

## Executive Orders and the Changing Landscape of Employer DEI Programs

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Corporate America is facing growing tension between, employee, shareholder and investor-driven diversity, equity and inclusion (DEI) initiatives and new government policies limiting such programs. On the investor side, for example, over the past decade, major investment firms such as BlackRock, Vanguard and State Street have pushed for greater corporate diversity and inclusion efforts, tying DEI performance to their environmental, social and governance (ESG) investment criteria. Many companies have responded by implementing DEI committees, leadership diversity targets and other DEI initiatives to attract investment and remain competitive in the market.

However, recent federal actions have shifted the legal and regulatory landscape surrounding DEI programs. On January 21, 2025, President Donald Trump issued Executive Order 14173, titled “Ending Illegal Discrimination and Restoring Merit-Based Opportunity,” which revokes several previous directives, most notably Executive Order 11246, which required federal contractors to implement affirmative action programs and prohibited employment discrimination based on race, color, religion, sex or national origin.

This new order states that DEI and DEIA policies “violate the text and spirit of our longstanding Federal civil-rights laws” and directs federal agencies to investigate and deter race- and gender-conscious employment and contracting practices (90 Fed. Reg. 8633 (Jan. 21, 2025)).

Following the executive order, on February 5, 2025, the Attorney General issued a memorandum titled “Ending Illegal DEI and DEIA Discrimination and Preferences,” reinforcing the administration’s position that such programs must be eliminated if they result in preferential treatment based on race or gender. The memorandum directs the Civil Rights Division of the Department of Justice to investigate and penalize discriminatory DEI practices in both the private sector and educational institutions receiving federal funds.

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Additionally, by March 1, 2025, the Civil Rights Division and the Office of Legal Policy must submit a report outlining strategies to deter illegal DEI and DEIA programs, including recommendations for litigation, regulatory actions and federal investigations.

With these directives in place, companies must now navigate an increasingly complex legal landscape, balancing compliance with federal restrictions on DEI while managing employee, shareholder and investor expectations for inclusive workplace policies.

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## **Key Impacts of Executive Order 14173 and the Attorney General's Memorandum**

### **End of Affirmative Action Requirements**

The revocation of Executive Order 11246 marks a major departure from past affirmative action mandates for federal contractors. Since 1965, EO 11246 required government contractors to develop affirmative action plans to increase workforce diversity and ensure equal employment opportunities for women and minorities. Executive Order 14173 explicitly eliminates these requirements, stating:

"Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity), is hereby revoked." (90 Fed. Reg. 8633)

With this change, federal contractors are no longer required to implement diversity-focused hiring or promotion initiatives, signaling a shift toward strictly race-neutral and merit-based employment practices. Companies should expect greater scrutiny of hiring and other employment policies to ensure that the policies do not include race- or gender-conscious factors.

### **Increased Legal Scrutiny of DEI Initiatives**

The Attorney General's February 5, 2025, memorandum makes it clear that the Department of Justice will actively investigate and take enforcement action against private-sector DEI policies deemed to be discriminatory. The memorandum orders the Civil Rights Division to identify and pursue "the most egregious and discriminatory DEI and DEIA practitioners" and to create a plan to deter the use of illegal DEI and DEIA programs.

Specifically, it calls for:

*"A plan including specific steps or measures to deter the use of DEI and DEIA programs or principles that constitute illegal discrimination or preferences, including proposals for criminal investigations and for up to nine potential civil compliance investigations."*

The memorandum also directs federal agencies to consider litigation, regulatory actions and sub-regulatory guidance to deter private sector businesses from engaging in DEI programs that involve racial or gender-based preferences.

However, the memorandum does clarify that “educational, cultural or historical observances” that “celebrate diversity, recognize historical contributions and promote awareness without engaging in exclusion or discrimination” are not prohibited. This means that companies can continue recognizing events such as Black History Month or International Holocaust Remembrance Day, as long as they do not involve hiring preferences, quotas or exclusionary policies.

Given the heightened enforcement environment, companies should conduct internal reviews of DEI policies to assure compliance under the new federal directives.

## **Risk of False Claims Act Liability**

In addition to legal challenges under civil rights laws, federal contractors now face a heightened risk of False Claims Act (FCA) liability. The executive order and memorandum emphasize that federal contractors must comply strictly with civil rights laws in order to maintain eligibility for government contracts.

Executive Order 14173 explicitly states:

*“The Federal contracting process shall be streamlined to enhance speed and efficiency, reduce costs and require Federal contractors and subcontractors to comply with our civil-rights laws.”*

This directive suggests that if a federal contractor maintains DEI policies found to include race or gender-based preferences, they could be found in violation of federal law and subject to penalties under the FCA. Contractors should carefully audit their hiring, training and supplier diversity policies to ensure that they comply with the merit-based principles outlined in EO 14173.

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## **Implications for Employers and Next Steps**

The executive order and the Attorney General’s memorandum significantly increase the legal risks associated with DEI programs, particularly for federal contractors and organizations receiving federal funds.

To mitigate these risks, employers should consider the following steps:

### **Conduct a DEI Policy Review**

- Identify statements or policies that could be problematic, including hiring programs, recruiting materials, promotion guidelines, training requirements and supplier diversity initiatives.
- Evaluate whether any DEI initiatives involve explicit racial or gender preferences that could now be considered discriminatory.

## **Ensure Compliance with Federal Civil Rights Laws**

- Modify DEI hiring and promotion strategies that now could be considered discriminatory.
- Shift DEI initiatives to emphasize broad inclusion efforts.

## **Monitor Federal Enforcement and Guidance**

- Stay informed about upcoming reports and policy recommendations from the Civil Rights Division and the Office of Legal Policy, which are due by March 1, 2025.
- Watch for new litigation or regulatory actions that may further define the scope of permitted DEI policies.

## **Seek Legal Counsel on Compliance Risks**

- Given the potential for federal investigations and FCA liability, companies should consult with legal experts to ensure their policies align with the new federal mandates.

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## **Conclusion**

The federal government's heightened scrutiny of DEI policies found to include race- or gender-based preferences presents new legal and compliance challenges for employers. While companies may still prioritize workplace inclusivity, they must ensure that their policies do not violate the new legal framework outlined in Executive Order 14173 and the Attorney General's memorandum. By restructuring DEI programs to comply with these mandates, businesses can mitigate legal risk while maintaining a commitment to inclusive corporate cultures.

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