

Insights

President Trump's DEI Ban Ruled Likely Unconstitutional – What Now?

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On February 21, 2025, a U.S. District Judge in Baltimore, Maryland ruled that executive orders recently issued by President Trump to roll back Diversity, Equity, and Inclusion ("DEI") programs likely violate the First Amendment. The judge temporarily blocked the enforcement of these executive orders, citing concerns over their vagueness and the potential infringement on free speech.

Background – The Politicization of DEI Initiatives

Over the past decade, DEI has become widely known as private companies, nonprofits, and federal, state, and local governments have implemented such programs. The history of DEI is difficult to pin down, in part because the meaning of the term is so varied depending upon how it is used and by whom. Opponents often equate DEI with historical affirmative action programs which first rose to prominence in the 1960's.¹ However, proponents of DEI programs generally cite a much broader purpose than merely hiring practices, instead describing it as principles and practices intended to promote a more inclusive and fairer environment in society. These differing opinions were highlighted during the recent presidential campaigns, with then candidate Donald Trump expressing strong opposition to DEI programs, characterizing them as radical and wasteful. He argued DEI initiatives led to discrimination in hiring practices and promoted racism. Candidate Trump promised to dismantle such programs if he should return to office.

President Trump's Executive Orders on DEI and the Subsequent Legal Challenge

On January 20² and 21³, 2025, consistent with his campaign promises, President Trump issued two executive orders targeting DEI programs in both the federal government and the private sector. The orders announced that the Trump administration would be terminating all "equity-related" grants or contracts" and would be targeting practitioners of DEI under a "strategic enforcement plan." As part of this plan, federal contractors and grantees who maintain DEI programs would be liable under the False Claims Act⁴ ("FCA"). The FCA allows private citizens, known as "whistleblowers," to file lawsuits on behalf of the government against individuals or companies that are committing fraud against the government in exchange for a share of the recovery if the suit is successful. Whistleblower claims typically target fraudulent activities leading to false or misleading claims for payment or reimbursement from government programs.

On February 19, 2025, the executive orders were challenged in a lawsuit brought by several plaintiffs, including the City of Baltimore, Maryland and the National Association of Diversity Officers in Higher Education. The plaintiffs argued that the order violated the US Constitution by overriding Congress' power over spending and the Constitution's protections of free speech. On February 21, U.S. District Judge Adam Abelson issued a preliminary injunction, ruling that the Trump administration could not pause or cancel "equity-related" contracts or enforce a requirement that federal contractors certify that they were not promoting DEI. The judge stated

that the policy is written so vaguely that it chills the free speech of federal contractors concerned they will be punished if they don't eliminate programs meant to encourage a diverse workforce.

What Should Organizations Do Now?

For now, federal contractors, grant recipients, and those in the private sector who maintain DEI programs should enjoy temporary relief from the threatened funding ban pending a final resolution of the case. However, impacted funding recipients will want to monitor the case as it moves forward to a final resolution and seek legal counsel to determine whether changes to existing DEI programs or their public messaging about DEI are warranted. Many practices that support objectives of fairness and inclusion will continue to be appropriate and acceptable. Companies should consider engaging counsel to conduct an audit of their DEI practices and policies to identify DEI compliance risks and to provide suggestions on what, if any, changes should be made.

If you have any questions regarding the potential impact of the Trump administration's executive orders on federal contracts or grant funding, please contact Kendall Schnurpel, Bob Greising, or your regular Krieg Devault attorney and stay tuned to further updates from Krieg Devault.

Disclaimer: The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have.

¹President John F. Kennedy issued an executive order in 1961 requiring government contractors to treat employees "without regard to their race, creed, colour or national origin."

²Exec. Order No. 14,151, Ending Radical and Wasteful Government DEI Programs and Preferencing, Executive Order of January 20, 2025, 90 Fed. Reg. 8339, 8339 (Jan. 29, 2025)

³Exec. Order No. 14173, Ending Illegal Discrimination and Restoring Merit-Based Opportunity, Executive Order of January 21, 2025, 90 Fed. Reg. 8633, 8634-35 (Jan. 31, 2025)

⁴31 U.S.C. § 3729 *et seq.*