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Executive Orders Raise Compliance Concerns for Employers

The first 100 days of President Donald Trump's term have seen a flurry of executive orders. While they do not modify legislation, they indicate new government enforcement priorities and alter regulatory schemes, which raise compliance concerns for employers.

Disparate Impact

Most recently, an April 23 executive order (EO 14281) seeks "to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, Federal civil rights laws, and basic American ideals." Under disparate-impact liability, antidiscrimination laws may be found to prohibit not only intentional discrimination but also facially neutral practices that have a disproportionately adverse effect on a protected class. EO 14281 describes disparate-impact liability as holding that "a near insurmountable presumption of unlawful discrimination exists where there are any differences in outcomes in certain circumstances among different races, sexes, or similar groups, even if there is no facially discriminatory policy or practice or discriminatory intent involved, and even if everyone has an equal opportunity to succeed."

EO 14281 directs federal agencies to "deprioritize enforcement of all statutes and regulations to the extent they include disparate-impact liability," including Title VII of the Civil Rights Act of 1964. It also directs the attorney general, the Equal Employment Opportunity Commission (EEOC) chair and other federal officials to take a series of actions, including:

- Within 30 days, the attorney general shall report on steps to repeal or amend all existing federal regulations that impose disparate-impact liability and address any legal infirmities in other laws or decisions that impose disparate-impact liability, including at the state level.
- The attorney general shall determine whether any federal authorities preempt state laws, regulations, policies or practices that impose disparate-impact liability and whether such laws, regulations, policies or practices have constitutional infirmities that warrant federal action.
- Within 45 days, the attorney general and EEOC chair shall assess all pending investigations, civil suits and positions taken in ongoing matters under federal civil rights laws that rely on a theory of disparate-impact liability and take appropriate action with respect to such matters consistent with the policy of this order.
- Within 90 days, all agencies shall evaluate existing consent judgments and permanent injunctions that rely on theories of disparate-impact liability and take appropriate action with respect to such matters consistent with the policy of this order.
- The attorney general and EEOC chair shall issue guidance to employers regarding appropriate methods to promote equal access to employment regardless of whether an applicant has a college education, where appropriate.

At a minimum, EO 14281 signals a new enforcement approach for the EEOC, which is expected to focus on disparate-treatment liability—i.e., intentional discriminatory actions—rather than disparate-impact liability. However, it remains to be seen whether the effect will be broader, including whether disparate-impact liability will survive at the state and local levels.

Diversity, Equity and Inclusion (DEI)

A January 21 executive order (EO 14173) directs the attorney general to provide recommendations for enforcing federal civil rights laws and taking other measures to "encourage the private sector to end illegal discrimination and preferences,

including DEI." Although EO 14173 does not define what makes a DEI program "illegal," a February 5 memorandum issued by Attorney General Pamela Bondi suggests that illegal programs are those that "discriminate, exclude, or divide individuals based on race or sex." EO 14173 itself does not change existing law, but it likely will lead to increased charges of discrimination, investigations and enforcement actions focusing on DEI programs.

Consistent with EO 14173, EEOC Acting Chair Andrea Lucas stated on January 21 that her "priorities will include rooting out unlawful DEI-motivated race and sex discrimination; protecting American workers from anti-American national origin discrimination; defending the biological and binary reality of sex and related rights, including women's rights to single sex spaces at work; protecting workers from religious bias and harassment, including antisemitism; and remedying other areas of recent under-enforcement."

On March 19, the EEOC and Department of Justice (DOJ) released two technical assistance documents addressing unlawful workplace discrimination related to DEI. The first of these documents, What To Do If You Experience Discrimination Related to DEI at Work, identifies ways in which DEI programs might violate Title VII, which applies to all employers with 15 or more employees, including the following:

- **Disparate Treatment.** DEI-related discrimination can include an employer taking an employment action, such as hiring, firing, promotion or demotion, motivated (in whole or in part) by race, sex or another protected characteristic.
- **Limiting, Segregating and Classifying.** Prohibited conduct may include limiting membership in workplace groups, such as employee resource groups or other employee affinity groups, to certain protected groups or separating employees based on race, sex or other protected characteristics when administering DEI or other trainings.
- **Harassment.** Depending on the facts, DEI training may give rise to a colorable hostile work environment claim.
- **Retaliation.** Reasonable opposition to DEI training may constitute protected activity if the employee provides a fact-specific basis for his or her belief that the training violates Title VII. Title VII prohibits employers from retaliating against employees for engaging in protected activity.

The other EEOC/DOJ document, What You Should Know About DEI-Related Discrimination at Work, addresses many of the same issues in a question-and-answer format. Among other things, it states:

- Title VII's protections apply equally to all workers, not only individuals who are part of a minority group. The EEOC does not require a higher showing of proof for so-called reverse discrimination.
- A DEI initiative, policy, program or practice may violate Title VII if it involves an employer taking an employment action motivated—in whole or in part—by race, sex or another protected characteristic. Title VII also prohibits employers from limiting, segregating or classifying employees or applicants based on race, sex or other protected characteristics in a way that affects their status or deprives them of employment opportunities.
- An employer cannot justify taking an employment action based on race, sex or another protected characteristic because the employer has a business necessity or interest in diversity, including based on client or customer preference.
- Depending on the facts, an employee may be able to plausibly allege or prove that a DEI-related training created a hostile work environment by pleading or showing that the training was discriminatory in content, application or context.
- Depending on the facts, an employee's opposition to a DEI training may constitute protected activity if the employee provides a fact-specific basis for his or her belief that the training violates Title VII.

