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President Trump DEI Executive Orders: What We Know and How Companies Can Prepare

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Upon taking office, President Trump issued three executive orders aimed at curbing Diversity, Equity, and Inclusion ("DEI") initiatives within the federal government and its contractors:

- Executive Order 14173, Ending Illegal Discrimination and Restoring Merit-Based Opportunity
- Executive Order 14151, Ending Radical and Wasteful Government DEI Programs and Preferencing
- Executive Order 14170, Reforming the Federal Hiring Process and Restoring Merit to Government Service

These orders, referred to as the "DEI EOs," emphasize a shift towards merit-based hiring practices, seeking to eliminate discrimination. At the heart of this policy is the belief that hiring and promotion preferences violate, rather than promote, long-standing federal anti-discrimination laws and principles. With an emphasis on Executive Order 14173 ("EO 14173"), this article examines the key provisions of EO 14173 and how both government contractors and private companies can navigate unravelling DEI and proactively adjust their hiring policies to comply with the new anti-discrimination landscape. The Trump administration will be aggressive in enforcing the DEI EOs.

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Background

Presidents Franklin Roosevelt, Truman, and Eisenhower all issued executive orders prohibiting federal government contractors from discriminating based on race, color, religion, sex, or national origin. In Executive Order 11246 (Equal Employment Opportunity), President Johnson expanded what was then called "affirmative action" to federal government contractors, setting the stage for the Federal Civil Rights Act and subsequent DEI programs that encouraged hiring minorities. EO 14173 revokes Executive Order 11246 and prohibits DEI initiatives (referred to as "illegal preferences and discrimination").

To the extent DEI policies promote preferences and affirmative action, the Supreme Court already held that such policies are illegal in its 2023 decision in Students for Fair Admissions Inc. v. President & Fellows of Harvard College. In that case, the Supreme Court overturned affirmative action in college admissions as violating the Equal Protection clause, and lawsuits based on that holding have been filed in other contexts.

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Key Requirements of EO 14173

- The Office of Federal Contract Compliance Programs, which ensures that government contractors comply with anti-discrimination laws, must "immediately cease" the following:
  (1) "promoting 'diversity';"
  (2) "holding Federal contractors and subcontractors responsible for taking 'affirmative action;'" and
  (3) "workforce balancing based on race, color, sex, sexual preference, religion, or national origin."
  EO 14173 does not define the quoted terms.

- Every Federal government contract must include sections in which the contractor:
  (1) Agrees that compliance with all applicable Federal anti-discrimination laws is material to the government's payment decisions under the False Claims Act (Section 3729(b)(4) of Title 31, United States Code); and
  (2) Certifies it does not have DEI programs that violate Federal anti-discrimination laws.

- The Office of Management and Budget must:
  (1) remove references to DEI and DEIA principles from government-wide processes and directives related to acquisition, contracting, grants, and financial assistance; and
  (2) terminate mandates or programs related to "diversity," "equity," "equitable decision making", "equitable deployment of financial and technical assistance" and the like (all terms undefined).

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Key Requirements of EO 14173 (cont)

- For the private sector, the Attorney General must submit a report with policy recommendations for enforcing federal civil rights laws in the private sector. Among other things, the report must identify (with input from each federal agency and the Attorney General):
  (1) "Up to nine potential civil compliance investigations of publicly traded corporations, large non-profit corporations or associations, foundations with assets of 500 million dollars or more, State and local bar and medical associations, and institutions of higher education with endowments over 1 billion dollars;"
  (2) "Litigation that would be potentially appropriate for Federal lawsuits, intervention, or statements of interest;" and
  (3) "Potential regulatory action and sub-regulatory guidance."

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Compliance with Federal Anti-Discrimination Laws

EO 14173 requires compliance "with all applicable Federal anti-discrimination laws." Contractors should be mindful of the Federal statutory scheme for anti-discrimination, especially where DEI hiring policies might be in tension with these laws.

EO 14173 mandates a return to the principles in Title VII of the Civil Rights Act of 1964, which makes it illegal for employers to discriminate based on race, color, religion, sex, or national origin.Other potentially relevant Federal anti-discrimination laws include: the Equal Pay Act of 1963 (prohibits wage discrimination based on sex); the Age Discrimination in Employment Act of 1967; the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973; and the Genetic Information Nondiscrimination Act of 2008. The new administration views DEI programs as inherently violative of these laws.

