]romoting 'diversity,'" [h]olding Federal contractors and subcontractors responsible for taking 'affirmative action,'" and "[a]llowing or encouraging Federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin."

Executive Order 14173 provides new requirements for federal contractors, who are now required to (1) agree that their compliance with federal anti-discrimination laws is material to the government's payment decisions for purposes of section 3729(b)(4) of title 31, United States Code (concerning false claims); and (2) certify that they do not operate any programs promoting DEI that violate any applicable federal anti-discrimination laws. Contractors are permitted to comply with the regulatory scheme in effect prior to Executive Order 14173 for 90 days.

Executive Order 14173 further attempts to deter DEI policies and programs in the private sector. It orders a report that identifies "[k]ey sectors of concern within each agency's jurisdiction;" the most "egregious and discriminatory DEI practitioners" in each sector of concern; a plan to deter DEI programs or principles that constitute illegal discrimination or preferences, including an identification by each agency of up to nine potential civil compliance investigations; "[o]ther strategies to encourage the private sector to end illegal DEI discrimination and preferences" and comply with federal civil rights laws; "[l]itigation that would potentially be appropriate for federal lawsuits, intervention, or statements of interest; and [p]otential regulatory action and sub-regulatory guidance."

II. Related Memoranda

On February 5, the Attorney General released a memorandum regarding the Department of Justice's approach to enforcement in light of Executive Order 14173. The memorandum states that "the Department of Justice's Civil Rights Division will investigate, eliminate, and penalize illegal DEI and DEIA preferences, mandates, policies, programs, and activities in the private sector and in educational institutions that receive federal funds." The memorandum carves out "educational, cultural, or historical observances—such as Black History Month, International Holocaust Remembrance Day, or similar events—that celebrate diversity, recognize historical contributions, and promote awareness without engaging in exclusion or discrimination" as permitted.

The Attorney General's memorandum directs the Civil Rights Division and the Office of Legal Policy to submit a report by March 1, 2025, consistent with Executive Order 14173 addressing: "[k]ey sectors of concern within the Department's jurisdiction; [t]he most egregious and discriminatory DEI and DEIA practitioners in each sector of concern; . . . proposals for criminal investigations and for up to nine potential civil compliance investigations of entities . . . ; [a]dditional potential litigation activities . . . , regulatory actions, and sub-regulatory guidance; and [o]ther strategies to end illegal DEI and DEIA discrimination and preferences and to comply with all federal civil-rights laws."

Finally, the OPM issued a memorandum on the same day, directing government agencies to "terminate all illegal DEIA initiatives," noting that "[u]nlawful discrimination related to DEI includes taking action motivated, in whole or in part, by protected characteristics." The memorandum states that agencies should "end[] unlawful diversity requirements for the composition of hiring panels, as well as for the composition of candidate pools (also referred to as 'diverse slate' policies)."

The OPM memorandum further notes that "agencies should not terminate or prohibit accessibility or disability-related accommodations, assistance, or other programs that are required by" civil rights laws. While agencies are directed to "prohibit ERGs that promote unlawful DEIA initiatives or advance recruitment, hiring, preferential benefits . . . , or employee retention agendas based on protected characteristics," agency heads "retain the discretion to allow employees to host affinity group lunches, engage in mentorship programs, and otherwise gather for social and cultural events" but "must ensure that attendance at such events is not restricted (explicitly or functionally) by any protected characteristics."

III. Navigating the Changing Legal Landscape

These new executive orders and memoranda present significant new risks for companies in relation to existing DEI programs and policies. While leaving "illegal DEI" undefined, the Administration's view seems to align with treating any use of race, gender, or other demographic characteristic in employment-related decisions as suspect if not plainly unlawful under, *inter alia*, Title VII.[1] In particular, members of the Administration have identified race-restricted access to mentoring and other programs, diverse slate policies, compensation tied to certain demographic targets, and race-restricted diversity internship programs or accelerated interview processes as potentially unlawful.[2] Employee resource groups and

[1] This view of Title VII is likely informed by a reading of *SFFA v. Harvard*—particularly the concurrence of Justice Gorsuch—as well as public commentary since *SFFA v. Harvard*, which relate its reasoning in the context of educational institutions to public and private employers' obligations and limitations. *See*, *e.g.*, Andrea R. Lucas, *With Supreme Court affirmative action ruling, it's time for companies to take a hard look at their corporate diversity programs*, REUTERS, June 29, 2023, https://www.reuters.com/legal/legalindustry/with-supreme-court-affirmative-action-ruling-its-time-companies-take-hard-look-2023-06-29/ (statements made by the current EEOC Acting Chair when she was a member of the EEOC, discussing *SFFA v. Harvard* in the employment context).

[2] *See id*. (flagging such policies as potentially unlawful).

mentorship programs that are open to all are likely to draw less hostility from the Administration.

In light of these views and recent developments, certain activities may increase the risk of government scrutiny, such as having and tracking numerical goals for diversity purposes, giving preferential treatment or "plus" factor status to certain demographic characteristics over others, providing programming or support that is restricted to those with certain demographic characteristics, and pairing performance reviews to achieving diversity targets. In addition to programs and policies generally widening recruitment efforts and opening mentorship programs to all, those that merely celebrate diversity or historical understandings are less likely to draw government scrutiny.

For government contractors specifically, there are additional risks to navigate. The new requirement that contractors certify to not using "illegal DEI" and agreeing that such a certification is material seems designed to trigger False Claims Act liability should the certification be deemed inaccurate. How the Administration's approach affects a company's DEI programs and policies, certifications for contracting and public disclosures related to these issues will likely depend heavily on the facts and circumstances, but companies should expect scrutiny and government investigative demands as the different agencies seek to follow through on the Executive Orders.

An additional challenge companies face is that they continue to have compliance obligations under federal court interpretations of Title VII, as well as state and local anti-discrimination and civil rights laws. There also may potentially be conflicting disclosure and labor and employment laws across international borders and within different United States jurisdictions.

We recommend that companies examine their policies, programs, and disclosures to ensure that they are consistent with current law and will survive investigative scrutiny. We also advise that companies consult counsel in determining how these new executive pronouncements affect existing or future programs, policies, and disclosure decisions, given the rapidly changing legal and enforcement landscape, and prepare themselves for potential regulatory and criminal investigations. A close examination of DEI programs and associated disclosures with a nuanced understanding of the legal underpinnings of the new Administration's views can help mitigate risk in this environment.

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