

Publications

March 20, 2025 • Updates

DEI-Related Executive Orders Move Forward After Fourth Circuit Grants Stay of Preliminary Injunction; Federal Agency Actions

On March 14, 2025, the Fourth Circuit Court of Appeals issued a stay of the U.S. District Court's preliminary injunction, which will allow the Trump administration to continue enforcing the Executive Orders (EOs) related to Diversity, Equity and Inclusion (DEI) programs while the litigation continues.

The National Association of Diversity Officers in Higher Education filed a lawsuit in the U.S. District Court for the District of Maryland (Maryland District Court) challenging the constitutionality of the following EOs, arguing they are vague under the Fifth Amendment and violate the First Amendment's Free Speech Clause:

1. Executive Order 14151, "Ending Radical and Wasteful Government DEI Programs and Preferencing."
2. Executive Order 14173, "Ending Illegal Discrimination and Restoring Merit-Based Opportunity."

Earlier, the Maryland District Court issued an injunction against three key provisions in the two Executive Orders, effectively blocking the federal government from enforcing: 1) the termination of equity-related grants or contracts by executive agencies, 2) a requirement for federal contractors and grantees to certify that they will not operate DEI programs that violate federal anti-discrimination laws and 3) the U.S. Attorney General's authority to investigate and initiate civil compliance actions against private sector entities continuing DEI practices.

Federal agencies have taken actions to enforce the EOs. Below are examples of three federal agencies that have issued guidance and enforcement letters to public and private entities on ensuring they are compliant with removing DEI from its policies, practices and other programs.

Federal Agencies: Guidance and Enforcement Letters from the DOE, HHS and EEOC Guidance from The Department of Education

Guidance by federal agencies regarding DEI has been published since the signing of the EOs. In its initial Dear Colleague Letter issued on February 14, 2025, the Department of

Related People

- Lisa M. Schultes
- William C. Vail
- Michael Kuczynski
- Shivani P. Bailey
- L. Maverick Flowers

Related Capabilities

- Nonprofit Organizations
- Labor & Employment
- Executive Orders

Education (DOE) advised educational institutions receiving federal funding to stop using race, color or national origin in decisions related to admissions, hiring, promotions, compensation, financial aid, scholarships, prizes, administrative support, discipline, housing, graduation ceremonies and all aspects of campus life.¹ Additionally, the DOE advised that institutions are prohibited from using non-racial information (such as personal essays) as a proxy for race when making decisions.² For example, the DOE asserts that using a students' personal essays or other materials to determine a student's race would constitute the misuse of non-racial information when used to make decisions about the student's admission or status.³ To further clarify its guidance, the DOE shared a frequently-asked-questions (FAQs)⁴ document stating that "race cannot be used as a proxy for socioeconomic disadvantage."⁵

The DOE emphasized that simply using terms like "diversity," "equity" or "inclusion" is not enough to determine whether a program or policy violates federal law. The DOE's Office for Civil Rights (OCR) will review additional materials for more subtle forms of discrimination. The DOE has stated that institutions failing to comply may face the potential loss of federal funding.⁶ The department has set up a new website where private individuals can report a school or school district for discriminatory practices.

On March 14, 2025, the DOE and the OCR published a press release that it has launched Title VI and Title IX investigations into 52 universities in 41 states in order to "reorient civil rights enforcement to ensure all students are protected from illegal discrimination." The departments are looking into the universities' race-based practices in their graduate and scholarship programs.

Pushback Against DOE's Dear Colleague Letter

In response to the DOE's Dear Colleague Letter, 14 state Attorneys General issued guidance⁷ on March 5, 2025 setting out their position that the EOs and the DOE's guidance do not change current laws. These Attorneys General argued that the DOE misinterprets the *SFFA* ruling, and that while schools cannot use race as a factor in admissions, they can still evaluate applicants who discuss how race has influenced their lives—provided the mention of race ties back to "that student's courage and determination."⁸ In essence, these Attorneys General advise that schools cannot factor race into admissions decisions but may "consider the ways... race affected a particular student's life."⁹

HHS Investigates Alleged Discrimination in Medical School and Health Care Workforce Training Programs

On March 7, 2025, the U.S. Department of Health and Human Services (HHS) Office for Civil Rights (OCR) announced it is investigating four medical schools and hospitals that may be operating programs for education, training, or scholarships that discriminate based on race, color, national origin or sex. These investigations align with President Trump's Executive Order 14173. The stated focus is on ensuring that healthcare professionals and students are not excluded from opportunities based on these factors. OCR's actions are intended to enforce the Trump Administration's position that DEI Programs violate civil rights laws under Title VI of the Civil Rights Act of 1964 and Section 1557 of the Affordable Care Act.

