

ALERT

Key Parts of Anti-DEI Executive Orders Blocked by Federal Judge

February 24, 2025

UPDATE as of March 5, 2025: Within days of our initial publication of this alert, additional lawsuits with identical or similar claims were filed challenging the DEI EOs. On February 20, the San Francisco AIDS Foundation filed a complaint in the District Court for the Northern District of California San Francisco Division asserting that the DEI EOs and EO 14168, "Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government," violate the First and Fifth Amendments and are ultra vires presidential action in excess of authority. A motion hearing for preliminary injunction is set for May 22, 2025. On February 26, the Chicago Women in Trades similarly filed suit for injunctive and declaratory relief in the District Court for the Northern District of Illinois Eastern Division asserting that the DEI EOs violate the First and Fifth Amendments and Article I § 8 (Spending Clause and Separation of Powers) of the U.S. Constitution, and targeting the same Termination, Certificate, and Enforcement Provisions as those enjoined by the Maryland court.

On Friday, February 21, 2025, the U.S. District Court for the District of Maryland issued a nationwide preliminary injunction that enjoins aspects of two Executive Orders (EOs), EO 14151, "Ending Radical and Wasteful Government DEI Programs and Preferencing," and EO 14173, "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," which seek to discourage and eliminate Diversity, Equity, and Inclusion (DEI) concepts, policies, and practices across the federal government and "encourage" the private sector to terminate DEI programs that constitute illegal discrimination and preferences (collectively, the DEI EOs).

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Practice Areas

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Diversity, Equity, and Inclusion (DEI) Counseling and Support
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Litigation

President Trump issued several EO^s during his first week in office, and Wiley has analyzed the DEI EO^s here and here. Multiple challenges to these and other EO^s have already been filed.

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Background and Summary of the Nationwide Preliminary Injunction

The injunction arises from a challenge brought by the National Association of Diversity Officers in Higher Education, the American Association of University Professors, Restaurant Opportunities Centers United, and Baltimore, Maryland's mayor and city council.

The plaintiffs argued that three key provisions of the DEI EO^s violate the United States Constitution:

- The "Termination Provision" of EO 14151, which requires federal agencies to terminate "equity-related grants or contracts."
- The "Certification Provision" of EO 14173, which requires federal contractors and grantees to certify that they do not operate programs "promoting DEI" in contravention of nondiscrimination laws and to agree that their compliance with "all applicable Federal anti-discrimination laws" is material to the government's payment decisions for purposes of the False Claims Act.
- The "Enforcement Threat Provision" of EO 14173, which directs the U.S. Attorney General to enforce civil rights laws against DEI programs in the private sector.

Summary of Termination Provision Analysis

The court found that the term "equity-related" in EO 14151 is likely vague and could lead to arbitrary and discriminatory enforcement. The court also determined that the Administration's failure to define key terms in the EO leaves federal contractors and grantees uncertain about what activities are prohibited, which could have a chilling effect on protected speech and activities related to DEI.

Summary of Certification Provision Analysis

The court determined that the Certification Provision of EO 14173 imposed a content-based restriction on speech and required contractors and grantees to certify compliance with undefined federal anti-discrimination laws. The court also found that the provision leveraged federal funding to regulate speech outside the scope of the funded programs, thereby violating the First Amendment.

Summary of Enforcement Threat Provision Analysis

The court concluded that it is likely to be found that this provision in EO 14173 is, on its face, an unlawful viewpoint-based restriction on speech. The provision targets DEI programs in private companies without clear definitions, and the threat of enforcement is likely to have a chilling effect on speech related to DEI. The court stated the EO's language made clear "that viewpoints and speech considered to be in favor of or supportive of DEI or DEIA are viewpoints the government wishes to punish and, apparently, attempt to extinguish."

Nationwide Application of the Injunction

As a result of the court's ruling, the foregoing provisions of the DEI EOs are enjoined and may not be enforced. The injunction applies to the plaintiffs in the case and to similarly situated federal contractors, grantees, and private-sector entities throughout the nation, even if they are not parties to the action.

Parts of the DEI EOs Remain in Effect

The court's decision does not halt all the recent federal efforts to discourage or eliminate contractor and grantee DEI programs and policies. Parts of the DEI EOs remain in effect, and EO 11246, Equal Employment Opportunity, the primary affirmative action and nondiscrimination obligation enforced by the federal government, remains withdrawn by the President.

Several agencies have begun implementing the withdrawal of EO 11246 – most notably through class deviations removing the relevant clauses from the Federal Acquisition Regulation (FAR). (For example, GSA and Commerce already have issued deviations). Moreover, the injunction does not halt other recent federal efforts to discourage or eliminate federal government or federal contractor and grantee DEI programs and policies that were not challenged by the plaintiffs in this case, such as EO 14168, "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government," which has been challenged along with EO 14151 and EO 14173 in the U.S. District Court for the District of Columbia.

Key Takeaways

This Trump Administration's early efforts to eliminate DEI policies are a continuation of similar action by President Trump during his first term, in which he sought to eliminate "divisive concepts" in workplace diversity trainings; that attempt was partially enjoined by the U.S. District Court for the Northern District of California in 2020. The elimination of DEI continues to be a major focus area for the Trump Administration, and the Government has already noticed an appeal of the Maryland court's decision, which the United States Supreme Court could ultimately review.

The legal and regulatory landscape concerning DEI remains unsettled and involves complex legal compliance and risk challenges. Contractors and grantees, along with other private employers, should continue assessing their programs involving DEI, anti-harassment, and equal opportunity for compliance with law and regulation as interpreted by the courts, and with the Administration's recently announced positions. Some federal regulatory agencies already have expressed interest in examining private companies' DEI policies, and other EO provisions make clear that investigations and other oversight will be pursued.

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 clients navigate changes to DEI and related federal policies. Please contact our DEI Counseling and Support Team with questions about the lawfulness of existing DEI-related programs, policies, or practices, or if you need assistance with civil compliance investigations, litigation defense, or other matters arising from these EOs.

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

Wiley's Trump Administration Resource Center