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Anti-DEI Executive Orders Enjoined: Implications for Federal Funding Recipients and Private Employers

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On Friday, February 21, 2025, a federal judge issued a Preliminary Injunction in *National Association of Diversity Officers in Higher Education, et al. v. Trump*, blocking significant portions of two Executive Orders (EOs) issued by President Donald Trump.

The decision, which will be appealed, creates more uncertainty for employers with programs that may fall under the broad umbrella of "Diversity, Equity, and Inclusion" (DEI) or "Diversity, Equity, Inclusion, and Accessibility" (DEIA) in light of the Trump administration's efforts to eliminate DEI programs within federal agencies and impose restrictions on private sector DEI initiatives. For now, the court's order blocks most – but not all – of the provisions in the two EOs.

Background

The U.S. District Court for the District of Maryland addressed a motion seeking relief from EO 14151 ("Ending Radical and Wasteful Government DEI Programs and Preferencing," which the court labeled "J20 Order") and EO 14173 ("Ending Illegal Discrimination and Restoring Merit-Based Opportunity," referred to by the court as the "J21 Order"). Epstein Becker Green has published several advisories explaining these EOs and how they may affect federal contractors and other federal funding recipients (see here and here) as well as other public and private employers (see here).

Both EOs were challenged by a group of plaintiffs that includes the City of Baltimore, the American Association of University Professors, and National Association of Diversity Officers in Higher

Education. In brief, the plaintiffs argued that:

- The EOs use vague terminology, creating compliance difficulties and violating the Fifth Amendment.
- Failure to comply with the EOs' unclear directives could, in some circumstances, even lead to criminal liability under the False Claims Act, creating untenable risk for those affected.
- The EOs' requirements that organizations certify that they do not engage in vaguely defined "illegal DEI" and threats of investigations of private organizations with DEI programs or enforcement action against entities create an unlawful chilling effect on speech protected by the First Amendment.
- The EOs exceed the President's constitutional authority because they violate the separation of powers and due process provisions of the Constitution.
- Implementation of the EOs would cause irreparable harm to the plaintiffs and similarly situated federal contractors, grantees, and entities identified as targets for investigations and other compliance initiatives.

Highlights of the Court's Analysis

In a 63-page Memorandum Opinion, Judge Adam B. Abelson found that the challenged provisions were unconstitutionally vague, and that the plaintiffs are likely to succeed on their claims under the First Amendment and the Fifth Amendment's Due Process Clause. Noting that, despite duties of unrivaled gravity and breadth, a president is not exempt from the general provisions of the Constitution, the court found sufficient grounds to halt enforcement of two EO provisions in full, and a portion of a third provision.

Unlawful Viewpoint Discrimination Violates the First Amendment

Reviewing the First Amendment claims, the court considered the potential effects of both EOs. Section 3 of EO 14173 (referred to as the "Certification Provision") requires every federal contract or grant award recipient to certify, among other things, that "it does not operate any programs promoting DEI that violate any applicable Federal antidiscrimination laws." Section 4 of the same EO (referred to as the "Enforcement Threat Provision") calls for civil compliance investigations and even actions under the False Claims Act (FCA) against entities engaging in protected speech, as we previously explained. Additionally, as we wrote here, the Enforcement Threat Provision, along with ensuing agency activity, has broad implications for the private sector. Finally, a "Termination Provision" contained in EO 14151 (in its Section 2) requires the federal government to terminate all "equity-related" grants or contracts (read more here).

The court found that such threats of "enforcement against perceived violators of undefined standards" place an unlawful viewpoint-based restriction on protected speech. The opinion describes the private-sector-oriented Enforcement Threat Provision, with its stated purpose of eliminating one type of principle (DEI) without a similar restriction on *anti*-DEI principles that may also violate anti-discrimination laws, as "textbook viewpoint-based discrimination."

Impermissibly Vague Language Violates the Fifth Amendment

The court also found merit in arguments that certain terms in both EOs violate the Fifth Amendment's Due Process clause by being so vague as to invite "arbitrary and discriminatory enforcement" and failing to sufficiently inform current contractors or grantees what they must do to avoid termination of their agreements with the government.

Specifically, the court agreed that the term “equity-related” in the Termination Clause’s discussion of grants or contracts that could be cancelled was ill-defined. The court also found that the Certification Provision could be interpreted very broadly, so that even DEI-related activities unrelated to any federally funded programs could be foreclosed. Describing a colloquy at the hearing in which “the government refused to even attempt to clarify what the Certification Provision means,” the court found that “even the government does not know what constitutes DEI-related speech that violates federal anti-discrimination laws,” which in turn leads to the conclusion that such an overbroad term is highly likely to cause self-censorship by contractors to mitigate risk.

The court also found that both EOs fail to explain what, exactly, constitutes “illegal DEI” or “illegal DEI and DEIA policies.” The absence of clear definitions for such terms grants excessive discretion to federal agencies and potentially leads to arbitrary enforcement.

A Broadly Applicable Nationwide Injunction – But Not A Blanket

The court, noting “prudential and separation-of-powers issues,” declined to halt the EOs with respect to any language directing the U.S. Attorney General to prepare a report or engage in investigations. The Preliminary Injunction also expressly excludes the President, but otherwise prohibits enforcement of the three provisions nationwide based on the finding that other employers would be affected in the same way as the plaintiffs. Specific prohibitions for each are as follows:

1. **Termination Provision** (EO 14151): may not be invoked to “pause, freeze, impede, block, cancel, or terminate … or change the terms of any [awards, contracts or obligations].”
2. **Certification Provision** (EO 14173): may not be enforced, eliminating (at least for now) requirements for federal contractors and grantees to certify they do not operate DEI programs that violate federal anti-discrimination laws.
3. **Enforcement Threat Provision** (EO 14173): may not be implemented to bring any anti-DEI enforcement action, including actions under the FCA, against private entities or government contractors and grantees.

Note that other portions of the EOs, including those directing agencies to take internal actions, remain in place. EO 11246, which required federal contractors to maintain affirmative action programs (AAPs) since 1965, remains revoked, and contractors are still required to wind down AAPs by April 21, 2025.

Employers should also note that this case has no effect on enforcement priorities or actions by other federal agencies such as the Equal Employment Opportunity Commission, whose Acting Chair , Andrea Lucas, has expressed a commitment to “rooting out unlawful DEI-motivated race and sex discrimination,” “[c]onsistent with the President’s Executive Order.”

The Battle Will Continue

On Monday, February 24, the Trump administration filed a Notice of Appeal, signaling that the case will proceed to the United States Court of Appeals for the Fourth Circuit. It is entirely plausible that the matter will proceed from there to the Supreme Court.

Meanwhile, there is no statement about or mention of the court’s preliminary injunction anywhere on the official White House website, including the pages listing the EOs. Other lawsuits challenging these (and other) EOs are pending. We will keep you apprised.

Staff Attorney Elizabeth A. Ledkovsky contributed to the preparation of this article.

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