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What, if Anything, Should Businesses Do About DEI in the Age of Trump?

By Neil C. Schur
March 24, 2025

In light of President Donald J. Trump's recent executive orders, private businesses should examine their diversity, equity and inclusion (DEI) policies and practices and formulate a plan of action—change policy, reaffirm a commitment to DEI (amended or not), or wait and see.

While Trump's Jan. 21, 2025, Executive Order 14173, titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" (the order), focuses mainly on government agencies and contractors, it also directs federal agencies to scrutinize "illegal DEI preferences, mandates, policies, programs and activities" in the private sector as well.

The plain text of the order makes this conclusion inescapable, as it:

- Directs all agencies to "enforce our longstanding civil rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs and activities."
- Instructs the Attorney General and the director of the Office of Management and Budget to submit within 120 days a report containing recommendations for enforcing federal civil rights laws and "taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI."

The order further directs that the report contain a strategic enforcement plan identifying "key sectors of concern within each agency's jurisdiction" and "the most egregious and discriminatory DEI practitioners within each agency's jurisdiction." The plan is to include "specific measures to deter DEI programs or principles."

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Neil C. Schur of Anderson Kill.

The order continues: "As a part of this plan, each agency shall identify up to nine potential civil compliance investigations of publicly traded corporations, large nonprofit corporations or associations, foundations with assets of $500 million or more, state and local bar and medical associations, and institutions of higher education with endowments over $1 billion" as well as "other strategies to encourage the private sector to end illegal DEI discrimination and preferences," including "litigation that would be potentially appropriate for federal lawsuits, intervention, or statements of interest" and "potential regulatory action and sub-regulatory guidance."

The order explains its reasoning as follows: "Illegal DEI … policies not only violate the text and spirit of our longstanding federal civil rights laws, they also undermine our national unity, as they deny, discredit, and undermine the traditional American values of hard work, excellence, and individual achievement in favor of an unlawful, corrosive, and pernicious identity-based spoils system."

The most relevant government agency for enforcement of federal employment law is, of course, the Equal Employment Opportunity Commission (EEOC), which is charged with the initial review in discrimination-based disputes (before they are filed in court) and federal enforcement of anti-discrimination laws. Recently appointed EEOC Chair Andrea R. Lucas said her priorities include "rooting out unlawful DEI-motivated race and sex discrimination." The EEOC has removed language promoting what the current administration deems inappropriate gender ideology (the view that human beings are not defined by their biological sex, but by their "internal sense of gender") on the EEOC's internal and external website and documents, including webpages, statements, social media platforms, forms and trainings. On the EEOC's website, Lucas states: "I am confident that the work of our agency remains critically important, as illustrated by multiple executive orders protecting civil rights and expanding individual, merit-based opportunity issued by the president in his first few days in office."

The order does not purport to ban all DEI—just "unlawful" or "illegal" DEI. What is that? Stay tuned, of course, to this highly dynamic space. For now, we know that the Trump administration deems "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" unlikely to be viewed as "illegal" DEI. Moreover, we know that the administration considers at least the following to be illegal:

- Quotas (e.g., 30% of new hires must be women);
- Set-asides (e.g., reserving a vacant position for someone other than a white man); and
- Preferences (e.g., giving a "plus" to a woman or person of color because of their protected characteristic, even if the plus is given to break a tie).

While the order implies an initial focus on larger, publicly-held companies, institutions and organizations, midsize and even smaller closely-held companies should not consider themselves immune and may become targets. The reach of the administration's scrutiny may also extend to any industry.

Although the president's legal authority to mandate that the private sector abandon DEI practices is questionable, the order does signal—loudly and fairly clearly—the Trump administration's interpretation that certain DEI practices are themselves discriminatory and unlawful.

Of course, DEI initiatives were under attack prior to the order. The opposition to DEI gathered momentum following a 2023 ruling of the U.S. Supreme Court that admissions policies of Harvard University and the University of North Carolina taking race into account were unconstitutional, after certain students claimed the policies were a violation of the equal protection clause of the Fourteenth Amendment and unfair to white and Asian American applicants. Following that ruling, conservative groups and activists launched pressure campaigns and filed lawsuits against race-focused hiring practices in the private sector.