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Compliance with Federal Anti-Discrimination Laws (cont)

The DEI EOs raise questions about whether the prohibition on DEI will eventually unravel the Federal scheme for establishing participation goals and set asides in Federal government projects, many of which are in tension with anti-DEI principles. An executive order cannot "officially" roll back Federal programs established by Congress, so the DEI EOs do not make it unlawful to enter set-aside contracts under these programs. Nonetheless, the DEI EOs suggest a shift towards limiting or eliminating set-aside programs, and certain set aside programs have already been limited based on Students for Fair Admissions Inc. and its progeny. Some federal courts have held that the government can no longer apply the rebuttable presumptions – which are articulated in the small/disadvantaged business regulations – that certain business are "disadvantaged" based on race and gender. For example, a 2023 Tennessee case held that all 8(a) applicants had to demonstrate social disadvantage, and it could no longer be presumed, and a 2024 case in Tennessee enjoined the Department of Transportation from presuming disadvantage in Disadvantaged Business Enterprise contracts.

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Compliance with the DEI EOs

All companies should review and adjust their DEI policies to ensure they do not promote quotas or preferential treatment based solely on protected categories. Federal government contractors also must ensure compliance with new certification requirements and be aware of potential implications under the False Claims Act.Private sector companies, especially large, publicly traded ones, should be wary of being the target of Federal investigations.

- *Recommendations for all companies:*
  - Review current DEI programs to determine if they promote quotas or preferential treatment based on the presumption that individuals or subcontractors are disadvantaged solely based on their race, color, sex, sexual preference, religion, or national origin. If the policies do this, they need to be changed.Revise such policies to include merit-based components; consider mirroring the current approach of the SBA, which now requires the submission of narratives detailing how an individual's minority status disadvantaged them.
  - Remove reference to Executive Order 11246 from all contracts and internal policies, including company break rooms and trailers.
  - Keep abreast of Federal policy documents, public statements, and enforcement actions relating to DEI and monitor the National Association of Diversity Officers in Higher Education lawsuit (see below) seeking to enjoin the Order.
  - Engage with leadership to assess the company's priorities and how it wants to balance its commitment to DEI with the potential risks of facing Federal scrutiny or litigation.

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Compliance with the DEI EOs (cont)

- *Special considerations for Federal government contractors:*
  - Contractors should be mindful that the new certification requirements may implicate the False Claims Act, which prohibits contractors from making "materially false" statements on claims, regardless of intent.There are some questions as to whether the certification on the contract would constitute a "claim" under the False Claims Act. Nonetheless, subsequent representations to the government (for example, payment applications and change order requests) that represent the contractor has complied with the contract – and certifications therein – constitute "claims" and must be truthful and accurate. EO 14173 even says that compliance with Federal anti-discrimination laws is material to government's payment decisions under the False Claims Act.
  - False Claims Act penalties are significant and include treble damages, penalties, and attorneys' fees.
  - There is no indication that the DEI EOs will be applied retroactively.Although contracts specifically for DEI programs will likely be terminated, it is unlikely that the government could rightfully terminate construction contracts that do not contain the DEI certification based on preexisting DEI programs or hiring practices.
  - It is possible the government will issue unilateral change orders inserting the DEI certification into existing contracts.

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Compliance with the DEI EOs (cont)

- *Special considerations for private sector companies:*
  - Private companies, like government contractors, must comply with Federal civil rights laws, with few exceptions, and they can be prosecuted for civil rights violations through the Equal Employment Opportunity Commission, the Department of Justice, and in some instances, through private lawsuits.
  - EO 14173 requires the government to make an example of large public companies by subjecting them to Federal investigations and lawsuits. Specifically, the Order requires the AG and the heads of every Federal agency to identify up to nine companies for investigation. We expect the Federal government to make examples of some private sector companies on DEI grounds. Keep an eye on Costco, which has doubled-down on its DEI policies since the DEI EOs, as a possible target.

Ultimately, companies in the public and private sector will have to make a weighty decision between their commitment to inclusive hiring and potential harassment or lawsuits from the new administration.

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Legal Challenges

The National Association of Diversity Officers in Higher Education and others filed the first legal challenge against EOs 14151 and 14173, arguing that the orders exceed presidential authority, violate separation of powers, are unconstitutionally vague, and create a chilling effect on DEI-related speech. The lawsuit seeks preliminary and permanent injunctions against the EOs. Although the lawsuit is focused on higher education, a preliminary injunction would immediately halt the measures in the EOs across all industries until the court determines whether they are constitutional.

It is also noteworthy that there are lawsuits pending relying on the DEI EOs to allege discrimination. For example, the state of Missouri sued Starbucks alleging that its DEI programs violate Federal law. We will continue to monitor these developments and provide updates.