EEOC Requesting DEI-Related Employment Practices of 20 National Law Firms

On March 17, 2025, based on publicly available information, Equal Employment Opportunity Commission (EEOC) Acting Chair Andrea Lucas sent letters to 20 law firms requesting each firm's employment practices with respect to using DEI or other

employment programs that would violate Title VII of the Civil Rights Act of 1964. These firms are asked to create spreadsheets with personal information of each applicant for its diversity internship, fellowship and scholarship programs. The data points include the name, race, sex and GPA of the applicants. If the applicants were selected for these programs, the EEOC asks for the applicants' compensation during the program, whether they received a full-time associate attorney position, and whether they received additional funds. Additionally, the letters requested similar data in relation to the firm's compensation and partnership decisions, and whether any DEI or diversity considerations (ex. participation in firm-sponsored or third-party affinity group) play a role in such decisions. The information requested dates as far back as 2015.

What Does This Mean for Organizations and Employers?

Given the rapidity with which new orders, guidance, and judicial decisions are being issued, it is important for organizations and employers to stay as current as possible on legal developments.

All organizations and employers, but particularly grant recipients and federal contractors, should consider reviewing any DEI-related documents, policies, programs, initiatives, affirmative action plans, etc. for potential issues. This may include going beyond the obvious, and evaluating scholarship programs, hiring policies and processes, onboarding and application documents, marketing materials, governing documents, trainings, compensation and performance materials, equity language, mission and vision statements, internship programs and website language.

Organizations and employers may also want to review their workplace facility and pronoun usage policies. These policies and initiatives should apply equally to be lawful. In addition, organizations and employers may want to do department level reviews to ensure all DEI-related documents and materials are properly evaluated.

Finally, federal contractors do have a deadline by which to comply with Executive Order 14173. Thus, they likely will want to put additional resources to this task in the short-term. Other employers should begin evaluating these documents and be ready to show good faith efforts in case of questions from employees or governmental agencies.

* * *

Polsinelli's Nonprofit Organizations team provides a full range of professional services focused on solving the challenges nonprofits encounter. Polsinelli's Labor & Employment team is available to assist with evaluating documents and preparing for compliance with these Executive Orders. If you have any additional questions, please feel free to reach out to Lisa Schultes, William Vail, Michael Kuczynski, Shivani Bailey, Maverick Flowers, Michele Manceaux, Polsinelli's Executive Action Working Group or your regular Polsinelli attorney.

[1] Craig Trainor, United States Department of Education (Feb. 14, 2025), <https://www.ed.gov/media/document/dear-colleague-letter-sffa-v-harvard-109506.pdf>.

[2] *Id.* at 3.

[3] *Id.* at 2.

[4] Press Release, U.S. Department of Education, U.S. Department of Education Releases Frequently Asked Questions on Dear Colleague Letter About Racial Preferencing (Mar. 1, 2025), <https://www.ed.gov/about/news/press-release/us->

department-of-education-releases-frequently-asked-questions-dear-colleague-letter-about-racial-preferencing.

[5] United States Department of Education (Feb. 28, 2025), <https://www.ed.gov/media/document/frequently-asked-questions-about-racial-preferences-and-stereotypes-under-title-vi-of-civil-rights-act-109530.pdf>.

[6] Craig Trainor at 4.

[7] The Attorneys General of Illinois, Massachusetts, New York, California, Connecticut, Delaware, Maine, Maryland, Minnesota, New Jersey, Nevada, Oregon, Rhode Island, Vermont, and the District of Columbia, Office of the New York State Attorney General (Mar. 5, 2025), <https://ag.ny.gov/sites/default/files/publications/joint-guidance-re-school-programs-guidance-2025.pdf>.

[8] *Id.* at 2 n.7.

[9] *Id.* at 2.