LEGAL UPDATES

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Navigating Trump's Executive Order on Affirmative Action and DEI Programs: What Private Employers Need to Know

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As our team has previously highlighted, on January 21, 2025, President Donald Trump issued an executive order entitled Ending Illegal Discrimination and Restoring Merit-Based Opportunity which is likely to have a broad impact on Diversity, Equity, and Inclusion (DEI) programs both inside and outside of the federal workplace.

Our prior client alert, authored by Michael Schrier and Tracey O'Brien, focused on the first part of the January 21 E.O. – the revocation of Executive Order 11246, issued in 1965 by President Lyndon Johnson, which established the primary basis for equal employment opportunity obligations for federal contractors and subcontractors. As outlined in that alert, the January 21 E.O. completely removes affirmative action requirements derived from E.O. 11246 concerning race, color, sex, sexual preference, religion, or national origin and also prevents the OFCCP – the agency that has historically enforced E.O. 11246 – from taking any action to enforce such requirements in the future.

This update will focus on the second part of the January 21 E.O., which encourages private employers to end "illegal" DEI practices and empowers federal agencies to prosecute violations of federal antidiscrimination laws.

What does the January 21 E.O. say about private employer DEI programs?

Section 4 of the January 21 E.O. has the following heading: "Encouraging the Private Sector to End Illegal DEI Discrimination and Preferences." This section empowers the "heads of all agencies, with the assistance of the attorney

general" to take "all appropriate action . . . to advance in the private sector" the elimination of "illegal" DEI initiatives. It further directs the attorney general to enforce federal civil-rights laws and "take other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI."

Section 4 contemplates having the attorney general and federal agencies "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" that are ostensibly engaged in "illegal" DEI activities, and asks those agencies to recommend "[l]itigation that would be potentially appropriate for federal lawsuits, intervention, or statements of interest."

What constitutes an "illegal" DEI program?

Notably, Section 4 of the January 21 E.O. does not ban or prohibit all private employer DEI programs – indeed, the executive branch does not have that authority absent an act of Congress, and there would likely be legal challenges under the First Amendment of the U.S. Constitution to an action so broad. Instead, the focus of the January 21 E.O. is on "illegal" DEI programs and policies. As a result, the threshold question for private employers is what exactly constitutes an "illegal" DEI program under existing law.

The relevant caselaw suggests that if a private employer sets explicit hiring quotas, articulates a preference for specific demographics such as women or people of color, or makes employment decisions based in whole or in part on an employee's race, gender, or identity status, it risks violating Title VII of the Civil Rights Act of 1964. Our assessment is that this risk is now elevated in light of the January 21 E.O.

By contrast, the vast majority of DEI programs and policies currently utilized by most employers – which include employee resource groups, optional DEI and bias trainings, and strategies for diversifying candidate pools for recruiting purposes – would appear to fall well outside the definition of "illegal" practices under existing law. Indeed, the former chair of the EEOC made clear in a 2023 press release that it "remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace."

Advice for private employers

While the January 21 E.O. represents a significant shift in the way the executive branch intends to approach private employer DEI programs, the underlying legal framework has not changed. As

outlined in Husch Blackwell's prior client alerts, there remains a crucial distinction between DEI initiatives that may violate federal law and those that remain lawful and permissible.

[See Impact of US Supreme Court's Affirmative Action Decision on Private Employer DEI Programs and Recommendations for Employers and Still Business as Usual: Recent Challenges to Company DEI Efforts.]

Notwithstanding the executive order, private employers should still be able to continue operate legal DEI programs by following the following guidelines:

Avoid quotas: Instead of setting quotas or percentage targets, aim to enhance workforce diversity more broadly.

Review existing DEI initiatives: Evaluate any current DEI programs to ensure they do not violate federal civil rights laws. Focus on initiatives that promote inclusion without implementing discriminatory practices.

Utilize a broad definition of diversity: Consider diversity in terms of various characteristics, including age, veteran status, and life experience, not just race or gender.

Utilize inclusive hiring practices: Remove barriers in hiring processes and ensure equal treatment of all applicants.

Support employee engagement: Develop mentorship programs open to all employees and support Employee Resource Groups consistent with state and federal law.

Training and awareness: Continue offering training on bias, anti-discrimination, and cultural competency, but avoid mandatory trainings where certain groups of employees are singled out as responsible for historical inequities.

Consistent messaging: Carefully review DEI-related communications and seek support from legal counsel where appropriate.

Address complaints in good faith: Investigate all discrimination complaints thoroughly, including those brought by individuals who may not belong to historically underrepresented populations.

Stay informed: Keep up with legal developments related to DEI to ensure ongoing compliance.

This is a rapidly evolving area of law. Husch Blackwell is closely monitoring related legal developments and will issue additional legal updates on these topics if the attorney general or federal agencies take action to enforce the January 21 E.O., or as new guidance is issued.

Contact us

If you have any questions about the executive order and your DEI programs, please contact Erik Eisenmann, Catarina Colón, or a member of the Workplace DE&I practice team.