The technical assistance documents do not prohibit DEI programs altogether. Nevertheless, they indicate that such programs will be a focus for the EEOC, which is encouraging employees to file charges of discrimination relating to DEI programs. Therefore, it is important for employers to make sure that any such programs comply with the law.

On February 13, a group of 16 state attorneys general, including those from Connecticut, Massachusetts, New Jersey, New York and Rhode Island, issued guidance regarding the continued viability of DEI policies and programs in light of the recent executive orders. The guidance identifies what it describes as best practices for employers' DEI programs, including:

- **Recruitment and Hiring.** Use widescale recruitment to attract a larger pool of applicants from a variety of backgrounds. Use panel interviews to involve multiple people in hiring and promotion decisions. Set standardized criteria for evaluating candidates. Ensure that recruitment and hiring practices are accessible.
- **Professional Development and Retention.** Ensure equal access to all aspects of professional development, training and mentorship. Set up employee resource groups. Conduct training on unconscious bias, inclusive leadership and disability awareness. Ensure equal access to all aspects of employment.
- **Assessment and Integration.** Monitor the success of policies and practices in attracting and retaining qualified employees. Create clear protocols for reporting discrimination and harassment. Design strategies to support inclusive behaviors and practices. Promote belonging and unity in the organization.

While this guidance does not have the force of law, it is a useful reminder that not all DEI programs are unlawful and that states have their own interests in enforcing employment laws.

Federal Contractors

EO 14173 has additional consequences for employers that contract with the federal government. It directs the Office of Federal Contract Compliance Programs to cease promoting diversity, holding federal contractors and subcontractors responsible for taking affirmative action and allowing or encouraging federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion or national origin.

The executive order states that the employment, procurement and contracting practices of federal contractors and subcontractors cannot consider race, color, sex, sexual preference, religion or national origin in ways that violate civil rights laws. Agency heads are required to include in contracts and grant awards: (a) a term requiring the contracting party or grant recipient to agree that its compliance with federal antidiscrimination laws is material to the government's payment decisions, and (b) a term requiring the party or recipient to certify that it does not operate any programs promoting DEI that violate any applicable federal antidiscrimination laws.

On February 21, in a lawsuit brought by the National Association of Diversity Officers in Higher Education, the U.S. District Court for the District of Maryland issued a nationwide preliminary injunction preventing the government from enforcing portions of EO 14173. However, on March 14, the U.S. Court of Appeals for the Fourth Circuit stayed the injunction pending appeal, permitting the government to enforce EO 14173 while the lawsuit proceeds.

Gender

A January 20 executive order (EO 14168) announces a policy of recognizing two sexes that are not changeable, with women as biologically female and men as biologically male. EO 14168 rejects the Biden administration's position that the Supreme Court's 2020 decision in *Bostock v. Clayton County* requires gender identity-based access to single-sex spaces and it directs the attorney general to issue guidance and assist agencies in promoting sex-based distinctions. EO 14168 also directs the attorney general to issue guidance to ensure the freedom to express the binary nature of sex and the right to single-sex spaces in workplaces covered by the Civil Rights Act of 1964. It directs the attorney general, secretary of labor and EEOC chair to prioritize investigations and litigation to enforce these rights and freedoms.

EO 14168 also directs the EEOC to rescind its 2024 Enforcement Guidance on Harassment in the Workplace to the extent it advised that Title VII prohibits workplace harassment based on gender identity. The guidance had advised that prohibited sex-based harassment under Title VII includes repeated and intentional use of a name or pronoun inconsistent with an individual's known gender identity and denying an employee access to a bathroom consistent with the employee's gender identity. Consistent with EO 14168, as noted above, Lucas has identified the EEOC's priorities to include "defending the biological and binary reality of sex and related rights, including women's rights to single sex spaces at work."

Apart from the federal government's changed position identified in EO 14168, many state and local laws prohibit discrimination and harassment based on gender identity. It is not yet clear whether an executive order would be held to preempt such state and local laws to the extent they conflict.

Takeaways

While the recent executive orders themselves do not change federal, state or local laws, they do indicate new enforcement priorities for the federal government, including the EEOC, making "illegal" DEI programs a target. Employers need not terminate all DEI programs and policies; however, they should review any existing programs and policies with counsel to identify potential legal risks and ensure that they comply with the law. Employers should also review their trainings to make sure they are consistent with the executive orders. In addition, it is important to remember that employers remain responsible for complying with all applicable federal, state and local laws. Human resources professionals and supervisors should make sure that they are familiar with the recent executive orders as well as all applicable employment laws.

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