

“Illegal DEI”: Key Considerations for Higher Education and the Private Sector in the New Administration

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On January 21, 2025, President Trump issued Executive Order (EO) 14173, titled “Ending Illegal Discrimination and Restoring Merit-Based Opportunity.” The EO raises significant new considerations for private companies and institutions of higher education that operate in the United States regarding their diversity, equity, inclusion, and accessibility (DEI or DEIA) programs because it directs all federal agencies, including the U.S. Department of Education (DOE), to “terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements” and “enforce [the country’s] longstanding civil rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities.” The EO does not define what constitutes an “illegal DEI preference or program,” which has led to uncertainty about its scope.

Since the EO’s issuance, numerous agencies and agency heads have weighed in on what constitutes “illegal DEI” under the new Trump Administration. We have highlighted some of the key actions and provided our insights below:

- On February 5, 2025, Attorney General Pam Bondi issued a memorandum on the U.S. Department of Justice’s (DOJ) priorities to enforce EO 14173, which explained, among other things, that EO 14173 does not prohibit “educational, cultural, or historical observances . . . that celebrate diversity, recognize historical contributions, and promote awareness without engaging in exclusion of discrimination,” such as Pride Month, Asian-American and Pacific Islander Heritage Month, Black

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History Month, International Holocaust Remembrance Day, or similar events. We previously discussed and analyzed the Attorney General's memorandum here.

- On February 14, 2025, the U.S. Department of Education's Office for Civil Rights (OCR) issued a Dear Colleague Letter (DCL), which provides notice of the Department's current interpretation of legal requirements under Title VI of the Civil Rights Act of 1964, the Equal Protection Clause of the United States Constitution, *Students for Fair Admissions vs. Harvard*, and other relevant authorities. The DCL indicates the Administration's apparent position that any use of race, color, or national origin as a basis for decisions or benefits by recipients of federal funding violates Title VI of the Civil Rights Act of 1964. The DOE issued Frequently Asked Questions (FAQs) in connection with the DCL clarifying that DEI programs are not inherently unlawful and that the DOE will evaluate whether practices or programs violate Title VI based on the facts and circumstances of each case.
- On March 19, 2025, the U.S. Equal Employment Opportunity Commission (EEOC) and the DOJ issued technical assistance documents "focused on educating the public about unlawful discrimination related to 'diversity, equity, and inclusion' (DEI) in the workplace." The technical assistance documents acknowledge that DEI is a "broad term that is not defined" in Title VII of the Civil Rights Act of 1964. Notwithstanding the lack of definition in the primary federal law governing employment discrimination in the workplace, the agencies explain that DEI policies may be unlawful if they are "motivated—in whole or in part—" by an employee's protected characteristic, such as race or sex, or if they create quotas or attempt balancing of the workforce based on protected traits. We previously analyzed the technical assistance documents here.

The guidance from the DOJ, EEOC, and DOE generally signals a heavy focus by the Trump Administration on ensuring that programs, activities, opportunities, and observances are not "segregated" or made available based on individuals' protected traits.

Key Considerations Moving Forward

As agency guidance and enforcement actions continue to clarify the full scope of the government's efforts to eradicate illegal DEI and to define what the Administration considers to be actionable illegal DEI, it is essential for higher education institutions, other federal funding recipients covered by Title VI, and private companies to continually monitor developments and be prepared to address the potential risks of noncompliance with evolving requirements. The complicated landscape of federal, state, and local government interests in DEI and related policies and activities have significantly increased those potential risks, including the reputational harm that can arise based on efforts to comply or failure to comply with the Administration's directives. We've outlined several key considerations that may help guide efforts in that regard:

Be Mindful of Impending Deadlines: The EO provides that within 120 days of January 21, 2025, i.e., by May 21, 2025, the Attorney General and the Secretary of Education will jointly issue guidance regarding the federal student loan assistance program under Title VI and compliance with the *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* Supreme Court ruling.

The EO also provides that within 120 days of January 21, 2025, i.e., by May 21, 2025, the Attorney General must submit recommendations for enforcing federal civil rights laws and adopting measures to encourage private-sector employers to discontinue DEI preferences. The report shall identify, among other things:

- Key sectors of concern within each agency's jurisdiction;
- The most egregious and discriminatory DEI practitioners in each sector;
- A plan of specific steps or measures to deter DEI programs;
- 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;
- Litigation that would be potentially appropriate for federal lawsuits, intervention, or statements of interest; and
- Potential regulatory action and sub-regulatory guidance.

Employ Best Practices to Ensure Compliance: Regardless of whether your organization finds itself named in the impending reports and recommendations, there will continue to be heavy scrutiny of DEI-related practices and policies by federal agencies. Organizations should take steps now to ensure they are prepared. We recommend that organizations:

- Conduct an attorney-client privileged legal review of DEI programs and related training materials with counsel.
- Be prepared to deal with legal conflict issues. Organizations may encounter conflicts with their obligation to report, track, or share DEI-related information to state EEO agencies under state law or as part of contractual requirements based on their receipt of state funds. Notably, many states and local governments maintain affirmative action requirements similar to those that the EO has directed the Office of Federal Contract Compliance Programs to discontinue concerning federal government contractors. For example, New Jersey requires state contractors to submit reports of their efforts to ensure that their workforce demographics align with standards set by the state, while Minnesota requires state contractors to submit affirmative action plans and yearly workforce reports setting hiring goals for women and minorities when they are deemed underutilized based on the available workforce. Likewise, foreign organizations may receive requests from federal agencies to certify their compliance with the Administration's anti-DEI initiatives and must be careful to understand the scope of their obligations and potential liability under U.S. anti-discrimination laws.
- Ensure hiring, promotion, and compensation decisions are transparent and well-documented.
- Train personnel on legally compliant DEI practices that support your academic or business objectives.
- Focus on creating and fostering an inclusive environment: DEI programs, practices, and policies should highlight the benefits of inclusion in academic and professional environments and how such initiatives can serve as a key tool in achieving educational and corporate objectives. Student and employee resource groups and activities should be open to anyone interested in the topic, regardless of their sex,

race, or any other protected category. Reframe DEI efforts to emphasize campus and workplace culture, leadership development, inclusion, and equitable access to opportunities as sustainable business and educational practices rather than preferential treatment.

- Reconsider goals that are based on protected traits. It has always been unlawful under Title VI and Title VII for organizations regulated by the Civil Rights Act of 1964 to use quotas to reserve specific positions for individuals based on traits considered protected under Title VI or Title VII. Work with legal counsel to review your past or existing goals and ensure that your objectives are appropriate.
- Retool scholarship, internship, and mentoring programs that promote academic and career development to ensure they are open to all candidates regardless of their protected traits.
- Understand and be prepared to effectively communicate any changes you decide to make to your DEI-related programs and practices to all stakeholders.

We Can Help

Wiley has a team of skilled practitioners with knowledge and experience in relevant areas (including Employment & Labor, Litigation, Government Contracts, and White Collar Defense & Government Investigations) to help private-sector businesses navigate changes to DEI and related federal policies. In particular, companies with questions about whether their existing DEI-related programs involve unlawful discriminatory practices or whether certain policies or practices could draw unwanted attention from the federal government, may contact the authors of this alert for assistance. Further, our team can guide those seeking advice regarding or assistance with civil compliance investigations, provide defense in related litigation initiated by the federal government, or handle other matters arising from this EO.

To stay informed on all the Executive Orders and announcements from the Trump Administration, please visit our dedicated resource center .