The order has increased both the public scrutiny and the litigation risk of DEI initiatives or the absence thereof.

As noted, there is pending litigation that may impact the force of the order. In National Association of Diversity Officers in Higher Education, for example, the U.S. District Court for the District of Maryland issued a nationwide preliminary injunction temporarily blocking key provisions of the order and EO 14151. Specifically, that court found that certain provisions are unconstitutionally vague and enjoined federal agencies from bringing any enforcement action targeting "DEI programs or principles" but declined to enjoin the Attorney General from "engaging in investigation" of DEI programs.

In the business world, the response to the order has so far been mixed.

- Some companies, including Amazon, Amtrak, Boeing, Disney, Ford, Google, Harley Davidson, Lowe's, McDonald's, Meta, Molson Coors, Pepsi, Target, and Walmart, among others, have preemptively scaled back on DEI or "DEI-adjacent" practices and policies.

- Others, such as Apple, Cigna, Cisco, Coca-Cola, Costco, Deutsche Bank, Deloitte, Delta, Gap Inc., Goldman Sachs, Honda, Hyundai, John Deere, Johnson & Johnson, JPMorgan Chase, MassMutual, Procter & Gamble, NFL, Nike and Tiffany, among others, have either publicly continued to embrace DEI or affirmatively reaffirmed their commitment to DEI policies and practices, with strong investor support. Indeed, in late February, the management side law firm, Littler Mendelson, issued a report finding that about half of the respondents to a survey on DEI were not planning to change their DEI plans at all.

In Pennsylvania, State Sen. Art Haywood has stated that he is "confident" that the state can maintain its DEI policies and called for legislation "to make sure that our laws here in Pennsylvania have the protections that we once relied on the federal government to produce."

Two of the largest private companies in Philadelphia, Comcast and Aramark, both reaffirmed their commitment to DEI. Comcast stated on its website: "We believe that a diverse, equitable, and inclusive company is a more innovative and successful one." Similarly, Aramark's website states: "We know that having a workforce that reflects the communities we serve benefits everyone … At Aramark, one of our core values is that we respect diversity and appreciate differences."

Given the order and the statements of the EEOC, the following seems clear:

- Companies that retain DEI policies and practices should expect claims from individual employees and class actions alleging reverse discrimination, as well as possible investigation by the AG or OMB; and
- Companies that abolish DEI can also expect private litigation from employees (likely people of color or women) claiming discrimination.

In view of the current rapidly changing landscape, we recommend that private employers take at least the following steps:

- Evaluate your risk tolerance with your stakeholders.
- Perform an audit or assessment of your DEI risk, which will be protected by attorney-client privilege and possibly by the attorney work product doctrine. Determine steps needed, if any, to minimize risk or take risk with eyes wide open.
- Evaluate all DEI-related initiatives, program and policies to assess risk and ensure compliance with current law. The order suggests the Trump administration wants merit-based hiring, firing, promotion and compensation programs that provide equal access to opportunities and skills development and do not give special advantages to one person or group over another.
- Keep in mind that nondiscrimination and fair employment policies, procedures and training programs are still essential to compliance with state and federal nondiscrimination laws.
- Whether you make any changes or not, carefully formulate a communications strategy. The perception of your position and actions may be extremely important to your employees.
- Prepare for pushback from internal or external groups—and do so now, when you have time to reflect and are not in a crisis. Be ready to defend and explain why you did what you did, but assume the Trump administration will scrutinize your explanation.
- Train your HR department and managers on your company's policies, procedures and practices following your review and evaluation.
- Consult counsel if you have questions or concerns about your DEI policies, procedures or practices.

Neil C. Schur *is a shareholder in Anderson Kill's Philadelphia office and co-chair of the firm's antitrust and unfair competition group*.