

ALERT

Impacts of New DEI Executive Order Extend Beyond Federal Government to Private Sector

January 24, 2025

***UPDATE:** On February 5, 2025, Attorney General Pam Bondi issued a memorandum on the DOJ's priorities to effectuate Executive Order 14173, "Ending Illegal Discrimination and Restoring Merit Based Opportunity", which is discussed in greater detail [here](#).

On January 21, 2025, President Trump issued an Executive Order (EO) titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity." This EO raises significant new considerations for companies across the United States regarding their diversity, equity, inclusion, and accessibility (DEI or DEIA) programs, as it targets the elimination of "illegal DEI and DEIA policies" beyond federal employees, contractors, and grantees to "encourage" the private sector to eliminate DEI programs that constitute illegal discrimination and preferences. This EO is similar to the Trump EO issued on Day 1 directing the termination of the federal government's DEI and related mandates, policies, programs, preferences, and activities (summarized in a prior Wiley alert), which has already resulted in action by myriad federal agencies in the first week of the Trump Administration.

This EO will operate within a complicated landscape of federal, state, and local government interests in private DEI and other policies and activities. The subject area is complex and fraught with challenges. We discuss below how the reporting, compliance investigations, and other strategies prescribed in the EO may impact private-sector entities, whether or not they do business with the federal government.

Provisions Affecting the Private Sector

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This Presidential action will have impacts on an array of private-sector companies, even those that do not contract with the federal government. Section 4 of the EO directs heads of all agencies, in collaboration with the U.S. Attorney General (AG), to take several steps to identify private-sector companies and policies for review and “to advance in the private sector the policy of individual initiative, excellence, and hard work.” For instance, within 120 days of the order (May 21, 2025), the AG must submit a report to the White House with actions focused on and/or directed at the private sector. The report must include “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.” In addition, the EO calls for the report to include a “proposed strategic enforcement plan” identifying the following:

- “Key sectors of concern” within each agency’s jurisdiction;
- “The most egregious and discriminatory DEI practitioners” in each sector of concern;
- A plan with specific steps to “deter DEI programs or principles...that constitute illegal discrimination or preferences”;
 - Among other things, this plan must “identify up to nine potential civil compliance investigations of publicly traded corporations, large non-profit 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.”
- Other strategies to encourage the private sector to end “illegal DEI discrimination and preferences”;
- Potential litigation that would be appropriate for federal lawsuits or intervention; and
- Potential regulatory action and sub-regulatory guidance.

Key Takeaways

Although some phrasing in the EO appears to characterize DEI programs and practices as *per se* unlawful, the impact of the EO and the impending agencies’ recommendations regarding private-sector companies is unclear. The lawfulness of a private-sector company’s DEI programs and practices under federal law is determined by applicable federal statutes, such as Title VII of the Civil Rights Act of 1964, and relevant agency guidance and legal precedents interpreting such statutes. The EO “encourages” private companies to discontinue “illegal” DEI programs, but it does not provide new guidance or specific direction concerning what might make an existing practice or program illegal, and it does not impose any new obligations or requirements on private-sector employers beyond existing federal anti-discrimination requirements.

Nevertheless, the EO does signal new federal civil enforcement priorities that private employers must take seriously. The Trump Administration’s priorities in this area may result in new agency guidance from the U.S. Equal Employment Opportunity Commission (EEOC), which remains the primary agency responsible for enforcing federal anti-discrimination laws. Based on the current makeup of the EEOC’s leadership – consisting of a newly appointed Republican Chairperson but a Democratic majority that will continue until 2026 – the Trump Administration may encounter some roadblocks to the extent it seeks to promote the policies underlying the EO via the EEOC. That said, the new EEOC Chair may still direct the agency’s local offices to increase their

efforts to investigate companies concerning these issues, and other agencies may initiate investigations that could be potentially costly and burdensome to companies in the near term based on the President's directives.

Private companies may also 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 with respect to federal government contractors. For example, 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. Private companies must ensure they understand how such conflicts may be resolved or avoided as the Trump Administration continues to guide the enforcement of the EO.

Accordingly, private employers should immediately shift their focus to conducting a privileged assessment of all current affirmative action and DEI-related obligations under state law as well as their DEI statements, policies, programs, procedures, and initiatives to ensure compliance with federal anti-discrimination laws, to limit their potential exposure to costly investigations and litigation, and to ensure a clear plan for how to proceed concerning DEI-related matters while maintaining their legitimate, non-discriminatory practices and goals related to recruiting and retention.

Potential Impacts

The Trump Administration has already issued EO's to overturn other prior DEI-related efforts to advance racial equity and prevent discrimination on the basis of gender identity or sexual orientation (see Omnibus EO, "Initial Recissions of Harmful Executive Orders and Actions" and EO addressing Sex and Gender Identity), and we expect more to follow. We will continue to monitor developments in this area and provide updates as they occur.

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 below.

Wiley's Trump Administration Resource Center