

February 19, 2025

## **CLIENT ALERT**

### **Compliance with EO on Private Sector DEI**

On January 21, 2025, President Trump [signed](#) an Executive Order (EO) titled, Ending Illegal Discrimination and Restoring Merit-Based Opportunity. This Executive Order provides updated guidelines on the legality of DEI policies. However, the EO does not change federal or state civil rights laws.

#### **Background**

The Executive Order purports to put an end to “dangerous, demeaning, and immoral race- and sex-based preferences under the guise of so-called ‘diversity, equity, and inclusion’ . . . that can violate the civil-rights laws of this Nation.” It does so, firstly, by not “allowing or encouraging Federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion or national origin.” Further, it seeks to, “enforce[e] Federal civil-rights laws and tak[e] other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI.”

#### **What is Illegal DEI?**

What exactly is meant by “Illegal DEI” is the subject of much speculation. However, we can look to other offices in the Administration for clues as to how this might be enforced. For example, in a recent [Dear Colleague Letter](#), the Department of Education forwarded the test: “If an educational institution treats a person of one race differently than it treats another person because of that person’s race, the educational institution violates the law.”

In a [memo](#) to Department of Justice employees, the Attorney General defined illegal DEI as “programs, initiatives, or policies that discriminate, exclude, or divide individuals based on race or sex.” The memo goes on to say that this does not include educational, cultural, or historical observances – like Black History Month, or International Holocaust Remembrance Day, or similar events-that celebrate diversity, recognize historical contributions, and promote awareness without engaging in exclusion or discrimination.

#### **What is at Stake for Violators?**

Federal contractors and subcontractors face an especially great risk if they are found to have illegal DEI policies, as they may be liable under the False Claims Act, according to the Executive Order. False Claims Act violations could carry penalties of up to three times the contract amount plus attorneys’ fees. But even entities that do not accept federal dollars may be at legal risk.

Since the Supreme Court’s decision in *Students for Fair Admission, Inc. v. Harvard College / University of North Carolina*, litigants have been suing private actors, alleging

violation of Title VII of the Civil Rights Act of 1964, and the Equal Protection Clause of the 14<sup>th</sup> Amendment. This change in the legal landscape led to [McDonald's](#) changing its Latino scholarship program, and [several other large companies](#) rolling back DEI programs.

### **What can we do?**

There is no one-size-fits-all approach to complying with the new DEI landscape. However, there are a few rules of thumb that non-profits can implement to attempt to reduce the risk of legal action:

- Review job opportunities, awards, grants, funding, scholarships, etc. that contain a race, gender, or sexual orientation requirement at the exclusion of another;
- Review handbooks, bylaws, and other internal documents that may contain language referring to monitoring race, gender, and sexual orientation in hiring, or any other language that may be taken to mean that a workforce quota exists; and
- Review DEI policies and publications for DEI language that private actors could use in potential litigation against you.

This is an area of the law that is evolving. As always, be sure to engage qualified counsel in this regard.

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