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Navigating Whistleblower Protections and Compliance with DEI Executive Orders

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As Polsinelli has discussed, President Donald Trump issued Executive Order No. 14151 titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" and Executive Order No. 14173 titled "Ending Radical and Wasteful Government DEI Programs and Preferencing" (collectively, the "Orders") shortly after taking office, and that a District Court of Maryland enjoined certain aspects of those Orders. The Trump administration appealed the District Court's decision, and on March 14, 2025, the U.S. Court of Appeals for the Fourth Circuit granted the Trump administration's request for a stay (i.e., pause) of the injunction pending the outcome of the appeal. This means that during the appeal, the Orders are in full force and effect.

There are many articles discussing the importance of employers taking steps to determine whether their actions, policies and procedures may violate the Orders.

Given the back-and-forth nature of the decisions related to the Orders, a question that some employers may have is whether an employee is protected from retaliation if they report that they believe their employer is violating one of the Orders, but that Order is eventually struck down. Employers may be surprised to learn that if an employee reasonably believes the employer's activity violates a legal provision (here, for example, the Orders), then they may be protected even if the Orders are later revoked or struck down.

Whistleblower Protections and Potential Activity Related to the DEI Executive Orders

What might protected activity look like with regard to these Orders? Examples of potential whistleblowing activity could include:

- An employee may report the employer is continuing DEI programs, trainings or initiatives that they believe violate the Orders prohibiting race- or gender-based preferences.
- An employee may report that an employer or an employee of the employer is prioritizing hiring, promotions or contracting decisions based on race, gender or other DEI-related criteria.

- An employee may report that their employer is requiring them to participate in DEI training and claim such training promotes race- or gender-based biases, in violation of the Orders.
- Employees working for federal contractors may report that their employer is not following the Orders' requirements regarding DEI restrictions in government-funded projects or is inaccurately certifying compliance with DEI-related contract terms.

How Should Employers Respond to Whistleblowing?

When an employee reports a concern or engages in whistleblowing activities, employers should carefully evaluate and respond to the allegations. Steps an employer should consider taking include:

- Assessing the complexity and seriousness of the employee's complaint and, if appropriate, consider an investigation conducted under the attorney-client privilege or by an external investigator in conjunction with human resources.
- Documenting findings and actions taken.
- Maintaining a communication channel with the employee throughout the process.
- Communicating with the employee that the investigation has concluded, sharing appropriate information considering the privacy of other employees and privilege considerations.

A well-handled response not only helps address and potentially resolve immediate concerns but also demonstrates the company's commitment to compliance and transparency, reducing potential legal exposure.

Given the current fast-changing circumstances, now may be a good time for employers to review their complaint reporting procedures. An effective internal reporting system typically will be accessible, confidential and supported by a clear policy that outlines the process for handling reports and the protections available to employees.

How Should Employers Treat Whistleblowers?

Employers should not try to identify who made a report of an alleged violation of law to a governmental agency, particularly if the agency is then investigating the employer. That information is usually not necessary to respond to the report and could create additional risk for the employer.

If an employer knows who has made a complaint, then the employer should treat that employee with the same level of care it would afford its other employees. In particular, the complaining employee should not be held to a higher performance or behavior standard.

That said, making a complaint does not mean that an employee cannot be held to performance and behavior standards. Nor does making a complaint mean that an employee cannot be separated from employment for lawful reasons. However, as in many areas, employers would be wise to consult counsel before taking adverse action against an employee if the employee has recently complained that the employer has violated the law. This is so because many courts have held that close timing is enough to infer a retaliatory motive. Thus, employers should be very careful to show that it has a legitimate, non-retaliatory reason for separating an employee who it knows has complained (rightly or wrongly) of a violation of law, particularly if that complaint occurred close in time to when the separation will occur.

Next Steps for Employers

Employers should also consider regularly reviewing their policies and procedures to ensure ongoing compliance with applicable law. Reviewing policies and procedures with legal counsel can help identify areas of risk and ways to implement changes. By taking a proactive approach to compliance and employee relations, employers can create a positive work environment that supports both legal obligations and business objectives.

Finally, employers particularly impacted by the recent changes may want to consider offering training to managers by knowledgeable trainers who can explain these new laws and how they may change the way an employer operates.

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