

With DEI Initiatives Under Review, Employers Must Still Comply with Federal and State Anti-Discrimination Laws

Client Alert

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In the aftermath of the Trump Administration's actions regarding Diversity, Equity and Inclusion (DEI) and the issuance of several Executive Orders related to DEI initiatives, it is important for employers to be mindful of their ongoing obligations to comply with state and federal employment and anti-discrimination laws. This Client Alert is intended to provide employers with some perspective and guidance as they seek to navigate the issues associated with recent developments on this front.

Executive Orders | Action in the Courts

Executive Order 14151, titled "Ending Radical and Wasteful Government DEI Programs and Preferencing," was signed by President Trump on January 20, 2025. It seeks to end DEI programs and offices across the federal government.

Executive Order 14173, titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," was signed by President Trump on January 21, 2025. It seeks to revoke Executive Order 11246, which mandated equal employment opportunity for federal contractors. The new order requires federal contractors and grantees to certify that they do not operate any "illegal DEI" programs. It further requires the Attorney General to create strategic enforcement plans identifying specific enforcement targets in the private sector for DEI programs which the administration finds in violation of federal antidiscrimination laws.

On March 14, 2025, the U.S. Court of Appeals for the Fourth Circuit issued a stay lifting the preliminary injunction issued by the U.S. District Court for the District of Maryland blocking the implementation of key provisions of President Trump's Executive Orders related to DEI. This decision temporarily reinstated the enforcement of Executive Orders 14151 and 14173, pending further review at the appellate court level. It appears likely that this matter will require review by the U.S. Supreme Court.

Key Takeaway: Regardless of the status of enforcement of the above-referenced Executive Orders, large corporations, healthcare entities, and small business owners alike should take this opportunity to review all relevant employment practices and policies, including their employee handbooks, to ensure that they are up to date and in conformance with the law. Failure to do so could result in fines and other penalties, as well as potential litigation.

Federal & State Anti-Discrimination Laws | EEOC Guidance

Employment and discrimination disputes arise in the business sector over a wide variety of employment-related concerns. Claims of bias, prejudice, and unfair treatment have not been excluded from judicial consideration following the present administration's efforts to curtail and/or eliminate DEI initiatives.

The New Jersey Law Against Discrimination (NJLAD) is a significant and broad reaching law that protects New Jersey employees from **discrimination in the workplace**. NJLAD, which applies to all employers regardless of the number of employees, provides protection to employees from discrimination or harassment from employers or coworkers based on race, national origin, age, sex, gender identification, sexual orientation, marital status, religion, disability, pregnancy or military status. Under NJLAD – which pertains to bias, prejudice and equality in the workplace for employees facing a wide range of circumstances – a business entity can be liable for punitive damages including attorney's fees even if there is a minimal finding of liability. As a result, employers must have rigorous safeguards in place to facilitate the handling of any employment disputes that arise in a timely and effective manner.

Federal laws relating to claims of discrimination are equally inclusive and strenuous. Title VII of the Civil Rights Act of 1964 is a federal law that protects employees against discrimination based on certain specified characteristics: race, color, national origin, sex, and religion. Under Title VII, an employer may not discriminate with regard to any term, condition, or privilege of employment. Areas giving rise to Title VII violations include recruiting, hiring, promoting, transferring, training, disciplining, discharging, assigning work, measuring performance, and providing benefits. Title VII applies to employers in both the private and public sectors that have 15 or more employees and is often enforced by the Equal Employment Opportunity Commission (EEOC).

The EEOC recently released the following guidance, which attempts to differentiate between “legal” and “illegal” DEI. The line appears to be drawn over what will be considered “merit based” discrimination and what is not.

The EEOC stated:

Diversity, Equity and Inclusion (DEI) is a broad term that is not defined in the statute. Under Title VII, DEI policies, programs, or practices may be unlawful if they involve an employer or other covered entity taking an employment action motivated—in whole or in part—by an employee's race, sex, or another protected characteristic. In addition to unlawfully using quotas or otherwise “balancing” a workforce by race, sex, or other protected traits, DEI-related discrimination in your workplace might include the following:

Disparate Treatment

DEI-related discrimination can include an employer taking an employment action motivated (in whole or in part) by race, sex, or another protected characteristic. Title VII bars discrimination against applicants or employees in the terms, conditions, or privileges of employment, including: Hiring

- Firing
- Promotion
- Demotion
- Compensation
- Fringe benefits
- Exclusion from training
- Exclusion from mentoring or sponsorship programs
- Exclusion from fellowships
- Selection for interviews (including placement on candidate slates)

Key Takeaway: There are several steps every employer should consider to ensure that all employment policies and practices remain up-to-date and compliant with the law:

- Review existing employment policies and handbooks with employment counsel.
- Make sure that if your company is applying for a state or federal contract/grant your employment policies are compliant with state and/or federal requirements.
- Have an employment compliance officer/representative who is readily accessible to staff, and who can identify and bring critical new issues to the attention of management immediately.
- Once a claim is made or identified don't sweep it under the carpet; make sure the administration promptly and effectively responds, including consulting with outside employment counsel if necessary.
- It is not necessary to eliminate DEI policies altogether, however it is advisable to review them to ensure they comply with the law.
- Make sure managers, directors, and leaders understand the employment laws through mandatory training so they readily identify and enforce company policy.
- Keep abreast of developments in employment and discrimination laws.

Conclusion

This Client Alert serves as a reminder that business entities should remain as vigilant as ever in maintaining discrimination-free practices and policies in their hiring practices and daily operations. You should document the existence of such policies and practices in employee handbooks and other employment materials. Vigilance is critical to avoiding problems. Please contact the author of this Alert with questions or to discuss your specific business circumstances.

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