LEGAL UPDATES PUBLISHED: FEBRUARY 24, 2025

Federal Court Issues Preliminary Injunction Enjoining Key Portions of Anti-DEI Executive Orders

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Our prior alert on President Trump's executive order revoking Executive Order 11246 addressed the certification, investigation, and other legal risks posed and related private sector impact on DEI programs. On February 21, 2025, the United States District Court for the District of Maryland issued a 63-page memorandum opinion and a nationwide preliminary injunction prohibiting the federal government from enforcing three key provisions from Executive Order 14151 (Ending Radical and Wasteful Government DEI Programs and Preferencing - January 20, 2025) and Executive Order 14173 (Ending Illegal Discrimination and Restoring Merit-Based Opportunity - January 21, 2025). The injunction offers temporary relief to contractors, grant recipients, and private employers who are concerned that they will be a target of administration efforts to search out and potentially prosecute "illegal DEI."

The court's opinion and the preliminary injunction address three key provisions of Executive Orders 14151 and 14173 identified here in an excerpt from the injunction:

- Executive Order 14151 Section 2(b)(i) (in part) (the **Termination Provision**):

Each agency, department, or commission head, in consultation with the attorney general, the director of OMB, and the director of OPM, as appropriate, shall take the following actions within 60 days of this order:

(i) terminate, to the maximum extent allowed by law…all…"equity-related" grants or contracts[.]

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- Executive Order 14173 Section 3(b)(iv) (the **Certification Provision**):

  The head of each agency shall include in every contract or grant award:

  > (A) A term requiring the contractual counterparty or grant recipient to agree that its compliance in all respects with all applicable federal anti-discrimination laws is material to the government's payment decisions for purposes of section 3729(b)(4) of title 31, United States Code; and
  > (B) A term requiring such counterparty or recipient to certify that it does not operate any programs promoting DEI that violate any applicable federal anti-discrimination laws.

- Executive Order 14173 Section 4(b)(iii) (the **Enforcement Threat Provision**):

  To further inform and advise me so that my administration may formulate appropriate and effective civil-rights policy, the attorney general, within 120 days of this order, in consultation with the heads of relevant agencies and in coordination with the director of OMB, shall submit a report to the assistant to the president for domestic policy containing recommendations for enforcing federal civil rights laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI. The report shall contain a proposed strategic enforcement plan identifying

  …(iii) A plan of specific steps or measures to deter DEI programs or principles (whether specifically denominated 'DEI' or otherwise) that constitute illegal discrimination or preferences. As a part of this plan, each agency shall identify up to nine potential civil compliance investigations of publicly traded corporations, large non-profit corporations or associations, foundations with assets of $500 million or more, state and local bar and medical associations, and institutions of higher education with endowments over $1 billion.

Preliminary injunction at 2-3

The District Court ruled that each of the foregoing executive order provisions was likely unconstitutional based on two separate constitutional provisions. First, the court concluded that they likely violated the First Amendment of the U.S. Constitution as unconstitutional content based and viewpoint discriminatory restrictions designed to chill free speech rights.

Second, the court concluded that they likely violated the Due Process Clause of the Fifth Amendment of the U.S. Constitution as void for vagueness because key terms such as "illegal DEI discrimination and preferences," "promoting diversity," and "illegal DEI and DEIA policies" are undefined and subject to multiple interpretations. The court concluded that a "person of ordinary intelligence" would be unable to determine what is prohibited and what is permitted under the executive orders. The

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court points to the threat of False Claims Act liability for contractors and grant recipients required to guess their compliance obligations as grounds for granting the preliminary injunction:

> The harm to constitutionally protected notice interests caused by the newly announced "prohibitions" is further exacerbated by the interaction between the Enforcement Threat Provision and the Certification Provision. The Certification Provision states that not only are government contractors (and grantees, insofar as they are required to aver to such certifications too) in a position to have to guess whether they are in compliance with the administration's as-yet-unpromulgated guidance on what constitutes, for example, "illegal…DEI," they are nevertheless being threatened with False Claims Act liability if they miss the mark. Such escalation of consequences dramatically raises the stakes, and by extension dramatically expands the degree of injury to interests protected by the Fifth Amendment.

Memorandum opinion at 54-55 (citations omitted)

Based on its finding that the plaintiffs will likely succeed on the merits of their claims and satisfaction of the remaining preliminary injunction legal standards, the court imposed a three-pronged preliminary injunction:

> Defendants other than the president, and other persons who are in active concert or participation with defendants (the enjoined parties), **shall not**:
>
> a. pause, freeze, impede, block, cancel, or terminate any awards, contracts or obligations (current obligations), or change the terms of any current obligation, on the basis of the termination provision;
>
> b. require any grantee or contractor to make any "certification" or other representation pursuant to the certification provision; or
>
> c. bring any False Claims Act enforcement action, or other enforcement action, pursuant to the enforcement threat provision, including but not limited to any False Claims Act enforcement action premised on any certification made pursuant to the certification provision.

Preliminary injunction at 3 (emphasis added)

What does this mean going forward?

In the short term, the preliminary injunction should pause federal government actions directed at canceling federal contracts, grants, and grant-funded contracts for "illegal DEI." It should stop federal government efforts to insert certification clauses and/or require contractors and grant recipients to

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make False Claims Act related certifications related to newly awarded contracts and grants. It should stop the government from seeking to enforce contract modifications and grant modifications already in place. Finally, the preliminary injunction should stop government efforts to initiate False Claims Act investigations or enforcement proceedings involving alleged violations of these two executive orders that are the subject of the preliminary injunction. It remains to be seen how and to what extent the Trump administration will comply with the preliminary injunction order.

Nothing in the recent preliminary injunction ruling or in the underlying lawsuit discusses or addresses any other aspect of the administration's anti-DEI agenda, such as the revocation of Executive Order 11246, restrictions on programming at the Office of Federal Contracts Compliance Programs, the rollback of DEI within the federal government itself, or the government's efforts to modify contracts and grants that implement other executive order requirements that are not subject to the preliminary injunction. The preliminary injunction does not prevent the U.S. attorney general from preparing reports or pursuing investigations related to the anti-DEI directives.

It is also crucial to recognize that the Maryland preliminary injunction is one judge's opinion. The judge could change his mind before the case is resolved on the merits. We expect that the government will move quickly to challenge the preliminary injunction in the U.S. Court of Appeals for the Fourth Circuit and then the U.S. Supreme Court.

While the preliminary injunction is in place and the Maryland case works its way through the federal appellate courts, contractors, grant recipients and private employers are reminded that their current DEI policies and practices likely remain permissible, to the extent they otherwise comply with existing statutory and federal case law. For additional information, reference our previous alert, Navigating Trump's Executive Order on Affirmative Action and DEI Programs: What Private Employers Need to Know.

This is a rapidly evolving situation. Husch Blackwell is closely following the situation and will issue additional legal updates on these topics and the impacts on existing contractors and grant recipients as further legal challenges progress through the courts, new guidance is issued by the administration, and facts and situations warrant.

Contact us

If you have any questions about the executive order, the court's ruling, or impacts on DEI for contractors, please contact Michael Schrier, Brian Waagner, Tracey O'Brien, Catarina Colón, or your Husch Blackwell attorney.

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